

FAIRSUPPLY EXPLAINS

# The Future of Modern Slavery Reporting in Australia

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## The Future of Modern Slavery Reporting in Australia

# Modern Slavery Reporting in Australia is likely to change.

At the end of March 2023, the first review of Australia's Modern Slavery Act 2018 (Cth) (MSA) will come to an end. Around the world, human rights due diligence reporting requirements are strengthening.

What can be expected over the next 6–24 months?

How should organisations prepare?

# Expect,

## a stronger, more robust Modern Slavery Act, including:



### Appointment of an independent Anti-slavery Commissioner.

Australia will likely follow the UK model, where the Commissioner is independent and is tasked with the whole-of-government response to modern slavery. In NSW, an Independent Anti-slavery Commissioner, Dr James Cockayne was appointed in 2022.



### Forced labour import bans.

Australia may create lists of countries, particular regions or industries with high risks of modern slavery.<sup>1</sup> Companies importing from countries, regions or industries on those lists may be required to rebut a presumption that the goods being imported were not made using forced labour.



### Shift from disclosure to due diligence obligation.

Continuous improvement is demanded by the Act. This will necessitate the shift from disclosure obligations which are largely descriptive to a focus on due diligence and remediation. A stronger due diligence response to address and remediate will ensure real people are helped.



### Penalties for non-compliance.

The MSA has seven mandatory reporting criteria requiring entities to describe their operations and supply chains and actions they are taking to identify, address and mitigate modern slavery risks across their operations and supply chains, including due diligence and remediation where necessary. To date, there has been no regulatory action as a result of non-compliances. It may be the case, that this changes following the Review.



### Survivor voice to be considered in implementation of certain sections of the Act.

This reflects the necessity of ensuring that the MSA is addressing the lived experience of modern slavery survivors.



### 'Hyper transparency'.

Greater supply chain transparency which identifies risk deep into the supply chain will be essential. Modern slavery risk typically occurs along the supply chain, generally, beyond Australia's borders.

## Therefore, expect:



### Increased scrutiny of Directors and their fiduciary duties.

The potential penalties for non-compliance would increase the velocity at which the failure to fulfil fiduciary duties are regulated, litigated and affect market reputation.



### Stricter government procurement.

Winning work from the government will require deeper MSA compliance.

To prepare companies, we need to be proactively asking: "How can we show continuous improvement in our response to modern slavery?"

#### We outline three areas for attention:

- ✓ Substantial, data-driven, due diligence actions
- ✓ Demonstrated continuity
- ✓ Industry collaboration

<sup>1</sup> <https://www.congress.gov/117/plaws/publ78/PLAW-117-publ78.pdf>

# Modern Slavery Act Review

## Requirements under the Modern Slavery Act 2018 (Cth)

1. **Mandatory reporting entities** – An entity which has a consolidated revenue of at least \$100m for the reporting entity and is an Australian entity at any time in that reporting entity or carries on business in Australia at any time in that reporting period.
2. **Requirement** to publish annual Modern Slavery Statement, 6 months after financial year end.
3. **All lodged statements** are made publicly available on the government’s online register.

### ✔ When is my next Modern Slavery Statement due?

Financial Year	Reporting Year	Statement Due Date
Australian Financial Year	1 July 2022 – 30 June 2023	31 December 2023
Calendar Year	1 January 2023 – 31 December 2023	30 June 2024
Foreign Financial Year	1 April 2022 – 31 March 2023	30 September 2023

## Seven mandatory reporting requirements under Section 16 (1) of the Modern Slavery Act 2018 (Cth)

- ✔ a. Identify the reporting entity
- ✔ b. Describe the structure, operations and supply chains of the reporting entity
- ✔ c. Describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and any entities it owns and controls
- ✔ d. Describe the actions taken by the reporting entity and any entities it owns or controls to assess and address these risks, including due diligence and remediation processes
- ✔ e. Describe how the reporting entity assesses the effectiveness of these actions
- ✔ f. Describe the process of consultation with any entities the reporting entity owns or controls (a joint statement must also describe consultation with the entity giving the statement)
- ✔ g. Any other relevant information



### Modern Slavery Act Review

*The Australian Government is undertaking a statutory review of the Act's operation and compliance over the first three years since commencement.*

The review commenced on 31 March 2022 and is to be completed by the end of March 2023, followed by a report to be tabled in Parliament. Professor John McMillan, AO, is leading the review, supported by the Attorney-General's Department.

