

ATTACHMENT A

PART A – CORE LEGISLATIVE COMPONENTS

As set out above, ACSI supports stronger action on modern slavery but has concerns that the proposed failure to prevent offence may create unintended consequences inconsistent with the intended outcomes. Nonetheless, if the Government proceeds with the proposed criminal offence, the remainder of Part A sets out recommendations intended to improve its effectiveness and reduce the risk of unintended outcomes.

Application of the offence

If the Government proceeds with the proposed offence, we agree that alignment with the existing threshold under the Modern Slavery Act (of corporations with annual consolidated revenue of \$100 million) is appropriate, for regulatory consistency. It also captures corporations with the greatest capacity and leverage to identify, prevent and address modern slavery risks within their operations and value chains. The extent and application of the proposed reforms will need to be made clear. For example, some investors currently report under the Modern Slavery Act. They invest across asset classes including listed equities, infrastructure, property, private equity, private credit, fixed income, and cash where nexus and leverage can vary significantly, and in such cases, clarity would be required to support appropriate action in line with the policy aim.

We agree that the offence should not impose direct liability on directors. A failure to prevent offence is best understood as a mechanism of organisational accountability, designed to address the limitations of traditional attribution models in establishing corporate responsibility for harms occurring within complex operations and global value chains. Further, existing criminal law already provides mechanisms to address knowing involvement, aiding, abetting, procuring or other forms of complicity in offending.

However, directors play a critical role in overseeing modern slavery risk management. Accordingly, the reasonable steps defence should recognise directors' responsibility to exercise appropriate governance, oversight and supervision of modern slavery risks, including ensuring that effective due diligence and risk management processes are in place.

Underlying criminal conduct to be prevented

If the Government proceeds with the proposed offence, its scope should support the preventative objective of the reforms. In our view, there should be alignment with the definition of modern slavery under the Act, and therefore that the worst forms of child labour should be included in the proposed offence. In addition, deceptive recruitment is a significant mechanism through which workers are drawn into situations of forced labour, debt bondage and other forms of exploitation, and often occurs at the earliest stages of the exploitation cycle. As the proposed offence is intended to operate as a preventative mechanism, it would be appropriate that it captures conduct that facilitates and enables modern slavery.

In addition, excluding deceptive recruitment and the worst forms of child labour may inadvertently signal that these forms of exploitation are of lesser importance and result in them receiving less attention within corporate due diligence and risk management processes. This would be inconsistent with the preventative purpose of the proposed offence and with the UNGPs. For many companies operating within Asia-Pacific supply chains, deceptive recruitment practices represent a particularly salient modern slavery risk.

Nexus

If the Government proceeds with implementing the proposed offence, the UNGP model should be followed insofar as is possible. This would involve incorporation of a broader nexus to reflect how modern slavery can be 'directly linked'. This should be balanced with very clear and practical guidance on what action is expected to as part of a reasonable steps defence. This guidance should either form part of the regulation or government guidance, to promote efficiency and reduce the risk of confusion across the market. Similarly, there should be clarity on how concepts (for example "material contribution", "facilitation", "enablement" and "significant omission") are intended to operate across different sectors. Such guidance should recognise differences in control, influence and leverage across corporate structures. However, our view is that the nexus issue highlights some of the complexity and potential unintended consequences of the proposed criminal offence, and we explain this further below.

We note and agree that requiring a connection between the conduct and the corporation's supply chain, together with a requirement that the corporation's activities in some way contributed to the harm, would support an appropriate link to corporate conduct. We also agree that a threshold needs to establish a sufficient nexus between the corporation's conduct and the underlying offending to support the imposition of criminal liability fairly and proportionately.

Modern slavery typically occurs within complex supply chains and business relationships. In practice, modern slavery often arises through a combination of actions and omissions occurring across multiple entities, jurisdictions and tiers of a value chain. As a result, causation may be difficult to establish even where a corporation's conduct has played an important role in enabling or sustaining the conditions in which exploitation occurs. There is a need to establish an appropriate nexus (which, using the UNGP continuum, would likely be 'cause or contribute') yet most modern slavery is deep in the supply chain (again, using the UNGPs 'directly linked'). There is therefore, a risk that a nexus appropriately calibrated for criminal liability may not support effective action against slavery deep in supply chains. Consequently, the nexus question between the underlying exploitation, particular products or services, and the corporation itself highlights some of the potential unintended consequences of the proposed criminal offence.

