

7 June 2022

International Labour Policy
Workplace Relations and Safety Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

Tēnā koe

Response to discussion document on Modern Slavery and Worker Exploitation

We appreciate the opportunity to comment on MBIE's discussion document on "A Legislative Response to Modern Slavery and Worker Exploitation: Towards, freedom, fairness and dignity in operations and supply chains".

The Guardians of New Zealand Superannuation is the Crown entity that manages the New Zealand Superannuation Fund, which invests on behalf of taxpayers globally and in New Zealand. As a responsible investor with a commitment to sustainable finance we place a high priority on human rights, and actively engage with investee companies on a range of human rights concerns including modern slavery, a topic on which we have significant institutional expertise and have been active both publicly and in private. Notably, our Head of Responsible Investment acted as a Commissioner in the [United Nations Financial Sector Commission on Modern Slavery and Human Trafficking](#).

Our submission focuses on the context and way forward to achieve the best outcomes in addressing modern slavery as a systemic global issue. Modern slavery is illegal – all of the time - regardless of country or employment regulations. NZ has legislation making slavery a criminal act by a person or business. This consultation covers a further legislative response that extends beyond perpetrators to encourage diligence and transparency across business supply chains as part of a network of preventative measures. Slavery hides in the complexity of supply chains and building out a system which is more preventative requires a multi-stakeholder approach.

We are making this submission by referring to the key themes raised in the discussion document.

The key points of our submission are:

1. We support a legislative approach to modern slavery that includes diligence and disclosure.
2. We support the broad goal of business and other stakeholders working together to prevent modern slavery in supply chains.
3. In line with the Government's plan of action on modern slavery, the legislation should focus on slavery and extreme labour abuses that contribute to slavery. MBIE should reconsider the broadening of the scope of the proposals and should provide clarity on definition throughout.
4. Penalties should be for non-compliance with putting in place diligence processes, not for finding modern slavery or failure to do so. Companies should be given time to improve

processes before receiving a penalty which should also be reasonable and proportionate to the situation.

5. Criminal and personal liability should not apply. These are already applicable under existing New Zealand legislation for punishing perpetrators of modern slavery. Personal liability risk is also deterring people from taking on governance roles and reducing the pool of good potential directors for New Zealand companies.
6. An emphasis on liability and litigation also delivers a compliance-centred approach with more qualified and legalistic disclosures at a time when transparency, innovation and collaboration are needed.
7. A phased approach should apply to introducing the legislation.

A. Best practice diligence – the need for collaboration and transparency.

8. There is no one way to address modern slavery when considering the dynamic and evolving nature of modern slavery risks. Practitioners understand the insidious nature of modern slavery and how pressure on one part of the supply chain can lead to slavery flowing to another part. It is important that companies globally work together and with others to search for, expose and put in place other prevention measures against, modern slavery. Legislation should encourage, not discourage, a high level of transparency, trust, innovation, and collaboration.
9. The ultimate goal of modern slavery policy is to eliminate slavery. However, experts would see it as naïve to declare a supply chain slavery-free even with strong measures in place and we should be wary of encouraging companies or policy makers to make such claims.
10. Companies motivated by finding least cost suppliers based on least cost labour need to consider if that strategy is externalising social cost through illegal working conditions and slavery. These externalities lead to mispricing in the market for consumers and investors and are anticompetitive for companies with fairer practices. As investors we welcome better disclosure and management of modern slavery by companies.

B. Scope and interpretation of Modern Slavery and worker exploitation.

11. The Government's Plan of Action against forced labour, people trafficking and slavery rightly recognises the role business has to play in the fight against modern slavery in supply chains. The Plan in its description focuses on slavery and trafficking and extreme labour abuses that contribute to slavery. Modern slavery diligence practice covers this spectrum of exploitation.
12. The Government in 2020 announced it would introduce a new duty that would require third parties with significant influence or control over another New Zealand employer – for example franchisors - to take reasonable steps to prevent breaches of New Zealand's employment standards by the employer.
13. The proposal to combine these two policy initiatives in one piece of legislation should be dropped, and the legislation should be reframed to focus solely on modern slavery diligence and disclosure. The modern slavery proposal currently seeks to combine a new duty aimed at broad employment standards in certain situations with wider industry legislation targeting modern slavery. In doing so it has introduced a conflict in scope to both legislative responses, increased complexity, and created definitional issues. In turn this has generated concern from the business sector that could have been avoided, and compromised the duty regarding significant influence and control.

