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NORTON ROSE FULBRIGHT

Submission to the Attorney-General's Department Public Consultation

Modern Slavery in Supply Chains Reporting Requirement

6 December 2017

Executive Summary

Norton Rose Fulbright welcomes the Australian Government's proposal to create a Modern Slavery in Supply Chains Reporting Requirement. We have been following Australia's journey towards a reporting requirement and have actively participated in the Parliamentary Joint Standing Committee's Inquiry into establishing a Modern Slavery Act in Australia, as well as the Attorney-General's Department public consultation roundtables in Sydney and in Perth in October this year. As an international law firm with a dedicated global Business and Human Rights team, we are well placed to assist in the Australian Government's consultation process.

Since the United Kingdom Parliament passed the *Modern Slavery Act 2015* (**MSA UK**), we have worked with a significant number of businesses to ensure compliance with the MSA UK, especially with respect to the reporting requirements in section 54. We have also been working with Australian businesses, sharing best practice in the human rights area. This is one of our commitments under Norton Rose Fulbright Australia's recently adopted Human Rights Policy.

In this submission, we address each of the Government's questions and provide our recommendations based upon our experience of working with the MSA UK.

In summary:

- The definition of "modern slavery" should be defined as conduct that would constitute slavery-like offence provisions in the *Commonwealth Criminal Code*. "Forced marriage" and "human trafficking" should not be excluded from the definition.

- We recommend that a reporting requirement should apply to all types of entities that carry on a business in Australia, including not for profit organisations, partnerships, joint venture entities and also PGPA Act bodies, in so far as they are carrying on a business.

- In the interests of harmonisation with existing international laws and to promote effective coverage, the threshold of AUD100 million appears to be too high. The MSA UK's reporting threshold is GBP36 million. Currently, this is around AUD62 million. We recommend that the Australian Government define an entity's income to include group-revenue. Parent entities should be required to include in their income the income of their subsidiary undertakings (wherever located) in determining whether they meet the reporting threshold.

- We do not recommend that an Australian Modern Slavery Act contain a definition for an entity's "operations and supply chains", but we do consider that detailed guidance should be provided to assist reporting entities to understand what the Australian Government means by "operations and supply chains" and what it expects a business to report on.

- The way in which entities will respond to the reporting requirements is likely to differ greatly. Some entities will already be accustomed to reporting under other regimes. Many entities will need to consider this issue for the first time.

- The compliance cost will differ depending on the response of the business to the reporting requirement. We anticipate that for some businesses, the cost of compliance is likely to be in excess of AUD11,500. The average cost of compliance is likely to be more than AUD11,500.

- We consider that some of the proposed criteria will be difficult for businesses to report upon, at least initially. That is because the criteria ask for findings in relation to risk and effectiveness of measures taken to address slavery risk, which many businesses are unlikely to be able to report on at first. In our experience, the process of mapping and assessing slavery and human rights impacts can take years. Reporting on the effectiveness of programs may also be difficult initially.

- The Australian Government should maintain a central repository of statements.

- The Australian Government ought to have the ability to seek an injunction against a business that fails to file a statement in accordance with its statutory obligations.

We look forward to working with the Attorney-General's Department towards the drafting of a Modern Slavery Bill and remain at the Department's disposal should it have any queries.

Yours faithfully

[redacted]

[redacted]

Response to the Consultation Questions

1 Is the proposed definition of 'modern slavery' appropriate and simple to understand?

1.1 We agree that the definition of modern slavery should be defined as conduct that would constitute slavery-like offence provisions of Divisions 270-271 of the schedule to the *Criminal Code Act 1995* (Cth) referred to as the *Commonwealth Criminal Code*. However, "forced marriage" and "human trafficking" should not be excluded from the definition.

1.2 Forced marriage is a very significant form of slavery. Forced labour can be disguised through marriage where a vulnerable people, mostly women, can be forced to work without pay at a family owned business.

1.3 "Human trafficking" is also a very significant form of slavery. We note that the MSA UK requires organisations to publish a "slavery and human trafficking statement". Excluding human trafficking from the Australian regime would result in it having a narrower scope than the UK regime. It could result in businesses not searching for and identifying red flags and warning signs of human trafficking and related slavery type activity. To the extent possible, we recommend consistency in the reporting obligations between the Australian and UK regimes.

2 How should the Australian Government define a reporting 'entity' for the purposes of the reporting requirement? Should this definition include 'groups of entities' which may have aggregate revenue that exceeds the threshold?

2.1 We recommend that a reporting requirement apply to all types of entities that carry on a business in Australia. This would therefore include: constitutional corporations, trusts, partnerships, sole traders, not for profit organisations and also *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) bodies, in so far as they are carrying on a business (see for example ss 2A, 2B, 2 BA, and 2C of the *Competition and Consumer Act 2010* (Cth) (**CCA**)). PGPA Act bodies include:

(1) a non-corporate Commonwealth entity, which may be established as a Department of a State, a Parliamentary Department or a listed entity;

(2) a corporate Commonwealth entity, which may be established as a statutory authority, a statutory corporation or a government business enterprise; or

(3) a Commonwealth company under the Corporations Act, which may be established as company limited by shares or a company limited by guarantee, and will also be subject to Chapter 3 of the PGPA Act.

2.2 We consider that the income of corporate groups ought to be combined, so that a global multinational (above the reporting threshold) with a mid-sized Australian presence (below the reporting threshold) will still need to report. In other words, parent entities should be required to include in their income the income of their subsidiary undertakings (wherever located) in determining whether they meet the reporting threshold. This should ensure a level playing field for Australian headquartered businesses.

2.3 We understand that there is significant pressure to develop lists of reporting entities. The ability to develop lists of entities that need to report is closely linked to the reporting threshold. We set out in Annexure A possible options for defining a reporting entity that would link to data held by the ATO and/or ASIC, enabling a relatively accurate list of reporting companies to be drawn up. We note that the regimes in Annexure A will leave a few key gaps, which would need to be addressed through self-reporting/enforcement/investigation work. We stress that we do **not** consider that the ability to develop reporting lists ought to determine how the threshold is drawn.

