NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry for Business, Innovation and Employment

on

A Legislative Response to Modern Slavery and Worker Exploitation: Discussion Document

10 June 2022

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About NZBA

1. The New Zealand Bankers' Association (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - China Construction Bank
   - Citibank N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank N.A.
   - Kiwibank Limited
   - MUFG Bank Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Introduction

NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on A Legislative Response to Modern Slavery and Worker Exploitation: Discussion Document (**Discussion Document**). NZBA commends the work that has gone into developing the Discussion Document.

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

NZBA agrees that modern slavery and worker exploitation have no place in Aotearoa New Zealand or overseas. We broadly support the concepts set out in the Discussion Document, particularly where MBIE has aimed to align its approach with international best practice and existing overseas regimes.

New Zealand legislation should align with Australian/United Kingdom regime

We strongly support MBIE's intention at page 16 of the Discussion Document, to align its approach with other jurisdictions and international best practice *"…so that entities who are already taking effective action are not required to take additional measures unnecessarily."*

The proposals currently go further than other jurisdictions and international best practice in some respects, and we consider that New Zealand's legislation should align with the existing Australian and United Kingdom regimes. The Australian and United Kingdom models align with current international expectations, and placing a different set of requirements on New Zealand entities dealing globally would create complexity and may have minimal benefit. This approach could also potentially undermine the protections New Zealand is trying to achieve by encouraging a tick-box approach by some firms contending with multiple frameworks, rather than allowing industry to align first on current international best practice.

Modern slavery regimes are still in their infancy, and starting with an internationally aligned approach will allow us to assess the success of our regime before introducing a significant compliance burden that may not be proportionate to the results achieved.

Some New Zealand reporting entities will also be subject to overseas reporting obligations, and we consider that there is great benefit in aligning reporting obligations so that a single entity can submit the same report in different jurisdictions.

Disclosure requirements should be more flexible

NZBA considers that the disclosure provisions in the proposed legislation should be drafted to include an element of flexibility around how reporting should take place. As noted above, some entities that will be subject to the proposed legislation are also subject to the equivalent overseas regimes via an overseas parent, and will already be undertaking some form of reporting; and/or the suggested tiered approach to obligations may result in different entities within a group potentially having to separately report on their activities.

The flexibility to permit entities to either report individually, or combine reporting and make a "joint statement" as a group in circumstances such as those described above, will avoid duplication and simplify reporting for entities captured under the proposed legislation. For example, this could entail:

- A New Zealand entity, already undertaking a certain level of reporting at the parent level under equivalent overseas regimes, can continue to report in a combined group report with any additional New Zealand legislative obligations included over and above the existing content for New Zealand in the group report; and/or

- As permitted under the equivalent Australian regime, a group of New Zealand entities, captured separately under the proposed legislation could make a "joint statement" and report as a group, rather than each providing a separate report.

The proposed due diligence requirements

The proposed due diligence framework is currently extremely broad and requires further detail/guidance on expectations around the scope of the due diligence requirements. As noted above, we support alignment with the Australian regime where the requirements are to disclose steps an organisation is taking, which will in practice require due diligence (but the due diligence itself is not mandated).

In regard to the current proposals, we note:

- Potential measures to prevent and mitigate identified risks of modern slavery and worker exploitation include in-scope entities educating suppliers and workers in their supply chain about relevant rights and obligations. In our view, educating bad actors is not an appropriate role for in-scope entities to play. The Discussion Document mentions that the government will be rolling out non-legislative tools to educate businesses on modern slavery, and it is appropriate for education to be addressed in this manner.

- There are also a number of references to large organisations being required to remedy modern slavery. This has the potential to be a burdensome approach and it will be important that any legislation ensures entities are able to exercise discretion in their responses to these scenarios.

- We would like clarity that the inclusion of "investment and lending activity" in the definition of "operations" and that the definition of "supply chains" will not capture a banks' relationship with its customers. Existing regulation of financial service providers such as under Anti Money Laundering and Countering of Financing of Terrorism Act 2009 where monitoring of customers applies, is limited to data, rather than the nuanced interpretation required for modern slavery or worker exploitation. For this reason, it is not appropriate or practical to apply a due diligence and monitoring standard in the context of modern slavery and worker exploitation to the thousands of individuals and entities comprising banks' customers.

The Proposal for Thresholds

The proposed thresholds for due diligence are markedly lower than under the Australian, UK regimes, and as proposed under the EU regime. When contemplating adding an intensive due diligence obligation, this may be detrimental to productivity and innovation for entities when combined with other regulatory compliance costs. We consider $20m, $50m and $100m revenue thresholds to be more proportionate to the obligations under the proposed responsibilities 2, 3 and 4, respectively.

Other comments

We make the following additional comments on the Discussion Document:

- In relation to director personal liability, we do not consider that personal director liability is appropriate in the context. Instances where personal liability applies under

law are more appropriately for direct actions by the entity they govern and for which the board is responsible and controls such as under the Health and Safety at Work Act and Financial Markets Conduct Act. It may also give rise to conservatism and heavy disclaimers within modern slavery statements. A better approach would be to incentivise good quality disclosure. More detail is needed on the rationale for this being imposed versus liability to the relevant entity. There needs to be a balance where liability is appropriate in the circumstances compared to imposing liability where directors may have acted diligently. Further detail would be needed on defences available before commenting further on appropriateness of personal liability. As a general comment, the role of board is to oversee and monitor compliance activity with the ability to test and challenge management. Moving towards personal liability requires more director involvement in what should be management activities.

- It will be important to have an adequate lead time for legislation to enable entities to uplift their capability, ensure business continuity and create a baseline/complete an initial risk assessment, set up processes/policies/governance etc. A phase-in period would be ideal (e.g. start with disclosure and then phase in due diligence (if required) over time).

- We consider that some form of well-resourced independent oversight would be required for the legislation to be effective. In relation to enforcement, if there are going to be specific offences/penalties under the legislation, it will be important to have clear guidance on what is required to meet requirements and who would determine whether those requirements have been met (noting that many of the proposed requirements are subjective e.g. “reasonable in circumstances and proportionate to risk”). This will be particularly important if due diligence is mandated. It will be burdensome and impractical if the highest level of responsibility is not linked to prescribed content being provided.

- We suggest there should be some kind of tiering of industries based on their risk profile so those that are high risk are to be prioritised and the expectations are different for these suppliers, i.e., it is not practical for an entity to check with every single supplier on a regular basis that it is complying with New Zealand employment standards. This could be combined with tiering based on the risk profile of countries where suppliers are based, for example using tools such as the Global Slavery Index. We suggest there should be guidance on what are high risk industries/suppliers and what would be reasonable and proportionate in relation to high-risk suppliers and low risk suppliers.