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Dear Professor McMillan

## REVIEW OF AUSTRALIA'S MODERN SLAVERY ACT 2018

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to make a submission in respect of the review of Australia's *Modern Slavery Act 2018*.

### About ACSI

Established in 2001, ACSI exists to provide a strong voice on financially material environmental, social and governance (ESG) issues. Our members include 26 Australian and international asset owners and institutional investors with over \$1 trillion in funds under management. Through research, engagement, advocacy and voting recommendations, ACSI supports members in exercising active ownership to strengthen investment outcomes and enhance the long-term value of retirement savings entrusted to them to manage.

ACSI has undertaken research and engagement with ASX300 companies on the issue of modern slavery for over a decade. Our submission is therefore drawn from our experience of the operations and disclosures of these companies. In addition, the *Modern Slavery Act 2018* (MSA) also applies to many of ACSI's members (asset owners), so this submission draws from, and focuses on, the MSA's application to both of these cohorts of entities.

### The importance of robust legislation in Australia to combat modern slavery

Modern slavery has a devastating human impact, and the rates of modern slavery globally are cause for serious concern. Due to Australia's reliance on imported goods, our businesses are particularly at risk of exposure to modern slavery practices. In addition to tragic consequences for people across supply chains, modern slavery creates risks for investors and can impact the commercial success, stability and longevity of the companies in which superannuation funds invest. It is therefore important that the legislation in Australia sets high standards that mitigate the risk of modern slavery and establish certainty through clear requirements.

ACSI welcomed the introduction of the MSA in 2018, and also welcomes the current review. The MSA has significantly advanced disclosure on modern slavery over the past three years. We are seeing improved disclosures in the most recent round of statements, with increasing levels of detail being reported. It is positive to see that some companies are identifying their challenges in identifying modern slavery and outlining how they are addressing these challenges.

However, there are still many statements that fail to demonstrate deep engagement with modern slavery risks or much detail on concrete action being taken to mitigate<sup>1</sup> these risks. In 2021, [ACSI commissioned Pillar Two to conduct research](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf) that assessed modern slavery statements of ASX200 companies in the first reporting cycle. The research found that the ASX200 were in a 'race to the middle', seeking to satisfy the legal requirements of the MSA without disclosing more than key peers. ACSI's research rated companies out of a maximum score of 41 points, and the average score across the ASX200 was 15.4, with only 31 statements scoring 20 points or more. This illustrates that there is significant room for improvement.

<sup>1</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act, July 2021*: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

ACSI is in the midst of updating its analysis based on the available modern slavery statements released by ASX200 entities in 2022.<sup>2</sup> There have been improvements in the most recent round of reporting, with the average total quality score for statements assessed increasing by approximately 34 per cent as compared with the first reporting period. Nonetheless, there remains a lack of sufficient detail in many statements to provide investors with a clear understanding of how a company is managing its modern slavery risk.

The MSA as it currently stands is focused on disclosure, without imposing requirements to ensure practices are improving on the ground. Disclosure is very important for investors to understand the risks in their investee companies. However, to ensure that modern slavery is being effectively mitigated in practice by Australian companies, the MSA should extend beyond reporting requirements and require concrete action to protect against modern slavery. The MSA was a positive starting point, but Australia should not rest on its current standards: progress should be ongoing.

In proposing changes to the MSA, ACSI considers the following overarching objectives to be important:

- **Better outcomes** on the ground, by reducing the instances of modern slavery and ensuring that there are more effective responses to modern slavery when it does occur;
- **Increased transparency** and greater detail in reporting, to help stakeholders understand how an entity is managing modern slavery risk. From ACSI's perspective, entities that report on identified cases or allegations of modern slavery demonstrate more mature systems. It is better practice for entities to provide open and frank identification of cases and how they are responding to them, so increased transparency should be encouraged (while ensuring reporting protects the safety and privacy of any survivors). Likewise, certain poor practices (such as underpayments or substandard working conditions) might be leading indicators illustrating a heightened risk of modern slavery, so disclosure of such practices should also be encouraged. More detailed disclosure from all entities will enable a better understanding of modern slavery risk and will facilitate more effective solutions for entities across the market.
- **Focusing on highest risk:** in order to most effectively address modern slavery as quickly as possible, entities should prioritise their activities based on level of risk. Resources are inevitably limited, so focusing on the highest risks is likely to generate the most effective outcomes.
- **Balancing outcomes and compliance burden:** increased obligations should only be introduced if they are likely to improve outcomes, so that the burden of complying with the MSA is not increasing unnecessarily. The cost-benefit should be considered, to ensure that any increased burden is worthwhile in contributing to tangible reductions in modern slavery risk;
- **Balancing responses to modern slavery risks with other human rights risks:** while modern slavery presents a formidable challenge, it is one of a number of human rights risks faced by Australian entities. When investing resources into addressing modern slavery, it is important that both companies and Government retain the capacity and funding to also address other human rights risks.

