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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Honourable Members,

Re: International Justice Mission Australia's submission on the Modern Slavery Bill 2018 (Cth)

Thank you for the opportunity to provide a submission to the inquiry into the Modern Slavery Bill 2018 (Cth).

International Justice Mission ('IJM') is the largest anti-slavery organisation in the world. We partner with local authorities and organisations to rescue victims, bring criminals to justice, restore survivors and strengthen justice systems. IJM Australia joins this mission globally and works locally to grow the movement of Australians seeking justice for the oppressed.

IJM Australia is encouraged by the consultative approach of the Government in the development of the Bill and is eager to continue providing input on the Bill and the accompanying guidance material. We include our submission below, noting that it draws upon our previous submissions to the Inquiry and Public Consultation (preceding the Bill's introduction), and concludes with a summary of our 14 recommendations. We focus on the provisions in the Bill that we believe will be effective, and amendments that will strengthen the implementation of the Bill to ensure its intended objectives are achieved.

We would be grateful for the opportunity to appear before the committee at a public hearing for this inquiry.

Yours faithfully,

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1. Overview

- 1.1 IJM Australia is pleased to see the Government taking a leading role in the effort to eradicate modern forms of slavery from the supply chains of Australian corporate and governmental entities through the Modern Slavery Bill 2018 (Cth) (“the Bill”). We appreciate that the Government has taken a thorough and considered approach to developing the supply chain transparency legislation, involving extensive consultation with civil society and business, and is looking to improve upon existing transparency regimes in Australia and around the world.
- 1.2 It is imperative that the core features of the Bill as it stands pass into law. While we set out below recommendations on how the Bill could be strengthened, we recognise that its effectiveness in tangibly reducing modern slavery in supply chains will depend on rigorous and sustained collaboration between business, civil society and the Government’s new Anti-Slavery Business Engagement Unit (“Business Engagement Unit”).
- 1.3 This submission will focus on: existing features of the Bill which should be retained; ways in which the implementation of the Bill can fulfil the Government’s stated objectives, particularly in relation to the central register and functions of the Business Engagement Unit; and the long-term plan the Government should adopt to enhance the impact of the transparency regime. These submissions draw upon our previous submissions to the *Inquiry into Establishing a Modern Slavery Act in Australia*¹ and the Public Consultation on the Modern Slavery in Supply Chains Reporting Requirement conducted by the Attorney General’s Department.²

2. Existing Features

- 2.1 The Bill includes the positive elements of the UK’s *Modern Slavery Act 2015*,³ such as requiring senior management to approve Modern Slavery Statements. Several features of the Bill and its proposed implementation are welcome and necessary improvements on the UK legislation. These features should be retained and are set out below.

Guidance

- 2.2 The Government intends to introduce clear and comprehensive guidance for businesses on the completion of Modern Slavery Statements before the law comes into force.⁴ The delay and lack of detail on key terms has been identified by academics and legal experts as inhibiting the ability of businesses to comply with the transparency legislation in California and the UK.⁵ The planned assembly and release of guidance in advance will remedy this. Recommendations of what should be included in the guidance are included in Section 4 below.

Central Register

- 2.3 The Bill provides for a Government-run public central register of statements.⁶ This will allow easy comparison between companies, which is essential to provide the ‘reputational incentives’ needed to achieve the Government’s objective of ‘facilitating a

“race to the top”⁷ on action against modern slavery.⁸ Recommendations of how the registry should function are included in Section 4 below.

Public Sector Reporting

- 2.4 The Bill extends the obligation to report to the public sector.⁹ This brings Australia closer to the ‘best practice’ legislation in US which mandates compliance procedures for all significant public sector contracts to reduce the risk of modern slavery.¹⁰ It will also ensure that the significant volume of goods and services in government supply chains fall within the legislation¹¹ and allow the public sector to provide an example to the private sector.¹²

Mandatory Criteria

- 2.5 The Bill makes it mandatory for an entity to report on certain criteria, including its ‘structure, operations and supply chains’, the risks of modern slavery in its supply chains, actions to address those risks including due diligence, and methods of assessing the effectiveness of such actions.¹³ This is an important improvement upon the optional criteria in the UK legislation as it will allow for easier comparison between companies and encourage greater and more useful detail to be included in statements.¹⁴
- 2.6 However, given that there are no penalties for non-compliance with the reporting requirement, it is difficult to see how the criteria can truly be regarded as ‘mandatory’. Entities are free to disregard the criteria with no consequences, just as under the UK legislation.¹⁵ See discussion of enforcement options in Section 4 below.

Clarity of Terms

- 2.7 The Bill clearly defines which entities are required to report by reference to established legal categories in tax and corporations legislation and defined accounting methods.¹⁶ These definitions have been the subject of confusion in the UK legislation and legal experts have suggested it may be impossible to identify which companies are required to report as a result.¹⁷
- 2.8 Importantly, the foreign entities required to report must ‘carr[y] on business in Australia’ as defined by the *Corporations Act 2001* (Cth).¹⁸ Such entities, if incorporated, must already be registered with the Australian Securities and Investments Commission (‘ASIC’).¹⁹
- 2.9 This means that most entities will have certainty about whether they are required to report.²⁰ However, publishing a public list of entities that are required to report would provide even greater certainty; see the discussion in Section 3 below.
- 2.10 It is also encouraging to see that the Government intends to include an explanation of the terms ‘supply chain’ and ‘operations’, which have also been the subject of confusion in the UK,²¹ in the guidance.²² It is important that the Government makes it clear that reporting only on ‘tier one’ suppliers will not be in compliance with the requirement to report on ‘supply chains’.²³

Reviews of Effectiveness

- 2.11 The effectiveness of the legislation is to be reviewed every three years.²⁴ While this requirement for continuous improvement is important, provisions should be made for necessary modifications to be made as they arise, discussed further at Section 4.

Recommendation 1

The Government should retain the features of the Bill and its planned implementation concerning director sign-off, guidance, the central register, public sector reporting, mandatory criteria, clarity of terms and reviews of effectiveness.

