Modern Slavery in Supply Chains
Reporting Requirements – Public Consultation

Submission to
the Attorney-General’s Department
Australian Government

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Recommendations

This Joint Submission benefits from the expertise of four Australian- and UK-based academics who have established international reputations as a result of their research and scholarship in regard to corporate social responsibility, modern slavery, and supply chains, as well as experience or engagement with the drafting process of the UK Modern Slavery Act 2015.

The Submission considers each of the consultations questions which has drawn the Attorney General’s Department particular interest.

Above and beyond this, however, we wish to emphasise that the Government is sending the wrong message by seeking to regulate supply chains in the private sphere while excluding its own procurements from such transparency, given the Government’s capacity to influence behaviour and compliance along its own supply and distribution chains in undertaking the business of government. The imposition of a mandatory reporting obligation on modern slavery upon business but not government, even where the state itself engages in commercial activities, misses an opportunity for the Government to become a role model and to develop shared learnings between government and business on modern slavery reporting.

We look forward to seeing an overall Modern Slavery Act in Australia which goes beyond the enactment of a Modern Slavery in Supply Chains Reporting Requirement legislation, and speaks to (a) the grave lacunae in the 2000 UN Palermo Protocol related to Trafficking in Persons in regard to rights of victims of trafficking and (b) the manner in which Australia may extend such protection to all victims of modern slavery.

With this in mind, and taking into consideration those fourteen consultation questions which the Attorney-General’s Department noted, the following are our Recommendations corresponding to each of those consultation questions:

1) that the Government consider providing detailed guidance to businesses in a manner which disaggregates the conduct criminalised under the banner of ‘modern slavery’ within the Commonwealth Criminal Code;

2) that the Government become a role model and demonstrate leadership on modern slavery by including itself as a reporting ‘entity’ for the purposes of reporting requirements;

3) that the Government adopt a lower reporting threshold level, commensurate at least with that of the UK, in order to adequately tackle domestic modern slavery practices;

4) that in regard to ‘supply chains’, the Government should require entities to report on both their efforts to detect and address modern slavery in their product supply chains and their labour supply chains;

5) that the Government continue to emphasise that costs will be off-set by placing Australian companies at a reputational and regulatory advantage within a global economy in which the governance gaps on modern slavery are progressively closing;

6) that it be recognised that the impact of the proposed reporting requirement should not be characterised in zero-sum terms, as simply an extra regulatory burden; rather considerations of environmental, social, and governance factors (including business respect for human rights) all require corporate attention in the context of modern slavery eradication, as the price for maintaining a good business reputation and attracting investment and customers;
7) that the proposed reporting requirement could usefully be reinforced by its alignment with pre-existing standards such as the ASX Corporate Governance Council’s principles and recommendations on corporate governance, as a means of positioning Australian companies as global leaders in corporate governance and reporting that meaningfully guards against any exploitation of modern slavery to business advantage;

8) that the Repository be funded by the Australian Government and operated by a third party, ensuring its independence. It should be conceived of as a Data Platform from which analysis and research can easily transpire;

9) that the Government consider establishing legislation that backs up reporting requirements with specific penalties for non-compliance with the obligation to provide a Modern Slavery Statement, given the policy importance of eradicating all regulatory gaps on modern slavery;

10) that a single deadline common to all reporting entities be established shortly after the end of the Australian financial year as a specific modern slavery compliance date, and, by so doing, raise awareness for the business community;

11) that the Government demonstrate its backing of such legislation by including a limited phased-in period which sets a specific modern slavery compliance date within two years of enactment;

12) that one of the best means of monitoring and evaluating the effectiveness of reporting is for the Government to establishment and house the repository within a University setting;

13) that an independent oversight mechanism be established to review, monitor, and evaluate compliance so as to assist businesses in addressing modern slavery in supply chains; and

14) that the Government remain committed to Option 3, thus meeting its own responsibility under international instruments and standards such as the UN Guiding Principles on Business and Human Rights.
Contributors

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In 2010-2011, Professor Horrigan was a member of an Australian Government expert panel whose recommendations resulted in changes to three major pieces of national economic regulation regulating business conduct. His most recent book in the area of corporate responsibility and governance, Corporate Social Responsibility in the 21st Century: Debates, Models, and Practices Across Government, Law, and Business was published internationally by UK-based Edward Elgar in late 2010. More recently, Prof Horrigan has been a member of the expert reference groups for a published legal opinion on directors’ duties in managing climate change risks, and the review of the national electricity market by Australia’s Chief Scientist.

