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‘Let’s be reasonable: What are reasonable steps to tackle modern slavery in supply chains?’

Keynote address: NSW Anti-slavery Forum 21-22 May 2024

Transcription of Dr James Cockayne, NSW Anti-slavery Commissioner, delivered on 22 May in Sydney, NSW

Thank you, Fiona and thank you to all of you for being here today. We had a wonderful day yesterday. I'm really excited by the getting down to the business end of things in some ways today.

I want to thank members of the Modern Slavery Committee who are with us, Norton Rose Fulbright for hosting us in this incredible space. And I want to thank the Gadigal people of the Eora Nation who looked after this country for tens of thousands of years before we all got here.

We heard very movingly yesterday from Uncle Widdy and also from Nathan, who you heard from this morning give the Welcome to Country. And I think we often tend to think that Indigenous slavery issues here are kind of disconnected from this business discussion that we have about modern slavery. But when we think about how First Nations people ended up in situations that would qualify today as modern slavery, it's critical to realise that that was in the context of the insertion of Australian wealth into global financial markets and global supply chains.

Indigenous people were pushed off land so it could be turned over to agriculture, for export into global markets. Indentured labourers were brought here from overseas. 65,000 South Sea Islanders were brought here, kidnapped, trafficked to start the sugar industry. Some of our wealthiest companies in the country, including for example some that are still listed on the ASX, almost 200 years ago today were founded in part with that labour, a forced coerced labour.

So, it's very much alive and well, and that wealth is still part of our political economy here in New South Wales. And I think we need to understand what we're doing here today in that broader global context. It's not just a local or a global conversation. These things in the forced labour context in particular, are very interconnected and it's in that global context that I want to draw your attention to a watershed moment that's expected this Friday when the European Council is expected to pass into law an initiative that's been working its way through the European Commission Parliament and Council for almost five years - the corporate sustainability due diligence directive.

Now if as expected this is enacted, the directive will impose substantive human rights and environmental due diligence obligations on 5,500 of the largest European companies and their global supply chains and their global investees, including Australian exporters and Australian companies. The CS3D, as the law is known, is based on the UN

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guiding principles on business and human rights and the closely aligned OECD guidelines for multinational enterprises on responsible business conduct. And those are both international frameworks to which the Australian government has committed and with which Australia's modern slavery response is nominally aligned.

Now the independent review of the Federal Modern Slavery Act at the federal level led by Professor John McMillan AO reported almost a year ago now. And in that, he recommended the federal government amends that act to clarify that alignment of Australia's approach to modern slavery with those international standards and ensure that corporate anti-slavery reporting in this country is measured against the same substantive due diligence that increasingly markets expect around the world. So the CS3D is in a sense of bellwether of what markets think reasonable steps to manage human rights risks, including modern slavery risks, look like.

Markets today are global, so what happens in other markets and jurisdictions shapes what markets here in Australia think are reasonable and what courts and governments will think are reasonable. Access to the European market will depend on alignment with the CS3D and with a new EU regulation that will also require member states to ban the import or the sale on the European market of goods made with forced labour. And that is a very important trend around the world. In the US, the Tariff Act and the Uyghur Forced Labor Prevention Act have led to hundreds of millions of US dollars worth of goods, notably solar panels and also now textiles and vehicles, being detained at the border on suspicion of having been made with forced labour. Similar forced labour import bans and due diligence arrangements also control access to the markets in Canada, Mexico and various non-EU European countries, and even countries like Thailand have strong ESG arrangements in place on their stock exchange.

In Australia, the Labor Party has indicated that it intends to adopt a forced labour import ban, if re-elected in Canberra next year. But it's not only governments that are taking action to ensure the goods and services are not produced and distributed through forced labour. In France, civil society groups have brought a prosecution of leading fashion houses for complicity in crimes against humanity for using cotton grown in Xinjiang. In the US and Germany, shareholders have brought actions related to forced labour at Apple, Audi, Nike, and Volkswagen amongst other companies. In Hong Kong, the medical equipment manufacturer Top Glove saw its share price fall very significantly when its goods were impounded by US customs on suspicion of being made with forced labour.

So increasingly, these are the signs that should make us stop and think whether perhaps company directors might have a fiduciary duty to undertake due diligence to address modern slavery, just as directors' duties are increasingly understood to encompass action on climate change. And the parallels between action on modern slavery and action for decarbonisation don't end there. Both involve an effort to retool our economies to remove something that is historically being thought of as a negative externality - something we can just leave out of the economic model. Carbon in one case, coercion in the other. And in both cases there's been a slow recognition of the need for collective action to change the resting state of the system of production distribution as a whole. No individual business can solve climate change. No individual business can solve forced labour. But if no one takes responsibility, the problem will simply get worse and worse.