In order to ensure that the MSA continues to improve the mitigation of modern slavery, ACSI proposes the following specific changes:

- **An independent Anti-Slavery Commissioner**, with an important role in monitoring the impacts and functioning of the MSA;
- **A due diligence requirement**, to ensure entities are improving their risk assessment and mitigation;
- **More robust enforcement** of entities that are not complying with the MSA through penalties and other incentive measures;
- **Additional detail in the mandatory reporting criteria** to ensure entities are providing sufficient granularity in their modern slavery statements;
- **Access to remedies** for victims of modern slavery;
- **Further guidance** to increase clarity in a number of areas that are currently under-reported;
- **Harmonisation of the MSA with international jurisdictions** while ensuring that this does not weaken the standards in the MSA;
- **A further 3-year review period** to ensure the MSA continues to improve standards on an ongoing basis.

Please see further detail on these suggestions below.

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<sup>2</sup> ACSI has commissioned Pillar Two to undertake further analysis of all statements from ASX200 reporting entities in the third round of reporting (this analysis is currently being undertaken). There are 38 statements available to date from entities that have reported in 2022, so the following comments are based on this initial sample group.

I trust our comments are of assistance. Please contact me ([ldavidson@acsi.org.au](mailto:ldavidson@acsi.org.au)) or Romy Faulkner, ACSI's Public Policy and Advocacy Senior Analyst ([rfaulkner@acsi.org.au](mailto:rfaulkner@acsi.org.au)), should you require any further information.

Yours faithfully



Louise Davidson AM  
Chief Executive Officer  
Australian Council of Superannuation Investors

## Suggested improvements to the Modern Slavery Act

### Anti-Slavery Commissioner

ACSI supports the introduction of an Anti-Slavery Commissioner. It is important that such a Commissioner be independent from Government, to be able to provide advice and analysis that is impartial. The Commissioner should independently assess how the Government is carrying out its functions under the MSA, as well as analyse Australia's progress on mitigating modern slavery at a systemic level.

Similar to the role of the Independent Anti-Slavery Commissioner in the UK, it would be useful if an Australian Commissioner could work on:

- establishing clearer standards and guidance for different sectors to observe when carrying out their obligations under the MSA,
- conducting research and providing recommendations for improvements to the MSA,
- stakeholder engagement, training and awareness-raising on mitigating modern slavery risks,
- ensuring that there is an effective reporting mechanism for victims of modern slavery to raise complaints safely and have them investigated,
- ensuring appropriate oversight and enforcement of the Act.

Each of these tasks is critical to the development of the MSA and, if not carried out by the independent Anti-Slavery Commissioner, they should be adequately resourced and undertaken within Government. It is important that resources are used efficiently, so responsibilities should be divided between an independent Commissioner and the Government in the way that most efficiently and effectively achieves the outcomes sought. If it is more practical for any of the above activities to be carried out within Government rather than by an independent Commissioner, this should be the case.

### Due diligence requirement

The importance of human rights due diligence is clearly established in the UN Guiding Principles on Business and Human Rights (UNGPs). In order to effectively mitigate modern slavery risk, entities need robust processes to identify where the risk exists, and to respond to it. In other words, if due diligence is not being carried out, there is little chance of improving modern slavery outcomes. ACSI therefore supports the introduction of an obligation on reporting entities to conduct due diligence on modern slavery, and to report on the outcomes of their due diligence.

A number of entities are already undertaking and disclosing on their due diligence. A requirement to undertake due diligence would incentivise entities that are lagging behind to improve their practices, and create a more level playing field. It would also align the Australian market more closely with requirements in key jurisdictions overseas, such as the EU. Australia would be well placed to learn from how human rights due diligence legislation has been developed in Europe.

A due diligence requirement should be accompanied by a very clear definition and scope, so that entities understand how they can satisfy their obligations. Appropriate due diligence should involve an entity identifying potential and actual risks, taking meaningful action to respond to them, monitoring its action effectively, and explaining the process and outcomes in its modern slavery statement.

Due diligence will naturally differ based on the type of entity. The parameters for due diligence must be framed in terms of what is reasonable for specific types of entity, given their operations and supply chain. Setting these parameters for different sectors or types of entity could be part of the role of an Anti-Slavery Commissioner and should be developed through further consultation with sectoral experts.