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Introduction

The following Submission to the Attorney-General’s Department, in regard to the Public Consultation into Modern Slavery in Supply Chains Reporting Requirements, builds on the 28 April 2017 submission by Monash University and others, made to the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade in regard to its Inquiry into Establishing a Modern Slavery Act in Australia.1 It also is informed by the oral evidence presented by Prof Allain before the Joint Standing Committee on Foreign Affairs, Defence and Trade, in Melbourne in August 2017 and his participation in the October 2017 Roundtable also held in Melbourne by the Attorney-General’s Department.

Having previously submitted to the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and recognising that those who had “already provided a submission to this inquiry do not need to provide an additional submission to government unless there is new information that government should consider”, the following Submission speaks specifically to reporting requirements of supply chains going beyond the only recommendation made by Monash University and others in regard to supply chains: “That an effective reporting infrastructure, including a central repository, be developed, to ensure supply chains are both transparent and free of modern slavery”.

Having considered the Modern Slavery in Supply Chains Reporting Requirement Public Consultation Paper and Regulation Impact Statement, including its acknowledgment that the Commonwealth “Government proposes to enact an Australian Modern Slavery in Supply Chains Reporting Requirement (reporting requirement)”; having also noted that the Government seeks to “encourage the business community to be more transparent about how it addresses modern slavery risks, improve business awareness of this issue and provide consistency and certainty for business about Government’s expectations”; finally, acknowledging the Government’s commitment to developing “a reporting requirement model that is as simple, sensible and effective as possible”,

the following is our consideration of the fourteen consultations questions for which the Attorney-General’s Department sought community feedback.

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1 See Submission 85: Monash University and Others: Joint Submission to the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, in regard to its Inquiry into Establishing a Modern Slavery Act in Australia by Jean Allain, Heli Askola, Kevin Bales, Andrew Crane, Marie Segrave, 28 April 2017.
1) Is the proposed definition of ‘modern slavery’ appropriate and simple to understand?

Defining ‘modern slavery’ as incorporating the conduct set out in Divisions 270 and 271 of the Commonwealth Criminal Code is appropriate for the purposes of reporting.

While seeking to improve the business community’s awareness of modern slavery risk within supply chains, it should be recognised that, in the main, ‘modern slavery’, as set out by Divisions 210 and 271 of the Criminal Code, is a serious criminal offence and that no matter where it is present – including within business settings – there exists a legal requirement that it be treated as such. As a result, the Government should provide detailed forward guidance to businesses, in plain language, in a manner which disaggregates the conduct criminalised under the banner of ‘modern slavery’ within the Criminal Code, and makes plain what legal requirements are manifest where, for instance, slavery versus forced labour is present.

The experience of the development of the term ‘contemporary forms of slavery’ by the United Nations during the 1980s and 1990s was that it was rendered effectively meaningless by a failure to be anchored in well-defined laws. The High Court of Australia recognised this possibility when it noted that “it is important not to debase the currency of language” by recognising “that harsh and exploitative conditions of labour do not of themselves amount to slavery”.2