2.4 A few examples are set out below of businesses that would need to report under our proposal, but would not be captured in the data held by the ATO or ASIC:

(1) **Foreign parent with income of less than AUD1 billion, Australian subsidiary with income of less than AUD100 million**

Where a foreign business with global income of <AUD1 billion has an Australian subsidiary with limited income (<AUD100 million), we understand that existing data held by the ATO would not capture that business. Instead, those businesses would need to be captured by way of self-reporting and enforcement.

Notably, this category may include circumstances in which sales in excess of the threshold are made in Australia, but are booked overseas (e.g. the Australian presence is limited to a supporting marketing role, and the sales are made out of a foreign jurisdiction such as Singapore). Any gap should be reduced if the business changes from using offshore sales structures to booking revenue in Australia. Post-transition these structures should be captured by the corporate tax transparency regime.

(2) **Fragmented non-consolidated group**

The corporate tax transparency measures captures groups of companies only where those companies are consolidated for income tax purposes. It is therefore conceivable that a business could split its revenue over several entities that are not consolidated, and thus may not meet the threshold.

We note, however, that doing this would likely have adverse tax consequences and would be an unusual step for a business to take. It might be possible to introduce a test that aggregates entities based on co-ownership and control rights, but this would significantly increase the compliance burden, and similar tests have historically been the subject of significant dispute (e.g. the thin capitalisation regime).

(3) **Private companies**

We note that the ATO does not currently publish the corporate tax transparency information of private companies with income of less than AUD200 million. Information relating to private companies with income of less than AUD100 million should still be available.

2.5 We consider that there are compelling reasons for government (or PGPA) entities to report. Under the UNGPs at least, Commonwealth and State entities have their own responsibility to tackle modern slavery. Specifically, UNGPs 4 requires that "States [should] take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the States". Apart from this, the stated aim of the legislation is to equip and enable Australian businesses to respond to modern slavery risks and maintain responsible and transparent supply chains. If PGPA entities were included as reporting entities, then it is likely that there would be changes to the Commonwealth Procurement Rules to require that suppliers adhere to a minimum set of human rights compliance criteria in their supply chain. If Commonwealth or State procurement functions then implemented a requirement that their suppliers report on slavery risks and made that a precondition to government (Commonwealth or State) tenders, that would significantly increase the reach and effectiveness of the Australian regime, given the extent of those procurement functions. It would also likely see a significant uptake in reporting , including from entities not necessarily covered by the Australian Government's proposed model.

3 How should the Australian Government define an entity's revenue for the reporting requirement? Is AUD100 million total annual revenue an appropriate threshold for the reporting requirement?

3.1 We make three key points with respect to the threshold in the Australian Government's proposal:

(1) Revenue of related entities (including subsidiary undertakings) should be combined. Otherwise, large Australian-based entities would need to prepare a statement, but a

multinational competitor with a subsidiary operating in Australia might not be caught, unless the subsidiary had an income in excess of the threshold;

(2) AUD100 million is not equivalent to the MSA UK – that means there could be some companies that are required to report under the MSA UK, but not the Australian model. Harmonisation with other similar laws should be a priority;

(3) The UK used the phrase "turnover", but "income" is more appropriate in the Australian context – as outlined below. Australian accounting standards should be applied to calculate income, so that entities do not need to undertake a separate accounting process to identify if they need to report.

Group reporting

3.2 Unless the Australian Government provides that income of different entities in a group is combined, there is a risk that entities with multiple small subsidiaries may fall outside the reporting requirement. This could significantly reduce the reach and effectiveness of an Australian reporting requirement.

3.3 If related entities are treated as a group for reporting purposes, then the income of all members of the group should be included:

(1) the income of subsidiaries of Australian corporations that operate offshore should be included as part of the income of the group (in fact these are the corporate groups that arguably might have the most exposure, depending upon where the subsidiary operates);

(2) corporate groups with a parent domiciled outside Australia would be bound in the same way as a corporate group with an Australian parent. This would ensure a level playing field.

3.4 The Australian Government might want to consider including a *de minimis* threshold of Australian income (e.g. AUD20 million) so that the reporting obligations do not attach to entities with a very limited Australian presence. Rather than this being provided explicitly in the legislation, this could be addressed in the guidance materials, as it is in the UK.

3.5 Under the MSA UK, the threshold is total turnover of GBP36 million a year for a commercial organisation. For a parent, the calculation includes its turnover in addition to the turnover of its "subsidiary undertakings", including those that operate entirely outside the UK. The turnover does not need to derive from the UK. The commercial organisation needs to partly carry on business in the UK. If by chance the UK subsidiary acts entirely independently, then the commercial organisation (i.e. parent) would not be carrying on business in the UK.

(1) Total turnover is calculated as:

(a) the turnover of that organisation; and

(b) the turnover of any of its subsidiary undertakings (including those operating wholly outside the UK).

(2) "Turnover" means the amount derived from the provision of goods and services falling within the ordinary activities of the commercial organisation or subsidiary undertaking, after deduction of—

(a) trade discounts;

(b) value added tax; and

(c) any other taxes based on the amounts so derived.[1]

[1] Home Office, United Kingdom Government, *Transparency in Supply Chains etc. A Practice Guide* (4 October 2017) 7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf>.

Harmonisation with existing laws

3.6 An Australian supply chains transparency reporting requirement ought be consistent with other reporting frameworks, for instance the MSA UK.

3.7 The MSA UK reporting threshold is set at GBP36 million. Currently, this is around AUD63 million. If the threshold is set at AUD100 million, and the reporting threshold does not include related entities, the reporting requirement is in danger of capturing too narrow a contingent of entities. In addition, there are likely to be some Australian companies that are captured by the MSA UK, but not the Australian model. We do not consider it advantageous for Australia to have a narrower regime than other jurisdictions.

