

NSW public procurement and modern slavery

Discussion Paper #001, September 2022

Office of the NSW Anti-slavery Commissioner

Responses to this Discussion Paper are invited until 25 November 2022. Responses will by default be compiled and published through the Anti-slavery Commissioner's website. To make a submission, or to request the opportunity to make a confidential submission, contact antislavery@justice.nsw.gov.au.



Acknowledgement of Country

The Office of NSW Anti-slavery Commissioner acknowledges that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia, and the oldest continuing culture in human history.

We pay respect to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky.

We acknowledge the ongoing stewardship of Aboriginal and Torres Strait Islander peoples, and the important contribution they make to our communities and economies.

We acknowledge the enduring legacies of coerced labour, exploitation and practices today described as modern slavery, on Aboriginal and Torres Strait Islander peoples.

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

Artwork: 'Regeneration' by Josie Rose 2020

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Summary of key issues for discussion

The *Modern Slavery Act 2018* (NSW) ('the Act') and related *Modern Slavery Amendment Act 2021* make significant changes to New South Wales public procurement. They require government agencies and local councils to take "reasonable steps" to ensure that goods and services procured are not the product of modern slavery. They also create new reporting obligations for government agencies, local councils and state owned corporations, and empower the NSW Anti-slavery Commissioner, NSW Procurement Board and Auditor-General to oversee efforts to remove products of modern slavery from NSW public procurement, including assessing the "effectiveness" of the steps taken. These changes are summarised in Annex 1.

These changes to NSW public procurement reflect a broader trend aligning procurement with sustainable development goals. They also reflect Australia and NSW's commitment to the UN Guiding Principles on Business and Human Rights. But they raise new and challenging questions of policy and practice.

With many NSW government entities expected to report at the end of this financial year on the steps they are taking to remove products of modern slavery from their procurement, there is an urgent need for clarification of expectations in several areas, for development of guidance on how the changes will be implemented, and for consultation on templates, training and related needs. Based on the mandate in the *Modern Slavery Act 2018* (NSW), and drawing on best international practice in the public administration of mandatory due diligence obligations to achieve human rights objectives, I aim as Anti-slavery Commissioner to work with stakeholders to develop a clear, shared framework for driving up the effectiveness of modern slavery due diligence in NSW public procurement in the years ahead.

This Discussion Paper surfaces issues that will need to be addressed in developing this framework. For each issue, it makes a proposition and offers a justification. These are summarised in the table overleaf. The Office of the Anti-slavery Commissioner will hold two consultation meetings on this Discussion Paper in October and November. Responses to the Discussion Paper are invited by email to antislavery@justice.nsw.gov.au until 25 November 2022.

Issue	Proposition	Justification
<i>Plan</i>		
'Product of modern slavery'	Any good or service made in whole or in part by modern slavery, at any tier upstream.	International practice, legislative drafting.
Risk identification and prioritisation	Focus on modern slavery risks to people, assessed through ongoing 'salience' analysis. To facilitate this, task the Anti-slavery Commissioner to identify higher risk products, suppliers or supply-chains.	Existing guidance to suppliers on buy.nsw, <i>Cth Guidance to Reporting Entities</i> , international practice.
<i>Source</i>		
Effective due diligence	Procurers should evaluate suppliers based on six areas of their management of modern slavery risks: 1) governance; 2) stakeholder engagement; 3) risk identification and prioritisation; 4) acting on identified risks; 5) monitoring and evaluating effectiveness in addressing risks; 6) providing and enabling remedy. Which steps are "reasonable" in each area will depend on the salience of the risk, the involvement of the procurer in the modern slavery risk, and the capabilities of the supplier.	International practice and lessons learned on 'effectiveness'. NSW procurement and Small Business Commissioner guidance.
Contracting	Contracting should not contribute to modern slavery risks (for example by purchasing at a price that does not permit payment of a living wage). Contracting should create leverage and opportunities for collaboration with suppliers to promote modern slavery prevention, mitigation and remedy – and not only create a basis for termination or suspension. Contracting should create enforceable performance conditions, and not rely only on warranties or certification.	International research and good practice. Availability of collaborative solutions combining contract conditions with effective performance monitoring, such as Electronics Watch.
<i>Manage</i>		
Leverage	NSW public procurers should build and use leverage to address modern slavery risks within procurement relationships. This includes use of both contractual (e.g. Supplier Code of Conduct) and non-contractual mechanisms (e.g. supplier training, active engagement, remediation of business practices, policy engagement). Termination or suspension should be considered only where leverage is unavailable or proves ineffective, and should itself be considered as a source of leverage.	UNGPs. <i>Cth Guidance to Reporting Entities</i> .
Remedy	NSW public procurers should provide or enable effective remedy if they contribute or are linked to modern slavery in their supply-chains. This could include supporting engagement with judicial and non-judicial grievance mechanisms, including the Office of the Anti-slavery Commissioner and the hotline mandated by the <i>Modern Slavery Act 2018 (NSW)</i> , and the Australian National Contact Point for Responsible Business Conduct . In some cases procurers may wish to consider collective enabling of remedy, including through cooperation with commercial peers and civil society organisations.	UNGPs. <i>Cth Guidance to Reporting Entities</i> . OECD MNE Guidelines on Responsible Business Conduct.
<i>Cooperate</i>		
Cooperation amongst procurers	NSW public procurers should work with the Anti-slavery Commissioner to explore benefits of cooperation in each phase of procurement (Plan, Source, Manage), for example through joint risk analysis, a shared supplier questionnaire infrastructure, common contract performance conditions, shared performance monitoring and active engagement capacity.	Lessons learned from other jurisdictions, eg Swedish county councils.