By contrast, mHRDD avoids these nexus challenges by focusing on the corporation's own conduct, namely whether the corporation has implemented reasonable and effective systems to identify, assess, prevent, mitigate and address modern slavery risks across its operations and value chains. This places emphasis on prevention rather than directing substantial attention towards legal responsibility for harms.

Defence

Should the Government proceed with the proposed criminal offence, we support the inclusion of a reasonable steps defence.

In our view, the reasonable steps defence should be expressly grounded in human rights due diligence aligned with the UNGPs and the OECD Guidelines for Multinational Enterprises. This would provide a well-established and internationally recognised framework for assessing whether a corporation has taken appropriate steps to prevent modern slavery risks.

The defence should focus on whether the corporation has implemented and maintained a reasonable, risk based and effective human rights due diligence system designed to identify, assess, prevent, mitigate and address modern slavery risks across its operations and value chains. This should include:

- Governance and oversight arrangements;
- Risk identification and assessment processes;
- Supplier and business relationship engagement;
- Prevention and mitigation measures;
- Monitoring and review mechanisms;
- Grievance and reporting mechanisms; and

- Remediation processes where harm has occurred.

The defence should also recognise that HRDD is inherently risk based and proportionate. Expectations should take account of:

- Severity and likelihood of the risk;
- Corporation's size and resources;
- Corporation's level of leverage or influence;
- Corporation's relationship to the harm; and
- The practical steps that were reasonably available to the corporation in the circumstances.

Importantly, multiple companies may source from the same supplier yet reach different risk assessments or have different levels of leverage. The reasonableness of a corporation's actions should therefore be assessed by reference to its own circumstances, risk assessment processes and ability to influence outcomes, rather than solely by reference to whether modern slavery ultimately occurred.

This approach recognises that a particular supplier or business relationship may not have been identified as high risk even though it has a reasonable due diligence process, or that a company may have identified a salient risk but had limited practical leverage to prevent or mitigate the conduct. The relevant question should be whether the corporation implemented a reasonable, proportionate and effective due diligence system and acted appropriately in response to the information available to it.

This approach would also build on practices already familiar to reporting entities under the Modern Slavery Act, many of which have developed human rights due diligence processes based on the UNGPs and OECD framework.

These elements should be clearly set out in regulation or Government guidance, to promote efficiency and consistency. We further recommend that the reasonable steps defence be designed to preserve incentives for behaviours that support the identification, disclosure and remediation of modern slavery risks. In particular, consideration of the following as mitigating factors in assessment:

- Identification and disclosure of modern slavery instances through Modern Slavery Act reporting processes;
- Good faith remediation efforts; and
- Supplier engagement and capacity building measures.

Such measures would help avoid unintended incentives for reduced transparency, reduced disclosure and supplier disengagement.

Specific guidance will also be required regarding how the reasonable steps defence applies to investors. Any assessment should take account of:

- Proximity to harm;
- The investor's level of ownership, control, influence or leverage;
- The nature of the relevant asset class or investment structure;
- Limitations on access to information;
- Stewardship and engagement activities; and
- The investor's practical ability to identify, prevent, mitigate or address the relevant modern slavery risk.

A reasonable steps defence should support proportionate accountability that reflects an investor's actual ability to influence outcomes, rather than imposing uniform expectations across fundamentally different investment structures.

Ministerial guidance

We support the development of comprehensive Ministerial Guidance to accompany any failure to prevent modern slavery offence. Guidance on reasonable steps should be firmly grounded in the UNGPs and related OECD due diligence frameworks. This would align the Australian regime with internationally recognised standards and support consistency with emerging regulatory developments.

Consistent with the UNGPs, guidance should explain how corporations are expected to:

- Identify and assess risks;
- Prevent and mitigate impacts;
- Exercise leverage where appropriate;
- Track the effectiveness of responses;
- Engage with affected stakeholders; and
- Support remediation where harms occur.

We strongly support the development of sector specific guidance, including dedicated guidance for investors. Investors can differ significantly from operating companies in terms of their access to information, level of control and ability to influence outcomes.

