



Modern Slavery Bill 2018

**Supplementary Submission to the Senate Legal and Constitutional
Affairs Committee**

Inquiry into Provisions of the Modern Slavery Bill 2018

13 August 2018



Anti-Slavery Australia
Faculty of Law
University of Technology Sydney
PO Box 123, Broadway NSW 2007
www.antislavery.org.au

**Senate Legal and Constitutional Affairs Legislation Committee
Modern Slavery Bill 2018
Anti-Slavery Australia: Supplementary Submission**

1. ENTITIES REQUIRED TO REPORT

1.1. Entities required to report.....	2
1.2. Practical difficulties with the threshold test.....	2
1.3. The superior merits of a risk-based reporting requirement.....	3

2. PROMOTING COMPLIANCE WITH THE REPORTING REQUIREMENT..... 6

2.1. Poor quality of reporting under the United Kingdom legislation.....	7
2.2. Inability to identify and list all entities required to report.....	9
2.3. Acute limits on consumer and investor interest in corporate responsibility	9
2.4. Other incentives for compliance.....	11

3. FURTHER MEASURES 12

Anti-Slavery Australia welcomes the opportunity to provide this supplementary submission to the Senate Legal and Constitutional Affairs Committee on the Modern Slavery Bill 2018.

This submission was written by Prof Paul Redmond AM, Anti-Slavery Australia, Faculty of Law, University of Technology Sydney.

Acknowledgements: Carolyn Liaw and Elizabeth Sheridan.

Prof Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney.

1. Anti-Slavery Australia (ASA) provides this submission as a supplement to that earlier provided to the Committee. Its purpose is to assist the Committee by setting out in more detail the evidence given to the Committee at its Sydney hearing on the Modern Slavery Bill 2018 on 2 August 2018.

The focus of this submission is upon two aspects only:

- the merits of the revenue threshold test in the Bill to identify entities subject to its reporting requirement, and
- measures to promote compliance with the requirement including the issue of penalties.

1.1. *Entities required to report*

2. The Bill uses a threshold test to identify those entities subject to its reporting requirement. The Explanatory Memorandum (at p 11, [78]) justifies the proposed test on the basis that the revenue test identifies those entities with the capacity to “meaningfully comply” with the requirement and have the market leverage to effect change in their supply chains.
3. In its submission to the Joint Standing Committee on Foreign Affairs, Trade and Defence, ASA proposed a revenue threshold of \$25 million of consolidated revenue on the basis that this was consistent with the test in the *Corporations Act 2001* (Cth) for identifying the group of large proprietary companies denied the reporting privileges of smaller counterparts. In its submission to the Senate Committee, ASA recommended lowering the Bill’s threshold to \$50 million to be closer to the UK threshold in the interests of consistency for entities required to report under each statute.
4. Discussion about where to set a threshold for the reporting requirement reveals difficulties inherent in this approach for identifying entities subject to the requirement. These difficulties are practical in nature; more importantly, they also go to the regulatory policy underlying this measure. In its oral testimony before the Committee, ASA canvassed the merits of an alternative basis for triggering the reporting requirement. That basis is elaborated under this heading. We discuss first some practical difficulties with the threshold test.

1.2. *Practical difficulties with the threshold test*

5. Among the practical difficulties are the arbitrariness inherent in selecting the quantum of the threshold and the inability of government to identify accurately a list of entities required to report: the Australian Government does not hold sufficient

information to compile an accurate list of all entities required to report.¹ The Corporate Tax Transparency Report is not apt for this purpose, apparently, since “it does not necessarily account for entities’ foreign revenue or identify corporate groups with consolidated Australian revenue of \$100 million where these groups are not consolidated for tax purposes.”² No other organisation is likely to be in a position to produce such a list. Identifying the subjects of the reporting requirement is a pre-condition to effective market monitoring.