List of reporting entities

3.8 The Australian Government proposal to create a list of reporting entities has centred upon the need for transparency of companies that are required to report. This is understandable, but does give rise to a practical issue in terms of identifying companies for inclusion in the reporting regime. Questions may also arise as to the legal significance of the list. We suggest as an alternative that the Australian Government considers the introduction of a self-reporting obligation, backed up with, as appropriate, the use of existing databases maintained by (or available to) the ATO.

4 How should the Australian Government define an entity's 'operations' and 'supply chains' for the purposes of the reporting requirement?

4.1 The UK guidance does not explicitly define supply chains and operations. This leaves room for interpretation, which may give rise to some uncertainty. However, we do not consider that inserting definitions of "operations" or "supply chains" in the legislation would be advisable. Nor do we consider it is likely to be helpful to insert concepts such as "direct" or "indirect" to limit or broaden the scope of the words, as this is only likely to lead to further confusion.

4.2 Instead, we suggest that the Australian Government use those words in the statute, without further elaboration, and provide detailed guidance on what constitutes operations and supply chains for the purpose of the reporting requirement, referring where appropriate to different sectors and industries, and business structures and relationships. This is likely to enable a more common sense and flexible approach to be taken to the reporting requirement, which we believe is likely to lead to better and more meaningful compliance, without placing unnecessary limitations on the scope of the reporting.

5 How will affected entities likely respond to the reporting requirement? As this is how the regulatory impact is calculated, do the Government's preliminary cost estimates require adjustment?

5.1 There are four key points to consider in relation to how entities are likely to respond to the reporting requirement:

(1) The cost model underpinning the MSA UK was criticised for underestimating the costs of preparatory and ongoing tasks needed to report, even assuming some divergence in compliance across companies. We recommend that the Australian Government clearly set out all assumptions that underpin the preliminary cost estimates to ensure that there is a reduced risk of underestimating compliance cost.

(2) A less flexible regime, with reporting against mandatory criteria, will likely increase costs (in comparison to other, more flexible, non-mandatory regimes).

(3) It is not safe to assume that costs will be higher in the first year and lower in subsequent years. Costs may be higher in later years as companies ramp up their activities, given the expectation of year-on-year improvement.

(4) The regulatory impact of the legislation will likely go beyond the reporting entities caught by the legislation – reporting entities are likely to make increased demands of

suppliers, large and small, to engage with modern slavery risks and this will have cost implications for supply chains.

5.2 There will undoubtedly be a range of responses to the reporting requirement. Experience in the UK indicates that some entities will fail to comply, some will do as little as possible to comply, and others will fully engage. To our knowledge, only one reporting business in the UK has reported that it has not taken any steps to eradicate modern slavery from its operations and supply chains. We anticipate that if the Australian Government adopted a flexible regime, as exists in the UK, some reporting entities in Australia may similarly choose to declare they have taken no steps to tackle modern slavery. This would lower costs, but would do nothing to encourage full engagement by reporting entities.

5.3 If the Australian model incorporates the proposed compulsory reporting on:

(1) the entity's structure, its operations and its supply chains;

(2) the modern slavery risks present in the entity's operations and supply chains;

(3) the entity's policies and processes to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff), and

(4) the entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness,[2]

then we anticipate that in order to be compliant, businesses will not be able to say that they have taken no steps to tackle modern slavery and are likely to have to take more rigorous steps, and engage in more detailed reporting, than is required under the UK regime.

5.4 Indeed, the flexible, non-mandatory criteria of the MSA UK is designed to enable a low cost alternative where appropriate, and this has been factored into the UK's regulatory impact assessment. With the inclusion of a set of compulsory criteria, the current proposal is likely to lead to higher compliance costs.

5.5 In particular, we consider that the inclusion of mandatory criteria will make it difficult for entities seeking to comply with the reporting provisions to avoid undertaking at least some due diligence to assess the likelihood of modern slavery in their supply chains and consider how best to tackle any modern slavery risks. In addition, under criterion (4), they will need to describe those due diligence processes. This is not an argument not to include mandatory criteria, but simply reflects an assessment of the cost of compliance.

5.6 The quality of the due diligence/risk assessment undertaken by reporting entities is likely to vary depending upon the particular circumstances of the entity, including its size, scale, geographical spread, industry and engagement.

5.7 The due diligence will likely include at a minimum, assessing the risk of modern slavery in operations and supply chains and considering how this risk is being managed and the effectiveness of the measures being taken. Entities will need to explain what due diligence processes they are implementing, both within their organisation and their supply chains.

5.8 Due diligence is generally understood as a form of fact checking and investigation, and it has specific meaning across various legal and business contexts. For example, in a corporate acquisition or asset purchase, or other large securities transactions, companies are advised to perform due diligence as a risk management process, in order to avoid or correctly price business risks such as fines, legal claims, and operational complications.[3] The United Nations Guiding Principles on Business and Human Rights (**UNGPs**) describe a specific type of due diligence, namely a human rights due diligence, as a best practice approach for companies to

[2] Commonwealth, Attorney-General's Department "Modern Slavery in Supply Chains Reporting Requirement" *Public Consultation Paper and Regulation Impact Statement* (16 August 2017) 16.

[3] Norton Rose Fulbright and the British Institute of International and Comparative Law, *Exploring Human Rights Due Diligence,* Norton Rose Fulbright, <http://human-rights-due-diligence.nortonrosefulbright.online/> citing Olga Martin-Ortega, 'Human rights due diligence for corporations: From voluntary standards to hard law at last?' (2013) 32(1) *Netherlands Quarterly of Human Rights* 44-74, 51.

undertake when considering compliance with human rights laws. Due diligence is at the heart of the UNGPs. The UNGPs describe human rights due diligence as a context-dependent process, aimed at the prevention of adverse human rights impacts.

5.9 An entity will likely respond to the reporting requirement in a way that reflects the risk that modern slavery exists in its operations and supply chain; its size and financial position; its approach to public relations; and the potential for reputational impacts at industry-wide and individual levels in the event of non-compliance or poor compliance.