### Issues Considered

The key issues that were considered in the modern slavery Act Review are as follows:

- Has the Modern Slavery Act had a positive impact?
- Are the Modern Slavery Act Reporting Requirements appropriate?
- Are additional measures required to improve compliance with Modern Slavery Act Reporting Obligations?
- The administration of the Modern Slavery Act and the Role of an Antislavery Commissioner
- Does the Modern Slavery Statements Register adequately report scheme objectives?
- Are public sector reporting requirements under the Modern Slavery Act adequate?

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## What do we expect to see as a result of the Modern Slavery review this year?

### Possible outcomes from statutory review period of Modern Slavery Act 2018 (Cth) (3 years of operation):

#### ✔ Public interest groups 'wish list' of amendments from 'Broken Promises'<sup>2</sup>

- Evolving from prompting a paper-driven response, to a people-driven response to tackling modern slavery.
- Increased independent oversight and enforcement (e.g. proposal to introduce penalties and an independent Anti-Slavery Commissioner).
- Fundamental shift in the Act's purpose in requiring companies to take action to actually address modern slavery, not just to report on their current practices. i.e. shift to mandatory human rights due diligence.

#### ✔ "Deeper" due diligence

Such as:

- Instigating onsite auditing, including beyond 1st tier suppliers (through supplier partnerships, industry bodies and other collaborative efforts).
- Facilitating high-risk supplier (including beyond 1st tier) certification through leading 3rd party schemes.
- Long-term anti-slavery partnerships with key suppliers.

<sup>2</sup> <https://www.hrlc.org.au/reports-news-commentary/broken-promises>

# Key Expected Changes in the Regulatory Environment



## Human Rights Due Diligence in supply chain a standard “S” issue

Around the world, human rights due diligence reporting mandates are strengthening. Notable is the introduction of a due diligence obligation in Europe. There are several countries, Germany, Norway, France and the Netherlands, with domestic legislation which places a positive obligation on companies to conduct due diligence throughout their operations and supply chains. There is also a proposal at the EU level for mandatory human rights and environmental due diligence.

The focus is upon the duty to prevent, end or mitigate adverse impacts of the companies activities on human rights and on the environment. The way to discharge this duty would be to undertake adequate due diligence that is aligned with the UN Guiding Principles on Business and Human Rights ‘Protect, Respect and Remedy’ Framework.

The movement from pure disclosure obligation to the obligation to act is also shaping New Zealand’s debate around modern slavery legislation, which may be introduced in the next parliamentary term.

It is likely that a prescribed disclosure model similar to Australia will be adopted, i.e. the law sets out reporting requirements. Due diligence obligation has been discussed, as well as a duty to act if cases of modern slavery are found.

Australia may mirror the European due diligence obligation. The disclosure obligation under the MSA in Australia has been a substantial first step. However, to have a significant impact companies need a due diligence obligation as well.

### EU Corporate Sustainability Reporting Directive

The EU Corporate Sustainability Reporting Directive is a real ‘game-changer’ because it sets up a framework for national laws that impose mandatory, positive, and significant obligations on companies to implement significant and meaningful action to address human rights issues in their value chains and operations.

### Companies subject to the Directive’s due diligence requirements are:

- EU companies with more than 500 employees on average and a worldwide net turnover exceeding EUR 150 million in the financial year.
- Companies which had more than 250 employees on average and more than EUR 40 million worldwide net turnover in the financial year and which operate in one or more high-impact sectors.

The second group of companies (smaller size and turnover but in high-impact sectors) have two years from when the Directive is transposed into national law before becoming subject to the mandatory due diligence (and other) requirements.

The new obligations apply to over 50,000 companies, a substantial increase from the 11,700 companies covered by the current Non-Financial Reporting Directive 2014/95/EU (“NFRD”).

The European Parliament and Council of the European Union formally adopted the Corporate Sustainability Reporting Directive (“CSRD”) in late 2022. The rules will start applying to companies between 2024 and 2028.

**“The high-level takeaway from all of that is that these laws are coming, and they’re coming at a higher level and with stronger requirements than what we’ve seen here in Australia.”**

– SERENA GRANT, WALKFREE.

**WATCH THE COMPLETE WEBINAR: “THE FUTURE OF MODERN SLAVERY REPORTING IN AUSTRALIA”.**





### Penalties for Non-compliance

Many businesses throughout the review have advocated for the introduction of penalties for non-compliance to 'level the playing field'.