6. Second, it is possible that some Australian companies will need report under the United Kingdom *Modern Slavery Act 2015* but not the Australian legislation. This would be an anomalous situation. The Department of Home Affairs in its submission to the Committee notes that each of the 36 Australian companies that currently report in the UK would be caught by the proposed threshold.³ However, in the absence of an authoritative list of reporting entities in the United Kingdom, it is unclear that this is the universe of Australian companies required to report there or that this situation will obtain in the future.
7. Third, an overseas parent company operating in Australia though a locally incorporated subsidiary will not need to file a modern slavery statement if it does not carry on business in Australia within the meaning of s 21 of the *Corporations Act 2001* (Cth) even though its revenue exceeds \$100 million. The section 21 definition sets a reasonably high test for a quite different regulatory purpose, whether an entity is required to register as a foreign corporation in Australia. It is not obvious why this test should be adopted for this particular regulatory purpose. The Australian subsidiary will need file a modern slavery statement only if its consolidated revenue and that of its controlled entities exceeds the threshold. There is no upstreaming of foreign parent revenue. In some instances, this would give such subsidiaries whose consolidated revenue falls below \$100 million a competitive advantage over Australian companies caught by the threshold.

1.3. *The superior merits of a risk-based reporting requirement*

8. Anti-Slavery Australia believes that the threshold test in the Bill is inconsistent with the expressed objective of the Bill, namely, reduction of the risk of modern slavery. The Explanatory Memorandum (at p 34) states that the Bill addresses “the high risk that Australian businesses’ operations and supply chains may be tainted by serious exploitation. This poses serious legal and reputational risks for the Australian business community.” The purpose of modern slavery statements is to “increase business awareness of modern slavery, reduce modern slavery risks in in Australian goods and services, and encourage business to improve workplace standards and

¹ *Modern Slavery Bill 2018*, Explanatory Memorandum, 57.

² Australian Government, Department of Home Affairs, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Modern Slavery Bill 2018*, Australian Government Submission, p 6.

³ Australian Government, Department of Home Affairs, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Modern Slavery Bill 2018*, Australian Government Submission, p 5.

practices” (p 26) by “raising business awareness of modern slavery and providing shareholders and consumers with information about modern slavery risks in entities’ operations and supply chains” (p 35).

9. The threshold test is, however, disconnected from modern slavery risk and poorly linked to these worthy objectives. Assumed reporting capacity and supplier leverage, the bases for its adoption, are poor proxies for risk identification. The test is poorly targeted to risk, both under and over-inclusive in its reach: over-inclusive because not all large firms will be exposed to modern slavery in their operations and supply chains although it is likely to be a risk for the great majority of such enterprises; more importantly, the test is under-inclusive because many firms whose revenue falls under the threshold will have higher risk exposure by dint of the nature of their business, their industry sector and the countries and regions of their operations and supply chains. Reporting based on sectoral and regional risk offers a better targeted strategy for meeting the objectives of the Bill. There are abundant resources that map modern slavery risk from which a reporting requirement might be drawn; these would precisely address the harms identified and the goals of the Bill.⁴
10. Such an approach also has the particular strength that it is consistent with United Nations Guiding Principles on Business and Human Rights. The Guiding Principles express the global standard on responsible business conduct and provide the framework through which governments and business enterprises are enjoined to address issues relating to business and human rights. Their focus is upon human rights risks such as those arising from modern slavery.
11. The Guiding Principles have three pillars. The first is the duty of states to protect against human rights abuse within their territory, not only by the state and its agents but also by other actors such as business enterprises. The Bill is partial discharge of this duty arising under international law; that is the perspective through which it ought to be judged. The second pillar is the responsibility of a business enterprise to respect human rights: that is, to avoid infringing on the human rights of others by its own operations but also to seek to prevent or mitigate human rights harm to which it is linked by a business relationship such as a supply chain.⁵ Modern slavery is just

⁴ These resources include the *Global Slavery Index* <<https://www.globallslaveryindex.org/2018/findings/global-findings/>>, the ILO *Global Estimates of Modern Slavery* <https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm>, and the US State Department’s annual *Trafficking in Persons Report* <<https://www.state.gov/j/tip/rls/tiprpt/>> and the *Verisk Maplecroft Modern Slavery Index* <https://www.maplecroft.com/portfolio/new-analysis/2017/08/10/20-eu-countries-see-rise-modern-slavery-risks-study/>, US Department of Labor, List of Goods Produced by Child Labor or Forced Labor, <<https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>>.