Australia is well-placed to ensure this does not transpire by ensuring the effectiveness of the concept of ‘modern slavery’. This is so, as the provisions of Divisions 270 and 271 of the Criminal Code are amongst the best and most thorough articulation, by any country in the world, of the requirements of the international legal instruments which speak to ‘modern slavery’. As such, not only does the Criminal Code best capture the essence of ‘modern slavery’, it does so in a manner which can be replicated by other countries in the Asian-Pacific region, and further afield – this in the context where less than half the countries of the world criminalise slavery, while only one-third have provision of criminal law related to servitude or forced labour.3 Thus, the framing of ‘modern slavery’ within the context of an Australia Modern Slavery Act, may well be the most significant and far-reaching affect, globally, of the Government’s commitment to “playing a leadership role domestically and internationally on this issue”.4

The providing of forward guidance in regard to reporting requirements to businesses should lay emphasis on those provisions of the Criminal Code which relate specifically to criminal offences in the business environment, such as: Section 270.3(2)(ii) related to the finance of commercial transactions involving slavery; Sections 270.5(2) and 270.6A(2) which address business that involves servitude or forced labour; and Section 270.10 which covers evidence of economic relations in regard to slavery-like offences.

The Australian Government might consider the following to strengthen the Commonwealth Criminal Code so as to provide certainty to the business environment:

1) define what constitutes debt-bondage in the Criminal Code, as well as those other ‘institutions and practices similar to slavery’ as set out in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;

4 Here it might be noted that the failure to have a common definitional basis to what constitutes ‘exploitation’ within the framework of the Palermo Protocol on Trafficking in Persons has limited the effectiveness of transnational cooperation in criminal matters, specifically: 1) its extra-territorial reach; and 2) in regard to ‘double criminality rule’ in cases of extradition requests. The establishment of clear legal parameters to ‘modern slavery’ and its promotion overseas would do much to facilitate cooperation in criminal matters. See generally: Jean Allain, “No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol”, Albany Government Law Review, Vol. 7, 2014, pp. 111-142.
2) engage with exceptions to forced labour, as set out in Article 2(2) of the 1930 Forced Labour Convention or in slightly modified form, in Article 8(3) of the UN International Covenant on Civil and Political Rights. In more concrete terms: to what extent are supply chains which include prison labour captured by the criminal conduct of the Divisions 270-271 of the Criminal Code; and more so, the distinction between public and private prison labour;

3) consider incorporating the subject-matter jurisdiction of ILO Convention 182, the 1999 Worst Forms of Child Labour Convention, into Commonwealth Criminal Code; and

4) in light of the ILO’s recommendations in regard to the Thai fishing industry, the focus of Part 3 of the UK Modern Slavery Act 2015, and Australia’s obligations under the UN Convention on the Law of the Sea; consider the extent to which Australia’s policing powers in the maritime environment, including the high seas, are adequate in seeking to suppress the slave trade. Further, to consider whether the compelling of forced labour at sea, in the controlled environment of a ship, is such as to constitute being held in a condition of slavery.5

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?

While a broad definition such as that proposed is to be welcomed in terms of ensuring the legislation has wide coverage, it is critical to clarify exactly what constitutes a reporting entity for the purposes of the legislation.

It has been very difficult in the UK context to accurately define which level of organisation (holding company, group, subsidiary, etc.) is required to report under the Modern Slavery Act 2015. As a result, there is still no definitive list of companies subject to the Act, which severely hampers transparency. We would recommend that the Government consult with Tiscreport.org in the UK which has the most extensive experience of dealing with this issue to date.

We would strongly advise against excluding public organizations from the legislation, especially given the scale of public procurement in Australia, which is currently around 12% of GDP6. This represents a major proportion of business activity and represents an important area of influence where the Australian Government can show leadership. At the very least, governmental business activities should be covered, consistently with the policy approach on governmental immunity and liability in major economic legislation such as the Competition and Consumer Act 2010 (Cth).

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5 In regard to Thai fishing see: International Labour Bureau, Governing Body, Report of the Director-General Sixth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Thailand of the Forced Labour Convention, 1930 (No. 29), made under article 24 of the ILO Constitution by the International Trade Union Confederation (ITUC) and the International Transport Workers’ Federation (ITF), GB.329/INS/20/6, 20 March 2017.

