

**Submission
No 1**

INQUIRY INTO ETHICAL CLOTHING EXTENDED RESPONSIBILITIES SCHEME 2005 (NSW)

Organisation: New South Wales Council for Civil Liberties (NSWCCL)

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NSWCCL SUBMISSION

NEW SOUTH WALES PARLIAMENTARY MODERN SLAVERY COMMITTEE

REVIEW OF THE ETHICAL CLOTHING EXTENDED RESPONSIBILITIES SCHEME 2005 (NSW)

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Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the New South Wales Parliamentary Modern Slavery Committee (**Committee**) in regards to its review of the Ethical Clothing Extended Responsibilities Scheme 2005 (NSW).

1 Executive Summary

- 1.1 In New South Wales, the Ethical Clothing Trades Extended Responsibility Scheme (the **Scheme**)¹ operates as a mandatory scheme for protecting the entitlements of outworkers in the textile clothing and footwear (**TCF**) industries (**TCF outworkers**).² The term 'outworkers' refer to workers who perform work outside conventional business premises and factories, and instead in their own residential premises.
- 1.2 The NSWCCL submits that the Scheme should be abolished for the following reasons which are explained further throughout this submission:
- (1) **Current non-operationality of Scheme:** while the Scheme may have been effective in the past, the Scheme appears to be currently non-operational. The Scheme itself is difficult to access and there is little to no evidence of it being regulated and enforced beyond the year 2014;
 - (2) **functions of Scheme are already covered by the legislative regime created by the Fair Work Act and employment and workplace safety legislation in Australia (Employment Regime):** there is a great amount of overlap between the Scheme and the Employment Regime. The Employment Regime (primarily by way of the *Fair Work Act 2009 (FW Act)* which include the National Employment Standards (**NES**), the *Textiles, Clothing, Footwear and Associated Industries Award 2020 (TCF Modern Award)* the Ethical Clothing Australia's Code of Practice incorporating Homeworkers (the **ECA Code**) and state and federal workplace health and safety laws) not only covers the same, but a broader range of outworkers and outworker entities than the Scheme does and serves to address the same concerns underlying the Scheme including protection of outworkers in the course of their employment. The obligations placed on outworker entities under the Scheme are largely replicated and imposed under the Employment Regime, most notably the TCF Modern Award, with the exception of express reporting obligations under the Scheme (discussed further below);
 - (3) while the Employment Regime does not create the same explicit reporting obligations that the Scheme does, the NSWCCL submits that the Employment Regime together impose enough checks and balances to achieve the same aims as the explicit reporting processes under the Scheme. This includes:
 - (a) the powers of the Fair Work Ombudsman to investigate and audit compliance of outworker entities with the terms of the TCF Modern Award, which includes hours of work, minimum rates of pay, rest breaks and entitlements. The Fair Work Ombudsman's power to take enforcement action to ensure the correction of instances of non-compliance achieves the same goals of the reporting processes under the Scheme, which is to ensure the lawful entitlements of outworkers; and
 - (b) civil penalties which can be imposed under the FW Act for contraventions of the TCF Modern Award (for example because of findings of non-contravention in proceedings commenced against a TCF outworker entity in the FWC). This imposes an implicit requirement on outworker entities to undertake the due diligences necessary to ensure appropriate workplace

¹ Ethical Clothing Trades Extended Responsibility Scheme (the **Scheme**):
<<https://web.archive.org/web/20050717075918/http://www.industrialrelations.nsw.gov.au/behindthelabel/ethical-clothing+trades+extended+responsibility+scheme.html>> and
<<https://web.archive.org/web/20050717084049/http://www.industrialrelations.nsw.gov.au/resources/ethical-clothing+trades.pdf>>.

² Michael Rawling, 'The Regulation of Outwork and the Federal Takeover of Labour Law' (2007) 20 AJLL 189.

records are kept and reviewed and compliance with the TCF Modern Award and the NES are maintained;

- (4) **functions of the Scheme are already covered by the ECA Code and other modern slavery legislation:** given the widespread support of Ethical Clothing Australia (ECA) as an accreditation body and the ECA Code, we believe that the re-introduction of the Scheme is unnecessary as:
- (a) we note that while the ECA Code is voluntary, the introduction of a mandatory scheme will create complexities with procurement and is likely to face significant pushback from businesses, creating further risks of offshoring. However, we consider that given the protections for TCF outworkers in NSW afforded by the Employment Regime, the introduction of a mandatory scheme although preferable, is not necessary in order to achieve the objectives of the Scheme;
 - (b) The ECA Code offers a form of voluntary accreditation which provides a further level of checks and balances for outworker entities to comply with the TCF Modern Award; and
 - (c) The Criminal Code, Commonwealth Modern Slavery Act, NSW Modern Slavery Act and ECA Code (together the **Modern Slavery Regime**) also provide a comprehensive network of protections for TCF outworkers in NSW, including mandatory reporting requirements and penalties for breach;
- (5) **regulation and enforcement of the Scheme** - there is little recent evidence to indicate the effectiveness of the explicit reporting processes of the Scheme. In contrast, there is more recent evidence of the Employment Regime being regulated and enforced effectively to ensure the lawful entitlements of outworkers; and
- (6) **other advantages** – the abolition of the Scheme will allow the regulation of the TCF outworker industry as an overall to be simplified, funding to be re-allocated including to the relevant entities better suited for and more effective in regulating the TCF outworker industry in the current industry landscape.

2 Introduction

Introduction to the Scheme

- 2.1 The Scheme was first established in 2005 by the NSW state government under NSW state legislation³ in recognition of TCF outworkers being one of the most exploited and vulnerable workforces in Australia. TCF outworkers are particularly vulnerable as they consist of a predominantly female migrant workforce from non-English speaking backgrounds and are often less visible to labour law regulators due to the nature of their work in residential premises.⁴
- 2.2 The Scheme was enacted at a time prior to the referral of state industrial relations powers to the Commonwealth and where the only applicable industrial relation laws that applied to protect TCF outworkers was the now largely superseded Clothing Trades (State) Award (**State Award**).⁵ This is of significant context given the subsequent creation of the extensive federal system of employment under the *Fair Work Act (Cth) (2009)* (Cth) (**FW Act**), which in present day, also governs working conditions and entitlements for a broad range of vulnerable workers, including TCF outworkers. Today, the Scheme and State Award, to the extent it is still applicable to private sector organisations in Australia, operate

³ The Scheme is made under Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW)*.

⁴ Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (Report, 2019) < <https://www.fairwork.gov.au/sites/default/files/migration/965/textile-clothing-footwear-compliance-phase-campaign-report.pdf>>.

⁵ The enactment of the Scheme and State Award were established in reaction to campaigning by the Textile Clothing and Footwear Union of Australia (**TCFUA**) (now the Textile, Clothing and Footwear (**TCF**) Sector of the Manufacturing division of the Construction, Forestry and Maritime Employees Union (**CFMEU**)).

in addition to and not in conflict with the federal system of employment, in recognition of the state's continual role in regulating outworkers.