⁵ The third pillar requires states, as part of their duty to protect, to ensure an effective remedy is available for human rights abuse within their territory; businesses should also establish or participate in effective operational-level grievance mechanisms for those adversely impacted.

such a harm. The responsibility to respect applies to all business enterprises, irrespective of size, sector or national origin.

12. The responsibility to respect is not binding legally unless made so by domestic law. The Guiding Principles have, however, received strong endorsement by inter-governmental organisations and national governments. As the Explanatory Memorandum notes (p 38), “Australia supports the UN Guiding Principles and encourages businesses to apply them in their operations.” The UN High Commissioner for Human Rights has described the Guiding Principles as “the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights”.⁶ The Guiding Principles have been incorporated into a range of international regulatory instruments. The responsibility to respect is incorporated into the OECD *Guidelines for Multinational Enterprises*. The Guidelines are recommendations expressing a standard of responsible business conduct addressed to multinational enterprises operating in or from OECD member countries; they apply to the enterprises’ operations and business relationships globally. Although the Guidelines are not legally enforceable, national contact points in each member state provide a grievance process for claims of breach that leads to mediation. The Australian Government is presently strengthening the effectiveness of the Australian National Contact Point in the promotion of the Guidelines and the responsiveness of its grievance process.
13. The Guiding Principles provide a clear roadmap for an enterprise’s responsibility for modern slavery in its operations and supply chains, including the adoption of preventive measures through human rights due diligence processes. The focus of the Guiding Principles is on human rights risk and its salience—the severity of risk because of its scope, scale and irredeemable character. The adoption of consolidated revenue as the basis for imposing the reporting requirement, rather than the risk of modern slavery, is therefore inconsistent with the Guiding Principles. What is called for is a requirement based on the severity of risk of modern slavery through the operations of an entity and its controlled entities, and their supply chain relationships.
14. At the very least, the Bill should refer to the Guiding Principles as a source of guidance and direction to firms, investors, consumers and civil society in the discharge of responsibilities, including those of investors by reason of their business relationship with investee firms. Anti-Slavery Australia urges the insertion into the Bill of an explicit direction to approach modern slavery reporting through the lens of the Guiding Principles and the human rights due diligence process which it contains.
15. The Department of Home Affairs submission to the Committee claims that a reporting requirement based on whether an entity is operating in or has supply chain relationships with entities in high risk areas or high risk goods is not a feasible

⁶ Zeid Ra’ad Al Hussein “Ethical pursuit of prosperity” *The Law Society Gazette* (23 March 2015).

alternative to a revenue threshold. This, it argued, is because large businesses may operate across multiple sectors and because knowledge about high risk goods and services is not sufficiently detailed to target reporting to specific sectors and countries.⁷ As for the latter objection, there is a detailed body of knowledge now available that maps modern slavery risk: see para [9] above. As for the former, under the Guiding Principles there is no carve out from the responsibility to respect for enterprise complexity; what is required is human rights risk assessment, prioritising action by reference to the salience of risk — its scope, scale, severity and irredeemable character.

16. Anti-Slavery Australia detects in the Australian community a hunger for knowledge and authoritative guidance about the human rights risks accompanying the production of the goods and services we consume daily, that are central to our lives in the global economy that has seen production move from regulated national economies to sites of low cost and corresponding low social protection. This hunger is evident in the depth of support that has been expressed for the Bill. A more sustaining response to that hunger is one that is consistent with and reinforces emerging international norms of responsible conduct. A risk-based approach to modern slavery reporting grounded in the Guiding Principles would provide the principled leadership sought from government and business.