So what's needed is a combination of regulatory and market incentives, encouraging a retooling of business systems. And in New South Wales, we're incredibly lucky that we're ahead of the curve in some respects on removing coercion from our supply chains. In 2021, our state became the first jurisdiction in the world to impose a mandatory substantive modern slavery due diligence obligation on public buyers. The obligation is to take reasonable steps to ensure that goods and services bought by and for an entity are not a product of modern slavery. This obligation and related reporting obligations

now apply to all New South Wales government departments and agencies, all New South Wales local councils, eight state-owned corporations such as Landcom, Sydney Water and the Transport Asset Holding Entity, as well as 10 universities in New South Wales. So overall there are more than 420 entities with these obligations, including the largest employer in the southern hemisphere, and the second largest procurer in the southern hemisphere. Together, their annual procurement is worth more than 45 billion Australian dollars.

Now these reforms have taken some time to work through the system. The obligations kicked in in July 2022, and when I took up my post in August of 2022, I very quickly began receiving questions. Okay, so what steps are reasonable? Is the standard the same for a giant government department like Transport as it is for very little council like Brewarrina? Is the standard the same for goods that seem to have no connection to modern slavery as it is for goods that are strongly suspected of having a component made with forced labour? What's expected of entities when they find modern slavery in their supply chain?

So in short, New South Wales public actors began asking all the questions that many of you in the room have been asking for several years because you've been reporting under the Federal Modern Slavery Act. And increasingly those are the questions that are being asked worldwide. But I would argue that the New South Wales legislative framework gives us a unique opportunity to work together to figure out very practical answers to those questions and in the process to gain quite important significant first mover advantages. First mover advantages in good practice, in data collection, in demonstrating effectiveness, and in turn that might lead to commercial benefits such as reduced capital costs, onshoring of production capability and greater supply resilience in the face of exogenous shocks, like, I don't know, the pandemic for example.

Of course, the endpoint is that they'll also help reduce modern slavery. And that's why we're here today on the second day of the inaugural New South Wales Anti-slavery Forum to come together as a community of purpose, to think about how we can work together to best identify and manage modern slavery risks in operations and supply chains. As I said, given the complexity, no individual agency can do this on its own. No business can do it on its own. What will be required is collaboration along value chains and peer learning.

So the framework we've developed in New South Wales provides us, I would argue, the foundation for that collaboration. And the discussions today aim to help prompt that collaboration and learning. And at the end of the day, as Fiona mentioned earlier, we will celebrate some of the work already being done because that's very important, with the awarding of the second round, yesterday with the first round Commissioner's commendations. We're going to use this waratah symbol as the symbol of those who receive the commendations. We picked the waratah for a reason. It's not, I should say make clear, the official New South Wales government waratah logo, because I am independent of government, as I like to remind the committee and members of government from time to time. But the waratah is obviously a symbol of our state and it's a symbol of the kind of beauty and strength you can have when you're regenerated through fire. Waratahs are regenerated by fire, they're one of those Australian natives like that, and that's an important symbol of how you can come through trauma and still have strength and be a symbol of hope.

So today, I want to share two things with you in the time that remains to me. First, I'm going to share some details with you about our due diligence framework here in New South Wales, how it works and how it's being developed. Second, I'll share some thoughts about how that framework's likely to develop over the next year. But before I spend time on that framework, I want to make sure that we actually have a common

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understanding of what we're talking about in terms of what we're responding to here. What do modern slavery risks look like in our operations and supply chains? I think when many people hear that question, their mind automatically goes to harsh manufacturing or mining conditions overseas. And indeed that's a very important part of the risk we're looking to grapple with here.

We buy a lot of things in New South Wales that are manufactured in that kind of way, whether it's solar panels, computers, vehicles, clothing, food, agricultural products. In some cases, we also buy things that were manufactured perfectly safely, but through the process of distribution were brought here on vessels where there was modern slavery present on those vessels. In fact, some 28 million people worldwide are thought to suffer forced labour offences in the supply chain at some point. But we also mustn't overlook the fact that forced labour and modern slavery occurs in commercial contexts right here in New South Wales.