Non-operationality of the Scheme

- 2.3 As at the time of writing of these submissions, the Scheme appears to have become largely non-operational.⁶ A copy of the Scheme could not be readily located or accessed from online databases,⁷ and there is little to no available evidence to show that the Scheme has been enforced or regulated in the past decade.
- 2.4 The NSWCCCL submits that the non-operationality of the Scheme is likely due to:
- (1) the rise in off-shore manufacturing, which has led to a reduction in the number of TCF outworkers in Australia and thus a shift in regulatory focus away from the exploitation of outworkers within Australia;
 - (2) changes in the political governing landscape since the enactment of the Scheme which has led to a significant reduction in the funding and powers of the Textile Clothing and Footwear Union of Australia (**TCFUA**) (now the Textile, Clothing and Footwear (**TCF**) Sector of the Manufacturing division of the Construction, Forestry and Maritime Employees Union (**CFMEU**)) which previously played a large role in the regulation and enforcement of the Scheme; and
 - (3) the introduction of the Federal-level system of employment, which currently acts as the primary source of regulation for corporate manufacturers and retailers in the TCF industry (which are the majority of large manufacturers and retailers operating in Australia).⁸

3 Arguments for abolishing the Scheme

3.1 In light of the non-operationality of the Scheme, NSWCCCL submits that:

- (1) the Scheme should be abolished given:
 - (a) the Scheme is now mostly redundant as its objectives are now by and large achieved by other legislation and regulations, primarily those under federal systems of legislation;
 - (b) the abolishing of the Scheme will not result in a loss of Federal or state regulatory powers given the Employment Regime and the State Award as well as, to the extent applicable, the *Industrial Relations Act 1996*, all of which will still continue to apply to impose Federal and NSW-specific requirements in the regulation on the TCF industry;

these submissions are set out in **Argument 1: Gap Analysis** below; and

- (c) other existing models of regulating the Scheme have proven to be more effectively regulated and enforced.

this submission is set out in **Argument 2: Regulation and enforcement** below; and

- (2) the abolishing of the Scheme is further advantageous as:

⁶ For example, the Scheme is no longer available kept current and available on any current website. The copy of the Scheme noted in footnote 1 above was obtained through webpage archives.

⁷ The Scheme could only be found by way of web archives, and not from currently live websites. The copy of the Scheme noted in footnote 1 above was obtained through webpage archives.

⁸ For example, 76 manufacturers are currently accredited under the Ethical Clothing Australia's Code of Practice incorporating Homeworkers (which sits within the Federal system of regulation). See Ethical Clothing Australia, 'Find an Ethical Manufacturer' (Web Page) <<https://ethicalclothingaustralia.org.au/find-an-ethical-manufacturer/>>.

- (a) it simplifies the regulatory framework that applies to the TCF industry which in turn enables regulations to be more easily complied with by outworker entities, and understood by outworkers;
- (b) funding previously allocated to the regulation of the Scheme can instead be re-directed and streamlined into the enforcement and regulation of other existing codes and systems which have been demonstrated to have more effectiveness in protecting outworkers; and
- (c) the shift in the nature of the TCF industry to off-shore manufacturing is better dealt with at a federal level as this often involves cross-jurisdictional issues,

these submissions are set out in **Argument 3: Other advantages** below.

4 Argument 1: Gap analysis

4.1 Currently, TCF outworkers are protected under both the federal and NSW state employment systems, namely in the:

- (1) NSW state system through:
 - (a) the *Industrial Relations Act 1996* (NSW) (the **IR Act**);
 - (b) the Clothing Trades (State) Award (NSW) 2021 (the **State Award**); and
 - (c) the Scheme, which acts as a mandatory code for ensuring outworkers receive their lawful entitlements under the State Award and IR Act.

(the **IR Regime**); and

- (2) Commonwealth federal system under:
 - (a) the *Fair Work Act (Cth) (2009)* (Cth) (**FW Act**) which prescribes a set of National Employment Standards (**NES**);
 - (b) the Textile, Clothing, Footwear and Associated Industries Award 2020 (**TCF Modern Award**), being a modern award enacted under the FW Act which prescribes minimum terms of conditions of workers' entitlements and employer obligations; and
 - (c) the Ethical Clothing Australia's Code of Practice incorporating Homeworkers (the **ECA Code**), being a voluntary Code which provides accreditation for businesses complying with the TCF Modern Award.

(the **Employment Regime**).

4.2 The NSWCCCL submits that the Scheme can be abolished as its objectives are now by and large achieved, and more effectively regulated and enforced by:

- (1) Schedule F of the TCF Modern Award;
- (2) the ECA Code, which provides accreditation to entities which are in compliance with the TCF Modern Award; and
- (3) the NES.

(**Proposed Scheme Replacements**, all of which sit within the Employment Regime).

4.3 We consider the Proposed Scheme Replacements will be able to meet the objectives of the Scheme for the following reasons, which will be further elaborated upon in the gap analysis to follow:

- (1) **coverage of outworkers** - the Proposed Scheme Replacements and the IR Regime which will remain after abolishing the Scheme cover the same, if not broader, range of outworkers as the Scheme, such that no coverage of outworkers is lost with the abolition of the Scheme;
- (2) **coverage of outworker entities** - the Proposed Scheme Replacements and the IR Regime which will remain after abolishing the Scheme cover the same, if not broader, range of outworker entities as the Scheme, such that no coverage of outworker entities is lost with the abolition of the Scheme; and
- (3) **entitlements protected** - the same objectives of the Scheme are achieved by the Proposed Scheme Replacements, and the IR Regime which will remain after abolishing the Scheme.

Gap analysis: (1) coverage of 'outworkers'

4.4 The definition of "outworkers" is substantially similar under the Scheme, the FW Act and the IR Act. The abolishing of the Scheme will not leave a gap in terms of outworkers covered by the protections of the Scheme.

4.5 Under the Scheme, "outworkers" are defined as:

"Any person who performs work outside a factory in the trade or manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail (and who is not the occupier of a factory)".⁹

4.6 This is substantially similar to the definition of "outworkers" under the IR Regime (which covers the State Award and the Scheme):

"Any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail. (In such a case, the occupier or trader is taken to be the employer.)"¹⁰

4.7 Under the FW Act, an outworker is defined as:

"(a) an employee who, for the purpose of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises; or

(b) an individual who, for the purpose of a contract for the provision of services, performs work:

(i) in the textile, clothing or footwear industry; and

(ii) at residential premises or at other premises that would not conventionally be regarded as being business premises."¹¹

4.8 The FW Act also provides a definition of "TCF outworker"¹², being an outworker in the textile, clothing or footwear industry.

4.9 At a high level, the FW Act covers national system employees, being employees employed by national system employers.¹³ However, TCF contract outworkers are taken to be employees in certain circumstances such that entitlements under the Fair Work Act apply to them (for example the 12 NES).

⁹ The Scheme, s 5.

¹⁰ *Industrial Relations Act 1996* (NSW) (IR Act) s 1, Schedule 1.

¹¹ *Fair Work Act 2009* (Cth) (FW Act) s 4.

¹² FW Act s 4.

¹³ FW Act s 13 and 14.