2. PROMOTING COMPLIANCE WITH THE REPORTING REQUIREMENT

17. In its earlier submission to the Committee, Anti-Slavery Australia took issue with the Bill's article of faith—its reliance upon investor and consumer pressure to 'drive a "race to the top"' in reporting compliance.⁸ Three considerations militate against such reliance:

- the poor quality of reporting practice, indeed, compliance, under the United Kingdom legislation upon which this Bill is based;
- the declared inability of the Australian Government to compile a list of entities required to report under the proposed legislation; and
- the limited consumer and investor interest in corporate responsibility even for the small subset of public facing enterprises, and the want of civil society resources to discharge their assumed monitoring role.

In this section we also briefly canvass other measures that would more effectively sanction compliance with the reporting requirement.

18. The Bill proposes no penalties for failure to comply with the reporting requirement. Indeed, proposed s 22(2) expressly states that rules made under the Act may not create an offence or civil penalty. Curiously, the Explanatory Memorandum (like the earlier Consultation Paper) offers little justification for this position beyond the

⁷ Australian Government, Department of Home Affairs, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Modern Slavery Bill 2018*, Australian Government Submission, p 5.

⁸ *Modern Slavery Bill 2018*, Explanatory Memorandum, 2 (para [7]).

expressed objective to “create an environment in which businesses feel ‘safe’ to identify and disclose MS risks [and the concern that] punitive penalties may lead to a tick box compliance approach from reporting entities” (pp 51, 57). The expectation is that a penalty-free environment will facilitate a collaborative ‘race to the top’, bolstered by a business concern for protection of reputation. Experience in the United Kingdom, however, suggests otherwise.

2.1. *Poor quality of reporting under the United Kingdom legislation*

19. There is now a substantial body of experience with reporting under the United Kingdom *Modern Slavery Act 2015*; that experience casts doubt upon the likely efficacy of market mechanisms to secure adequate disclosure of modern slavery risks under the Bill despite the latter’s its mandated heads of disclosure.
20. Low reporting rates persist three years after the introduction of the UK legislation. The Home Office estimates that between 9,000-11,000 companies are now required to report under the Act. The Modern Slavery Registry, the only authoritative registry, currently reports 6,394 modern slavery statements by 5,596 companies. It is not known if these figures include voluntary reports submitted by entities whose revenue is under the reporting threshold. Only 19 per cent of these reports meet the minimum requirements of the Act (viz, approval by the board of directors or equivalent, signature by a director and publication on the organisation’s website).⁹ There are further indicators of persistent poor quality reporting. Three are noted here.
21. First, the United Kingdom Equality and Human Rights Commission found that “companies are disclosing information about their policies and processes rather than detailed explanations of their human rights risks and the steps taken to manage those risks”.¹⁰
22. Second, Ergon Associates, a consultancy firm specialising in business and human rights, surveyed modern slavery statements to map developments in their quality. Its May 2016 report found that most statements did not go further than general commitments and broad indications of the processes; many statements said nothing about the company’s risk assessment processes and two-thirds did not identify priority risks whether in terms of countries, supply chains or business areas. There was a “key gap” in relation to reporting on contractor risks, anomalously since the use of agents and outsourced services are well known to pose particular human

⁹ See <<https://www.modernslaveryregistry.org/>> (accessed 7 August 2018).

¹⁰ Joint Committee on Human Rights (UK), *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (2017), [94] (quoting written evidence from Equality and Human Rights Commission).

rights risk. The report also found evidence of the use of templates rather than company-tailored statements.¹¹

23. In a follow up study published in 2017, Ergon Associates found that statements were generally longer and slightly more detailed than in the previous year; companies produced better reports about their structure, operations, supply chains and modern slavery policies. There was also more information about training on human rights and modern slavery.