One of my functions as New South Wales Anti-slavery Commissioner is to provide direct support and assistance to victims of modern slavery when they come forward and ask for that help. I've heard from around 150 people in the 22 months I've been in the role, who exhibit indicators of being victims of modern slavery and we've provided direct support and assistance to 65 of them. I've spoken to more than 50 workers from the Pacific Australia Labour Mobility scheme who appear to have suffered exploitation while working for agricultural companies in regional New South Wales under that scheme and have consequently disengaged from it. And there appear to be at least several hundred of these disengaged workers around Australia, if not a couple of thousand. When they disengage, they become more vulnerable to exploitation and many end up destitute without income, without shelter and lacking access to healthcare because of their visa conditions.

As we explained and talked about at some length yesterday, we heard just last week from colleagues in Griffith that local community service providers have literally run out of tents to provide the hundreds of disengaged migrant workers that are showing up in Griffith and Leeton. Literally run out of tents. And these people cannot access crisis accommodation because they're out of visa status. I've also heard in my role from workers in the cleaning security and hospitality industries who've suffered various forms of modern slavery here in Sydney, in Wollongong, in Newcastle, and in regional centres. Some of them appear to be working for contracts under contract to the New South Wales government. The absence of any licencing scheme for labour hire contractors in New South Wales makes workers in low skill roles and working in isolated conditions, for example, cleaning in an office block overnight after hours, it makes them especially vulnerable to exploitation.

And another key example that the Modern Slavery Committee is currently conducting the inquiry into is the textile clothing and footwear industry. ABS data suggests that there are almost 6,000 textile clothing and footwear workers here in New South Wales, but that probably undercounts quite a large cohort of invisible outworkers working in homes. The largest cohort of those workers are female workers from Asian backgrounds, aged between 55 and 69. And they exhibit a lot of indicators of forced labour. 10% of them appear to earn wages placing them on or below the poverty line. They report vulnerability to coercion and threats and forced overtime. Outworkers suffer three times as many injuries as factory workers. In some cases children appear to assist in the work. We don't have a minimum working age for children in New South Wales. And taken together those kinds of factors point to indicators of forced labour under the ILO's 11 forced labour indicators.

I think those examples of what this problem actually looks like also makes clear how difficult it is to understand what the role of business and government that's buying from

these workers actually is. What obligations do buyers have to look into these complex supply chains? And when they find the risks, what is it for them to do? What is it for the supplier to do? What is it for government to do? So those were all the kinds of questions that I received when I started in the role 22 months ago. As I said, we have the basic building blocks here in New South Wales to figure out practical answers. The law gives me an obligation to assist entities to develop those capabilities and then to monitor the effectiveness of the steps that they take. I often like to say to government entities, I'm like the teacher - yes, I'll mark your homework, but that's with a view to developing your capabilities. We do have a school principal however, that is the New South Wales Auditor General. So where the New South Wales Auditor General has jurisdiction over public entities, he now has the jurisdiction to carry out modern slavery audits. That hasn't been used yet, that power, but it represents a very important signal to public entities of the seriousness with which they need to take these obligations.

So we quickly realised that the challenge here was to come up with a framework that strikes a balance between providing clarity and allowing flexibility. It needed to be a framework that could work for everything from the Department of Transport to the smallest local councils. So in September, 2022, I published a discussion paper and set up an approach and then we formed a big working party with representatives from across government and observers, for example, from the Federal Government, the Australasian Procurement and Construction Council and the ACT. And we produced together a Shared Implementation Framework, which has five elements that you see here - Guidance on Reasonable Steps, model tender and contract clauses, an inherent risk identification tool and a public register. Now the centrepiece of this framework is the guidance that we published just before Christmas. Nice Christmas present for some people's stockings. It was a bit of a stocking stuffer actually because it's about 200 pages long and that's just the first edition.

So the aim there was to provide really detailed practical guidance and examples for entities on what's expected of them, what this actually looks like. And it sets out these seven reasonable steps, the first of which is to commit. So for many entities, this will be the big focus in this first year of implementing the guidance. It involves things that to many of you from a business background will be very familiar - conducting a salient modern slavery risk analysis, engaging with affected stakeholders, putting in place a broad signed off modern slavery policy, and a modern slavery risk management framework.

But I think there are a couple of things that are worth emphasising here. The first is that this is a due diligence framework. It's not a thou shalt not buy framework. If parliaments choose to introduce forced labour import bans that may add that component. But at the moment, entities are permitted to continue to buy goods and services that they believe are risky from a modern slavery perspective, just as they're continued to buy things that they believe represent high financial risk. But when doing so, the expectation is that they put additional safeguards in place to manage down that risk.