- 4.10 Importantly, the definition of an “outworker” under the FW Act:
- (1) covers outworkers who are employees *and* outworkers who perform work other than as an employee (e.g. contractors);¹⁴
 - (2) does not exclude outworkers based on locality, such that outworkers who fall in the definition can be based anywhere in New South Wales, Australia and theoretically, overseas;¹⁵ and
 - (3) is arguably broader than the definition of “outworkers” under the Scheme as “outworkers” are limited under the Scheme to individuals who “*perform work outside a factory in the trade or manufacture of clothing product... for the occupier of a factory or a trader who sells clothing by wholesale or retail*” (our emphasis added), in comparison to the broader category of outworkers covered by the FW Act who are “*in the textile, clothing or footwear industry*”.

Gap analysis: (2) coverage of outworker entities

- 4.11 Currently, the Employment Regime and IR Regime are structured in a way that they operate concurrently and together cover the same outworker entities due to specific terms in the State Award and the TCF Modern Award which allow them to operate together and not in conflict.¹⁶ The ECA Code, which provides accreditation for businesses complying with the TCF Modern Award, also applies to TCF entities covered by both the Employment Regime and the IR Regime.
- 4.12 The abolishing of the Scheme will not leave a gap in terms of types of outworker entities covered, given the coverage of the Employment Regime and the remaining IR Regime.

Coverage of outworker entities under the IR Regime

- 4.13 The IR Act (which the Scheme is made under) generally defines “*employer*” (to the extent it relates to outworkers in the clothing trades) as “*the occupier of a factory or a trader who sells clothing by wholesale or retail*”.¹⁷ The ability of outworkers to claim unpaid remuneration under the State Award extends to all *employers* except a person whose sole business in connection with the clothing industry is sale of clothing by retail.
- 4.14 The State Award¹⁸ also expressly covers an “*employer*” which is a constitutional corporation,¹⁹ such that all outworker conditions in the State Award remain enforceable against corporate employers, in addition to the obligations imposed on employers under the FW Act. The term “employer” under the FW Act has a broad and ordinary meaning.

Coverage of outworker entities under the Scheme (which is part of the IR Regime)

- 4.15 The Scheme’s mandatory obligations specifically, are imposed on:
- (1) retailers, wherever domiciled, who sell clothing products within NSW for products manufactured or altered in Australia, wherever domiciled (**Retailers**);
 - (2) suppliers, wherever domiciled, who enters into an agreement with a retailer for the supply of clothing products within (**Suppliers**); and
 - (3) contractors or sub-contractors engaged by a Supplier (**Contractors**).²⁰

¹⁴ FW Act s 789BB; the Scheme s 5.

¹⁵ Michael Rawling, ‘Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations’ (2014) 27(3) Australian Journal of Labour Law 191.

¹⁶ Michael Rawling, ‘The Regulation of Outwork and the Federal Takeover of Labour Law’ (2007) 20 AJLL 189; IR Act s 129B.

¹⁷ IR Act, Part 11, s 129A and Schedule 1(f).

¹⁸ Relating to the giving out of work, keeping of records, disclosure of information and registration of persons

¹⁹ IR Act s 129B.

²⁰ ECA Code s 5 & 7: see definitions of ‘retail’, ‘suppliers’, ‘contractors’ and ‘subcontractors’.

- 4.16 The broad definitions of Retailers, Suppliers and Contractors under the Scheme means the only limits on the cross-jurisdictional application of the Scheme are that clothing is manufactured in Australia and sold in NSW, otherwise the retailer or the supplier can be domiciled anywhere (including in theory, overseas).²¹

The Employment Regime

- 4.17 The FW Act does not limit its coverage by demarcation of retailers, suppliers and contracts. Rather, it uses broader definition to cover a range of entities who may employ, engage or contract outworkers, including:

- (1) “*national system employers*” as defined under section 14 of the FW Act and includes constitutional corporations which employ national system employees;
- (2) “*outworker entities*”, as defined under section 12 of the FW Act, which covers *constitutional corporations* and other Commonwealth entities, other than in their capacity as national system employers.

For example, if a constitutional corporation engages an outworker as an independent contractor, that outworker will not be considered a national system employee under the FW Act, and that corporation will not be considered a national system employer for the purposes of that outworker. However, that constitutional corporation will be considered an “outworker entity” under section 12 of the FW Act who has engaged a “TCF outworker” as defined under section 4 of the FW Act.

- (3) “*outworker entities*”, in relation to a referring state, is further defined under section 30Q of the FW Act as a person who arranges for work to be performed directly or indirectly for them, in the work that is the kind often performed by outworkers, and one of the following applies:

“(i) at the time the arrangement is made, one or more parties to the arrangement is in a referring State,

(ii) the work is to be performed in a referring State,

(iii) the person in question carries on an activity (whether of a commercial, governmental or other nature) [in NSW]..., and the work is reasonably likely to be performed [in NSW], or

(iv) the person carries on an activity (whether of a commercial, governmental or other nature) in a referring State, and the work is to be performed in connection with that activity.”

- (4) “*Indirectly responsible entity*” as defined under section 17A of the FW Act, and which includes, for example, parties to a chain or a series of 2 or more arrangements for the supply and production of goods produced by TCF work, including work performed indirectly as part of the chain and series.²²
- 4.18 Accordingly, the FW Act and Employment Regime, similarly to the IR Regime, applies to a variety of outworker entities whose outworkers may not necessarily be based in NSW. The definition of “outworker entities” under the FW Act is not limited to the categories of “retailer”, “supplier” and “contractors” (as applies under the Scheme), which means that the FW Act has the ability to offer protection to a broader category of TCF outworkers, than the Scheme provides for.

Gap analysis: (3) Entitlements and obligations

- 4.19 This section sets out what entitlements and obligations are created by the Scheme, what objectives they address, and how those objectives are already met and better enforced under the Proposed Scheme Replacements

²¹ Michael Rawling, ‘Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations’ (2014) 27(3) Australian Journal of Labour Law 191.

²² FW Act s 17A & 789CA(3).

Entitlements and obligations covered by the Scheme

4.20 Under the Scheme:

- (1) Retailers are required to, amongst other things:
 - (a) ascertain from the supplier before entering into an agreement with the supplier whether the services of an outworker will be engaged under a relevant award by the supplier or a contractor of the supplier to perform work in connection with the agreement;
 - (b) report less favourable conditions, that is, if the Retailer wants to engage an outworker on less favourable conditions than under relevant awards and industrial instruments, then they must report it to the TCFUA or the Director-General of the NSW Department of Commerce; and
 - (c) keep records of certain details when entering an agreement with a supplier.
- (2) Suppliers are required to, amongst other things:
 - (a) when showing samples of clothing or offering for sale ready made items of clothing, indicate to the retailer whether any or all of the clothing items will be, or have been manufactured in Australia;²³ and
 - (b) indicate on each invoice for the supply of clothing products to a retailer which of the clothing products supplied have been manufactured in Australia.