3. Compliance and Feedback

- 3.1 At several points in the Explanatory Memorandum, the Bill was stated to be addressing the fact that existing legislation and policy ‘does not directly target modern slavery in business operations and supply chains’.²⁵ Thus, the objective of the Government through the Bill is to ‘*equip and enable* the business community to *respond effectively* to modern slavery and *develop and maintain* responsible and transparent supply chains’.²⁶ Intermediate objectives include ‘encouraging the business community to *identify and address* modern slavery risks beyond first tier suppliers’ and ‘facilitating a “race to the top”’, as well as raising awareness and investor and consumer information.²⁷
- 3.2 However, the Bill does not *directly* address modern slavery in supply chains. As in the UK, the legislation is designed to operate *indirectly* by:
- (a) **Positive Recognition:** giving positive recognition to entities that are already taking effective steps to eliminate modern slavery;
 - (b) **Exposing Areas for Improvement:** encouraging entities that are taking inadequate action to do more through ‘pressure from consumers, shareholders and campaigners and competition between businesses’;²⁸ and
 - (c) **Cultural Shift:** raising awareness in senior management of entities about modern slavery who are forced to view addressing modern slavery as a business priority due to (a) and (b).²⁹
- 3.3 UK Government documents accompanying the introduction of its Modern Slavery Act explicitly acknowledge that the transparency scheme is intended to function as outlined above.³⁰ The Bill is based on an identical framework.
- 3.4 It is critical that the Government explicitly and precisely recognise the indirect way in which the Bill is intended to have a tangible effect on modern slavery in supply chains so that the implementation of the Bill can be targeted to ensure these effects are actually brought about. Below we set out clearly the pathways by which the reporting requirement can ultimately lead to concrete action by entities.

Pathways to Effectiveness

3.5 **Positive Recognition:** The following illustrates how Company A, which has implemented good practices to address modern slavery in its supply chains, would receive reputational benefits as a result of the reporting requirement as their competitors are also required to report.

- (i) Company A has best practice procedures in place to identify and mitigate the risk of modern slavery in their supply chains (eg, through comprehensive due diligence procedures based on OECD Guidance relevant to its industry).³¹
- (ii) Company A fully complies with the supply chain reporting requirement, providing significant detail about its practices under the mandatory criteria.
- (iii) A significant proportion of Company A's competitors also comply.
- (iv) A significant proportion of Company A's competitors provide sufficient detail about their practices under the mandatory criteria to allow a comparison between them and Company A.
- (v) Government or civil society draw attention to the fact that Company A's processes to address modern slavery are best practice in its industry.
- (vi) Company A's consumers and investors are made aware of this and view the issue as important, resulting in enhanced goodwill towards Company A.
- (vii) Company A views the reputational benefits it has received from its action on modern slavery as more valuable than the cost of taking such action, and is thus incentivised to continue improving its response to modern slavery.
- (viii) Government and civil society provide adequate resources and support to Company A to take concrete steps to improve its response (eg, through guidance material).

3.6 **Exposing Areas for Improvement:** The following illustrates how Company B, which has not as yet taken sufficient action to address modern slavery in its supply chains, would be prompted to take such action once it is forced to disclose its lack of action and is compared to its competitors.

- (i) Company B has undertaken limited investigation whether there is a risk of modern slavery in its supply chains.
- (ii) Company B determines it is required to report under the reporting requirement.
- (iii) Company B complies with the reporting requirement.
- (iv) Company B provides significant detail about its (lack of) practices to address modern slavery under the mandatory criteria.
- (v) Government or civil society draw attention to the fact that Company B's processes to address modern slavery are not adequate.
- (vi) Consumers and investors are made aware of this and view the issue as important, resulting in reputational damage to Company B.
- (vii) Company B judges that taking action on modern slavery will be less expensive than any direct or opportunity costs due to the weakness of its current response, and is thus incentivised to improve its response to modern slavery.

(viii) Government and civil society provide adequate resources and support to Company B to take concrete steps against modern slavery (eg, through guidance material).

- 3.7 **Cultural Shift:** The Government intends for the legislation to lead to ‘a shift in broader business culture’³² and ‘prompt flow on change down supply chains’.³³ However, this will only come about as a result of the cumulative effect of the ‘Positive Recognition’ and ‘Exposing Areas for Improvement’ taking place in numerous individual entities. Additionally, change further down supply chains may require a lowering of the reporting threshold.
- 3.8 Because the Bill is only designed to operate to bring about change in practices in this indirect manner, the implementation of the Bill must prioritise the following key steps:
- Ensuring that entities are aware that they are required to comply with the reporting requirement.
 - Ensuring a high rate of compliance.
 - Providing feedback on the adequacy and level of detail of reporting.
 - Identifying and drawing attention to best practice.
 - Allowing easy comparison between entities in similar industries to identify areas for improvement.
 - Sufficient incentives to prompt businesses to take action, such as the value of being recognised as an industry leader in the response to modern slavery.
 - Comprehensive guidance including practical steps on how to address modern slavery in supply chains.
- 3.9 At present, the proposed implementation and evaluation of the Bill schedules many of the above processes to take place at the three-year review. IJM Australia submits that these steps should instead be undertaken alongside the initial implementation. We have made further specific recommendations to accompany these steps below.

Recommendation 2

The Government should amend its implementation plan to include targeted, detailed and continuous feedback and communication between the Anti-Slavery Business Engagement Unit and reporting entities to ensure the completion of the intermediate steps necessary to achieve the desired indirect effects of the legislation in reducing modern slavery.