5.10 Accordingly, predicting how entities will respond to the reporting requirement is difficult. The diversity of potential responses will likely fall within a spectrum of highly engaged entities, from those which take the "gold standard approach" to the reporting requirement, to those which are non-compliant entities. However, what can be said, is that human rights due diligence requires a different approach from most other forms of corporate due diligence. Combine this, with what we anticipate is a general low level of awareness of the requirements of human rights due diligence across many Australian companies (reflecting the position in other jurisdictions), and it would seem easy to underestimate the cost involved in securing compliance with a mandatory set of criteria.

Overall

5.11 The Australian Government has estimated that approximately 2,000 entities will be required to report in the first reporting year, and has allocated an annual regulatory burden of AUD23 million. It is difficult to be confident about the accuracy of this estimate. While it is possible some entities will not spend as much as AUD11,500 on complying with the proposed reporting obligation, highly engaged entities are likely to spend much more, particularly those entities with large, complex operations and supply chains. We accept that some entities who are engaged in tackling their modern slavery risks and reporting at present under other regulatory regimes may not incur much more significant cost in complying with an Australian reporting requirement, assuming the requirements are not materially different. But differences in the reporting regimes may give rise to additional costs, even for those entities. Overall, we consider it likely that the average cost of compliance per reporting entity will be more than AUD11,500.

5.12 By way of further comparison, we consider below previous impact costs assessments carried out in relation to the UK and EU reporting regimes.

The UK Regulatory Impact Cost

5.13 In the consultation stages of the development of the MSA UK, businesses indicated to the UK Government that it would be difficult to estimate the total cost impact of the Transparency Statement prior to completion of the risk assessment and drafting of the Statement itself. Further, echoing the comments made above, businesses emphasised that the cost would vary across organisations. Based on the consultation with industry, the UK Government Impact Assessment for the MSA UK contained an estimate of the likely cost of the reporting requirement to businesses.[4] When considering these figures, it must be borne in mind that the cost estimates related to a narrower set of activities (i.e. drafting, reviewing and signing off the statement) than would actually be required to be undertaken in order to comply with the reporting requirement, and did not include the cost of preparatory steps and ongoing activities, such as engaging in due diligence.

5.14 The UK Government estimated for Policy Option 2 (reporting requirement for companies with annual turnover greater than GBP36m) that the total cost to business would most likely be GBP12.5m over ten years, spread across 9,000 businesses.[5] The UK Government expected the annual cost to **decrease** after the first year of implementation as businesses developed experience of drafting slavery and human trafficking statements (again, this did not factor in the ongoing cost of establishing and implementing new policies and procedures, or adapting and improving existing policies and procedures, in order to enable effective reporting on an ongoing basis).

[4] Home Office, United Kingdom Government, *Impact Assessment: Modern Slavery Act – Transparency in Supply Chains* IA No: HO0192 (15 July 2015) <https://www.legislation.gov.uk/ukia/2015/268/pdfs/ukia_20150268_en.pdf>.
[5] Ibid 2, 10-12.

Table 1: Estimated number of affected entities based on operating revenue threshold (UK Impact Assessment)

Operating Revenue	Initial Figure	Minus subsidiaries	Minus 7% due to non-compliance	Minus those reporting under the *Companies Act*	Minus those reporting in California	Total
>GBP100m	7332	4646	4320	3692	3442	3400
>GBP60m	11292	7193	6689	5995	5675	5700
>GBP36m	17257	11096	10301	9274	8974	9000

5.15 The lowest UK estimate is GBP85 per business in the year of implementation and GBP68 in year two onwards, based on it taking six hours to carry out the minimum steps of drafting, reviewing and signing-off a statement.

5.16 In our view, the UK estimates most likely underestimate the real impact of the reporting requirement, not least because they focus on the minimal tasks of drafting, reviewing and signing off the statement, and do not properly identify all the work that may need to be done in preparation for carrying out those tasks initially and on an ongoing basis. When all those activities are taken into account, the total cost involved in producing statements is likely to be substantially higher than the UK Government estimates. Furthermore, in contrast to the UK Government's assessment, we consider it likely that the costs are only likely to increase for many entities after the initial year, as they take steps to improve and extend the breadth and depth of their reporting processes.

The EU Regulatory Impact Cost

5.17 Directive 2014/95/EU (**ESG Reporting Directive**) sets out the requirements for large companies to report on a range of non-financial and diversity information. Essentially, the ESG Reporting Directive requires companies to disclose certain information on the way they operate and manage social and environmental challenges in their annual reports from 2018 onwards.

5.18 Under the ESG Reporting Directive, large companies are required to disclose and report on the policies they have in place regarding a range of different matters:

(1) environmental protection;

(2) social responsibility and treatment of employees;

(3) respect for human rights;

(4) anti-corruption and bribery; and

(5) diversity on company boards (in terms of age, gender, educational and professional background).

5.19 The ESG Reporting Directive gives companies significant flexibility to disclose relevant information in the way they consider most useful. There is a Guidance Document published by the European Commission, but it is not mandatory.[6]

5.20 The ESG Reporting Directive is more complex than the proposed Australian reporting requirement, with five areas of reporting as opposed to just one (i.e. modern slavery); the European Commission assessed the annual cost per company at EUR600 to EUR4,300 for first time reporters only. These costs were anticipated to decrease from the second year

[6] See European Commission, European Union, *Commission guidelines on non-financial reporting* (26 June 2017) <https://ec.europa.eu/info/publications/170626-non-financial-reporting-guidelines_en>.

onwards. For the reasons given above, we do not consider that to be a safe assumption in relation to modern slavery reporting.

6 What regulatory impact will this reporting requirement have on entities? Can this regulatory impact be further reduced without limiting the effectiveness of the reporting requirement?

6.1 As indicated above, the regulatory impact of the current proposal can be expected to vary greatly depending upon the nature and experience of the reporting entities and how they decide to respond to the reporting requirement.