For example, due diligence undertaken by an asset owner will be different from many other types of companies, because asset owners typically have large number of investments across their portfolios and will not necessarily hold or manage assets directly (they will often be managed by asset managers). Asset owners often have investment exposure to many jurisdictions that can differ substantially in their approaches to modern slavery. As such, while Australian-domiciled asset owners may have processes in place to assess their asset managers' approaches to modern slavery, this is not necessarily the case overseas, which can make it challenging to get a complete picture of portfolio exposures to modern slavery risk. As with any type of entity, there will be challenges, and asset owners should seek to understand their risk as comprehensively as possible.

Like all entities, institutional investors should take a risk-based approach to their due diligence across an asset portfolio. Rather than necessarily engaging with every single asset, due diligence for asset owners should involve:

- Setting up robust processes to identify material risks. For example, this should include assessing and engaging with asset managers and investee companies and ensuring there are effective risk management processes and grievance mechanisms along the supply chain.
- Responding to any identified risks.
- Using leverage and influence to improve the practices of asset managers, investee companies, suppliers and any other relevant entities.

Due diligence requires an investment of time and resources, so it is important that this investment is worthwhile in ultimately reducing modern slavery risks and therefore reducing the potential costs to an entity over the long-term. In order for the benefits of due diligence to outweigh the costs, it should be done in a way that:

- **Focuses on outcomes:** the purpose of due diligence is to reduce modern slavery, so it should be undertaken where there is a material risk, not merely for the sake of fulfilling a process. Entities should be driven by outcomes, not process.
- **Is driven by risk and prioritises resources:** resources are limited, so entities should address the most salient risks first, then allocate resources to the lower level risks to the extent possible.
- **Focuses on proximity:** what is reasonable to expect of entities depends on an entity's proximity to the impacts and its leverage to be able to achieve change.

The due diligence requirement should be framed in a way that effectively balances the benefits (of mitigating risk) with the compliance burden. A due diligence requirement should therefore be scoped in the following way, which would need to be made clear in the legislation:

- **Phase-in:** there should be a phase-in period to allow entities sufficient time to establish the necessary systems. There should be a clear plan for phasing-in requirements over the coming years. It would be reasonable to expect larger entities with greater revenues and resources to meet higher standards first and allow smaller entities more time to ensure they comply with requirements.
- **No penalties:** there should be no penalties for non-compliance with a due diligence requirement at this stage, to allow entities time to learn and develop robust due diligence processes. Penalties for failure to conduct appropriate due diligence could be considered in a later round of review of the MSA.
- **Materiality:** a due diligence requirement should be focused on an entity's material and salient risks, which are different for each entity. Due diligence should not be a cookie-cutter process that requires identification of every single risk, regardless of materiality.
- **Causality:** entities should be responding when they have a clear risk of causing or contributing to modern slavery. In contrast, if an entity is directly linked to modern slavery risk, it should use its leverage to the extent possible, but the entity's ability to effect change may be more limited. It would be important to clarify how due diligence requirements differ depending on whether an entity causes, contributes to, or is directly linked to modern slavery risk.
- **Proportionate to entity size:** due diligence will naturally differ based on the size, complexity and resources available in an entity. The expectations in terms of due diligence should differ based on an entity's size and resources.

Any due diligence requirements should be aligned with the UNGPs framework.

### Penalties

There has been a significant level of non-compliance with the current reporting requirements of the MSA. 41 per cent of all reporting entities were non-compliant in the first cycle of reporting, and 28 per cent in the second cycle<sup>3</sup>. Likewise, 33 per cent of ASX200 companies' statements assessed in 2021 appeared to be potentially non-compliant with one or more of the MSA's requirements.<sup>4</sup> Entities have now had sufficient time to get up-to-speed with the reporting requirements, so ACSI supports the introduction of financial penalties for non-compliance with the current requirements in the MSA. For example, penalties could cover:

- failure to submit a statement,
- failure to submit a statement by the due date,
- failure to address all mandatory reporting criteria,

<sup>3</sup> Review of the Modern Slavery Act 2018 Issues Paper: [https://consultations.ag.gov.au/crime/modern-slavery-act-review/user\\_uploads/review-modern-slavery-act-issues-paper.pdf](https://consultations.ag.gov.au/crime/modern-slavery-act-review/user_uploads/review-modern-slavery-act-issues-paper.pdf)

<sup>4</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

- submission of a materially false statement.

That said, if penalties are introduced, they should be used as a last resort after repeated instances of non-compliance and after other options have been exhausted, such as a warning and the opportunity to improve.

### Other incentives

In addition to financial penalties, other measures could be taken and might be more effective in certain cases to incentivise better practice. Other incentives could include:

- the Government publishing a list of non-complying entities,
- exclusion of non-compliant entities from public procurement contracts.