Objectives of the Scheme

- 4.21 The obligations under the Scheme aim to ensure that outworkers in a supply chain involving clothing manufactured in Australia, are engaged under conditions that meet the minimum requirements under relevant awards and industrial instruments, and if not, and a retailer wants to engage an outworker on less favourable conditions than under relevant awards and industrial instruments, that this is reported to the TCFUA or Director-General of the NSW Department of Commerce.
- 4.22 Proceedings for contraventions of the Scheme can be commenced by an inspector appointed under the IR Act. An authorised officer of the TCFUA can also commence proceedings on failure of Retailers to respond to a notice to produce records.²⁴ A maximum penalty of up to 100 penalty units (\$11,000) can be prescribed for a contravention of the Scheme.²⁵
- 4.23 What was unclear is whether the TCFUA or the Director-General of the NSW Department of Commerce have any other investigatory or enforcement powers, beyond those noted above, and whether the ability for inspectors to be appointed under the IR Act remains operative. Rather the Scheme is primarily a reporting regime and action was to be taken separately under the existing State Award or industrial relations laws.

Proposed Scheme Replacements

- 4.24 To the extent that the reporting obligations set out at 4.20(1)(b) and 4.21 are intended to protect NSW TCF outworkers from exploitation, the NSWCCCL submits that as a result of the comprehensive protections afforded to NSW TCF outworkers under the Employment Regime, IR Regime and modern slavery regime, the reporting functions of the Scheme are no longer necessary as a means to achieve this end.

²³ Minister Assisting the Minister for Commerce, 'Industrial Relations (Ethical Clothing Trades) Act 2001 — Order Under Section 12 — Ethical Clothing Trades Extended Responsibility Scheme' in New South Wales, *Government Gazette of the State of New South Wales*, No 200, 17 December 2004, 9526, 9534 cl 15(1).

²⁴ the Scheme, s 8 and 20.

²⁵ *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW), s 13.

- 4.25 While the TCF Modern Award does not expressly impose an explicit mechanism of certain reporting obligations the way the Scheme does, the objectives of the reporting obligations under the Scheme (being to ensure TCF outworkers are not exploited) are arguably met by the TCF Modern Award in the following ways:
- (1) sections 10-26 of the Scheme are in effect substantially replicated and imposed by Schedule F of the TCF Modern Award. This includes for example, obligations on Retailers and Suppliers to provide certain documents and details of the arrangements of engaging outworkers;
 - (2) the TCF Modern Award implicitly imposes requirements to undertake due diligences in order to comply with the requirements under the TCF Modern Award;
 - (3) the NES impose requirements to maintain work records;
 - (4) the legal force of the FW Act and TCF Modern Award which can be enforced by regulatory bodies bringing prosecutions and in the case of a breach enable entities to be held liable for civil penalties; and
 - (5) the requirement under the State Award for an employer who is proposing to engage outworkers to apply for registration to the Clothing Trades Industrial Committee further provides checks and balances and oversight of regulation. This includes regulation over an employer who is a constitutional corporation (and is thus a national system employer).²⁶
- 4.26 Overall, the Proposed Scheme Replacements and the IR Regime (to the extent it will remain if the Scheme is abolished), despite not having a reporting requirement such as that found under the Scheme, provide for minimum entitlements and protections to TCF outworkers in NSW which surpass the protections intended to be provided by the Scheme.
- 4.27 The Modern Slavery Regime and ECA Code further described below also provide further mechanisms of regulation and protection for TCF outworker rights.

Interaction between abolition of Scheme and the IR Regime and Employment Regime

- 4.28 For completeness, the NSWCCCL submits that the abolishing of the Scheme will not impact on the structure of the remaining operation of the IR Regime and the Employment Regime.
- 4.29 As noted previously, the Employment Regime and IR Regime are able to operate concurrently and cover the same outworker entities due to specific terms in the State Award and the TCF Modern Award which allow them to operate together and not in conflict.²⁷ The ECA Code, which provides accreditation for businesses complying with the TCF Modern Award, also applies to TCF entities covered by both the Employment Regime and the IR Regime.
- 4.30 While there is currently a specific carve out from the TCF Modern Award which ensures that the TCF Modern Award does not operate (or is intended to operate) to cover the field occupied by the Scheme, or to reduce the scope of the application of the Scheme,²⁸ NSWCCCL submits that in the event the Scheme is abolished, clauses 14.2 and 14.3(b) and (c) of the TCF Modern Award will be rendered non-operational such that Proposed Scheme Replacements can apply fully to cover the field left by the Scheme and perform the functions the Scheme previously performed.

Gap analysis – Modern slavery protections

- 4.31 In addition to protections afforded to TCF outworkers in NSW under the Proposed Scheme Replacements and the IR Regime, there are also relevant protections found under the Modern Slavery Regime (consisting of the Criminal Code, Commonwealth Modern Slavery Act, NSW Modern Slavery Act and ECA Code).

²⁶ IR Act s 129B.

²⁷ Michael Rawling, 'The Regulation of Outwork and the Federal Takeover of Labour Law' (2007) 20 AJLL 189. IR Act s 129B.

²⁸ Textiles, Clothing and Footwear and Associated Industries Award clauses 14.2, 14.3(b) and 14.3(c).

- 4.32 In 2013, the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (the **Amendment Act**) became law in Australia. The aim of the Amendment Act was to protect those who ‘do not consider himself or herself to be free to cease providing or leave the place where they provide labour or services, because of the use of coercion, threat or deception’.²⁹ The legislation amended divisions 270 and 271 of the schedule of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to include the offences of forced labour and forced marriage.³⁰ It expanded existing offences such as deceptive recruiting so the offence applied to all types of labour and services.³¹ The Amendment Act also increased the penalties for debt bondage from 12 months’ imprisonment to four years’ imprisonment to reflect the seriousness of the offence.³²
- 4.33 The Commonwealth and NSW Parliaments have also enacted modern slavery legislation to strengthen corporate and government response towards modern slavery.

Modern Slavery Act 2018 (Cth) (**Commonwealth Modern Slavery Act**)

- (1) In December 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade (**Joint Standing Committee**) published a report titled *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, which examined Australia’s response to modern slavery at the time and compared it with the *Modern Slavery Act 2015* (UK). The Joint Standing Committee recognised that there was room for improvement in relation to Australia’s response to combatting modern slavery and recommended that Australia implement a Modern Slavery Act.
- (2) The Commonwealth Modern Slavery Act, which commenced operation on 1 January 2019, introduced a requirement for Australian companies or foreign entities carrying on business in Australia with a consolidated annual revenue of at least \$100 million to prepare and submit an annual modern slavery statement.
- (3) Companies and other entities that are required to prepare and submit a modern slavery statement must respond to six mandatory criteria.³³ These are:
 - (a) identify the company;
 - (b) describe the structure, operations and supply chains of the reporting company;
 - (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the company owns or controls;
 - (d) describe the actions taken by the company and any entity that the company owns or controls, to assess and address those risks, including due diligence and remediation processes; and
 - (e) describe the process of consultation with any entities that the company owns or controls, or if the statement is a joint statement with another entity, that entity.
- (4) The Commonwealth Modern Slavery Act is likely to undergo a significant period of reform in the coming years. In May 2023, Professor John McMillan’s *Report of the Statutory Review of the Modern Slavery Act 2019* (Cth): *The First Three Years* (**Modern Slavery Act Review Report**) was released. Professor McMillan introduced 30 recommendations, including:

²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2012, 6226 (Nicola Roxon, Attorney-General).

