

Responses to Questions on Notice

Submitted by Dr James Cockayne and Ms Justine Coneybeer to the Modern Slavery Committee's Inquiry into the Ethical Clothing Trades (Extended Responsibility) Scheme 2005

9 July 2024

Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky. We acknowledge their ongoing stewardship and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes, self-determination and for real freedom.

We advise this resource may contain images, or names of deceased persons in photographs or historical content.

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Question on Notice from Dr Sarah Kaine requesting recommendations on key updates to any ‘resuscitated’ Scheme

We recommend amending the *Industrial Relations (Ethical Clothing Trades) Act 2001* (‘IR ECT Act’) and the *Ethical Clothing Trades Extended Responsibility Scheme* (the ‘Scheme’) (a Schedule made under Part 3 of the IR ECT Act) as set out in Annexes 1 and 2 to this document, respectively.

The amendments contained in Annexes 1 and 2, taken together, would have the effect of integrating the Scheme with the contemporary anti-slavery infrastructure in NSW, while taking a light-touch approach intended to minimally alter the structure and operation of the Scheme.

Specifically, the amendments aim at:

- clarifying the anti-slavery objective of the Scheme as an additional objective to those already stated;
- integrating the Scheme and the IR ECT Act with the mechanisms created by the *Modern Slavery Act 2018* (NSW) (‘MS Act’) and related legislation;
- incorporating the NSW Anti-slavery Commissioner into the governance and operation of the Scheme by including the Commissioner in the Ethical Clothing Trades Council, and creating the statutory basis for the closer cooperation between NSW Industrial Relations, relevant union and business partners, and the NSW Anti-slavery Commissioner that is needed to ensure effective oversight of the trade in New South Wales;
- ensuring suspected cases of modern slavery are timely reported to the NSW Anti-slavery Commissioner;
- providing a mechanism – a power for the Minister to recognise, under Part 3 of the IR ECT Act, a code of practice issued by the Anti-slavery Commissioner under section 27 of the MS Act – that can be used to help ensure retailers meet the standards of responsible business conduct required under the UN Guiding Principles on Business and Human Rights, OECD

Guidelines for Multinational Enterprises on Responsible Business Conduct and 2014 Protocol to the ILO Forced Labour Convention.

The amendments achieve these aims through the following adjustments to a resuscitated Scheme:

- amendment of the objectives of the Scheme,
- incorporating the Anti-slavery Commissioner into the Ethical Clothing Trades Council as an *ex officio* member,
- making the Anti-slavery Commissioner or her/his delegates an ‘authorised person’ for the purpose of the Scheme,
- providing for reporting of suspected incidents of modern slavery to the Anti-slavery Commissioner,
- expanding the supplier undertaking in Schedule 2 to the Scheme to include undertakings relating to cooperation with retailers’ reasonable steps to tackle modern slavery, and
- allowing the Minister to recognise as a mandatory code under Part 3 of the IR ECT Act a Code of Practice issued by the Anti-slavery Commissioner under section 27 of the *Modern Slavery Act 2018* (NSW), addressing anti-slavery matters in TCF supply-chains. Such a Code could complement the Homeworkers Code by addressing those areas of responsible business conduct expected under Australia’s international commitments (as listed above) and not currently covered by the Homeworkers Code, including those relating to responsible purchasing practices, due diligence, effective contracting practices, and remedy, as relating to modern slavery as defined in NSW law. We recommend that the Committee recommends that the Minister and the Attorney-General work with the Anti-slavery Commissioner to develop such a code of practice, in consultation with relevant TCF stakeholders.

Question on Notice from Mrs Ayyad regarding use of section 27 of the *Modern Slavery Act 2018* (NSW)

The amendments proposed in Annexes 1 and 2 to this document rest in part on use of section 27 of the MS Act. The amendments would have the effect of incentivising TCF sector stakeholders to work with the NSW Anti-slavery Commissioner to develop a Code of Practice under section 27 of the MS Act, which shall complement the Homeworkers Code by addressing those areas of responsible business conduct expected under Australia’s international commitments and not currently covered by the Homeworkers Code, including those relating to responsible purchasing practices, due diligence, effective contracting practices, and remedy, as relating to modern slavery as defined in NSW law. In the absence of TCF sector engagement with such a code development process, the Anti-slavery Commissioner is already entitled, under existing NSW law, to issue such a Code. The amendments proposed in Annex 1 below would give the Minister the power to recognise that as a mandatory code under Part 3 of the IR ECT Act.

We further recommend that this Code should be developed through consultation between the Anti-slavery Commissioner, Ethical Clothing Australia and other TCF sector stakeholders. Since the Commissioner is already entitled to issue such a Code of Practice under section 27 of the MS Act, the Committee should be clear that it is mandating such consultation in the development of a Code, but that, in the event that the text of a Code of Practice that ensures responsible business conduct in line with Australia’s international commitments cannot be agreed by some defined date (say, one year after any amendment of the IR ECT Act comes into force), then the Commissioner shall issue

such a Code of Practice on his or her own initiative; and the Minister (for Industrial Relations) may recognise the code in accordance with Part 3 of the IR ECT Act.