1. Background

In a joint statement in September 2018, the governments of Australia, Canada, New Zealand, United Kingdom and United States committed to “[a]nalyze, develop, and implement measures to identify, prevent and reduce the risk of human trafficking in government procurement supply chains.” “Additionally”, the statement continued

governments can: provide tools and incentives and adopt risk assessment policies and procedures that require their procurement officers and contractors to assess the nature and extent of potential exposure to human trafficking in their supply chains; and take targeted action, including adopting appropriate due diligence processes, to identify, prevent, mitigate, remedy, and account for how they address human trafficking.¹

Government procurement is an important lever through which states can discharge their duty to protect human rights and influence how business meets its responsibility to respect human rights – including the prohibition on slavery.² These expectations are captured in the UN Guiding Principles on Business and Human Rights (‘UNGPs’)³ – with which Australia’s *Modern Slavery Act 2018* (Cth) and *National Action Plan to Combat Modern Slavery 2020-25* align⁴ – as well as other relevant international guidance such as that from the OECD.⁵

The effort to align public procurement processes with anti-slavery objectives reflects a broader trend aligning procurement with sustainable development goals (e.g. SDG 12.7).⁶ But it also raises new and challenging questions of policy and practice. For example, ‘social’ procurement has traditionally focused on achieving positive outcomes for people within the state in which procurement occurs.⁷ Victims of modern slavery may be located in workplaces of suppliers operating overseas, making it more difficult for those involved in procurement to identify and address risks, and to measure the impacts of procurement decisions and changes in practice. How can products of modern slavery be removed from public procurement?

2. The NSW context

These questions are live ones in New South Wales, which has an annual public procurement spend in the order of AUD 35 to 40 billion. The *Modern Slavery Act 2018* (NSW) (‘the Act’) and related *Modern Slavery Amendment Act 2021* make significant changes to New South Wales public procurement, requiring government agencies and local councils to take “reasonable steps” to ensure that goods and services procured are not the product of modern slavery.

The changes also create various reporting obligations for government agencies, local councils and state owned corporations, and empower the NSW Anti-slavery Commissioner, NSW Procurement Board and Auditor-General to play various oversight roles. This includes responsibilities for assessing the “effectiveness” of the

steps taken to remove modern slavery products from procurement, as well as advisory and reporting roles. These changes are summarised in Annex 1.

All of these changes have now taken legal effect. Affected entities are in many cases expected to report at the end of the current financial year (2023). There is consequently an urgent need for clarification of expectations in several areas, for development of guidance on how the changes detailed above will be implemented, and for consultation on templates, training and related needs.

Based on the mandate in the *Modern Slavery Act 2018* (NSW), and drawing on insights into leading international practice in the public administration of mandatory due diligence obligations to achieve human rights objectives,⁸ I aim as Anti-slavery Commissioner to work with stakeholders to identify:

- a pathway for clarification of expectations around “reasonable steps” and “effectiveness” in due diligence;
- a timeline of practical steps to address modern slavery risks in NSW public procurement;
- education, training, advisory and other resource needs of procurers, suppliers other affected stakeholders;
- arrangements for stakeholders, including workers, to raise complaints and grievances about compliance;
- modalities for cooperation between relevant stakeholders, both in New South Wales and beyond, to address concerns and ensure effective remedy; and
- processes for mandated monitoring, evaluation and reporting on effectiveness.