### Additional detail in the mandatory reporting criteria

One of the clear issues with current reporting is that many entities comply with all mandatory criteria but provide inadequate detail, meaning that their modern slavery statement is not very useful for stakeholders to understand how the entity is managing modern slavery risk.

ACSI's research, which assessed the quality of modern slavery statements in the ASX200, found a number of areas for improvement to:

- deepen disclosure on operational risks,
- provide more detail about how policies, risk assessments and training are being implemented,
- collaborate with suppliers and other stakeholders to address their modern slavery risks,
- strengthen grievance mechanisms to manage modern slavery complaints, and
- outline how the effectiveness of actions to address modern slavery risks is measured and assessed.

To address poor quality of reporting, the mandatory reporting criteria should specify some further detail within the areas under s16(1)(b)-(g) to ensure that entities provide adequate information. Any additional requirements should be based on the key areas that are currently under-reported and details that are useful in understanding an entity's approach to assessing, addressing and reducing risk. For example, this could include (but is not limited to):

- An entity's due diligence process.
- The methodology used to assess risk and prioritise highest risks (ACSI's research found that only 33 per cent of the ASX200 explained the methodology used for supply chain risk assessments)<sup>5</sup>.
- The grievance mechanisms an entity has in place to allow people to confidentially report modern slavery.
- How an entity has engaged with external stakeholders (eg workers, civil society, asset managers etc as relevant).
- Whether an entity has set any key performance indicators or measurement to track the outcomes of its approach.

Any requirements for further detail in reporting should be developed through consultation with sectoral experts. Most importantly, any additional mandatory reporting requirements must drive improved outcomes in practice, not just increased reporting. Additional reporting requirements should therefore only be included if they encourage entities to improve their risk assessment and response processes. Likewise, penalties should only apply to clear cases of inadequate information, where there is no genuine attempt to report in the spirit of the MSA. It would be crucial for guidance to be clear about the meaning of any additional requirements before any penalties were imposed.

### Access to remedies

Access to remedy is a core element of the UN Guiding Principles on Business and Human Rights, which would apply where a business has caused or contributed to modern slavery. Victims of modern slavery should not

<sup>5</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf). That said, according to ACSI's most recent analysis (currently being undertaken, see above no2), more statements in the 2022 reporting period indicate reporting entities are taking steps to understand how their suppliers are managing modern slavery risks (such as supplier questionnaires or social audits). The average quality score for this indicator increased from 17 per cent in the first reporting period to 51 per cent.

have to rely on voluntary remediation processes to obtain remedy or access justice, which is currently often the case in Australia. ACSI therefore supports access to remedy for victims of modern slavery, either to be embedded in the MSA or in other appropriate legislation. The Government should consider how best to ensure access to remedy through further consultation with experts. When a case of modern slavery is identified, not only should remedies be provided to victim(s), but changes should also be made to an entity's structures and systems, with the aim of preventing further harm.

### Clarify the definition of revenue

It would be useful if the MSA Guidance clarified whether the investment income of underlying investment vehicles of superannuation funds or other institutional investment funds should be included in the calculation of consolidated revenue for the purpose of the revenue threshold. While investment vehicles or trusts are not included in the definition under the Australian Accounting Standards AASB 10, the MSA Guidance could currently be interpreted to include the income of investment trusts as part of consolidated revenue. The income derived from investment vehicles can fluctuate significantly, without any relation to modern slavery risk. In other words, when markets are strong and investment income is high, an underlying trust might meet the threshold to report, but would not when markets downturn and investment income drops. It is most likely not the intention of the legislation that the income of underlying investment vehicles is included in the reporting threshold, but it would be useful to have clarity on this point.

### Areas for further guidance

There are a number of areas in which current reporting is weak across the market, which might be due in part to confusion or a lack of understanding of how to meet the requirements. It would therefore be useful to have further guidance on various areas, with the aim of improving practice. The following are suggestions based on gaps identified in the MSA Consultation Paper and [ACSI's research into modern slavery reporting](#):