³⁰ Explanatory Memorandum, Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012 (Cth) 20–1.

³¹ *Ibid* 23.

³² *Ibid* 53.

³³ *Modern Slavery Act 2018* (Cth) s 16.

- (a) lowering the reporting threshold to consolidated annual revenue to \$50 million;
- (b) imposing a due diligence obligation on companies;
- (c) introducing the role of the Commonwealth Anti-Slavery Commissioner — this recommendation has already been accepted by the Commonwealth Government (see 5.8(3));
- (d) expanding the mandatory reporting criteria to include:
 - (i) modern slavery incidents or risks identified by the reporting entity during the reporting year;
 - (ii) grievance and complaints mechanisms available to staff and others; and
 - (iii) internal and external consultation undertaken by the reporting entity; and
- (iv) imposing penalties for:
 - (A) failure to provide a modern slavery statement;
 - (B) providing a statement that knowingly includes materially false information;
 - (C) failure to comply with a request by the Minister to take specified remedial action to comply with the reporting requirements of the Commonwealth Modern Slavery Act; and
 - (D) failure to have a due diligence system in place that meets the requirements to be set out in s 25 of the Commonwealth Modern Slavery Act.³⁴

The Attorney General has indicated support for penalties for non-compliance.³⁵

Modern Slavery Act 2018 (NSW) (NSW Modern Slavery Act)

- (1) The NSW Modern Slavery Act commenced on 1 January 2022. It was introduced by the Hon. Paul Green as a private member's bill, which passed before the Commonwealth Modern Slavery Act passed.
- (2) The NSW Modern Slavery Act introduced the role of Anti-slavery Commissioner (**NSW Anti-slavery Commissioner**). This role is further discussed starting at 5.8(4).
- (3) The first iteration of the NSW Modern Slavery Act contained reporting obligations for companies with employees in New South Wales with total turnover of at least \$50 million to report on its modern slavery risks and due diligence processes. However, the act was amended to delete these provisions before the commencement of the act following an inquiry.
- (4) The current NSW Modern Slavery Act is targeted at procurement by the New South Wales public sector. The NSW Modern Slavery Act requires the Anti-slavery Commissioner to regularly consult with the Auditor-General and the NSW

³⁴ John McMillan, *Report of the Statutory Review of the Modern Slavery Act 2019 (Cth): The First Three Years* (Report, 2023) 13 <<https://www.ag.gov.au/sites/default/files/2023-05/Report%20-%20Statutory%20Review%20of%20the%20Modern%20Slavery%20Act%202018.PDF>>.

³⁵ Mark Dreyfus, 'Strengthening support for modern slavery victims and survivors' (Media Release, 27 June 2023) <<https://ministers.ag.gov.au/media-centre/strengthening-support-modern-slavery-victims-and-survivors-27-06-2023>>.

Procurement Board to monitor the effectiveness of due diligence procedures in place to ensure that goods and services procured by government agencies are not the product of modern slavery.³⁶

- (5) Government agencies³⁷, councils, county councils and joint organisations³⁸ are under an obligation to take reasonable steps to ensure that goods and services procured by and for the organisation are not the product of modern slavery. Government Sector Finance agencies, such as the NSW Police Force, are required to report in their annual reporting information a statement of steps to ensure that goods and services procured by the agency in that financial year were not the product of modern slavery.³⁹ The NSW Anti-Slavery Commissioner's Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply Chains (**Guidance on Reasonable Steps**) is aimed at providing NSW public buyers with more information on how they can comply with these obligations.

Voluntary ECA Code

- 4.34 Ethical Clothing Australia's Code of Practice, incorporating Homeworkers (the **ECA Code**), is a pre-existing voluntary mechanism aimed at helping businesses ensure that they and their outsourced supply chains comply with Australian workplace laws.⁴⁰
- 4.35 The Homeworkers Code Committee trading as Ethical Clothing Australia (**ECA**)'s membership includes the Australian Industry Group (**Ai Group**), the NSW Business Chamber (**NSW BC**), accredited businesses Cue Clothing Co, Nobody Denim, Australian Defence Apparel and union representatives from the Textile, Clothing and Footwear (**TCF**) Sector of the Manufacturing Division of the CFMEU.⁴¹
- 4.36 Iterations of the ECA Code have been in operation for more than two decades. The Australian Competition and Consumer Commission (**ACCC**) has authorised versions of the ECA Code since 2000.⁴²
- 4.37 The ECA Code protects workers, including outworkers, by providing an accreditation process which assesses the compliance of workplace laws in the main manufacturing company, as well as any outsourced operations.⁴³ Businesses which are successful in achieving accreditation or the renewal of accreditation can use insignias from the Ethical Certification Trademark series to promote their compliance to purchasers.⁴⁴

³⁶ *Modern Slavery Act 2018* (NSW) s 25.

³⁷ *Public Works and Procurement Act 1912* (NSW) s 176(1A).

³⁸ *Local Government Act 1993* (NSW) s 438ZE.

³⁹ *Modern Slavery Act 2018* (NSW) s 31(1)(b).

⁴⁰ Australian Competition and Consumer Commission, *Application for Revocation of A91354-A91357 and the Substitution of Authorisation AA1000418 Lodged by Homeworker Code Committee Incorporated in respect of the Homeworkers Code of Practice (to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers')* (Authorisation AA1000418, 30 August 2018) i <<https://www.accc.gov.au/system/files/public-registers/documents/AA1000418%20-%20Homeworkers%20Code%20Committee%20Incorporated%20-%20Final%20Determination%20-%2030.08.18%20-%20PR.pdf>>.

⁴¹ Ethical Clothing Australia, '2021–22 Pre-Budget Submission' (2021) 3

<https://treasury.gov.au/sites/default/files/2021-05/171663_ethical_clothing_australia.pdf>.

⁴² Australian Competition and Consumer Commission, *Application for Revocation of A91354-A91357 and the Substitution of Authorisation AA1000418 Lodged by Homeworker Code Committee Incorporated in respect of the Homeworkers Code of Practice (to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers')* (Authorisation AA1000418, 30 August 2018) i <<https://www.accc.gov.au/system/files/public-registers/documents/AA1000418%20-%20Homeworkers%20Code%20Committee%20Incorporated%20-%20Final%20Determination%20-%2030.08.18%20-%20PR.pdf>>.

⁴³ Ethical Clothing Australia, *Accreditation Guidelines for Manufacturers* (March 2023) 4

<https://issuu.com/ethicalclothingaustralia/docs/accreditation_guidelines_fa_march_2023>.

⁴⁴ Ethical Clothing Australia, Submission No 15 to Standing Committee on Social Issues, Parliament of New South Wales, *Inquiry into Procurement Practices of Government Agencies in New South Wales and its Impacts on the Social Development of the People of New South Wales* (19 January 2024) 11

<<https://www.parliament.nsw.gov.au/lcdocs/submissions/83446/0015%20Ethical%20Clothing%20Australia.pdf>>.