14. **Modern slavery diligence practice already includes extreme labour abuses** or severe worker exploitation that contributes to, or increases the risk of, modern slavery. It is not clear, therefore, that there is a need to lift worker exploitation out separately or take a separate approach to supply chain obligations in New Zealand. For example, the Australian Modern Slavery Act sets out reporting criteria in this regard that includes diligence and risk assessments.
15. **Definitions currently lack clarity.** Currently, definitions are unclear in a number of places, including on breaches of employment standards, burden of proof, access to information, on reasonable proportionate action, and on expectations for mitigation or remedial action and feasibility of those actions.

C. Legislative responses – disclosure and diligence

16. **We support a diligence approach for large companies, with adjustments to requirements for the size/resources of businesses and phasing as necessary.**
17. From the Modern Slavery disclosure regimes in Australia and the UK, we have seen an increase in information flows and an uplift in action by companies to improve modern slavery diligence, including in New Zealand. Nevertheless, there are limitations to the degree of commitment across the business community that a 'disclosure only' regime can generate.
18. Diligence legislation strikes the right balance – providing it is not liability-driven resulting in a compliance-centred approach - (that is, if a company can be attacked for not abiding by its disclosed diligence practices it will minimise procedures to a cut and dry checklist). Rather we want high ambition, collaboration, innovation, and investment in tools and systems.
19. For many New Zealand companies, demonstrating diligence is already becoming a requirement from customers reporting under the Australian or UK Modern Slavery Acts, including certain of our investee companies. As disclosure legislation asks for reporting on diligence, diligence is a de facto requirement. A legal requirement for diligence is more direct – and to a large extent fairer in developing an even playing field amongst similar sized New Zealand companies – and with global competitors as other countries adopt similar legislation.
20. We recommend diligence requirements in the New Zealand legislation be consistent with the Australian legislation, which describes what should be in a good diligence system (albeit for reporting purposes).
21. We support the focus on minimising resource or compliance burden on smaller companies. The legislation should encourage and support small companies to be aware of and report modern slavery without creating legal or compliance disincentives in doing so. That said, we have also seen small companies with better voluntary diligence than larger companies, particularly where this is essential to their brand or customers.

D. Enforcement, mitigation and remedy.

22. Penalties should be reasonable and proportionate to the degree of non-compliance and Penalties should be for failure to make the public disclosure or put in place good diligence measures – it should not be based on finding – or for missing given the challenge – modern slavery in the supply chain. Legislative measures should not discourage reporting of incidents for fear of reprisals or litigation. An emphasis on liability and litigation risk delivers a compliance-centred approach with more qualified and legalistic disclosures at a time when transparency, innovation and collaboration are needed.

23. **Remediation.** MBIE should consult more widely with business, social auditing and modern slavery supply chain experts in the area of remediation and protection of victims, including prevention of re-entry into slavery. It is a priority and an evolving area of practice. Companies would expect remedy to mean an improvement in their systems, using their leverage on, or changing suppliers and working with other groups involved in victim support and prevention.
24. It is important that NZ's approach in respect of any remediation obligation – and rights of individuals to civil recourse – is consistent with other comparable markets where there is supply-chain overlap, as otherwise there is a risk NZ companies are exposed to a disproportionate risk of strategic litigation for supply chain matters i.e. NZ companies become the target of choice for litigation because of the regime here.
25. **Director liability.** Director (criminal or civil) liability should not apply to supply chain measures. Directors can already face liability for employment and other breaches of standards directly under their control, including modern slavery offenses. It is not reasonable to expand director liability to breaches by other companies in the supply chain, and we consider that doing so would result in a compliance-centred approach (as set out above). We need good directors on New Zealand boards but increasing personal liability risks already discourage people from taking on these roles, and over the long term proposals of this nature can reduce the quality of governance, which in turn reduces the capacity of companies to address the fundamental risks which are the very purpose of the reforms.

E. Anti-Slavery Commissioner

26. We believe it is important to have an Anti-Slavery Commissioner. The complexity of preventing slavery in national and global supply chains, redress for victims, difficulties in verifying non-compliance, guarding against false claims, penalties, the creation of a registry, all requires a mediator or oversight role. A similar mediatory role to draw comparisons with already exists with the OECD National Contact Points - providing an existing non-regulatory mediator familiar with the UN Guiding Principles on Business and Human Rights.

Contacts for further information:

- Anne-Maree O'Connor, Head of Responsible Investment, aoconnor@nzsuperfund.co.nz
- Catherine Etheredge, Head of Communications, cetheredge@nzsuperfund.co.nz

Yours sincerely



Matt Whineray
Chief Executive Officer