6.2 In our experience, the proposed model is likely to require reporting entities to incur costs in engaging in the following tasks:

(1) Initial costs are likely to include costs associated with:

(a) Understanding and developing a risk matrix that is relevant to the entity's operating systems and industry;

(b) Mapping a company's supply chain, including identifying supplier/contractors, locating supply contracts and taking steps to identify whether particular supply chains present any modern slavery risks, and the level of risk (assuming, as is likely, most companies will take a risk-based approach to this mapping exercise);

(c) Reviewing internal policies and procedures to identify the extent to which they address any modern slavery risks;

(d) Taking appropriate steps to address identified risks, including reviewing and if necessary drafting or adapting contracts and codes of conduct for suppliers and liaising with suppliers regarding any changes;

(2) Ongoing costs are likely to include:

(a) Costs associated with maintaining an up to date supply chain map – including, for example, setting up a centralised procurement/contracts office if one does not already exist;

(b) Costs associated with drafting the report, and tabling it at a board meeting for review/approval by the board. The board may have questions on the report and therefore there may be costs associated with providing further information and board briefings about the content of the report;

(c) Costs associated with publishing the report online and submitting the report to a centralised government database. (If the report is able to be submitted electronically, costs should be relatively low);

(d) Costs associated with answering questions/comments from the public, including consumers/clients, shareholders and the media, in relation to statements made by the reporting entity.

(3) Further ongoing costs may include:

(a) Costs of further mapping, risks assessments, legal and other advice, and audits;

(b) Costs of providing training to employees to meet regulatory requirements (for example, to staff involvement in procuring goods and services for the organisation); and

(c) Costs of collecting and providing third party information to third parties. For example, we know that companies are accustomed to using supplier

questionnaires as part of their supply chain due diligence. Legislators need to appreciate that a reporting requirement may give risk to substantial costs for suppliers and customers who are using (or responding) to questionnaires designed to assist reporting entities to comply with regulatory reporting obligations. These costs will not be limited to reporting entities, so a reporting requirement may have an impact that is wider than the Australian Government's current impact assessment envisages.

6.3 While many of these costs may be considered internal costs, reporting entities are likely also to engage professional service providers and external experts to assist them in complying with their reporting obligations. Indeed, the UNGPs encourage businesses to engage external expert assistance where they do not have the necessary knowledge or skills internally. This is likely to give rise to additional start-up costs and continuing costs.

7 Are the proposed four mandatory criteria for entities to report against appropriate? Should other criteria be included, including a requirement to report on the number and nature of any incidences of modern slavery detected during the reporting period?

7.1 The proposed criteria are:

(1) The entity's structure, its operations and its supply chains;

(2) The modern slavery risks present in the entity's operations and supply chains;

(3) The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff), and

(4) The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

7.2 The Australian Government's proposal for a set of mandatory criteria is compelling, especially in light of the findings of the Business and Human Rights Resource Centre (**BHRRC**) in its analysis of the first collection of company statements made under the MSA UK. In summary, the BHRRC found that only 9 out of the first 75 published Statements responded to all 6 criteria.[7]

7.3 It is important that the Government recognises the complexities that arise from the reporting requirement and does not adopt a regime that imposes unrealistic requirements on reporting entities. We anticipate many entities caught by an Australian reporting requirement would be likely to be in the same position as many UK companies. That is, they would be reporting on matters about which they may currently have a low level of awareness and understanding and little or no internal expertise. As in paragraph 6.2 above, significant time and resources are likely to be required to enable some entities to develop the necessary policies and procedures and report fully against the proposed criteria. In other cases, the risks may be such that lengthy or detailed reporting by entities is unnecessary (and this should not be taken as an indication of non, or poor, compliance). Equally, we recognise that requiring entities to report against a set criteria would have some benefit, at least in terms of assisting comparisons between different entities and sectors, and understanding the quality of the reporting being provided.

7.4 Against that background, our view is that an Australian model should be designed to encourage all reporting entities to make their best efforts to report in a meaningful way against the proposed criteria, without imposing unrealistic requirements on entities to report fully against all criteria, or penalise them for failing to do so. To that end, we suggest that the Australian Government might consider the following options:

(1) ***The adoption of recommended criteria***, with encouragement from Government for businesses to respond to each criterion and an explanation that, while reporting

[7] Business & Human Rights Resource Centre and CORE, *UK Modern Slavery Act: Analysis of early company statements, new guidance available,* Business & Human Rights Resource Centre <https://business-humanrights.org/en/uk-modern-slavery-act-analysis-of-early-company-statements-new-guidance-available>.

against each criterion is not mandatory, it is anticipated that businesses will endeavour to provide meaningful responses to all the criteria. (This option follows the UK model.)[8]

(2) ***The adoption of mandatory criteria***, with the publication of guidance that recognises that it is not anticipated that all businesses will need to or be able to provide a complete and detailed response to each criterion, at least in the initial year of reporting. The guidance could recommend that businesses should provide such information as is available to assist others in understanding their approach to a particular criterion, including outlining as best they can the processes that they have adopted or intend to adopt to enable them to provide meaningful responses.

(3) ***The adoption of some mandatory and some recommended criteria,*** and we suggest that at least criterion 1 be mandatory for all entities. Criteria 2-4 could be made optional, but with a requirement for reporting entities that did not report against any of those criteria to explain why they have not done so.

Criterion 1: *The entity's structure, its operations and its supply chains*

7.5 We consider that this criterion is appropriate. It is an obvious and necessary criterion and compliance should be relatively straightforward and not overly burdensome.

Criterion 2: *The modern slavery risks present in the entity's operations and supply chains*

7.6 In our view, this criterion is appropriate, provided it is understood that for some entities ascertaining and reporting on modern slavery risks will be a complex and demanding task, which many companies will be tackling for the first time and on which they are unlikely to be able to provide comprehensive reports especially in the first instance. There is increasing pressure on businesses to take steps to ascertain, manage and disclose their actual and potential human rights impacts. Despite this increased pressure, as highlighted by the Australian Human Rights Commission, many Australian businesses do not have processes in place to effectively identify and manage their human rights risks, including their modern slavery risks, in their operations.[9] When the MSA UK was enacted, many businesses examined their slavery risks for the first time. It was impossible for many companies to report accurately on their modern slavery risk at the conclusion of year 1.