The Australian MSA has seven mandatory criteria that require entities to describe their operations and supply chains and actions they are taking to identify, address and mitigate risks across that supply chain, including due diligence and remediation where necessary. To date, there has been no regulatory action as a result of non-compliances.

Since the MSA's inception, critics have charged the Commonwealth legislation as "toothless" given the absence of penalties. Notably, the commencement of the NSW Modern Slavery Act was stalled for years with penalties a critical sticking point. The final NSW Act commenced without a penalty provision. The impact of non-compliance penalties promises to be significant for Australian companies.

*Since the Act's inception, over 5000 mandatory statements have been published on the ABF's Register for Modern Slavery Statements, covering more than 7000 reporting entities.*

The report, "Paper Promises" assessing companies operating in sectors with known risks of modern slavery, found **77% of entities reviewed had failed to comply with basic reporting requirements mandated by the legislation.**<sup>3</sup>

### CASE STUDY

#### The Uyghur Forced Labour Prevention Act

*The Uyghur Forced Labor Prevention Act (UFLPA) was signed into law by President Biden on 23 December, 2021 and came into effect on 21 June, 2022.*

*The UFLPA determines that "any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part" in the XUAR should be assumed to be the product of forced labor unless proven otherwise by "clear and convincing evidence."*

All such goods are barred from entry into the United States under Section 307 of the Tariff Act of 1930.

Additionally, the UFLPA requires interagency cooperation in the development of strategy to prevent the import of goods from Xinjiang. This includes guidance for importers.

Central to this strategy and guidance is the human rights due diligence and supply chain tracing that proves sufficiently that the goods were not sourced from the Xinjiang area, or if they are, that they were not made with forced labour.

It is estimated that one-fifth of the world's cotton and about half of the world's polysilicon – a central ingredient to the manufacturing of solar panels – are produced in the XUAR.

In November 2022, the U.S. Customs and Border Protection disclosed it had seized 1,053 shipments of solar energy equipment between 21 June and 25 October in response to a Reuters public records request. At the time of that disclosure, none of the shipments had been released.<sup>4</sup>

The burden of proof is upon the company to provide a supply chain map and account of the human rights due diligence conducted to mitigate identified human rights risks.

<sup>3</sup> <https://www.hrlc.org.au/reports-news-commentary/2022/2/3/paper-promises-evaluating-the-early-impact-of-australias-modern-slavery-act>

<sup>4</sup> <https://www.reuters.com/world/china/exclusive-us-blocks-more-than-1000-solar-shipments-over-chinese-slave-labor-2022-11-11/>



### Forced labour import bans

The Review may recommend forced labor bans. In this scenario, Australia may create lists of countries, particular regions or industries with high risks of modern slavery. Companies importing from countries, regions or industries on those lists may be required to rebut a presumption that the goods being imported were not made using forced labour.

Forced labour import bans are either operative or under consideration in Canada, the EU, the UK and the US. Such bans carry higher levels of organisational risk regarding social license and commercial operations



### Stricter government procurement

The Australian Government last year spent more than **approximately \$80b** on procuring goods and services.

The Government's Modern Slavery Statement clearly describes how it has met the mandatory reporting criteria. It is expected that the introduction of an Anti-slavery Commissioner coupled with a continuous improvement approach with regards to supply chain risk assessment and due diligence will have a significant impact on businesses seeking to win work from the Government.

It is possible the Government may also choose to employ debarment from public procurement as a way to address poor supplier behaviour. Typically, such a debarment regime would establish grounds, process and governance that allows government to work with suppliers to improve their practices and also to penalise in situations of wrong doing related to the Act.



### Appointment of an Independent Anti-slavery Commissioner

A likely outcome of the Review will be the appointment of an independent Anti-slavery Commissioner. A probable path would be following the UK model: the Commissioner is independent and is tasked with the whole-of-government response to modern slavery. That is, they can look at the Government's engagement with the issue across the board, whether that is modern slavery legislation, how victims are identified, how services are provided, procurement or forced marriage.

#### NSW's Anti-slavery Commissioner

The Anti-slavery Commissioner for New South Wales is Dr James Cockayne. NSW was the first state or territory in Australia to introduce standalone legislation to address modern slavery.