Clarifying Reporting Obligations

- 3.10 As noted in Section 2 above, there has been confusion around which entities are required to report under the UK Modern Slavery Act based on the definitions used in the legislation. While the Bill provides a clearer definition of which entities are required to

report, the Government suggested that it ‘does not hold sufficient information to compile an accurate list of all entities required to report’.³⁴

- 3.11 One way of resolving this confusion is for the reporting requirement only to extend to those entities that the Government has identified as meeting the criteria. The *Hidden in Plain Sight* report recommended that the Government publish a list of entities that are required to report for this very reason.³⁵ The report noted that this ‘would both assist to clarify the obligations for those entities, and improve accountability and transparency’.³⁶ The UK Independent Anti-Slavery Commissioner also recommended the production of a list of entities required to report under UK legislation.³⁷
- 3.12 Only requiring entities on the list to report would ensure that the obligation to report does not extend to so many entities that it is impossible to enforce and has low compliance rates.³⁸ Requiring the Business Engagement Unit to assemble this list in cooperation with the Australian Taxation Office and other relevant agencies will mean it is aware of all the companies it is required to assist with compliance from the outset.
- 3.13 The Government already has sufficient information to produce this list. As a starting point, the list would include ‘Australian public and foreign owned corporate tax entities with total income of \$100 million or more’, which the Australian Taxation Office is already required to publish each year.³⁹ This list also includes private companies with total income over \$200 million, which could be extended to include all private companies above the \$100 million threshold.⁴⁰
- 3.14 Requiring only entities on the public list to report will create certainty for business and reduce unnecessary expenditure on legal and accounting services determining whether or not they are required to report.
- 3.15 At present, the proposed implementation and evaluation of the Bill schedules many of the above processes to take place at the three-year review. IJM Australia submits that these steps should instead be undertaken alongside the initial implementation. We have made further specific recommendations to accompany these steps below.

Recommendation 3

The Government should adopt the recommendation of the *Hidden in Plain Sight* report to publish a list of entities that are required to report.

Compliance Mechanism

- 3.16 The Government has stated that there will be no compliance mechanism, the justification being ‘[t]he reporting requirement is also intended to facilitate a collaborative “race to the top” amongst business and punitive penalties may lead to a tick box compliance approach from reporting entities’.⁴¹ However, this conflates the ‘reporting’ stage and the ‘improving practices’ stage of the way the transparency scheme

is designed to work as outlined above (steps (i)–(iv) concern ‘reporting’ and (v)–(viii) concern ‘improving practices’).

- 3.17 If companies take a ‘tick box compliance approach’ to **reporting**, this will not necessarily have a negative impact on the generation of a ‘race to the top’ in terms of **improved practices**, which is the ultimate goal of the legislation. As long as the minimum standards of reporting that are required are sufficiently detailed and enforced, as in the outlines above, the pressure for improved practices will be driven by government, investors, consumers and civil society on the basis of comparisons between companies.
- 3.18 The legislation has no requirements for actual **practices** that must be implemented to address modern slavery, so it is not as though a ‘tick box’ approach to compliance could result in companies only making the minimum required changes to comply with the legislation. The ‘race to the top’ was always intended to arise from pressure on businesses to imitate best practices *revealed through* the reporting rather than *mandated by* it.
- 3.19 Rather than hinder a ‘race to the top’, the outlines above indicate that a ‘race to the top’ will not occur **without** some mechanism of ensuring widespread compliance with the legislation.

Recommendation 4

The Government should reassess whether a formal compliance mechanism may be necessary, given that the potential for entities to take a ‘tick box’ approach to compliance with *reporting* has no impact on the desired ‘race to the top’ with respect to *practices* to address modern slavery.

Penalties

- 3.20 A mechanism to ensure compliance with the legislation could include penalties. IJM believes the case for the use of penalties *as a last resort* is demonstrated by the WGEA reporting framework. While it is true that the vast majority of entities required to report under this framework do report, there are some businesses who seem to persistently fail to comply with their reporting obligations. For example, it appears that the women’s footwear label Wittner has failed to lodge a report since the 2013-2014 financial year.⁴² Other than listing the business as a non-compliant organisation, there are no other tools available to the WGEA to enforce Wittner’s compliance.⁴³ The ability to apply a penalty for consistent and persistent non-compliance could be an effective compliance mechanism in this case.
- 3.21 Furthermore, IJM wishes to draw to the attention of the committee concerns that have been raised with respect to inconsistencies between the *Modern Slavery Act 2018* (NSW) recently passed in NSW and provisions of the Modern Slavery Bill which is the subject of this inquiry. In particular, IJM is aware of concerns that inconsistencies exist between

penalty provisions between the two pieces of legislation. The NSW Act allows for a maximum penalty of 10,000 penalty units, which amounts to \$1.1 million, for companies that fail to comply with their reporting requirements under the Act.⁴⁴

- 3.22 However, if a company is subject to both the *Modern Slavery Act 2018* (NSW) and the Commonwealth Modern Slavery Act, the provisions of the Commonwealth Act will prevail,⁴⁵ meaning the company will not be subject to any penalties at all as the Commonwealth Act does not provide for penalties.
- 3.23 IJM believes business, civil society and governments wish to see strong and consistent anti-slavery regimes in Australia that significantly improve upon the scheme in the UK. The table below shows the features of the UK, NSW and Commonwealth Modern Slavery Acts. Darker shading indicates stronger regulatory measures likely to bring about broader compliance and cultural change in corporate procurement.

	UK (2015)	Commonwealth (proposed June 2018)	NSW (passed June 2018)
Modern Slavery Statement	Yes	Yes	Yes
Revenue Threshold	~AU\$60 million	\$100 million	\$50 million
Public Sector Reporting	No	Yes	1. Public sector required to take 'reasonable steps' to ensure goods and services are not product of modern slavery 2. Auditor-General empowered to conduct Modern Slavery Audit to ensure due diligence in public sector
Penalty for Non-compliance	Injunction	None	\$1.1 million fine
Central Public Register	No	Yes	Yes
Publication of Statement	Organisation must 'include a link to the slavery and human trafficking statement in a prominent place on that website's homepage'	Not required	Statement to be published as prescribed by regulations
Body Overseeing Reporting	Independent Anti-Slavery Commissioner	Business Engagement Unit	Independent Anti-slavery Commissioner
Clear Guidance in Advance	No	Yes	Power to create 'codes of practice'
Reporting Criteria Not Optional	No	Yes*	No**
Review	None	Legislation must be reviewed every 3 years	Commissioner has power to recommend changes to modern slavery legislation in annual reports

* The Bill states that entities ‘must’ report on each of the criteria listed. However, given there is no penalty for non-compliance, it is difficult to see how this is ‘mandatory’.