The guidance should recognise differences across different asset classes including listed equities; private equity and private markets; property, infrastructure investments; fixed income investments; cash externally managed investments; and other investment structures. Clarity will be needed as to whether and if so, how, the proposals are intended to apply. Comprehensive practical guidance will be critical to identify the extent to which investment types, sizes, and characteristics are within scope, including provision of examples of how the proposed reforms would apply in practice, and clarification of the steps that should be taken by investors.

It should distinguish expectations according to ownership interests; degree of control; available leverage; access to information; and practical ability to influence outcomes.

The guidance should also provide practical examples of what reasonable human rights due diligence might look like for asset owners and investment managers, including:

- Investment due diligence processes;
- Stewardship and engagement activities;
- Collaborative engagement initiatives;
- Investment monitoring and review processes; and
- Responses to identified modern slavery risks.

Any assessment of reasonable steps should reflect an investor's actual ability to influence or mitigate risks rather than applying expectations designed for operating companies with direct procurement or employment relationships.

We also encourage Government to provide specific guidance on the operation of reasonable steps in situations involving:

- State-sponsored forced labour;
- Conflict of laws issues; and
- Circumstances where foreign laws restrict access to information or seek to limit compliance with overseas regulatory requirements.

These issues are increasingly relevant in global supply chains and may create significant practical challenges for companies and investors seeking to undertake effective human rights due diligence.

Impact and Support – Guidance required

To maximise the effectiveness of the proposed offence and minimise unnecessary compliance burdens, Government should adopt practical measures that assist corporations to implement effective modern slavery prevention systems.

Government should develop clear, practical and actionable guidance for both large corporations and SMEs on the operation of the offence and the reasonable steps defence. Sector-specific guidance should be developed for industries with elevated modern slavery risks.

Government should establish practical tools to support risk identification and prioritisation, including a centralised portal providing information on:

- High-risk countries;
- High-risk sectors;
- High-risk commodities;
- Known modern slavery indicators; and
- Emerging modern slavery trends;

Such tools would reduce duplication of effort and improve access to reliable risk information, particularly for smaller entities.

Government should recognise that effective modern slavery prevention often requires collective action. Corporations should be able to reasonably rely on credible:

- Industry initiatives;
- Shared supplier assessment platforms;
- Responsible sourcing programs;
- Collaborative audits;
- Multi-stakeholder initiatives; and
- Sector-based remediation mechanisms.

Allowing reasonable reliance on such initiatives would reduce duplicative activity and assist smaller organisations that may have limited leverage when acting alone.

Government should undertake ongoing education and capacity-building activities for business.

PART B – ALTERNATIVE ENFORCEMENT

Deferred Prosecution Scheme

We support the introduction of Deferred Prosecution Agreements as an enforcement option in connection with any failure to prevent modern slavery criminal offence, should the proposal proceed.

A prosecution-focused approach is primarily directed towards punishment. A DPA enabled framework is more capable of promoting prevention, remediation and long-term risk reduction. Accordingly, DPAs are likely to deliver better prevention, remediation and governance outcomes than prosecution alone. For long term institutional investors, particularly superannuation funds and stewardship focused asset owners, these outcomes align with fiduciary responsibilities, responsible investment objectives and the promotion of sustainable long-term value.

Civil remedies

We support the introduction of civil liability provisions as a necessary complement to Australia's broader response to modern slavery. From the investor perspective, access to remedy creates incentives for companies to undertake robust due diligence, strengthen governance systems and address harms before they escalate. This supports the creation and preservation of long-term enterprise value and reduces the accumulation of unresolved human rights risks that may later materialise as significant legal, operational, financial or reputational liabilities.

Access to remedy is a fundamental component of the UNGPs and forms the basis of Pillar III of the UNGPs framework. The lack of effective remedy is widely recognised as one of the most significant barriers faced by victims of business-related human rights abuses. Consistent with this, the UN Working Group on Business and Human Rights has recently called on Australia to strengthen access to remedy through the introduction of civil liability mechanisms that enable victims to enforce their rights where companies fail to undertake reasonable human rights due diligence to prevent modern slavery in their operations and supply chains.¹

Any civil liability regime should retain the proposed reasonable steps defence. A corporation that can demonstrate it undertook reasonable human rights due diligence should not be liable.

¹ See, <https://www.ohchr.org/en/statements-and-speeches/2026/08/working-group-encourages-amendments-australias-modern-slavery-act>