- 4.38 The ECA is a not-for-profit entity currently funded by the Victorian Government Department of Jobs, Skills, Industry and Regions, and the Federal Government Department of Industry, Science and Resources.⁴⁵
- 4.39 The introduction of new offences for modern slavery, the Commonwealth Modern Slavery Act, the NSW Modern Slavery Act and the continuous operation of the ECA Code create a comprehensive scheme that adequately addresses the aims of the Scheme.
- 4.40 The Commonwealth Modern Slavery Act puts the onus on businesses and other reporting entities to identify and describe modern slavery risks in their operations and supply chains. If Professor McMillan's recommendations are accepted, in particular, the due diligence obligations on reporting entities, the Commonwealth Modern Slavery Act will improve the national response to modern slavery in relation to business procurement.
- 4.41 Similar to the Scheme, the ECA relies on Compliance Officers from the CFMEU to assess compliance with the TCF Award.
- 4.42 Unlike the Scheme, the ECA Code goes further and puts an emphasis on outsourcing. Instead of relying on an undertaking, Compliance Officers from the CFMEU assesses compliance in all manufacturing locations for the company in Australia. We believe that this is a significant omission from the Scheme.
- 4.43 The ECA has identified non-compliance through its accreditation scheme. For example, in November 2020, the ECA claimed that it identified multiple health and safety, superannuation, and work records breaches, and the underpayment of more than 90 casual employees at one business.⁴⁶
- 4.44 We consider that, like the Cleaning Accountability Framework, the ECA is fit for purpose to achieve an industry-based response to modern slavery and the labour exploitation of workers in New South Wales.

5 Argument 2: Regulation and Enforcement

- 5.1 While there is evidence that the enforcement and regulation of the Scheme has in the past been effective in achieving its goals of regulating TCF supply chains, there is little to no recent commentary, examples of cases or prosecutions or evidence otherwise to demonstrate that it continues to be effectively regulated, or effective, today.
- 5.2 Instead, evidence of more active and recent enforcement and regulation of the Employment Regime suggest that the Employment Regime may be currently better placed and funded to regulate TCF workers and the TCF industry.

Regulation and enforcement of the Scheme

- 5.3 Proceedings for contraventions of the Scheme can be instituted by either an inspector appointed under the Industrial Relations Act, or by an authorised industrial officer of the TCFUA (now CMFEU).⁴⁷ No case law however, could be found in relation to any such proceedings which have been commenced in relation to contraventions of the Scheme.
- 5.4 There are other evidence of the Scheme's effectiveness in capturing crucial information about the location of clothing production workers and ensuring more transparency in the contracting process of the supply chain. Michael Rawlings reports in his 2014 article⁴⁸ these following examples of retailers and regulators enforcing the Scheme:

⁴⁵ Ethical Clothing Australia, 'About Ethical Clothing Australia' (Web Page) <<https://ethicalclothingaustralia.org.au/about/>>.

⁴⁶ Ethical Clothing Australia, Ethical Clothing Australia, '2021–22 Pre-Budget Submission' (2021) 10 <https://treasury.gov.au/sites/default/files/2021-05/171663_ethical_clothing_australia.pdf>.

⁴⁷ the Scheme, s 8.

⁴⁸ Michael Rawlings, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27(3) Australian Journal of Labour Law 191.

- (1) a NSW retailer, with the assistance of a regulator, used knowledge gained by the imposition of retailer obligations to compel other commercial entities to comply with industrial obligations owed to workers in the supply chain;
- (2) a major retailer uncovered that a supplier they were working with was non-compliant with the Scheme and cancelled clothing supply orders from the supplier until the supplier resolved the non-compliance issues;
- (3) regulators followed a cross-jurisdictional supply chain involving a retailer with retail stores in a number of states, a large factory in one state and smaller makers located in a number of other states, to track down sites of clothing production and making a hidden workforce visible. The regulators were able to then secure compliance for most or all of these workforces with pay and conditions standards, work health and safety standards as well as workers compensation legal requirements.⁴⁹

5.5 It is unclear if these forms of regulations and enforcement under the Scheme have continued into present day, given the lack of other information the NSWCCCL has been able to identify to support this. There is also little to no information available which the NSWCCCL could locate regarding the amount of resources and funding currently channelled into the enforcement of the Scheme.

Regulation and enforcement of the Employment Regime

5.6 Under the Employment Regime, entitlements for TCF outworkers are enforced and regulated by and through the following bodies:

- (1) the Fair Work Ombudsman (**FWO**), which is the regulatory body of the FW Act and any modern awards or instruments under it. The FWO's powers involve inquiring and investigating breaches of the FW Act and any modern awards under it, including the TCF Modern Award, and taking appropriate enforcement action to promote and ensure compliance with workplace laws. The FWC's budget estimate for 2023-24 is that it will receive approximately \$269.2 million in total resourcing. It received approximately \$239.2 million in resourcing in 2022-23;⁵⁰
- (2) the Ethical Clothing Australia (**ECA**), which administers the accreditation scheme under the ECA Code for entities complying with the TCF Modern Award. Between 2008 and 2014, Ethical Clothing Australia received an annual grant of \$1 million from the Commonwealth of Australia. Between 2021 and 2024, the ECA has been allocated \$2 million annually from the Labour government to administer the ECA Code. This followed initial government funding of \$1 million in 2008 which ceased 2014;⁵¹
- (3) the TCFUA, now CFMEU's manufacturing division, currently represents workers in the TCF industry, including those in textiles, apparel, clothing accessories, carpet, design, clothing industries.⁵² Between 2008 and 2014, approximately \$400 000 per annum was passed on from the ECA to the TCFUA to undertake compliance work;⁵³

⁴⁹ I Nossar, 'Supply Chain Regulation in the US and Australia: - A Comparative Perspective of the Effectiveness of Regulating OHS' presentation delivered at International Symposium on Regulating OHS for Precarious Workers Deakin University, Melbourne, 17 June 2011, as cited in Michael Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27(3) Australian Journal of Labour Law 191.

⁵⁰ Australian Government Department of Employment and Workplace Relations, *Employment and Workplace Relations 2023-24 Portfolio Budget Statements* (Report, May 2023) 158 <<https://www.dewr.gov.au/about-department/resources/employment-and-workplace-relations-2023-24-portfolio-budget-statements>>.

⁵¹ Australian Government Department of Employment, *Post-implementation Review of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Report, August 2014) <<https://oia.pmc.gov.au/sites/default/files/posts/2015/12/Fair-Work-Amendment-Textile-Clothing-and-Footwear-Industry-Act-2012-PIR.pdf>>.

⁵² CFMEU Manufacturing Division (Web Page) <<https://manufacturing.cfmeu.org.au/>>.