** The Bill empowers Governor to specify criteria upon which entities must report.

- 3.24 It would be unfortunate if federal legislation was to undermine steps being taken in states and territories to address modern slavery.
- 3.25 As a result, IJM recommends the Government consider the availability of penalties to be applied to businesses that persistently fail to lodge modern slavery statements or businesses that, despite guidance and feedback from the Business Engagement Unit, fail to provide a sufficient level of detail in their modern slavery statements.
- 3.26 IJM are openminded as to the nature of possible penalties with the caveat that the penalty must serve as an effective mechanism to ensure compliance. Penalties could be financial (eg, fines) or non-financial (eg, ineligibility to participate in Government funded contracts).
- 3.27 Rather than hinder a ‘race to the top’, the outlines above indicate that a ‘race to the top’ will not occur **without** some mechanism of ensuring widespread compliance with the legislation.

Recommendation 5

The Government should consider the use of penalties as a formal compliance measure in the case of businesses that persistently fail to report or that persistently fail to provide a sufficient level of detail in their reports.

List of Non-Compliant Organisations

- 3.28 The consistent finding of reviews of transparency regimes in the US, UK and Europe is that compliance rates are much lower in jurisdictions that lack a significant penalty for non-compliance, compared with those that do not.⁴⁶ In 2017 in the UK, ‘43 of the FTSE 100 and over 40% of the government’s top 100 suppliers failed to meet the basic legal requirements of the Act’.⁴⁷
- 3.29 Despite the Independent Anti-Slavery Commissioner writing letters to 25 of the FTSE who had not complied with the UK reporting requirement, over four months later two thirds had neither responded nor complied.⁴⁸ Accordingly, in 2018, the Public Accounts Committee’s report on ‘Reducing Modern Slavery’ stated that the ‘hands-off approach to businesses’ compliance with its transparency in supply chains legislation **is not working**, and suggested that publishing lists of companies that have and have not complied may be necessary.⁴⁹
- 3.30 This is consistent with the recommendation of the *Hidden in Plain Sight* report that the Government publish a yearly list of companies that are non-compliant with the reporting requirement, beginning after the second year of reporting.⁵⁰ A similar recommendation was made by the UK’s Independent Anti-Slavery Commissioner, in a joint statement

with business and human rights organisations, parliamentarians, trade unions and influential individuals.⁵¹ This is also consistent with the Government's decision not to impose a financial penalty.⁵²

- 3.31 The UK Independent Anti-Slavery Commissioner noted that a critical problem with the way the reporting requirement in the UK functions is that the lack of a list of non-complaint companies 'makes it problematic to identify non-compliant companies and engage with them to ensure they play their part'.⁵³
- 3.32 The Government should introduce a framework similar to the *Workplace Gender Equality Act 2012* (Cth) which gives the Workplace Gender Equality Agency ('WGEA') power to publish the names of companies that have failed to comply with the requirement to report information on gender equality indicators.⁵⁴ Before it publishes the names of employers, it must write to them and give them 28 days to respond.⁵⁵
- 3.33 Giving a similar power to the Business Engagement Unit⁵⁶ will encourage dialogue with the entity where it is non-compliant.

Recommendation 6

The Government should adopt the recommendation of the *Hidden in Plain Sight* report and give power to the Minister and/or the Anti-Slavery Business Engagement Unit to publish a list of entities that have failed to comply with the reporting requirement, based on section 19D of the *Workplace Gender Equality Act 2012* (Cth).

4. Central Register and Guidance

- 4.1 This section outlines the way in which the central register and the guidance material should function. In particular, it recommends that the Business Engagement Unit should be given statutory functions similar to the WGEA requiring and empowering it to take a more active role in facilitating compliance and enhancing the functionality and quality of the data on the register.

Sufficient Detail in Reporting

- 4.2 As noted above, a crucial feature of reporting if the Bill is to be successful in bringing about improved action on modern slavery is entities providing sufficient detail in their Statements to allow comparison with best practice in the industry and to allow feedback from government and civil society.
- 4.3 In the UK, more than half of the early Statements were less than 500 words and only a 'small minority' provided information under each of the criteria.⁵⁷ Further, 'two-thirds of businesses analysed in high risk sectors were found to have produced statements which failed to reference relevant slavery or human trafficking risks'.⁵⁸ Therefore, the Bill should include provisions for the Minister or the Business Engagement Unit to

provide feedback to businesses about their reporting, including where more detail is required.

- 4.4 The WGEA gives feedback to all businesses required to report to it on gender equality indicators ‘in the form of confidential, customised Competitor Analysis Benchmark Reports on their gender performance’.⁵⁹ Such reports are addressed at the *practices* of entities, and it would ultimately be useful for the Business Engagement Unit to provide this level of feedback to entities. However, in the interim, it would be useful to provide a similar report on the level of detail the entity has provided and whether this falls above or below industry best practice.
- 4.5 Another model the Government could look to is the process the Australian Council for International Development (‘ACFID’) undertakes with organisations seeking accreditation to determine whether they have complied with its Code of Conduct. An online portal allows organisations to provide information about their policies and processes against key indicators, and ACFID then provides direct feedback on where more information is needed for each of the indicators.⁶⁰
- 4.6 Some level of targeted feedback to entities about the level of information they have provided in their Statement should be provided for within the Bill.

Recommendation 7

The Bill should include a provision empowering the Minister and/or the Anti-Slavery Business Engagement Unit to provide targeted feedback to entities on the level of information they have provided in their Statement.