Question on Notice from Dr Sarah Kaine relating to how a resuscitated Scheme could assist the Anti-slavery Commissioner in the discharge of their government procurement responsibilities

Under existing NSW law, government agencies are required to take reasonable steps to ensure they do not procure goods and services made with modern slavery.

The NSW Anti-slavery Commissioner published *Guidance on Reasonable Steps* in December 2023, which includes an indication that covered entities should consider any Code of Practice issued by the Commissioner when procuring goods and services, especially those identified as attracting high modern slavery risks.

The NSW Anti-slavery Commissioner has issued an Inherent Risk Identification Tool (IRIT) to help government agencies – and other entities required to report on modern slavery due diligence arrangements under NSW law – to understand the inherent modern slavery risk associated with different procurement categories. The current version of the IRIT identifies garments and other TCF products as high risk (see IRIT workbook tab 54).

The amendments proposed in Annexes 1 and 2 to this document would have the effect of, in time, generating a Code of Practice relevant to NSW government procurement from TCF supply-chains. This would mean that NSW Government agencies must, at a minimum, consider whether suppliers meet the Code of Practice standard, when planning, sourcing and managing procurement from this supply-chain – for example, when procuring uniforms. Covered entities would have discretion how to take this conformance into account in their procurement decisions. One option open to them, for example, would be to factor conformance with this Code, or with equivalent standards elsewhere, into tendering processes. The *Guidance on Reasonable Steps* provides detailed instructions, and Model Tender Clauses, for incorporating such considerations into tendering processes under NSW law.

Government entities' conduct in this area would be subject to multiple levels of oversight:

- by the entities themselves, including through the modern slavery risk management systems required to be put in place under Reasonable Step 1 ('Commit') of the *Guidance on Reasonable Steps*, which includes the adoption by the senior governing board of a Modern Slavery Policy and approval by the senior executive of a Modern Slavery Risk Management Framework;
- by the NSW Procurement Board;
- by the Anti-slavery Commissioner, exercising his monitoring responsibilities under the MS Act;
- by the NSW Auditor-General, through discharge of his modern slavery audit power.

Annex 1 – Recommended Amendments to the *Industrial Relations (Ethical Clothing Trades) Act 2001*

- Amend section 3 Definitions to include:
 - Anti-slavery Commissioner* has the same meaning as it has in the *Modern Slavery Act 2018* (NSW)
 - modern slavery* has the same meaning as it has in the *Modern Slavery Act 2018* (NSW)
- In section 6 Membership and procedure of Council:
 - In section 6(1), replace ‘7 part-time members’ with ‘7 part-time members and one ex officio member’
 - Add a new section 6(1)(h):
the Anti-slavery Commissioner, serving *ex officio*.
 - In section 6(2)(b), after ‘lawful entitlements’ add ‘and to take reasonable steps to prevent, address and remedy modern slavery’
- In section 8 Quarterly reports:
 - In section 8(1), after ‘lawful entitlements’ add ‘and receiving adequate protection from and remedy for modern slavery’
 - Add a new section 8(2)(d):
activities of clothing industry retailers and manufacturers in relation to their obligations under any relevant Code of Practice issued by the Anti-slavery Commissioner.
- In section 11 Nature of mandatory code of practice:
 - In section 11(1), after ‘their lawful entitlements’ add ‘, or for the purpose of taking reasonable steps to prevent, address and remedy modern slavery in the clothing trades’.
 - Add a new section 11(1a):
The Minister may recognise as a code of practice under this Part any Code of Practice issued by the Anti-slavery Commissioner that pertains to the clothing trades.
 - Replace section 11(2) with:
 - (2) In particular, the Minister may make or recognise a code of practice if the Minister considers:
 - (a) that current voluntary self-regulatory mechanisms are inadequate to achieve improvements in the level of compliance with obligations to ensure outworkers receive their lawful entitlements or with obligations to prevent, address or remedy modern slavery, or
 - (b) that persons engaged in the clothing industry are not in good faith attempting to negotiate improvements or extensions to those voluntary self-regulatory mechanisms.
- Add a new section 12bis Recognising a code of practice under this Part:

- (1) The Minister may recognise a code of practice issued by the Anti-slavery Commissioner as a code of practice under this part, but only after considering a report of the Council under section 9 (Report on implementation of ethical clothing industry practices), and a report from the Anti-slavery Commissioner on the development and operation of the code of practice in question.
- (2) The terms of section 12 of this Act are otherwise to apply to a code recognised by the Minister as if it were a code made by the Minister.
- Replace section 14:

14 Inconsistency between code and federal awards, legislation or regulations

In the event of an inconsistency between the provisions of a mandatory code made or recognised under this part and the provisions of a federal award, federal anti-slavery legislation or federal regulations, the provisions of the federal instrument that are applicable to outworkers, manufacturers or retailers in the clothing trades prevail to the extent of the inconsistency.
- Schedule 2, Part 2, section 3 – at the end of the section add: ‘This section does not apply to the Anti-slavery Commissioner who shall serve as a member *ex officio*.’
- Schedule 2, Part 2, section 5(2): replace ‘remove a member from office’ with ‘remove any member from office, with the exception of the Anti-slavery Commissioner’.