24. The 2017 report, however, showed significant continuing problems with reporting. Most statements examined lacked detail and were limited to broad descriptions of processes and activities. The report disclosed little improvement in most companies' reporting of due diligence processes and outcomes; most statements (58 per cent) addressed risk assessment processes only minimally, and did not identify priorities for action based on the assessment. A significant gap remained in relation to sub-contractors—relationships with labour providers, outsourced service providers and sub-contractors—areas where forced labour has been identified, for example, in many industries. Only 11 per cent of statements examined disclosed specific cases where steps have been taken in response to identified modern slavery risks. Around 20 per cent only of statements mentioned key performance indicators or engagement with stakeholders or collaborative initiatives despite specific reference to performance indicators in the reporting requirement.¹²

25. Third, a survey in 2018 of companies in the FTSE index indicates that these weaknesses exist even in the largest 100 companies listed on the London Stock Exchange, the companies with the greatest resources, capacity and presumed incentive to comply with the requirement. The modern slavery statements of almost half of these companies do not meet the minimum requirements set out by the Act (board approval, director signature and posting on the company's homepage). The majority do not provide details on the complexity of their supply chains and risks they have identified. Fifty companies provide no meaningful information on whether their actions are effective in addressing modern slavery risks. Companies that do provide such information rely heavily on performance indicators and do not indicate whether the results of the data collected from these indicators indicate that their processes are effective.¹³

¹¹ Ergon Associates, *Reporting on Modern Slavery: The Current State of Disclosure* (May 2016) <<http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery2-May-2016.pdf?x74739>> (accessed 7 August 2018).

¹² Ergon Associates, *Modern Slavery Statements: One Year On* (April 2017) <<http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery2-May-2016.pdf?x74739>> (accessed 7 August 2018).

¹³ Business and Human Rights Resource Centre, *First Year of FTSE 100 Reports Under the Modern Slavery Act: Towards Elimination?* (2018) <<https://www.business-humanrights.org/en/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act-towards-elimination>> (accessed 7 August 2018).

26. It might be argued that the generally poor quality of UK modern slavery statements some three years on is referable to the weak requirement in the UK Act which states only that companies “may” include a number of details in their statements. In the United Kingdom, however, detailed guidance has been provided to companies with respect to the reporting requirement; there is also a vigilant and well-developed civil society, an active investment community attentive to stewardship responsibilities, and close Parliamentary scrutiny of compliance with the Act. The Australian situation is weaker: there are fewer civil society and media resources in Australia available for monitoring of compliance. Who realistically would devote resources to close monitoring except perhaps the Australian Council of Superannuation Investors? And in one respect at least the UK modern slavery statement is more exacting in that it invites statement of effectiveness of measures to ensure that slavery and human trafficking is not taking place (s 54(5)(e)); the corresponding Australian provision calls only for description of steps taken to assess effectiveness to address risk (proposed s 16(1)(e)).

2.2. *Inability to identify and list all entities required to report*

27. The Explanatory Memorandum (at p 57) reports that the Australian Government ‘does not hold sufficient information to compile an accurate list of all entities required to report’. Such a list is a *sine qua non* for effective monitoring by investors, civil society and consumers. If the Australian Government is unable to identify authoritatively those subject to the reporting requirement, what hope is there for other monitors to do so? And in the absence of such identification, what scope is there for the market responsiveness and advocacy pressure that are the presumed drivers of compliance with the requirement?

2.3. *Acute limits on consumer and investor interest in corporate responsibility*

28. The Bill, like its UK model, is premised on the assumed efficacy of market incentives to induce firms to comply voluntarily with its reporting obligations. A number of studies, however, indicate the significant limits to consumer and investor interest in corporate social responsibility (CSR) and therefore to civil society capacity to provide the necessary incentives for compliance with standards of responsible business conduct. These limits are referred to in ASA’s initial submission to the Committee but, in view of the concerns expressed by some members of the Committee during the Sydney hearing, are further elaborated here. (The limits of civil society monitoring capacity are noted above at para [26].)