3) How should the Australian Government define an entity’s revenue for the reporting requirement? Is $100 million total annual revenue an appropriate threshold for the reporting requirement?

$100 million is more than 50% higher than the UK threshold level, and as such would capture only large businesses, and primarily multinationals. This might make sense if the goal is only to target modern slavery practices overseas. However, it is important to also focus the reporting requirement on companies that also may have incidents of modern slavery in their supply chains in Australia.

Recent evidence suggests that incidences of modern slavery actually occurring in developed countries largely occur in the context of domestic companies supplying other domestic companies, rather than multinationals. As such, we urge the Australian Government to adopt a lower reporting threshold level, commensurate at least with the UK threshold, in order to adequately tackle domestic modern slavery practices.

The establishment of a monitoring threshold should be established by regulation, thus allowing it to be easily adjusted without the need to engage the efforts of the Commonwealth Parliament.

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

Australia has a relatively high use of contingent and temporary workers who are at a higher risk of modern slavery than permanent workers. Recent research suggests that companies have a blind spot in terms of the transparency of their labour supply chains in sourcing these workers (as opposed to their product supply chains that source components). That is, companies do not currently know the employment conditions of workers in their supply chains, because they do not effectively trace back how those workers came into employment.

Given the critical role played by labour market intermediaries, such as recruiting agents and agencies, in perpetrating modern slavery (especially in developed countries), the reporting requirement should specifically require entities to report on their efforts to detect and address modern slavery in both their product supply chains (ie: the stages their products and components have gone through) and their labour supply chains (ie: the stages the workers in their own operations and their product supply chains have gone through).

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

The response of affected entities will most likely depend upon three key factors – namely: the nature and scope of the reporting obligation; its enforceability; and how well it is integrated with other reporting obligations under law and in practice.

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The Public Consultation Paper usefully highlights the proposed reporting requirement’s connection to both business responsibility for human rights and general corporate governance. A holistic approach to corporate compliance and governance integrates relevant legal and practical requirements from an overall organisational perspective. So, Australian businesses are likely to be more receptive to the Government’s proposal if the connections are clear between pre-existing ‘hard’ and ‘soft’ law on human rights, corporate governance, and Modern Slavery Statements.

The Modern Slavery in Supply Chains Reporting Requirement Public Consultation Paper and Regulation Impact Statement sets out a number of Government aims which seek to facilitate ‘buy-in’ from businesses meeting the revenue threshold. As our considerations in Question 6 attest, those businesses are already doing much in the areas of environmental, social, and governance (ESG). The Government can, by equipping and enabling the business community to respond effectively to modern slavery by developing and maintaining responsible and transparent supply chains, provide an environment for a ‘race to the top’, which better places Australian companies within a global economy.

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?

Three fundamental points underscore any assessment of the regulatory impact of the proposed reporting requirement on Australian businesses, and counter any argument that the proposed reporting requirement is unwarranted new regulation.

First, it is not a matter of creating a new regulation in what is otherwise a regulation-free zone of activity for Australian businesses operating within and beyond Australia. Australian businesses that are subsidiaries or part of the supply and distribution chain of UK companies are part of what those UK parent companies must assess and report under equivalent reporting requirements of the UK Modern Slavery Act 2015. The same can be said of Australian businesses in the sphere of operations of equivalent reporting requirements in other countries, as the global coalition against modern slavery gathers momentum. The uptake and reinforcement of the UN Guiding Principles on Business and Human Rights and UN Principles of Responsible Investment in other international and business standards concerning investment and multinational enterprises is also a broader and pre-existing international regulatory framework with which the proposed reporting requirement would interact. Put another way, modern slavery is implicated in international standards relating to business and human rights, as well as international standards that focus companies and their investors on environmental, social, and governance (ESG) considerations.