Identifying Benchmarks and Best Practice

- 4.7 As outlined above, part of the Bill’s designed impact is through positive recognition to industry best practice. The function of the WGEA provides several examples that could be followed to achieve this:
- Identifying best practice in each industry by awarding Employer of Choice for Gender Equality (‘EOCGE’) awards which allow high performers to ‘differentiate themselves from the market’ and may ‘encourage those who have not already achieved the recognition of the EOCGE citation to aspire to do so’.⁶¹
 - Benchmark reports compiled from data received from companies about best practice in various industries.⁶²
 - Company-specific reports about how they compare to industry benchmarks, so they can ‘compare their gender performance to their peers, identify areas for improvement and track the effectiveness of their gender equality strategies over time’.⁶³

- 4.8 Companies reporting to the WGEA and academics analysing its effectiveness have noted that these measures have been effective in driving competition between businesses, particularly to be seen as leading on the issue of gender equality to attract employees.⁶⁴
- 4.9 While identifying industry best practice has been identified as a potential goal of the three-year review,⁶⁵ we submit that it should be ‘built in’ to the scheme from the outset allowing ongoing feedback to businesses in comparison to industry best practice. As stated earlier, such feedback is crucial for the reporting requirement to be successful in bringing about change. The WGEA has been statutorily assigned the function of ‘develop[ing], in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators’.⁶⁶

Recommendation 8

Identifying benchmarks and best practice should be a function of the Anti-Slavery Business Engagement Unit.

Register Facilitating Comparison

- 4.10 The register should facilitate comparisons between reporting entities.
- 4.11 The WGEA’s analysis and publishing of extensive data by industry and company has attracted ‘strong media interest’ that has the potential to influence public awareness on gender equality.⁶⁷ Smith and Hayes argue that ‘greater transparency and publicity may produce greater momentum and normative change so that a bad gender performance affects an organisation’s reputation, recruitment, retention and ultimately their bottom line’.⁶⁸ They note that ‘[r]equiring reports to be provided in a uniform format, on-line, and compiled in an accessible way enables stakeholders to examine the performance of individual organisations and compare them with others in the same industry and more generally’.⁶⁹
- 4.12 While different incentives apply in the domain of gender equality compared to action on modern slavery, creating and distributing high quality data from the modern slavery reporting will undoubtedly enhance the reputational effects the reporting is intended to have as an incentive for improved practices.
- 4.13 To facilitate this, IJM Australia has recommended that the register have several features, including:
- All information on the repository should be fully searchable, including full text searches of the statements and ability to filter by the different details recorded about the companies, eg, all companies in the electronics industry with revenue under \$100 million;
 - Keeping records of statements from previous years;

- All statements recorded in text format, preferably indexed by the mandatory criteria the government ultimately chooses to include in the legislation;
- Date on which statement was submitted;
- Company information including: name, annual revenue, industry, a brief description of its business activities, list of subsidiaries, and country where it is headquartered;
- Contact details for each company, such as email address and/or mailing address to which inquiries about the modern slavery statement can be addressed;
- Information from the database should be downloadable in bulk, eg, multiple statements at once, or CSV files with lists of companies and their information and compliance;
- Public record of any assessment given to any company's statement or any part of it, eg, if the oversight body views a statement as non-compliant, this should be recorded on the repository and this should be searchable.⁷⁰

4.14 The Business Engagement Unit should also conduct analysis of the information contained in Modern Slavery Statements as an ongoing part of the Bill's implementation.

Recommendation 9

The Modern Slavery Statements Register should facilitate comparison between reporting entities.

Recommendation 10

The Anti-Slavery Business Engagement Unit should have the function of undertaking and publishing analysis of the information provided in Modern Slavery Statements.

Guidance on Action against Slavery

4.15 As noted in Section 2 above, the Government's plan to 'develop detailed guidance for business' that includes 'case studies, clear definitions, frequently asked questions, tips on best-practice and additional information about the Government's expectations' on reporting is welcome.⁷¹ However, the Bill will not result in any tangible improvements in *action* being taken to address modern slavery unless entities are equipped with guidance on how to do this.

Recommendation 11

IJM Australia recommends that the guidance material accompanying the reporting requirement include steps that entities can take to address modern slavery in their supply chains. This should include:⁷²

- Details on how entities should conduct due diligence with respect to modern slavery, based on international best practice in the UN Guiding Principles on Business and Human Rights⁷³ and the OECD Guidelines for Multinational Enterprises.⁷⁴
- Guidance on specific risks entities should be aware of based on their industry and countries of operation, similar to the 'Country Specific Guidelines' created under the illegal logging due diligence scheme.⁷⁵
- Up to date practical measures entities can introduce into their practices to reduce the risk of modern slavery, including based on feedback from civil society organisations who are conducting work on the ground at the end of multinational supply chains in various industries.⁷⁶

5. Flexibility for Future Improvements to Reporting

- 5.1 IJM Australia is pleased to see that the Government is committed to mitigating the risk that the legislation 'may be ineffective or inappropriate due to poor design or implementation'.⁷⁷ The Government has also noted that it 'is closely monitoring the effectiveness of [overseas] initiatives to ensure that any Australian Government action corresponds to international best-practice'.⁷⁸
- 5.2 Throughout this submission we have stressed the importance that the Government's implementation plan for the Bill includes a focus on ensuring a high compliance rate and detailed Statements by entities. As noted above, compliance is higher in jurisdictions with penalties. To align with international best practice, the reporting requirement may need to have a lower threshold, as is the case in UK and NSW legislation.⁷⁹
- 5.3 Due to the reporting framework being based on company turnover, the reporting requirements in the Bill fail to capture businesses operating in industries that could be considered high risk for the purposes of modern slavery in Australia. For example, there are multiple examples of employee exploitation in the beauty, massage and horticulture industries in Australia. The recent case of 'Foot and Thai Therapeutic Massage' in Canberra saw the Fair Work Ombudsman determine that employees of the business were underpaid by almost \$1 million between 2012 and 2016. It was also alleged the employees were required to work more than 65 hours per week and that they were forced to repay some of their wages when the owner thought the parlour was not making enough money. While this case has all the hallmarks of an example of modern slavery in Australia, it is highly unlikely this business would have met the \$100 million annual turnover threshold implemented by the Bill and would thus be exempt from the reporting requirements. Consideration should be given to amending the bill to include high risk industries as part of the three-year review. This will ensure Australia's efforts to address modern slavery are applied overseas and at home.