⁵³ [Fair Work Amendment \(Textile, Clothing and Footwear Industry\) Act 2012 PIR \(pmc.gov.au\)](https://www.pmc.gov.au/fair-work-amendment-textile-clothing-and-footwear-industry-act-2012-pir)

- (4) the Fair Work Commission (**FWC**), being the workplace relations tribunal and regulator of modern awards under the Employment Regime. The FWC's budget estimate for 2023-24 is that it will receive a total of \$143.3 million in resourcing, with it receiving approximately \$134.8 million in resourcing in 2022-23;⁵⁴
 - (5) state and federal safety regulators, including SafeWork NSW who can investigate and prosecute breaches of work health and safety laws, which exists to protect the safety of TCF Outworkers whilst at work.
- 5.7 Some examples of the enforcements and regulations of TCF worker entitlements under the Employment Regime are as follows:
- (1) in prosecutions commenced by the TCFUA (now CFMEU) against 2000 Fashion, the employer of two outworkers, the Fair Work Commission found that two outworkers had been underpaid for annual leave, annual leave loading and long service leave, and ordered for these amounts to be paid to the workers;⁵⁵
 - (2) in 2019, the FWO audited 371 businesses as part of an investigation into compliance with the TCF Modern Award. A total \$84,846 was recovered in underpayments as a result of the FWO's investigations, with a finding made that 33% of businesses were non-compliant with record-keeping requirements and lacked a general familiarity with the TCF Modern Award.⁵⁶ In addition, the FWO found that of the 178 non-compliant businesses, 70 were in breach of Schedule F of the TCF Award outworker obligations.⁵⁷
 - (3) following on from the 2019 audit, the FWO commenced an extensive communication campaign about industry-specific rights and obligations targeting all levels of the supply chain.⁵⁸ The FWO also issued 31 Infringement Notices, 107 Formal Cautions, 55 of which were for failure to comply with Scheduled F.⁵⁹ Further four compliance notices totalling \$23,158 were issued.⁶⁰
 - (4) in 2021, the FWC conducted a review of the TCF Modern Award as part of their 4 yearly-review of modern awards. The 4-yearly review of modern awards is a mechanism by which the TCF Modern Award is regularly reviewed (noting that no such equivalent mechanism appears to be available for the Scheme).
- 5.8 Overall, evidence indicates that the Employment Regime is better and more recently regulated and enforced than the Scheme under the IR Regime.

Regulation and enforcement of the Modern Slavery Act

Criminal Code

- (1) Crimes under division 270 and 271 are investigated by the Australian Federal Police (**AFP**). In FY2021-2022, the AFP received 294 reports of alleged human trafficking and slavery offences.⁶¹ The AFP acknowledges that for every victim detected, there are approximately four undetected victims.⁶² There are difficulties in

⁵⁴ Australian Government Department of Employment and Workplace Relations, *Employment and Workplace Relations 2023–24 Portfolio Budget Statements* (Report, May 2023) 158 <<https://www.dewr.gov.au/about-department/resources/employment-and-workplace-relations-2023-24-portfolio-budget-statements>>.

⁵⁵ *Textile, Clothing and Footwear Union of Australia v 2000 Fashion* [2017] FWC 5878 <[https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2017/5878.html?context=1;query=\[2017\]%20FWC%205878;mask_path=>](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2017/5878.html?context=1;query=[2017]%20FWC%205878;mask_path=>).

⁵⁶ Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (Report, 2019) 15 <<https://www.fairwork.gov.au/sites/default/files/migration/965/textile-clothing-footwear-compliance-phase-campaign-report.pdf>>.

⁵⁷ Ibid 15.

⁵⁸ Ibid 16.

⁵⁹ Ibid 16.

⁶⁰ Ibid 16.

⁶¹ Australian Federal Police, *Human Trafficking and Slavery Strategic Plan 2023–2026* (Report, 2023) 3 <<https://www.afp.gov.au/sites/default/files/2023-07/HumanTraffickingandSlaveryStrategicPlan2023-2026.pdf>>.

⁶² Ibid, citing Samantha Lyneham, Christopher Dowling and Samantha Bricknell, Australian Institute of Criminology, 'Estimating the Dark Figure of Human Trafficking and Slavery Victimisation in Australia'

investigating and identifying victims of modern slavery, 'particularly when victims are not aware they are victims according to Australian law'.⁶³

- (2) As identified by the *National Action Plan to Combat Modern Slavery 2020–25 (National Action Plan)*, the most effective way to eliminate modern slavery in Australia and abroad is prevention.⁶⁴ The National Action Plan recognises that a major component to preventing modern slavery is working with businesses to identify, assess and address modern slavery risks in their operations and supply chains, both domestic and international.⁶⁵

Commonwealth Modern Slavery Act

- (3) The Commonwealth Attorney-General monitors compliance of the Commonwealth Modern Slavery Act (previously the Australian Border Force was responsible). On 30 November 2023, the Attorney-General introduced the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 (Anti-Slavery Commissioner Bill)*. The Anti-Slavery Commissioner Bill amends the Commonwealth Modern Slavery Act to introduce the role of the Commonwealth Anti-Slavery Commissioner. The Commissioner's role will include promoting business' compliance with the Commonwealth Modern Slavery Act.⁶⁶ The Commonwealth Anti-Slavery Commissioner will not have powers to investigate or resolve complaints concerning individual or suspected instances of modern slavery.⁶⁷

NSW Modern Slavery Act

- (4) As per the NSW Modern Slavery Act, the NSW Anti-Slavery Commissioner has a range of functions, including:⁶⁸
 - (a) advocating for and promoting action to combat slavery;
 - (b) make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery; and
 - (c) raise community awareness of modern slavery.
- (5) The NSW Anti-Slavery Commissioner has power to develop and publish codes of practices for the purpose of providing guidance in identifying modern slavery taking place within the supply chains of organisations.⁶⁹ These codes can relate to private business as well as public procurement. The first code in development applies to the renewable energy sector. The NSW Anti-Slavery Commissioner can also create public registers that identify non-compliance.⁷⁰
- (6) Notably, the NSW Anti-Slavery Commissioner does not have the power to investigate or deal directly with the complaints or concerns of individuals.⁷¹
- (7) In January 2024, the NSW Anti-Slavery Commissioner released a Guidance on Reasonable Steps. It provides direction for NSW public sector buyers on the actions they could take in ensuring that the products they procure are not the product of modern slavery.

(Statistical Bulletin 16, February 2019) 6 <https://www.aic.gov.au/sites/default/files/2020-05/sb_human_trafficking_050219.pdf>.

⁶³ Australian Federal Police, *Human Trafficking and Slavery Strategic Plan 2023–2026* (2023) 3 <<https://www.afp.gov.au/sites/default/files/2023-07/HumanTraffickingandSlaveryStrategicPlan2023-2026.pdf>>.

⁶⁴ Commonwealth, *National Action Plan to Combat Modern Slavery 2020–25* (2020) 22 <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.

⁶⁵ *Ibid.*

⁶⁶ *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* cl 20C(1)(a).

⁶⁷ *Ibid* cl 20C(2).

⁶⁸ *Modern Slavery Act 2018* (NSW) s 9(1).

⁶⁹ *Ibid* s 27.

⁷⁰ *Ibid* s 26.

⁷¹ *Ibid* s 10(1).