So the approach we take in the framework is to encourage integration of modern slavery risk management into existing risk management frameworks, not the creation of a whole new siloed system. So for example, that might mean that when you're buying high modern slavery risk products, you need to get that signed off by a chief risk officer or bring it to the attention of risk audit or compliance committee of the board, for example.

The other key point I'd say here is that what we mean when we talk about modern slavery risk is we do mean risk, not just incidents. I would argue that we've seen in the corporate reporting under the Federal Act that many reporters tend to focus on looking for modern slavery incidents and then they brag about the fact that they haven't found any incidents. That's not the way we're going to achieve effective prevention, we don't

deal with it after the fact. We have to address risk as well as incidents. So there are going to be very few reporting entities that have no exposure to modern slavery risk.

And the final and perhaps critical point is that when we're talking about that risk, we're really talking about risks to people. The risks we're trying to identify and manage and address here are the risks that workers and other affected stakeholders will suffer modern slavery. And that has a particularly important implication, especially when you're dealing with a giant legacy system like the New South Wales Public Procurement Framework. It means that you have to shift your focus as a procurement officer, as a legal officer, as an executive, from the classical notion of risk to the organisation, to risk to people.

It means that in the very limited resources you have to allocate to thinking about this work, you may not be dealing with your highest volume, highest value transactions. You may instead be dealing with something that you're not buying a lot of, like solar panels where there's very serious risk that that product is made with modern slavery. So it's an important but subtle shift in the kaleidoscope of how procurement officers, financial risk, and legal officers understand risk.

And of course that begs the question, well, how can we possibly know in our giant procurement portfolio where the risk is? So we've tried to make this a bit easier for our reporting entities by providing an inherent risk identification tool that's available to the public. And we know that some businesses are already incorporating this into their practice. You can look up their categories in the New South Wales government procurement taxonomy to find out how we at the office of the Anti-slavery Commissioner assess the inherent riskiness of a particular product category. And it covers everything from cleaning services to inmate wages and from construction equipment to uniforms.

Buyers still have to conduct their own supplier level due diligence, indeed their own product level due diligence, but we provide behind these pages, if you click on the hyperlinks on the left where it says risk assessment link to 12, for example, that takes you to a page that gives you a lot more information about how we've made that assessment and what the sources of information that we're relying on, so that you can quickly figure out if generators are high risk, what's actually high risk there are solar panels. If you're buying a diesel generator, while it might not be very good for the environment, from a modern slavery perspective it might be much lower risk than a solar panel.

But of course, risk is only half the story here because what's reasonable for a big department with big capabilities is not going to be the same as what's reasonable for a very small entity. So throughout the guidance we have this matrix embedded. It shows that the level of diligence that's due is a combination of the riskiness of the transaction, that's the y axis and the capability of the organisation, that's the x axis. And we provide guidance in the Guidance on Reasonable Steps to all the public buyers on what level of capability they are, and that's an objective test. By standardising risk analysis in this way, it's going to allow us to start looking at effectiveness at the systemic level as the law actually requires me to.

For example, from the 1st of July, as the result of a change recently approved by the Procurement Leadership group, we will be able to identify from the New South Wales government's contract register where New South Wales government buyers are buying high modern slavery risk products worth \$150,000 or more. And that's going to be really important because it will allow us to see where risk is pooling in the system, and then we will be able to work with those entities to address modern slavery risks specifically in those value chains.

Collaboration is going to be really critical to developing shared tools and collective capabilities. I just wanted to briefly touch on some of the other steps that are required here because I think they're important for our discussions today. First of all, planning. Planning is thinking in particular about sourcing strategy. So say you're buying a product, let's call it cleaning services, and you become aware that that procurement is at high risk of modern slavery. What's reasonable in that situation? Should you stop buying cleaning services? Well probably not, but what if you find that all of the available suppliers at a reasonable price represent significant risk of modern slavery? The Guidance on Reasonable Steps makes clear that one of the things expected of you in that situation is to think about how you approach the market for cleaning services in the first place. And whether a change in business model, in business organisation and management, might help to reduce overall modern slavery risk in the first place.