Secondly, the impact of the proposed reporting requirement should not be characterised in zero-sum terms, as simply an extra regulatory burden. However desirable it is as a measure on its own terms in combating modern slavery, it also needs to be viewed in terms of how compliance with it assists an Australian business in meeting other pre-existing regulatory requirements. The Public Consultation Paper already identifies the link between combating modern slavery and the responsibility of Australian businesses to respect human rights under the framework provided by the UN Guiding Principles on Business and Human Rights. So, compliance with the proposed reporting requirement can also form part of what an Australian business can demonstrate to its shareholders and other stakeholders about how it respects human rights concerned with labour conditions, anti-corruption, and other exploitation of vulnerable communities.
The ASX Corporate Governance Council’s *Corporate Governance Principles and Recommendations* provide a further impetus and a clear basis for integrating the proposed reporting requirement with broader corporate governance regulatory requirements that are already in existence and adopted by Australian businesses. Those standards apply primarily to listed companies, although they have become a model for good corporate governance standards across the public, private, and not-for-profit sectors. They are based upon good corporate governance regulation and practice in Australia and other countries. Importantly, as in the UK, Europe, and elsewhere, they adopt a principle-based approach to regulation, with a ‘comply or explain’ (ie: ‘if not, why not’) philosophy, under which a company can choose not to comply but must explain why to the market, which increases market awareness and transparency while also allowing for customisation to individual corporate circumstances.

For the last couple of reporting years, those standards have included a requirement on a ‘comply or explain’ basis, under Recommendation 7.4, for companies to disclose their material sustainability risks and how they address them, with sustainability risks being defined explicitly in terms of ‘economic sustainability’, ‘environmental sustainability’, and ‘social sustainability’, with the latter form of sustainability including reference to standards such as the *UN Global Compact*, the *Global Reporting Initiative*, and the *OECD Guidelines for Multinational Enterprises*.

Most significantly for the present context, all of those cited standards now incorporate reference to the globally accepted framework for protection of human rights under the *UN Guiding Principles on Business and Human Rights*, which the Public Consultation Paper explicitly identifies as being connected to combatting modern slavery. Companies retain the discretion to choose whichever reporting standard or framework best applies to their particular sustainability risks, thus optimising corporate flexibility within what is still a regulatory requirement, albeit one that operates on a ‘comply or explain’ basis.

As suggested further below, the proposed reporting requirement could usefully be reinforced by the Government through promulgating its connection and integration with pre-existing standards such as the ASX Corporate Governance Council’s principles and recommendations on corporate governance. For example, a listed company’s Modern Slavery Statement could also form part of how that company identifies and manages material risks in terms of both ‘economic sustainability’ (because exploitation of modern slavery to business advantage becomes more and more unsustainable as global regulatory gaps close) and ‘social sustainability’ (because exploitation of modern slavery to business advantage is, at worst, a corporate abuse of human rights and, at the very least, a breach of business responsibility towards protecting human rights).

Finally, the regulatory impact of the reporting requirement cannot be assessed simply in terms of whether or not it is enforceable and sanctionable by a government body, and whether or not that is desirable. Regulatory impact now extends to the consequences of compliance and non-compliance under both ‘hard’ and ‘soft’ law, self-regulation and co-regulation, multi-stakeholder standard-setting initiatives across national borders, and reputational and socio-ethical drivers of corporate behaviour. The Public Consultation Paper reinforces and illustrates this aspect, for example, in highlighting the impact of modern slavery upon “business performance”, “reputational damage”, and “shareholder and investor confidence”.9

A company’s reputation is its major asset, and that reputation can be affected by how well it guards against benefitting unfairly from exploitation of modern slavery across a global supply and distribution chain, whatever the extent of its technical legal liability under the criminal law for something for which it can be held individually accountable. Similarly, the

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global rise of laws and standards in Australia and elsewhere that support the consideration of ESG factors in investment decision-making means that international and Australian investors and shareholders increasingly require corporate attention to such considerations as the price for their financial investment in such companies.

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?