5.4 Therefore, there are a number of cases where there is a reasonable possibility that the Bill will need to be amended in the future in order to improve compliance or align with international best practice. These include:

- If compliance rates are low, the Government should consider introducing a penalty for non-compliance.
- If reports provide insufficient information to allow consumers and investors to make comparisons between companies on their action against modern slavery, reporting on a more detailed set of criteria may be required.
- If reporting by large entities does not appear to have flow-on effects to smaller entities, the threshold for reporting should be lowered.

Rule-making Powers

5.5 The *Modern Slavery Act 2018* (NSW), assented to on 27 June 2018, gives power to the Governor to determine, by regulations, the threshold at which entities are required to report (above a minimum of \$50 million), and the contents required to be in that report. The NSW Government has specifically noted its intention to phase in the application of the reporting requirement to smaller businesses.⁸⁰

5.6 The Bill should be amended to include similar provisions allowing minor amendments to the scheme should they be required in the futures.

Recommendation 12

The Bill should include a rule-making power to make minor amendments to the function of the scheme should they be required in the future to improve compliance or bring the Bill into alignment with international best practice, which may include power to add criteria on which reporting is required.

Three-year Review

5.7 As we have already recommended, the existing laws and their implementation in the UK and NSW indicate that there may be a need for a lower threshold for reporting and for penalties for non-compliance. While the Government has indicated it is reluctant to consider these at the present stage of the Bill, we recommend that they be placed on the agenda in advance to be seriously reconsidered at the three-year review or before. This is consistent with the way in which NSW plans to gradually expand the application of the legislation.

Recommendation 13

The Government should ensure that the three-year review reconsiders elements of the legislation that may be essential to ensure there is a tangible reduction of the risk of modern slavery in Australian businesses, including:

- Extending the reporting requirements to businesses operating in high risk industries.
- Lowering the reporting threshold to \$50 million.
- Implementing penalties for non-compliance.

6. Other Important Matters

- 6.1 The Modern Slavery Acts in the UK and NSW include broader reforms such as providing support for victims of modern slavery⁸¹ and giving an Independent Anti-Slavery Commissioner broad powers to coordinate the response of government and the community to modern slavery.⁸² Similar reforms were recommended at the federal level in the *Hidden in Plain Sight* report following last year's parliamentary inquiry.⁸³
- 6.2 IJM Australia recommends that the Government introduce legislation to implement these and other reforms recommended by that inquiry. We acknowledge that the Government has indicated it will respond to these recommendations in the next sitting period, and that the focus of the present Bill is only on supply chain transparency.⁸⁴ However, it is important that the Government view supply chain transparency as only one component of broader reforms needed to respond to modern slavery.

Recommendation 14

The Government should hasten to introduce legislation to implement the other reforms recommended by the *Hidden in Plain Sight* report, including an Independent Anti-Slavery Commissioner and a compensation scheme for victims of modern slavery.

7. Summary of Recommendations

1. **The Government should retain the features of the Bill and its planned implementation concerning director sign-off, guidance, the central register, public sector reporting, mandatory criteria, clarity of terms and reviews of effectiveness.**

These provisions implement the recommendations of the *Hidden in Plain Sight* report and remedy several of the deficiencies in the UK legislation. It is imperative that these core elements of the Bill are passed into law as soon as possible.

2. **The Government should amend its implementation plan to include targeted, detailed and continuous feedback and communication between the Anti-Slavery Business Engagement Unit and reporting entities to ensure the completion of the intermediate steps necessary to achieve the desired indirect effects of the legislation in reducing modern slavery.**

The Bill is designed to achieve tangible improvements to business processes to address modern slavery through indirect means of: giving positive recognition to entities that are already taking effective steps to eliminate modern slavery; and encouraging entities that are taking inadequate action to do more through pressure from consumers, shareholders and campaigners and competition between businesses. These both depend on a significant volume of entities providing sufficiently detailed statements, which can only be ensured through continuous feedback on the quality of the statements. However, the current implementation plan postpones any assessment of and feedback on the detail of statements until the three-year review. This strategy should be reconsidered.

3. **The Government should adopt the recommendation of the *Hidden in Plain Sight* report and publish a list of entities that are required to report.**

Providing a list of reporting entities would clarify the confusion around which companies are required to report that has arisen in the UK legislation. The Business Engagement Unit would be made aware of companies it needs to be in dialogue with as it develops the list. The list has been recommended by the UK Independent Anti-Slavery Commissioner and the Joint Standing Committee on Foreign Affairs, Defence and Trade as critical to the success of the reporting requirement. Existing lists of high revenue entities published by the ATO could be used as the starting point for this list. This would save companies time and resources that would be otherwise spent determining whether they are required to comply.

4. **The Government should reassess whether a formal compliance mechanism may be necessary, given that the potential for entities to take a ‘tick box’ approach to compliance with *reporting* has no impact on the desired ‘race to the top’ with respect to *practices* to address modern slavery.**

The reason provided by the Government for not introducing penalties for non-compliance is that it may lead to a ‘tick box’ approach to reporting that would not be

conducive to the desired 'race to the top' for modern slavery. However, the potential for entities to take a 'tick box' approach to compliance with reporting has no impact on the desired 'race to the top' with respect to practices to address modern slavery.

If the Bill introduced minimum standards for organisational policies and practices with respect to modern slavery, then it is thought that a penalty may have the undesirable effect of encouraging companies to do only the bare minimum. But if the change on policies and practices is to come about as a result of external pressure on businesses as *a result of* the information they disclose, this will be independent of any approach to reporting. We believe that penalties may be *necessary* for a 'race to the top', to ensure that companies do report and that a sufficient level of detail is provided, so that this external pressure can be applied.