7.7 We anticipate that some businesses may be unlikely to be able to comment comprehensively on the risks of modern slavery in their operations and supply chains for a number of years. This is particularly true of reporting on slavery risks beyond first tier suppliers. Accordingly, we recommend a criterion that requires disclosure of known risks, as well as the processes adopted to identify those risks.

7.8 This should be subject to an entity's right to privacy and its right to protect its own commercial interests. These interests are acknowledged by the UNGPs, and may suggest guidance to the effect that companies do not have to report on specific cases or matters that are the subject of ongoing investigation or litigation.[10]

Criterion 3: *The entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff)*

7.9 Measuring the effectiveness of an entity's policies and processes is not straightforward. We have no objection to this criterion, but recommend that entities be given some discretion as to how they measure and report on effectiveness. Not least, what entities report on, will depend on a number of factors, including how advanced they are in developing and implementing their

[8] See the recent changes to *Transparency in Supply Chains etc. A Practice Guide,* above n 1.
[9] Australian Human Rights Commission, *Human rights in supply chains: Promoting positive practice* (December 2015) 3 <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-supply-chains-promoting-positive-practice>.
[10] See the commentary to Office of the United Nations High Commissioner for Human Rights, United Nations, *Guiding Principles on Business and Human Rights* (2011) 6 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

policies and processes. Accordingly, we recommend that the Australian Government publishes guidance providing examples of effectiveness criteria. We also consider it may be helpful for the Government to explain what its expectations are for entities to report on the effectiveness of their policies and procedures, at least in the first year of reporting, given it will likely take some time (and possibly several years) for some businesses to be able to gauge the effectiveness of their policies and procedures sufficiently well enough to enable meaningful reporting against this criterion.

Criterion 4: ***The entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness***

7.10 We consider it appropriate to ask entities to describe their due diligence processes. As with Criterion 3, it is likely to be difficult for entities to gauge the effectiveness of their processes, at least in the first year of reporting, and the Australian Government should set out a clear expectation in this regard. In addition, we consider it would be helpful if the Government provided guidance on what due diligence it expects reporting entities to undertake and what this is likely to require.

7.11 In this regard, it is relevant in the modern slavery context to consider the findings of the Joint NRF-BIICL Study which sought to clarify existing business practices to understand how businesses are conducting human rights due diligence. The findings indicated the need for guidance on this topic. Almost half of the survey respondents had never undertaken a process which was described as being human rights due diligence or a human rights impact assessment. Many of these respondents had, however, conducted assessments which included human rights, such as with workplace health and safety, labour rights, equality and non-discrimination.

7.12 The Joint NRF-BIICL Study also found that where entities carry out human rights due diligence (as opposed to other forms of corporate due diligence), they are more likely to detect human rights impacts. The results of the Study found that of those survey respondents which had undertaken human rights due diligence on human rights impacts, 77% indicated that they did identify actual or potential human rights impacts linked to their operations during the process. In stark contrast, only 19% of companies using non-human rights specific due diligence identified adverse impacts linked to their operations. Similarly, 74% of the express human rights group did identify adverse impacts linked to the activities of third party business relationships, whereas only 29% of the non-human rights specific group identified these.[11]

7.13 We recommend that any proposed guidance make specific reference to publicly available authoritative human rights due diligence sources including the UNGPs as a starting point.

7.14 The Joint NRF-BIICL Study found that the following key components were commonly found in effective human rights due diligence:

(1) Initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;

(2) Risk assessment of human rights risks, including risks to rights-holders;

(3) Prioritisation of human rights issues;

(4) Development of action plans;

(5) Strategic direction at the board level;

(6) Cross-functionality: steering groups, working groups, interaction between relevant functions;

(7) Integration of human rights into internal compliance mechanisms, scoring and tools;

[11] Norton Rose Fulbright and the British Institute of International and Comparative Law, *Exploring human rights due diligence: Key findings from our empirical research,* Norton Rose Fulbright, <http://human-rights-due-diligence.nortonrosefu bright.online/publications/key-findings-from-our-empirical-research>.

(8) Translation and application of human rights to apply to each function;

(9) Inclusion in contractual provisions;

(10) Having codes of conduct and operational policies;

(11) Providing training; and

(12) Ensuring that there are effective grievance mechanisms.[12]

7.15 The guidance issued by the Australian Government in conjunction with the reporting requirement should encourage reporting entities to incorporate as many of these components into their due diligence processes as are appropriate, paying due regard to the fact that it may be appropriate for different businesses to apply these components differently across their operations and supply chains.[13]

7.16 It is important to remember that UNGP 24 (which is often overlooked) provides that if it is necessary to prioritise actions to address actual or adverse human rights impacts, businesses should first seek to prevent and mitigate those that are the most severe. The UNGPs recognise that not all adverse impacts will be addressed immediately, and that companies should take a risk-based approach. We consider that this should be borne in mind when drafting criteria and of course when drafting the legislative guidance.

Should other criteria be included?

7.17 We do not recommend any additional criteria.

8 How should a central repository for Modern Slavery Statements be established and what functions should it include? Should the repository be run by the Government or a third party?

8.1 The existence of a central repository of statements will facilitate the monitoring and review of statements. It is also likely to assist businesses, consumers and other stakeholders to understand the steps being taken by businesses to eradicate modern slavery in their operations and supply chains and take more effective steps to address the underlying issues, which is likely to be of benefit to all.

8.2 A central repository is also useful for comparing and benchmarking business performance in human rights due diligence and reporting. This assists in creating a "race to the top"-mentality across sectors and markets, which may in turn assist in maximising the effectiveness of the regulatory regime. The BHRRC's benchmarking initiative is one of the most important ranking systems to date and also functions as the UK MSA statement repository.