29. For the great majority of large firms, the business case for CSR expenditures rests on the threat or prospect of campaign advocacy brought against them by civil society for corporate irresponsibility, using the media to ‘name and shame’ and putting at risk the reputation of the firm and its products. (The incentive that CSR

aids recruitment and retention of talented staff operates only within narrow limits.¹⁴) The business case for CSR rests on the sanction of the threat of loss of firm value through the willingness of consumers and investors to make the conditions of production a criterion in purchasing and investment decisions respectively.¹⁵ However, consumer and investor sentiment in favour of responsible production, and media interest in monitoring for and reporting corporate irresponsibility, are easily overstated. Institutional investors face intense performance pressure to win and retain investment mandates with a time horizon that is not aligned with the long-term effects of CSR expenditures. Studies in several countries indicate that the proportion of socially conscious consumers is much lower than responses to consumer surveys suggest and that their commitment is not at heroic levels.¹⁶

30. CSR practices, in consequence, do not appear to have clearly demonstrated effects on the market share of a firm's products or its financial performance: 'of the myriad factors that affect corporate earnings, CSR remains, for most firms most of the time, of marginal importance'.¹⁷ For adopting firms, the code is liable to be passed over when it is judged unnecessary for brand value assurance or for competitive market advantage over rivals. Indeed, there is a danger faced by firms that seek to chart 'a proactive course in enacting human and labor rights protections that it can never fully satisfy its ideals ... [so that firms] that claim to set a higher standard often suffer the perverse result of becoming the targets of criticism'.¹⁸

31. A second limit on CSR is that the firms who are vulnerable to civil society advocacy, and for whom the business case for CSR might therefore be compelling, are limited to those producing branded products sold into markets with consumer and investor sensitivity to the conditions of their production. Effectively, only European and North American markets show such sensitivity. Production of unbranded goods for European and North American markets, and for all other markets including domestic developing country markets, does not appear to engage CSR drivers.

32. It is a measure of the poverty of the incentives for CSR that implementation — the monitoring, enforcement and external verification — of CSR measures is generally weak and 'represents a serious structural weakness' of CSR regulation.¹⁹ Surveys of CSR codes report the general absence of 'credible monitoring and verification

¹⁴ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC, Brookings Institution Press (2005), 56-60.

¹⁵ E V K FitzGerald, *Regulating Large International Firms* (United Nations Research Institute for Social Development, Technology, Business and Society Program Paper No. 5) (2001), 14.

¹⁶ See T M Devinney, P Auger and G M Eckhardt, *The Myth of the Ethical Consumer*, Cambridge University Press, 2010.

¹⁷ Vogel, *op cit*, 73, 47-53, 93.

¹⁸ L Compa and T Hinchliffe-Darricarrère, 'Enforcing International Labor Rights through Corporate Codes of Conduct', (1995) 33 *Colum J Transnat'l Law* 686.

¹⁹ Vogel, *op cit*, 184.

processes'.²⁰ Few firms integrate voluntary codes into their core business and report upon performance against the standard, even for codes containing human rights commitments.²¹ The structure of global production poses particular problems for effective monitoring. Firms that source from factories that they own or from a small number of suppliers have greater monitoring capacity than those who use many scattered independent suppliers. For these latter suppliers especially, CSR certification is a burden since its benefits accrue to buyer firms but none of the costs since certification rarely commands a price premium in retail markets. Until responsibly made products command a price premium, the incentives for suppliers and buyers to invest in costly monitoring and verification of compliance will remain weak.