5. **The Government should consider the use of penalties as a formal compliance measure in the case of businesses that persistently fail to report or that persistently fail to provide a sufficient level of detail in their reports.**

This would avoid inconsistency with NSW legislation and prevent the repeated failure to comply by certain entities, as has occurred in the UK, and in relation to the Government's Workplace Gender Equality reporting framework. Penalties in regard to repeated non-compliance should be strongly considered because a high volume of detailed statements are fundamental to the success of the Bill.

6. **The Government should adopt the recommendation of the *Hidden in Plain Sight* report and give power to the Minister and/or the Anti-Slavery Business Engagement Unit to publish a list of entities that have failed to comply with the reporting requirement, based on section 19D of the *Workplace Gender Equality Act 2012* (Cth).**

This was recommended by the Joint Standing Committee on Foreign Affairs, Defence and Trade and has been an effective incentive for businesses in relation to gender equality. It is consistent with a joint statement of the UK's Independent Anti-Slavery Commissioner, business and human rights organisations, parliamentarians, trade unions and other influential individuals. Under the WGEA legislation businesses are first notified of their non-compliance before their name is published. This would encourage dialogue between business and government on their reporting without imposing a penalty.

7. **The Bill should include a provision empowering the Minister and/or the Anti-Slavery Business Engagement Unit to provide targeted feedback to entities on the level of information they have provided in their Statement.**

The meaningful comparisons between companies will only be possible if sufficient detail is provided in the statements. This measure will prevent statements provided being extremely brief and not covering all the criteria, as has been the case for the majority of statements in the UK.

8. Identifying benchmarks and best practice should be a function of the Anti-Slavery Business Engagement Unit.

The Workplace Gender Equality Agency ('WGEA') identifies best practice in particular industries based on reporting and gives awards for leading organisations. This incentivises better practices. The current implementation plan indicates that benchmarking based on reports will take place at the three-year review. This should be moved forward.

9. The Modern Slavery Statements Register should facilitate comparison between reporting entities.

The register should be easily searchable, organised by entity industry, date of submission, size, etc, support bulk downloads, and include contact details for the relevant contact person in the entity responsible for the entity's Statement. This will facilitate comparison between entities and thereby a 'race to the top'.

10. The Anti-Slavery Business Engagement Unit should have the function of undertaking and publishing analysis of the information provided in Modern Slavery Statements.

Identifying trends within and across industries and patterns in the reporting data has been a useful feature of the WGEA's reporting which has raised the public profile of workplace gender equality. This item should be ongoing rather than part of the three-year review.

11. IJM Australia recommends that the guidance material accompanying the reporting requirement include steps that entities can take to address modern slavery in their supply chains. This should include:

- **Details on how entities should conduct due diligence with respect to modern slavery, based on international best practice in the UN Guiding Principles on Business and Human Rights⁸⁵ and the OECD Guidelines for Multinational Enterprises.**
- **Guidance on specific risks entities should be aware of based on their industry and countries of operation, similar to the 'Country Specific Guidelines' created under the illegal logging due diligence scheme.**
- **Up to date practical measures entities can introduce into their practices to reduce the risk of modern slavery, including based on feedback from civil society organisations who are conducting work on the ground at the end of multinational supply chains in various industries.**

Requiring transparency in reporting will not result in tangible action taken to reduce the risk of modern slavery unless organisations are provided with information about how to do so.

- 12. The Bill should include a rule-making power to make minor amendments to the function of the scheme should they be required in the future to improve compliance or bring the Bill into alignment with international best practice, which may include power to add criteria on which reporting is required.**

The *Modern Slavery Act 2018* (NSW) is an example of legislation with built-in flexibility so that legislation can be adapted to respond to the adequacy of compliance. The Bill should follow this example.

- 13. The Government should ensure that the three-year review reconsiders elements of the legislation that may be essential to ensure there is a tangible reduction of the risk of modern slavery in Australian businesses, including:**
- **Extending the reporting requirements to businesses operating in high risk industries.**
 - **Lowering the reporting threshold to \$50 million.**
 - **Implementing penalties for non-compliance.**

The Government should follow the example of NSW and have in place a long-term plan to respond to potentially low levels of compliance and to expand the application of the Bill so that action on modern slavery becomes a part of Australia business culture.

- 14. The Government should hasten to introduce legislation to implement the other reforms recommended by the *Hidden in Plain Sight* report, including an Independent Anti-Slavery Commissioner and a compensation scheme for victims of modern slavery.**

The reporting requirement is only one element of the holistic response to modern slavery outlined in the *Hidden in Plain Sight* report. The Government should complete the implementation of this response.