- (8) The Guidance on Reasonable Steps has noted that in relation to NSW public sector modern slavery reporting in the short to medium term, the NSW Anti-Slavery Commissioner will focus in particular on procurement related to:
- (a) information and communication technologies;
 - (b) cleaning services;
 - (c) renewable energy;
 - (d) domestically produced food and agriculture; and
 - (e) construction.

The Commissioner has not proposed the manufacturing of clothes for the public sector as a focus.

The ECA Code

- (9) Signatories to the ECA Code enter into an agreement with the CFMEU (Construction, Maritime and Manufacturing Employees Union), the Ai Group (The Australian Industry Group (Ai Group) is a peak national employer organisation representing traditional, innovative and emerging industry sectors), and the NSW BC (the NSW Business Chamber).⁷² In this way, it promotes collaboration between different participants in the clothes manufacturing sector.⁷³
- (10) Under the ECA Code, the role of the CFMEU includes:⁷⁴
- (a) undertaking compliance audits for accreditation;
 - (b) identifying incidents of non-compliance with the TCF Award and relevant legislation and/or the ECA Code;
 - (c) securing compliance through the promotion of the ECA Code;
 - (d) ensuring compliance with the TCF Award and relevant legislation by businesses that have not been accredited; and
 - (e) ensuring ongoing compliance with the ECA Code by accredited businesses.
- (11) the ECA's role is to 'promote ethical behaviour in the textile, clothing and footwear industry, administer the ECA Code of Practice and assist applicant and accredited businesses'.⁷⁵

5.9 The Criminal Code, Commonwealth Modern Slavery Act, NSW Modern Slavery Act and ECA Code (together the **Modern Slavery Regime**), together with the Proposed Scheme Replacements and the IR Regime, provide a comprehensive network of protections for TCF outworkers in NSW, such that in NSWCCCL's submissions, the Scheme is redundant.

6 Argument 3: Other advantages

6.1 There are strong administrative and funding reasons to support the abolition of the Scheme, being:

⁷² Ethical Clothing Australia, 'Ethical Clothing Australia's Code of Practice, incorporating Homeworkers :Manufacturers Agreement' (Code of Practice) cl 2 <<https://ethicalclothingaustralia.org.au/code-of-practice/>>.

⁷³ Compare to the Cleaning Accountability Framework, which has been established with participants in the cleaning supply chain to ensure ethical labour practices < <https://www.cleaningaccountability.org.au/>>.

⁷⁴ Ethical Clothing Australia, 'Ethical Clothing Australia's Code of Practice, incorporating Homeworkers :Manufacturers Agreement' (Code of Practice) cl 6.

⁷⁵ Ibid cl 7.

- (1) **complexity of maintaining the Scheme:** having to navigate and understand a series of different schemes and awards is a complex process, particularly for TCF outworkers who are often from migrant backgrounds,⁷⁶ and may for example, speak English as a second language and are unfamiliar with Australia's legal systems.⁷⁷ Removal of the scheme will simplify the regulatory framework that applies to the TCF industry which in turn enables regulations to be more easily complied with by outworker entities, and understood by outworkers;
- (2) **changes in the regulatory landscape:** There is support from a range of industry participants including manufacturers, retailers, industry bodies and the CFMEU for the ECA Code.⁷⁸ Currently, 76 manufacturers are ECA accredited confirming their entire supply chains of applicable businesses are adherent to the TCF Award and the association's additional requirements. With the push in government funding, the 2013 figures of accrediting 85 manufacturers representing 495 suppliers crossing factories, contractors and outworkers can be increased.⁷⁹

We consider that there is no need for the NSW government to re-enliven the Scheme.

- (3) **resources are better streamlined and directed elsewhere:** Instead, we recommend that any funding provided to maintain the Scheme could be better used by being directed towards the functions of the FWO, the ECA, or the NSW Anti-Slavery Commissioner who already play important roles in protecting the most vulnerable workers in Australia, including TCF outworkers in NSW.

From an anti-slavery perspective, as noted by the AFP and referred to earlier in this submission at 5.8(2), a significant barrier to detecting instances of modern slavery is lack of awareness. Reaching vulnerable groups is one of the action items in the *National Action Plan to Combat Modern Slavery 2020–25*.⁸⁰ The NSW Anti-Slavery Commissioner currently has, and the proposed Commonwealth Anti-Slavery Commissioner will have, important roles in increasing societal awareness of modern slavery. More funding to organisations such as the ECA can increase the profile of their work and reach workers that are more vulnerable to labour exploitation. Education of retailers and consumers is also critical, to drive demand for Australian, ethically produced, clothing in a market in which cheaper, imported products from jurisdictions with inferior labour protections dominate.

- (4) **change in the TCF industry:** the shift in the nature of the TCF industry to off-shore manufacturing and engagement of workers by large corporations is better dealt with at a federal level as this often involves cross-jurisdictional issues.

7 Others

- 7.1 Although modern slavery exists in Australia, even larger risks exist outside of Australia. Neither the Scheme, nor the ECA Code, directly address modern slavery risks in the inherently global supply chains of the clothing sector. Goods manufactured in Australia will likely use raw materials, such as cotton, which are mainly produced overseas. According to the US Department of Labor, cotton from Argentina, Azerbaijan, Benin, Brazil, Burkina

⁷⁶ 2019 statistics show that the TCF outworker sector comprises of 59.1% of women compared to 28% of women employed in manufacturing. Further, 44% of the labour-force are born overseas, higher than 30.4% found in all industries. Fair Work Ombudsman, *Textile, Clothing and Footwear Compliance Phase Campaign Report* (Report, 2019) 10 <<https://www.fairwork.gov.au/sites/default/files/migration/965/textile-clothing-footwear-compliance-phase-campaign-report.pdf>>.

⁷⁷ Ibid.

⁷⁸ Ethical Clothing Australia, 'Find an Ethical Manufacturer' (Web Page) <<https://ethicalclothingaustralia.org.au/find-an-ethical-manufacturer/>>.

⁷⁹ Australian Government Department of Employment, *Post-implementation Review of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Report, August 2014) 44 <<https://oia.pmc.gov.au/sites/default/files/posts/2015/12/Fair-Work-Amendment-Textile-Clothing-and-Footwear-Industry-Act-2012-PIR.pdf>>.

⁸⁰ Commonwealth, *National Action Plan to Combat Modern Slavery 2020–25* (2020) 22 <<https://www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf>>.

Faso, China, Egypt, India, Kazakhstan, Krygyz Republic, Mali, Pakistan, Tajikistan, Türkiye, Turkmenistan and Zambia are produced by child labour or forced labour.⁸¹

7.2 Due diligence obligations proposed by Dr McMillan in the Modern Slavery Act Review Report will strengthen business' response to address these upstream risks. We believe that this is an area that the proposed role of the Commonwealth Anti-Slavery Commissioner should be able to provide further assistance.

We trust that this submission assists the Committee in its work and would be pleased to offer further assistance if it would be of use.

Yours sincerely,

Tim Roberts
Secretary
NSW Council for Civil Liberties

Contact in relation to this submission: Anne Charlton

⁸¹ US Department of Labor, *2022 List of Goods Produced by Child Labor or Forced Labor* (Report, 28 September 2022) 24–8 <https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPR-List-of-Goods-v3.pdf>.