8.3 It would be preferable if an existing government department or agency was vested with the responsibility of creating and maintaining a publicly accessible central repository. In our view, ASIC would be well placed to act as central repository body, as it already has systems in place to accept online submissions of company reports and forms.

9 Noting the Government does not propose to provide for penalties for non-compliance, how can Government and civil society most effectively support entities to comply with the reporting requirement?

9.1 In our view a stewardship approach, rather than a punitive, or enforcement approach is better aligned with the goals underpinning the Australian Government's proposal.

9.2 We consider that there should be a body or department with the ability to compel compliance with the reporting requirement as a last resort, which may include access to court ordered remedies such as an injunction.

[12] Ibid.
[13] Ibid.

10 Is the five month deadline for entities to publish Modern Slavery Statements appropriate? Should this deadline be linked to the end of the Australian financial year or to the end of entities' financial years?

10.1 We consider that the five month deadline being linked to the Australian financial year is problematic. A large proportion of the reporting entities will have different financial years, linked to their international parent. A reporting requirement that does not align with their own individual reporting timetables will likely mean that compliance will be lower, and would result in outdated reports.

10.2 In our view, entities should be able to report in accordance with their own reporting timetable. We recommend that the deadline for reporting be five or six months following the entity's own financial year end. This would also be in line with the MSA UK, which would ensure harmonisation of the two regimes.

10.3 The downside to this approach could be that benchmarking is made more difficult with an entity-specific reporting deadline because entities will publish their statements at different times. We do not think that this concern justifies an adoption of a regime that differs from the MSA UK, which appears to work well.

11 Should the reporting requirement be 'phased-in' by allowing entities an initial grace period before they are required to publish Modern Slavery Statements?

11.1 We do not think that this will be necessary given that businesses will have five to six months to report and this debate has put corporate Australia on notice of the likely enactment of legislation creating a supply chains transparency reporting requirement.

12 How can the Australian Government best monitor and evaluate the effectiveness of the reporting requirement? How should Government allow for the business community and civil society to provide feedback on the effectiveness of the reporting requirement?

12.1 To monitor the effectiveness of the reporting requirement requires an understanding of the goals and desired outcomes of the legislation. The goals of the reporting requirement in the Australian Government's proposal are:

(1) "[to assist] the business community to respond more effectively to modern slavery[…];

(2) [to]raise business awareness of this issue;

(3) create a level playing field for businesses to share information about what they are doing to eliminate modern slavery[…];

(4) [to] encourage business to use their market influence to improve workplace standards and practices; [and]

(5) [to] improve information available to consumers and investors about modern slavery."[14]

12.2 In order to thoroughly evaluate whether these goals are being met, the Australian Government will need a wide range of qualitative information with a large sample size. The cost associated with collecting and then compiling this data could be significant.

12.3 In the UK, civil society, the commercial market and NGOs have developed a wide range of information, literature, assessment tools and commentary on the state of their reporting requirement. We consider this information to be extremely valuable, and while it can often be critical of government and organisations reporting under the MSA UK, it provides a wealth of material for discussion and improvement.

12.4 Our recommendation is that a review take place two or three years following the introduction of the legislation, that includes public/private consultation in order to gather the qualitative

[14] Attorney General's Department, "Modern Slavery in Supply Chains Reporting Requirement" above n 2, 10.

data. With that, appropriate data analysis can be undertaken which will give a clearer understanding of how effectively the reporting requirement has met the legislative goals.

13 Is an independent oversight mechanism required, or could this oversight be provided by Government and civil society? If so, what functions should the oversight mechanism perform?

13.1 As set out in our submission to the Joint Standing Committee, we recommend that an Independent Anti-Slavery Commissioner be appointed to review statements provided under an Australian Modern Slavery Act and to report annually to the Australian Parliament on the Commissioner's findings with respect to the reporting being provided under the Act.

14 Should Government reconsider the other options set out in this consultation paper (Options 1 and 2)? Would Option 2 impose any regulatory costs on the business community?

14.1 Options 1 and 2 should not be reconsidered.

14.2 Modern slavery is abhorrent. It has no place in a civilized, decent and just society. It is the individual and collective responsibility of governments, business, civil society and other stakeholders globally to tackle it.

14.3 We support legislation that encourages everyone to work together to tackle modern slavery, raises awareness of the issues surrounding modern slavery, and encourages greater transparency and accountability where this will help in eradicating modern slavery.

14.4 We fully support the introduction of targeted regulatory action through a Modern Slavery in Supply Chains reporting requirement as the best option to ensure:

(1) certainty and consistency for the business community;

(2) the creation of a level playing field for business; and

(3) support from the Australian Government for businesses in their efforts to stop modern slavery in their operations and supply chains.

Annexure A: Existing databases available to produce a list of reporting entities

No	Regime	Relevant Provisions	Summary	Pros	Cons
1	Corporate tax transparency	Section 3C, Taxation Administration Act 1953 (Cth)	Tax law currently requires the Commissioner to collate and publish certain information relating to 'corporate tax entities' that have 'total income' of AUD100 million or more. 'Corporate tax entity' includes: - companies; - corporate limited partnerships; - corporate unit trusts; - public trading trusts. 'Total income' is an accounting concept that refers to 'gross income' (i.e. broadly, turnover).	AUD100 million threshold. Low compliance burden; information already being collected by companies/ATO. Information already publicly available (therefore no issues with publishing list). 'Total income' would capture groups of entities where those entities are consolidated for income tax purposes.	Currently, the information of private companies is only being published if they have income of AUD200 million or more. Would not capture multinationals that do have eligible Australian subsidiaries. Would not capture passive trusts/partnerships (e.g. MITs). Commissioner's public report required "as soon as practicable after the end of the income year". It is not clear how long this takes in practice.

