

COMMONWEALTH MODERN SLAVERY ACT - SOME WELCOME CLARITY

Date: 26 April 2019

Global Ethical Supply Chains Alert

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The Department of Home Affairs recently released Draft Guidance (Draft Guide) on the reporting requirements of the *Modern Slavery Act 2018* (Cth) (Act). The Draft Guide provides welcome clarity on how to prepare, approve and publish a Modern Slavery Statement (MSS) under the Act.

A separate guide will be provided for those Commonwealth organisations who need to report under the Act.

HOW DO I PREPARE AN MSS?

Under the Act, a MSS must describe or address:

- the structure, operations and supply chains of the reporting organisation
- the risks of modern slavery practices in the operations and supply chains of the organisation
- the actions taken by the organisation to address and assess the risks of modern slavery in its operations and supply chains
- the method that the organisation uses to assess the effectiveness of its actions in addressing those risks
- if the organisation is reporting jointly with another organisation, or owns or controls other organisations, the process of consultation that has occurred between the organisations.

Whilst the Act is short on detail, the Draft Guide digs deeper and provides useful commentary on how to best comply with these specific requirements:

"Structure, operations and supply chains"

"Structure" refers to an organisation's legal and organisational form, including its legal classification, number of employees, whether it is part of a larger corporate group, and whether it owns or controls other organisations.

"Operations" refer to any activity or business relationship undertaken by the organisation to pursue its business objectives and strategy. This may include research and development, construction, production, arrangements with suppliers, distribution, purchasing, marketing, sales, provision and delivery of products or services, and financial lending and investments. This includes Australian and international activities.

"Supply chains" refer to the products and services (including labour) that contribute to the organisation's own products and services. This includes products and services sourced in Australia or overseas and extends beyond direct suppliers.

"Risks of modern slavery practices"

The "risks of modern slavery practices" means the potential for the organisation, via its operations and supply chains, to:

- cause modern slavery (e.g. the organisation may own and run a factory that uses exploited labour)
- contribute to modern slavery through any acts or omissions (e.g. the organisation ignored evidence that a supplier's workers were being exploited, or the organisation set unrealistic cost targets and delivery timeframes that could only be met with exploited labour), or
- be directly linked to modern slavery via the activities of another organisation with whom it has a business relationship (e.g. the organisation may retail electronic goods, which were manufactured by another organisation using minerals from a third organisation that were mined using forced labour).

The MSS does not require a certification that the organisation is slavery-free, nor does it require reporting on specific risks or actual cases of modern slavery. However, the organisation must include sufficient detail that clearly shows the types of products and services in its operations and supply chains that may involve risks of modern slavery. Organisations may include specific allegations or cases, provided they do not put the victim at risk.

For example, the MSS may explain that the reporting organisation has identified risks related to its sourcing of materials from particular countries which may be produced using modern slavery. However, the MSS does not need to specify the particular factories related to these risks.

"Actions" to "address and assess the risks" of modern slavery

Description of these actions must include information about due diligence and remediation processes. The Draft Guide defines "remediation and due diligence processes" with reference to the UN Guiding Principles 15 and 17.

There are four elements to due diligence:

- identifying and assessing actual and potential human rights impacts (e.g. screening new suppliers for modern slavery risks)
- integrating your findings across your organisation and taking appropriate action to address impacts (e.g. introducing internal training on modern slavery and processes for incident reporting)
- tracking your organisation's performance to check whether impacts are being addressed (e.g. doing an internal audit of your supplier screening)
- publicly communicating what you are doing (e.g. publishing an MSS or publicly responding to allegations against a supplier).

Remediation can involve taking steps to ensure the harm cannot recur, formal apologies, compensation or stopping certain activities. An organisation does not need a separate remediation process for modern slavery.

Organisations that do not cause or contribute to harm but are directly linked to modern slavery by a business relationship are not responsible for remediating the impact. However, they should use their leverage to work with the organisation that caused the impact to prevent or mitigate the harm and its recurrence. If this is unsuccessful, organisations should consider ending their business relationship.