- **Assessing effectiveness:** One of the criteria that has the highest rate of non-compliance is how an entity assessed the effectiveness of any actions it took to assess and address the risks of modern slavery practices in its operations and supply chains. ACSI's research found that ASX200 companies are not robustly evaluating the effectiveness of their actions to assess and address modern slavery risks and are often focusing on measuring quantitative outputs (such as number of workers trained) rather than practical outcomes (such as measurable increases in workers' awareness of modern slavery after training). Only 32 per cent of statements clearly explained how the companies assess effectiveness. Less than 5 per cent of statements defined "effectiveness" or identified key components for an effective response.<sup>6</sup> This figure has not changed in ACSI's analysis of the most recent statements from the ASX200, demonstrating that entities are still struggling with this.<sup>7</sup> Further guidance should also be included to make clear that reporting should cover both form (ie describing the assessment method used) and substance (ie. the entity's opinion on how effective its own actions have been).
- **Consultation with stakeholders:** there is weak reporting on how entities consult with civil society groups, workers and other stakeholders to inform their modern slavery risk management approach, so further guidance on this could be useful. ACSI's research found that only 21 per cent of statements referred to using feedback from external stakeholders to assist with assessing effectiveness, and this has not improved in the most recent round of statements.<sup>8</sup> Although 36 per cent of statements identified broader instances of collaboration, this collaboration appeared to primarily be with other businesses rather than other stakeholders, such as unions or NGOs.<sup>9</sup> Our most recent analysis indicates that only 5 per cent of the statements assessed indicated reporting entities consulted potentially affected groups, such as workers, as part of risk assessment processes.<sup>10</sup>
- **Grievance mechanisms:** there is already some guidance on how to design grievance mechanisms and response strategies, but it remains an area of weak reporting. It would be useful for the guidance to go into more depth and provide further examples. ACSI's research found that only 17 per cent of statements from the ASX200 identified actions taken by companies to ensure grievance mechanisms or other processes are trusted and accessible to stakeholders and that they are capable of receiving and responding to modern slavery complaints.<sup>11</sup>

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<sup>6</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

<sup>7</sup> Based on ACSI's most recent analysis of 2022 statements from the ASX200 – see above no2.

<sup>8</sup> Based on ACSI's most recent analysis of 2022 statements from the ASX200– see above no2.

<sup>9</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

<sup>10</sup> Based on ACSI's most recent analysis of 2022 statements from the ASX200– see above no2.

<sup>11</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

- **Identified incidents or allegations:** it appears that many entities remain uncomfortable or unable to report identified incidents or allegations of modern slavery. Modern slavery risk and cases are a reality for a large number of entities, and the issue needs to be discussed openly and constructively to support eradication. The MSA and its associated Guidance should therefore engender a culture that promotes honest communication about the risks and problems that entities face.
- **Third parties:** entities should make clear which work they have undertaken themselves as compared with the actions taken by third party consultants or auditors, as this influences the level of understanding within an entity of modern slavery risk. The MSA or its associated Guidance should make clear the need for this distinction.
- **Overseas jurisdictional requirements:** If an entity operates in jurisdictions where there are no modern slavery reporting requirements, this should not stop the entity seeking as much information as possible from stakeholders in these jurisdictions. Entities can explain the challenges they might face in obtaining information, but this should not prevent entities from seeking information. Further guidance to clarify this could be helpful.
- **Business and human rights frameworks:** Current reporting demonstrates that few entities are able to clearly articulate how they may be involved in modern slavery risks using the 'cause', 'contribute', 'directly linked' continuum set out in the UNGPs.<sup>12</sup> In our most recent analysis, less than a quarter of statements assessed drew on the UNGPs continuum of involvement.<sup>13</sup> The variable quality of statements' disclosures in this area (and more broadly) may be partly attributable to a low level of understanding of existing business and human rights frameworks such as the UNGPs within some companies, so further guidance and training could be useful in this respect.

### International harmonisation

In principle, ACSI supports harmonisation of laws across jurisdictions to make reporting less burdensome for entities that are required to report in multiple jurisdictions. Many Australian companies are also registered in other jurisdictions, and will need to adhere to increasing requirements, particularly in the UK, Europe and New Zealand (with the proposed new law). However, the MSA should not be harmonised with other jurisdictions in any way that will weaken the standards in the MSA.

### Governance approval process

ACSI agrees with the requirement for the governance of an entity to approve its Modern Slavery statement. Given that modern slavery is often a material risk, it is an important part of the governance role of an entity's board to manage modern slavery within its broader risk management framework. Requiring sign-off from the board ensures that board members are aware of, and ultimately accountable for, the entity's approach to modern slavery.

### Further 3-year review period

ACSI supports a further three-year review be maintained, to track progress and make improvements to the MSA on an ongoing basis.

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<sup>12</sup> ACSI, *Moving from paper to practice: ASX200 reporting under Australia's Modern Slavery Act*, July 2021: [https://acsi.org.au/wp-content/uploads/2021/07/ACSI\\_ModernSlavery\\_July2021.pdf](https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf)

<sup>13</sup> Based on ACSI's most recent analysis of 2022 statements – see above no2.