Annex 2 – Recommended Amendments to the *Ethical Clothing Trades Extended Responsibility Scheme*

- Replace section 3(1) with:
 - (1) This code is intended:
 - (a) to ensure outworkers in the clothing trades receive their lawful entitlements under the Clothing Trades (State) Award (as published in the NSW Industrial Gazette on 19 October 2001) and under any other industrial instrument enforceable under the Industrial Relations Act 1996, and
 - (b) to promote reasonable steps by firms engaged in the clothing trades in NSW to prevent, address and remedy modern slavery.
- At the end of section 3(2), add:
 - (e) ..., and
 - (f) facilitate efforts to prevent, address and remedy modern slavery in clothing trades supply-chains.
- In section 5, add:

‘**Anti-slavery Commissioner**’ has the same meaning that it has under the *Modern Slavery Act 2018* (NSW)

‘**authorised person**’...

 - (c) the NSW Anti-slavery Commissioner or a person to whom he has delegated relevant functions under section 18 of the *Modern Slavery Act 2018* (NSW).

‘Guidance on Reasonable Steps’ means the NSW Anti-slavery Commissioner’s *Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply-chains*

‘modern slavery’ has the same meaning that it has under the *Modern Slavery Act 2018* (NSW)

- In section 10 (‘Retailer to take reasonable steps to ascertain compliance with code’), add, in section 10(2)(a):
 - (iii) the supplier will not employ or engage any outworker in a manner that constitutes modern slavery;
 - (iv) the supplier will report to the retailer any information that would provide reasonable grounds to suspect an incident of modern slavery affecting a supplier’s, or contractor’s, outworkers
 - (v) the supplier will cooperate with any reasonable steps undertaken by the retailer to address any modern slavery reported or suspected under (iv) above, where such reasonable steps shall be understood through reference to the Anti-slavery Commissioner’s *Guidance on Reasonable Steps* as in force from time to time.
- Add a new section 11A:

11A Retailers must report indicators of forced labour or modern slavery

 - (1) Where a retailer, the CFMEU or the Director-General becomes aware that a relevant person is intending to engage, or has engaged, an outworker in a manner or in conditions that give rise to indicators of forced labour or modern slavery, the retailer must report the matter in writing to the Anti-slavery Commissioner.
 - (2) A retailer will be taken to contravene subclause (1) if the retailer:
 - (a) has information provided under this code; or
 - (b) has knowledge based on previous dealings or commercial arrangements with or through a relevant person; or
 - (c) has information arising from an inspection of premises where work is or has been performed by outworkers,
 that would lead a reasonable person in the position of the retailer to be so aware that the outworkers have been, or will be, employed or engaged in a manner or in conditions that give rise to indicators of forced labour or modern slavery.
 - (3) In assessing information for the purpose of subclause (2), regard shall be had to:
 - a. The International Labour Organisation’s Forced Labour Indicators;
 - b. Any indicators of modern slavery formally published by the Anti-slavery Commissioner.
- In subclause 12(3), change ‘to the Director-General, and to the TCFUA’ to ‘to the Director-General, to the Anti-slavery Commissioner, and to the CFMEU’
- Schedule 2 – in the Undertaking, change the number paragraphs to the following:
 - (1) that the engagement of outworkers by *me/us and by *my/our contractors will be under conditions that are no less favourable than those prescribed under....., the relevant award; and
 - (2) that all addresses where work is performed on the clothing products (whether at a factory or at the residential address of an outworker) will be disclosed to the retailer; and
 - (3) that we will not employ or engage any person, including any outworker, in a manner that constitutes modern slavery;

- (4) that we will report to [the retailer] any information that would provide reasonable grounds to suspect an incident of modern slavery affecting a our or our contractors' employees or outworkers; and
- (5) that we will cooperate with any reasonable steps undertaken by [the retailer] to address any modern slavery reported or suspected under (4) above, where such reasonable steps shall be understood through reference to the Anti-slavery Commissioner's *Guidance on Reasonable Steps* as in force from time to time; and
- (6) that a breach of this undertaking by *me/us and *my/our contractors will be taken to be breach of an essential term of the agreement referred to in Part A of this form, and will be grounds for termination of the agreement.