2.4. Other incentives for compliance

33. There are several options available to provide an incentive for compliance with the reporting requirement without engaging criminal offence provisions.
34. Section 18 of the Australian Consumer Law provides that a person (including a corporation) must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Anyone suffering loss or damage because of such conduct may recover compensation from the person contravening the section or any person involved in the contravention: s 236. Similar provisions are contained in the *Corporations Act 2001* s 1041H in relation to conduct relating to a financial product or service and in the *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA. On their face, these provisions provide a measure of accountability for the content of a modern slavery statement although not for failure of a liable entity to lodge a statement. Two problems emerge here, however. First, it is uncertain that these provisions would apply to modern slavery statements; that uncertainty might be cured by explicit reference in the Bill that confirms the application of one or more of the provisions to the contents of modern slavery statements. Second, even if the application to statements were clear, the problem would remain that it would be in rare circumstances only that a person would sustain individual loss, or a group a collective loss, in such recoverable amount that would justify the expense and risk of private enforcement. In the absence of economic incentive for misleading or deceptive modern slavery statements, the discipline of those provisions would fail.

²⁰ F Calder and M Culverwell, *Following up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility: Options for action by governments, Final Report*, Royal Institute for International Affairs, London: Chatham House (2005), 7.

²¹ J R Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/4/035 (2007), [77], [78], [81].

35. The civil penalties provisions of the *Corporations Act 2001* sanction the continuous disclosure provisions in Chapter 6CA and the market integrity rules in Part 7.2, in each case imposing pecuniary penalties upon entities contravening the provisions and for persons involved in the contravention. It may be that in some cases contravention of the modern slavery reporting requirement might engage the continuous disclosure provisions although this is likely to arise in exceptional situations only. The policy justification for the reporting requirement, however, is made on distinct grounds than preserving the integrity of market disclosure. Anti-Slavery Australia believes that the importance properly attached in the Bill to “proactive and effective actions to address modern slavery” and to the egregious harm of such practices occurring in the supply chains of goods and services in the Australian market, warrant the imposition of like civil sanctions.²²

3. FURTHER MEASURES

36. Anti-Slavery Australia urges upon the Committee consideration of several other measures that would provide incentive for compliance with the reporting requirement:

- Requiring compliance with the reporting requirement as a precondition to participation in Australian Government tender panels;
- Withdrawing economic diplomacy support (eg, export credit support and consular and trade assistance) for companies who, being obliged to do so, fail to lodge a modern slavery statement or lodge one that is prima facie inadequate in its disclosure;²³ and
- The creation of a defence to liability for a due diligence process that is compliant with the principles for such processes in the UN Guiding Principles; such a provision is contained in the *Illegal Logging Prohibition Act 2012* (Cth) which addresses a harm commensurate with that of modern slavery.

37. In 1787 James Madison, the principal drafter of the United States Constitution and, with Alexander Hamilton, leading advocate for its adoption at the Philadelphia Convention that year, wrote that “[a] sanction is essential to the idea of law, as coercion is to that of Government.”²⁴ The state is the natural source of regulatory authority. It is not clear why the Bill departs from this long-standing principle and relies on market forces only for the regulation of practices singled out as especially odious. In the United Kingdom investment institutions and civil society have greater resources and experience with respect to non-financial risk and stewardship responsibilities. The evidence there shows that the anticipated market discipline has

²² The quoted policy justification for the Bill is from the *Modern Slavery Bill 2018*, Explanatory Memorandum, 2 (para [2]); see also para [18] above.

²³ The Canadian Government has recently adopted such measures where its extractive companies fail to engage with the grievance processes under the OECD *Guidelines for Multinational Enterprises*; see Global Affairs Canada “Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad” <www.international.gc.ca> (accessed 9 August 2018).

²⁴ *Vices of the Political System* reprinted in John R Vile, *Founding Documents of America* (2015), 167.

clearly fallen short of expectation. There is no reason to believe that a greater level of discipline would be apparent in Australia. Anti-Slavery Australia argues that some further incentive to compliance is required.