No	Regime	Relevant Provisions	Summary	Pros	Cons
2	Significant global entity	Subdivision 815-E, Income Tax Assessment Act 1997 (Cth)	Tax law utilises a concept of a 'significant global entity' for several purposes, including the imposition of the MAAL, DPT and country-by-country reporting obligations (**CbC**). 'Significant global entity' relevantly means an Australian entity or permanent establishment that is a member of a group of entities with global consolidated accounting income of AUD1 billion or more.	**CbC** reporting already requires significant global entities to self-identify or face significant tax consequences. Therefore, this would involve little additional compliance burden. Would capture passive trusts/partnerships that have a multinational element.	AUD1 billion threshold is high for multinationals whose Australian subsidiary does not have income over AUD100 mill. CbC reports can be lodged (and therefore significant global entities can be identifiable) up to 12 months after the end of the relevant tax year. List of entities not currently public.
3	Trust/partnership tax returns	N/A	Passive trusts and partnerships are not currently captured as part of the corporate tax transparency initiative (discussed above). The ATO should be able to collate equivalent information, however, based on trust/partnership tax returns.	Would capture passive trusts and partnerships.	Requires additional work/expense from ATO. List of entities not currently public.

Annexure B: Defined terms

1 The below terms, unless otherwise defined, have the meaning assigned below:

(1) **ASIC** means the Australian Securities and Investments Commission;

(2) **ATO** means the Australian Taxation Office;

(3) **BHRRC** means the Business and Human Rights Resource Centre;

(4) **BIICL** means the British Institute of International and Comparative Law;

(5) **CCA** means the *Competition and Consumer Act 2010* (Cth);

(6) **CbC** means Country by Country;

(7) **DPT** means Diverted Profits Tax;

(8) **Joint NRF-BIICL Study** refers to the joint study undertaken by Norton Rose Fulbright and BIICL published as: Robert McCorquodale, Lise Smit, Stuart Neely, and Robin Brooks 'Human rights due diligence in law and practice: good practices and challenges for business enterprises' (2017) *Business and Human Rights Journal* 2:2, 195-224. It is also available online: http://human-rights-due-diligence.nortonrosefulbright.online/;

(9) **MAAL** means Multinational Anti-Avoidance Law;

(10) **MITs** means Managed Investment Trusts;

(11) **MSA UK** means *Modern Slavery Act 2015* (UK);

(12) **PGPA Act** means the *Public Governance, Performance and Accountability Act 2013* (Cth);

(13) **UNGPs** means the United Nations Guiding Principles on Business and Human Rights 2011 available online: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Annexure C: The Global Business and Human Rights Group at Norton Rose Fulbright

Norton Rose Fulbright regularly advises businesses in Australia and globally on modern slavery risk management and reporting, as well as broader business and human rights advice. Since the enactment of the MSA UK we have been working with clients who are required to report under that Act. This has involved carrying out jurisdictional analyses on which group companies have an obligation to report; carrying out a gap analysis on clients' human resources policies and supplier charters with regard to slavery and human trafficking; advising on the necessary preparatory risk assessment and due diligence work, both with the clients internally and also with their external supply chains; preparing explanatory memoranda for the relevant boards of directors on their obligations under the MSA; and advising on human rights-based contractual clauses, codes of conduct and MSA statements.

We advise clients on compliance with human rights laws, as well as the principal international frameworks containing human rights requirements for businesses, including the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, IFC Performance Standards, and the Equator Principles.

We combine a deep knowledge of this emerging regulatory framework with wide-ranging experience of best practice in business ethics compliance. Our approach is holistic: alongside the client, we work to deliver human rights management systems which address every aspect of legal, reputational and operational risk.

Our thought leadership in the business ethics and human rights sector is unparalleled. Norton Rose Fulbright and the British Institute of International and Comparative Law (**BIICL**) have collaborated on a joint study comprising academic research, an anonymous survey and interviews with business representatives, with the aim of clarifying issues of law, principle and practice in the area of human rights due diligence. We have launched *the Human Rights Due Diligence BIICL Report* in each of our Australian offices and are working on Stage 2 of this project that focuses on supply chain risks.

Our areas of work

- due diligence and impact assessments
- policy development
- human rights training
- compliance with international and domestic law
- corporate reporting requirements
- human rights related crisis management, complaints, and remediation
- internal investigations
- stakeholder engagement and reputational impact consulting

Engagement in the business and human rights community

- We collaborate regularly with BIICL to study certain critical Business and Human Rights issues. We have undertaken a human rights due diligence project in collaboration with BIICL with the aim of producing practical recommendations for businesses in relation to their approach to human rights due diligence. Through this project, we acquired market-leading experience in this area. The results of our project were launched on 17 October 2016. We are now working on Stage 2 of the project which focuses on supply chain risks.

- We are founder members of the University College London Centre for Ethics and Law.
- We participated in the working group (led by The Shift Project and Mazars LLP) developing the UN Guiding Principles Assurance Framework.
- We are actively engaged in national business ethics bodies, such as the UK Institute of Business Ethics, the French Cercle d'Ethique des Affaires and the Law Council of Australia's new National Integrity Committee.
- Abigail McGregor and Greg Vickery AO are members of the Law Council of Australia's Business and Human Rights Committee (which Greg Vickery chairs) and the Foreign Corrupt Practices Working Group.
- Abigail McGregor been appointed to the International Bar Association Business and Human Rights Advisory Group to assist in the development of training for lawyers on Business and Human Rights.
- Milana Chamberlain is a member of the Human Rights Law Committee of the International Bar Association.
- Greg Vickery spoke at the International Bar Association Conference in Sydney in October 2017 on Business and Human Rights.
- Greg Vickery spoke at the East African Trade Seminar at Strathmore University in Nairobi, Kenya in November 2017 on Business and Human Rights.
- Greg Vickery and Milana Chamberlain participated in the UN Global Forum on Business and Human Rights. This form is held annually in Geneva and we regularly host a session on key topical issues.
- JP Wood writes regularly on business and human rights issues. He is actively involved in establishing a Perth based business and human rights network to share knowledge and experience on business and human rights issues.