We welcome the decision to include these as mandatory criteria. Though it should be recognised that the Government’s proposal here involves trade-offs. If the Government’s final response is too novel or raises too many reasonable business concerns (including about the type or number of mandatory criteria), it risks being counter-productive in terms of traction with the business community. If it is allowed to be characterised as additional and unnecessary ‘red tape’ for business, its character as an integrative and reinforcing piece of corporate governance regulation risks being lost.

While the fourfold criteria add some risk of novelty by going beyond what is strictly mandated in the UK, the presence of a uniform set of criteria offers the trade-off benefit of facilitating regulatory and business guidance in mainstreaming the proposed reporting requirement. Similarly, its definition of modern slavery by reference to what would constitute offences under Commonwealth criminal law might be amenable to business as something that enhances their pre-existing approaches to corporate compliance and corporate governance reporting. However, at least in Professor Horrigan’s view, the proposed additional criterion ‘to report on the number and nature of any incidences of modern slavery during the reporting period’ is apt to increase business concern about the risk of regulatory investigation and prosecution arising from such particularity of information, thereby increasing the risk of anodyne business responses in compliance with such a requirement.

There is analogous support for this view. The ASX Corporate Governance Council’s principles and recommendations on reporting and managing corporate governance risks have successfully achieved business traction without arousing business concern about cross-overs between corporate governance reporting and ancillary regulatory investigations and prosecutions. By analogy, the proposed reporting requirement does enough for risk management and public reporting purposes through the proposed fourfold criteria, without adding to them, at least at this initial stage.

Whether the Government goes beyond the suggested criteria or not, the reporting duty should be drafted in a way that it steers the behaviour of the companies affected in such a manner as to ensure that they meaningfully address their supply chains. So, on another view, emphasis on the number and nature of incidences is fundamental to ensure genuine transparency, and to enable clients and customers to make informed decisions about which entities they want to do business with.

Beyond mandatory criteria, all authors of this Submission believe that the Government should, in developing guidance and awareness-raising material for the business community, emphasise standards such as those of the UN Global Compact, the Global Reporting Initiative, the OECD Guidelines for Multinational Enterprises, and the OECD Due Diligence Guidance for Conflict Minerals, as a means of facilitating a ‘race to the top’ and positioning Australia companies ahead of their competitors in creating reputational dividends through taking action against moderns slavery.
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?

The Repository should be funded by the Australian Government and operated by a third party to ensure independence. Included in the mandate of the Repository should be the requirement to regularly (and at least annually) report on levels of compliance with the reporting requirements, including a regularly (at least annually) updated list of compliant and non-compliant entities.

Given the extra-territorial nature of the UK reporting requirements, UK registries are already well advanced in dealing with companies operating in Australia, and so thought should be given to either enabling one of these registries to operate as the Australian Registry or to work in partnership with the Australian Registry. The Australian Government would repeat the mistake of the UK Government if it allowed multiple registries to operate, as this introduces complexity and reduces transparency.

The repository should be conceived of as a Data Platform from which analysis and research can easily transpire and inspire. Universities (alone, or in combination with one another and regulators) have the capacity to fulfil a role here. Such a Platform would hasten the move to end modern slavery.

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?

Without penalties or other regulatory sanctions for non-compliance, the reporting requirement is at risk of being ignored. Current compliance levels in the UK – where there are no penalties for non-compliance – are currently less than 50%, according to Tiscreport.org data. Therefore, while support for reporting entities is critical, we urge the Australian Government to also establish a landmark piece of legislation that for the first time backs up reporting requirements with specific penalties for non-compliance. A penalty is essential to make this new duty meaningful in the context where, in light of minimal reporting requirements on a significant social issue, a business fails to undertake a governmental requirement.