References

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- ² IJM Australia, [Submission](#) to the Attorney-General’s Department, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*, 24 October 2017 (*IJM Consultation Submission*).
- ³ [Modern Slavery Act 2015](#) (UK) c 30, s 54.
- ⁴ [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 32 [48], 46, 48, 53–5.
- ⁵ See [IJM Inquiry Submission](#), above n 1, [6.4.5], citing Susan Ariel Aaronson and Ethan Wham, ‘Can Transparency in Supply Chains Advance Labor Rights? Mapping Existing Efforts’ (Working Paper IIEP-WP-2016-6, Institute for International Economic Policy, George Washington University, April 2016) 14; [IJM Consultation Submission](#), above n 2, 1 [1.1]; Daniel Hudson and Oliver Elgie, ‘UK Government Issues Updated Guidance on Modern Slavery Act Reporting’ (Legal Briefing, Herbert Smith Freehills, 6 October 2017); Ashurst, ‘Updated Guidance on Modern Slavery’ (23 November 2017).
- ⁶ [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 45, 54; [Modern Slavery Bill 2018](#) (Cth) ss 18–19.
- ⁷ [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 39.
- ⁸ [IJM Inquiry Submission](#), above n 1, [6.4.3].
- ⁹ [Modern Slavery Bill 2018](#) (Cth) s 15.
- ¹⁰ [IJM Inquiry Submission](#), above n 1, [6.3.3], [6.4.8].
- ¹¹ Ibid.
- ¹² [IJM Consultation Submission](#), above n 2, 13 [3.2].
- ¹³ [Modern Slavery Bill 2018](#) (Cth) s 16.
- ¹⁴ [IJM Inquiry Submission](#), above n 1, [6.4.2], [6.4.7]; [IJM Consultation Submission](#), above n 2, 1 [1.1].
- ¹⁵ See [IJM Consultation Submission](#), above n 2, 6–8 [2.6].
- ¹⁶ [Modern Slavery Bill 2018](#) (Cth) ss 3 (definitions of ‘Australian entity’, ‘consolidated revenue’, ‘entity’), 5.
- ¹⁷ See Daniel Hudson and Oliver Elgie, ‘UK Government Issues Updated Guidance on Modern Slavery Act Reporting’ (Legal Briefing, Herbert Smith Freehills, 6 October 2017); Ashurst, ‘Updated Guidance on Modern Slavery’ (23 November 2017); Norton Rose Fulbright, [Submission No 72](#) to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia*, 28 April 2017, 28 [101].
- ¹⁸ [Modern Slavery Bill 2018](#) (Cth) s 5.
- ¹⁹ [Corporations Act 2001](#) (Cth) s 601CD; [Olson v Keefe](#) [2017] FCA 101, [11] (Bromwich J).
- ²⁰ See [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 5 [29], 6 [36].
- ²¹ Daniel Hudson and Oliver Elgie, ‘UK Government Issues Updated Guidance on Modern Slavery Act Reporting’ (Legal Briefing, Herbert Smith Freehills, 6 October 2017); Ashurst, ‘Updated Guidance on Modern Slavery’ (23 November 2017).
- ²² [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 19–20 [126]–[133].
- ²³ [IJM Inquiry Submission](#), above n 1, [6.4.7]; [IJM Consultation Submission](#), above n 2, 5 [2.4].
- ²⁴ [Modern Slavery Bill 2018](#) (Cth) s 24.
- ²⁵ [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 30 [39], 34, 38.
- ²⁶ Ibid 39 (emphasis added).

27 Ibid.

28 [IJM Consultation Submission](#), above n 2, 10–11 [2.11], citing Inter-Departmental Ministerial Group on Modern Slavery (UK), ‘[2015 Report of the Inter-Departmental Ministerial Group on Modern Slavery](#)’ (October 2015) 27, and quoting [Draft Explanatory Memorandum](#), The Modern Slavery Supply Act 2015 (Transparency in Supply Chains) Regulations 2015 (UK) [7.2].

29 See, eg, Independent Anti-Slavery Commissioner (UK), [Annual Report 2016–2017](#) (2017) 33.

30 [IJM Consultation Submission](#), above n 2, 10–11 [2.11].

31 See [IJM Inquiry Submission](#), above n 1, [6.4.1].

32 [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 55.

33 Ibid 44.

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35 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, [Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia](#) (2017) 127–9 [5.138]–[5.143].

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39 Australian Taxation Office, [Report of Entity Tax Information](#) (7 December 2017). Note, the definition of ‘total income’ used to compile the report appears identical to the definition of revenue in the Bill: see Australian Taxation Office, [Producing the Report](#) (7 December 2017).

40 See Synod of Victoria and Tasmania, Uniting Church in Australia, [Submission](#) to the Attorney-General’s Department, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*, 20 October 2017, 3–5.

41 [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 57.

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44 [Modern Slavery Act 2018](#) (NSW) ss 24(2), (6)–(7); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 sets penalty unit value at \$110.

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46 See [IJM Consultation Submission](#), above n 2, 1–2 [1.2], 6–8 [2.6]; [IJM Inquiry Submission](#), above n 1, [6.4.6]; see generally at [6.1]–[6.3].

47 Independent Anti-Slavery Commissioner (UK), ‘[Joint Statement Calls on Government for Central Modern Slavery Registry](#)’ (News, 3 July 2018) (citations omitted).

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49 Committee of Public Accounts, [Reducing Modern Slavery](#), House of Commons Paper No 886, Session 2017–19 (2018) 5–6 [3].

50 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, [Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia](#) (2017) Recommendation 19, 135–6 [5.165]–[5.174].

51 Independent Anti-Slavery Commissioner (UK), ‘[Taking Action on Slavery in the Private Sector](#)’ (News, 5 April 2018).

52 [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 57. One might argue that if businesses are intending to comply with the legislation, they have no reason to be concerned about the existence of a financial penalty since it will simply never apply to them. Thus, if a given business is adamant that there should be no penalty, this may suggest they do not intend to make a serious effort to comply. However, if there are such businesses who intend not to

comply, then those are the very circumstances in which a financial penalty is necessary to encourage compliance.

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(News, 5 April 2018).
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- 55 *Workplace Gender Equality Act 2012* (Cth) s 19D(4).
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- 73 Human Rights Commission, [‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’](#), UN Doc HR/PUB/11/04 (2011).
- 74 OECD, [‘Guidelines for Multinational Enterprises’](#) (2018).
- 75 See [IJM Inquiry Submission](#), above n 1, [6.1.2].
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- 77 [Explanatory Memorandum](#), Modern Slavery Bill 2018 (Cth) 40.
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- 79 See IJM Australia, [‘IJM Australia Welcomes Modern Slavery Bill Tabled by Federal Parliament’](#) (28 June 2018).
- 80 New South Wales, [‘Parliamentary Debates’](#), Legislative Council, 21 June 2018, 32 (Scott Farlow).
- 81 [Modern Slavery Act 2015](#) (UK) c 30, pt 5; [Modern Slavery Act 2018](#) (NSW) sch 5 item 5.7.
- 82 [Modern Slavery Act 2015](#) (UK) c 30, pt 4; [Modern Slavery Act 2018](#) (NSW) pt 2.
- 83 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, [‘Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia’](#) (2017) chs 4, 6.
- 84 Commonwealth, [‘Parliamentary Debates’](#), House of Representatives, 28 June 2015, 15–18 (Alex Hawke, Assistant Minister for Home Affairs)

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- ⁸⁵ Human Rights Commission, [*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*](#), UN Doc HR/PUB/11/04 (2011).