#### The Anti-slavery Commissioner's functions include:

- Advocating for and promoting action to combat modern slavery
- Identifying and providing assistance and support for victims of modern slavery
- Support to and oversight of NSW public procurement efforts to remove products of modern slavery from supply-chains
- Issuing codes of practice and maintaining a public register related to efforts to address modern slavery risks in supply-chains
- Raising community awareness of modern slavery

NSW Government agencies and local councils are required to take reasonable steps to ensure that the goods and services they procure are not the product of modern slavery. State owned corporations are also required to monitor the risks of modern slavery in their supply chains.

(Source: <https://dcj.nsw.gov.au/justice/anti-slavery-commissioner.html>)





### Survivor voice to be considered in implementation of certain Sections of the Act

The Review will likely call for survivor voice in the implementation of certain sections of the Act. This aligns with the fundamental shift in the Act’s purpose to require companies to take action to address modern slavery, not just to report on their current practices, i.e. the shift to mandatory human rights due diligence.

**“It is important when you choose who to partner with to address modern slavery, that the products and services that you are operationalising throughout the business are actually addressing a real risk to people, because the intention of the MSA is to address modern slavery which affects 50 million people... In circumstances where your response is only addressing the risk to business, it’s not achieving the desired effect of the MSA.”**

– KIMBERLY RANDLE, FAIRSUPPLY CEO

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### ‘Hyper transparency’

Greater supply chain transparency will be critical. For companies operating in Australia, modern slavery risk predominantly lies beyond our borders deep into tiers three and four of the supply chain. For this reason, modern slavery remains hidden.

**To find and address modern slavery demands: deep interrogation of the supply chain.**

Supply chain screening technology is vital given the complexity of this challenge. High-risk suppliers can then be identified and engaged. Best practice says, “Bring your suppliers along in your journey. This is the most rewarding part of this process.”



### Increased scrutiny of Directors and their fiduciary duties

Under the existing Act, there are penalties for non-compliance that are regulated under different pieces of legislation such as the criminal laws and the Corporations Act. The current MSA requires the entity’s Modern Slavery Statement be approved by the highest governing authority of the organisation.

Directors already carry fiduciary duties and obligations under the Corporations Act in relation to the Board. These responsibilities necessitate that Directors have an adequate level of understanding of what is going into the Modern Slavery Statement and how effectively the organisation is addressing modern slavery.

Penalties for non-compliance will certainly increase the velocity at which those implications are regulated, litigated and affect market reputation.



# What are the key areas of opportunity to show continuous improvement in your response to modern slavery?

## Responding to Modern Slavery

To reiterate, the fundamental expected shift in the Act will be from requiring companies to report on their current practices to taking action to actually address modern slavery.

This shift is critical to the Act achieving its founding purpose.

In this evolving environment of deeper compliance, it will be vital that companies demonstrate continuous improvement.

### ✔ Substantial, data-driven, due diligence actions

The shift to mandatory human rights due diligence will demand substantial, data-driven, due diligence actions, with timing horizons that extend well beyond individual reporting periods. Deeper supply chain interrogation. Clear identification of and engagement with high-risk suppliers and where necessary remediation activity.

A stronger due diligence response to address and remediate modern slavery where it is found will ensure real people are helped. The UN Guiding Principles have set out very clearly what human rights due diligence is and provides an excellent frame to understand what a concerted response looks like.

### ✔ Demonstrated continuity

Continuous improvement demands demonstrated continuity between described future intentions and what is achieved (and when). To date, many published Modern Slavery Statements have sustained a narrative of aspiration but have not done sufficient work to demonstrate at the close of each reporting period what has been achieved year on year and what will be achieved according to a robust timeline.

### ✔ Industry collaboration

Industries typically share similar supply chains and hence suppliers. Leveraging these interrelations can provide an excellent opportunity to effect change amongst those suppliers.

The Private Health Association (PHA) Community of Interest (CoI) is an example of a consistent approach to addressing modern slavery across the Australian health insurance industry.

## Conclusion

### Modern Slavery Reporting in Australia is likely to change.

The review of Australia's MSA will likely herald an era of higher regulation focused upon ensuring that the MSA is addressing the lived experience of modern slavery survivors. This coincides with a broader strengthening of human rights reporting requirements in the EU, particularly.


In this more demanding context, it will be critical the entities demonstrate continuous improvement, marked by substantial, data-driven, due diligence actions, demonstrated continuity and industry collaboration.



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