The proposed reporting requirement is integrally connected to corporate governance in the following ways. By defining ‘modern slavery’ in terms that pick up what would be offences under the criminal law, the reporting requirement has the potential to assist Australian businesses in meeting their compliance with the law and associated employee training in this area. In addition, by requiring board attention and sign-off, the reporting requirement brings its features within the realm of corporate governance. Furthermore, the proposed fourfold reporting criteria use a language (eg. ‘risk’ and ‘due diligence’) and structure with which business is familiar in terms of corporate governance risk management and reporting. Finally, as the specific subject matter of the reporting requirement (ie: modern slavery) relates to the general subject matter of ‘economic sustainability’ and ‘social sustainability’ under Australian corporate governance regulatory requirements, it dovetails with pre-existing corporate governance regulation, in the sense explained in this submission.

Consistently with those corporate governance features of the proposed reporting requirement, the Government could increase business receptivity towards this reform by doing as much as possible to reinforce how a Modern Slavery Statement of the kind proposed can also be used by Australian businesses to satisfy other corporate governance regulation. So, without mandating the following as an absolute requirement under the law, the Government could indicate by various regulatory means that such Modern Slavery Statements can fulfil aspects of corporate governance reporting, such as the requirements of the ASX Corporate Governance Council’s principles and recommendations. In addition, the Government could expressly support the development by that representative body and ASIC of regulatory guidance to that effect.

Finally, contemporary democracy embraces both the constitutional architecture of democracy (eg. separation of powers within and across different levels of government) and how other sectors of society engage with the machinery of democratic government and its regulatory requirements (ie: what is variously referred to in the academic literature as ‘participatory’, ‘deliberative’, or ‘monitory’ democracy). In that vein, there is a standard-setting and monitoring role for civil society, alone or in conjunction with regulators, business peak bodies, and other stakeholders. Greater public transparency, comprehensiveness, and accessibility of modern slavery statements will play an important part in facilitating civil society’s function in this area.

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?

For the purposes of transparency, it is critical that the reporting requirements establish a single deadline common to all reporting entities. In the UK, the deadline is linked to the entities’ financial years, which makes it much more complicated to assess compliance and to compare compliance across entities. For this reason, we recommend setting a date shortly after the end of the Australian financial year as a specific modern slavery compliance date, and by so doing raising awareness and garnering attention. The setting of such a date does not prevent businesses from using and referring to their Modern Slavery Statements to demonstrate how they are meeting broader reporting requirements that arise at other times.

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

No ‘grace period’ for reporting should be including in the legislation, as the revenue threshold for the reporting requirement proposed of no lower than $100 million total annual revenue captures a limited amount of companies with the ability to mobilise resources to report within a limited phase-in period. Such a phase-in period would be for two years from enactment to a specific modern slavery compliance date.

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?

On this question, this Submission comments only on some ways in which the university sector relates to the proposed reporting requirement and evaluation of its effectiveness. As it does with other national research priorities, the Government should consider using existing and new research funding to support applied, evidence-based, and comparative research across
disciplinary and national boundaries that assists in the Government’s stated aim “to support business groups and civil society to undertake analysis and benchmarking of Modern Slavery Statements”.

In addition, the establishment and housing of the repository as a Data Platform within an Australian university would provide for the best means of independent review, monitor, and evaluation of the effectiveness of the reporting requirement. With its long association between business and human rights and its expertise in the area, the Faculty of Law at Monash University would be the ideal location to house such a repository.

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?

An independent oversight mechanism consisting of the various stakeholders and mandated to review, monitor, and evaluate the compliance and effectiveness of reporting is essential, in the light of comparable overseas experience. Such oversight should be predicated on using applied, evidence-based, and comparative research (see also above) to assist businesses in address modern slavery in supply chains.

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?

In this public consultation process, the Government has stated a clear preference for Option 3. Options 1 and 2 are demonstrably inferior to Option 3, for the reasons already outlined by the Government, and for the additional reasons provided in this Submission. The Government should remain committed to Option 3. Indeed, stepping back from Option 3 exposes the Government to the risk of not meeting its own responsibility under international instruments and standards such as the UN Guiding Principles on Business and Human Rights.