That's why I wrote recently to several New South Wales government ministers and the schools cleaning review group, encouraging them to consider what steps could be reasonably taken to reduce modern slavery risks for the 7,000 cleaners that clean New South Wales schools, many of whom do exhibit signs of deceptive recruiting, debt bondage, or even forced labour. And one approach here could simply be to change the business model for the supply of these services from reliance on external vendors and labour hire contractors, which as I mentioned, are not licenced in New South Wales, to insourcing cleaning and janitorial services, by making these workers employees of the Department of Education.

So this is a key message under reasonable step two, 'plan'. Where a business model is itself a source of modern slavery risk, you probably need to rethink the business model itself. Moving to sourcing, this is about how you select suppliers and managing is obviously about how you manage the resulting contracts. And in those areas, our framework provides tools again in the form of new model tender and model contract clauses. And we're going to spend quite a bit of time talking about that later today. So I'm not going to use up further time now.

The final reasonable steps relate to remedy reporting and improvement. And that's all about collaboration. That's all going to have to be centrally about developing shared capabilities through these kinds of forums and other learning opportunities. So my office is working very hard to develop additional resources. Now one thing on reporting, and this is particularly for the attention of any of the New South Wales government entities that are in the room. We had hoped to introduce new transaction level reporting arrangements for heightened modern slavery due diligence transactions on the first of July this year. However, consultation with affected parties has made clear that we need more runway to ensure the reporting system is fit for purpose and smoothly integrated with legacy technology systems. And so I'm announcing this week I'll be sending a letter to all affected parties that we're postponing that arrangement for around a year. So probably to the first of July next year, in order to work with everybody to develop appropriate implementation arrangements.

And that brings me to what's going to happen over the next year. Ultimately, the obligation here is to take reasonable steps. So we need to work very hard to listen to all of the affected entities to understand what is reasonable in their current context given their current capabilities. We're putting several arrangements in place to do that. We'll be rolling out new resources on our website. Many of them take in the form of how to guides distilling key aspects of the Guidance on Reasonable Steps, but also including training. We should be releasing the first training module in about two weeks. It's very, very close to finalising that now. So this will be an introduction for the Guidance on Reasonable Steps. It's available for those of you who know it through Comperio. It'll be

available to any entity that can access Comperio and we'll continue to roll out those e-learning training modules in the months ahead.

I'm also going to be developing with members of the New South Wales Procurement Board, a new working group to develop a specific shared implementation plan for New South Wales government entities. So we'll work over the next 12 months to set out a maturity framework that allows New South Wales government entities to identify how far through the implementation of the Guidance on Reasonable Steps they are and commit to reaching certain milestones as a result.

And fourth, we've already embedded in the Guidance on Reasonable Steps, some key signals for covered entities about what they should be prioritising. So in short, three things. Risks to people, reasonable step one – so that's 'commit' – all of that framework around policy and salient risk analysis, and then specific supply chains.

So for this first year, ICT, cleaning and renewables, and that might take a bit of the mystery out of why we've selected certain topics for discussion this afternoon. Next year we'll add a focus on domestic agriculture and the year after that, my office will focus in particular on construction. We're also developing materials that we hope will be useful for the private sector. And I wanted to just draw attention to two in particular. If you follow that QR code, you can find more details of these two codes of practice that we now have underway. Mention has already been made this morning of our new code of practice we're developing with the Clean Energy Council on managing modern slavery risks in renewable energy value chains, and we'll talk some more about that later today.

And we're also announcing, we've just put a discussion paper up on our website, a new potential code of practice looking at investing, lending, and asset management. And a small group of us will be having a conversation about that at lunchtime if I don't continue to talk all the way through lunchtime. So what this all points to, as I've said, is really a need for shared collaboration and shared learning, and I think our conversations here at the Forum and forums in future are going to be a key part of that process. We'll convene this forum every year and we'll also have an online shorter version in roughly November of every year where we can bring in an even larger group.

The discussions I think we have in these forums allow us the potential to work together to make a real difference in the lives of people in New South Wales and beyond, but to do that, I think we need honest discussion. We need to think clearly about the impact we're having. Are we using taxpayers money wisely? Are we using shareholders money wisely? Are we actually achieving the impact and the effect that we're looking for? And that's very much the spirit in which we're going to approach the discussion today with humility and a willingness to learn, and particularly to learn from people with lived experience.

I'm just thrilled that we have a number of people with lived experience amongst us today. But I also acknowledge ahead of time, we could have done better. We tried hard, but we've got a distance to go on including the voices of workers in particular. It's an area that I think we need to focus on for the next forum.

Thank you.