Importantly, The Draft Guide does not specify the number of levels in the supply chain that an organisation needs to investigate.

While most reporting organisations will not have direct contractual relationships with all organisations in its supply chain, The Draft Guide notes that an organisation can still assess high risk parts of their supply chain by:

- requesting information from its direct suppliers about sub-suppliers, including country of origin
- engaging with investees to understand how they are addressing their modern slavery risks
- working with other organisations in your sector to carry out a joint assessment of high risk parts of a supply chain
- using existing traceability processes to improve information about the source of products
- identifying existing credible assessments of organisations in its supply chain, such as audit reports or NGO reviews
- developing trusted relationships with civil society stakeholders who can provide information about situations "on the ground"
- working directly with high risk organisations you do not have a direct contractual relationship with to help them assess and address their risks.

"Assess the effectiveness of its actions in addressing those risks"

Organisations are only required to explain the method of assessing the effectiveness of its actions, not how its actions are effective.

The Draft Guide notes that this method can involve:

- establishing a process to regularly review the actions
- regularly checking and updating its risk assessment processes
- providing for regular engagement and feedback between key areas of the organisation, as well as with any organisations it owns or controls
- conducting internal audits or monitoring of specific steps taken to assess and address modern slavery risks
- tracking the actions taken and measuring their impact
- working with suppliers to check how they are progressing any actions they have put in place to address modern slavery risks
- considering any trends in cases reported through grievance mechanisms and how these cases were handled
- partnering with an industry group, external auditor, or trusted NGO to undertake an independent review of its actions.

An organisation should assess the effectiveness of its actions in both qualitative and quantitative terms. For example, key performance indicators may be used to assess the quantitative impact of its actions.

"Process of consultation with any organisations the reporting organisation owns or controls"

Only organisations that own or control other organisations need to respond to this requirement.

The organisation giving the MSS must describe its consultation with each reporting organisation covered by the MSS, and the level of consultation should reflect the relationship with the other organisation and its risk profile. The consultation should ensure that the modern slavery risks relating to that other organisation have been appropriately identified, assessed and addressed and that other organisation is aware of the actions they need to take.

HOW DO I APPROVE AND PUBLISH AN MSS?

The MSS must be:

- approved by the board of directors or equivalent
- signed by a director.

It must state that it has been approved by the principal governing body, name that body and specify the date approval was granted.

The approval process cannot be delegated. Further, the MSS must be approved as a stand-alone document and not as part of a larger document.

After it has been approved, the statement must be signed by a director and it is best practice that the head of the principal governing body signs the MSS.

Once the MSS is approved, it must be provided to the Department of Home Affairs for publication. The Minister may refuse publication if the statement does not meet all the statutory requirements. In this scenario, the Department will explain the areas of the statement that need to be improved.

An MSS can be revised if it includes false or misleading or market sensitive information. If a revision is necessary, the Modern Slavery Business Engagement Unit should be advised as soon as possible. An organisation must provide a copy to the Department and request that it be uploaded to the register. The revised MSS must be re-approved and re-signed. It also needs to clearly indicate the date of the revision, explain the amendments and the reasons for the amendments.

WHAT HAPPENS NEXT?

The consultation period is open until 19 May 2019. Submissions can be emailed to slavery.consultations@homeaffairs.gov.au.

Organisations should continue to map out their supply chains and those of their suppliers. While the Draft Guide does not explicitly state how far up the supply chain is needed for due diligence, this requirement extends beyond direct suppliers. Organisations should consider their business relationships and organisations throughout their supply chains, in order to identify high-risk areas of potential modern slavery.

Organisations should also consider establishing their method of assessing the effectiveness of its actions, by reference to the Draft Guide's examples as well as their own commercial interests.

We will provide updates as soon as the following are released:

- the Draft Guidance for Commonwealth Government organisations
- the release of the final Guide following the consultation process
- the NSW Regulations for the Modern Slavery Act (NSW).

FOOTNOTES

Here are some footnotes.

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