The aim here is to work with affected stakeholders to develop a framework for driving up the effectiveness of modern slavery due diligence in NSW public procurement in the years ahead. This Discussion Paper is intended to surface a range of issues that will need to be addressed in order to ensure NSW public procurement is free of products of modern slavery.

3. Issues and propositions for discussion

This section identifies seven issues for discussion, grouping them according to the three phases of procurement in the [NSW Government Procurement Policy Framework](#) – Plan, Source, Manage – and in a final section entitled ‘Cooperate’. For each issue identified, the Discussion Paper provides a proposition – an initial suggestion offered as a basis for discussion – and a tentative justification for that proposition. Affected NSW government agencies, suppliers and the general public are invited to consider these issues, propositions and justifications and to respond by 25 November 2022. Details of how to respond are provided in section 5.

3.1 Plan

3.1.1 What is a ‘product of modern slavery’?

Issue: If any upstream component of a good or service – no matter how small – is made through modern slavery, is the downstream good or service automatically considered a ‘product of modern slavery’ under the *Modern Slavery Act 2018* (NSW)? Is there some content threshold below which a downstream good or service should not be considered a ‘product of modern slavery’? How many tiers back in the supply-chain are NSW public procurers expected to look for modern slavery?

Proposition: *A good or service is a ‘product of modern slavery’ if produced in whole or in part through modern slavery (as defined in the *Modern Slavery Act 2018* (NSW)). Modern slavery at any point in the supply-chain renders any downstream good or service, at any subsequent tier, a product of modern slavery.*

Justification: Emerging international practice – for example under the US *Tariff Act 1930*, US *Uyghur Forced Labor Prevention Act*, and proposed EU *Regulation on prohibiting products made with forced labour on the Union market* – takes this approach. Any non-zero content threshold would be arbitrary and difficult to police. It is unclear whether any content threshold should be assessed on volume, value-add, labour input cost or some other basis. And changes to the *Government Sector Audit Act 1983* (see s 38G(3)) make clear that for relevant NSW government agencies, due diligence obligations include not only examination of primary (i.e. Tier 1 suppliers), but also taking reasonable steps to ensure that primary suppliers are responsible for implementing processes to eliminate or minimise modern slavery risks further up the supply-chain.

3.1.2 Risk identification and prioritisation

How should NSW public procurers identify and prioritise risk? Should they focus due diligence efforts first on specific products, suppliers, commodities or industries? Or according to spend?

Proposition: *Risks should be prioritised based on the modern slavery risk to people – not risks to the procuring entity or how easily the organisation can address risks. This should be assessed through a ‘salience’ analysis – identifying where there is risk of the most severe modern slavery impacts on people, in the organisation’s procurement activities and relationships. Such an analysis should consider the gravity of the potential harm, its scope (how widespread it is) and its remediability. Salient risk analysis should be performed on an ongoing basis to take new and emerging risks into account, and where possible published. Salient risk analysis could be facilitated by tasking the NSW Anti-slavery Commissioner to identify higher risk products, commodities, sectors, suppliers and/or sourcing regions (or using a tiered risk analysis). This analysis could draw on existing resources such as the US Department of Labor’s [List of Goods Produced by Child Labor or Forced Labor](#). The Anti-slavery Commissioner could offer alerts to NSW government agencies and local councils, and/or publish a modern slavery risk list as part of the electronic register mandated by the *Modern Slavery Act 2018* (NSW). Inclusion in this list could trigger heightened due diligence obligations (discussed further below).*

Justification: The *Modern Slavery Act 2018* (NSW), *Modern Slavery Act 2018* (Cth) and Commonwealth *National Action Plan to Combat Modern Slavery 2020-25* all align with the UN Guiding Principles on Business and Human Rights (UNGPs). The Commonwealth Government’s *Guidance for Reporting Entities* under the *Modern Slavery Act 2018* (Cth) is explicit that engagement with suppliers should be “risk based” and that in this context “modern slavery risks need to be understood in terms of ‘risk to people’ rather than risk to your entity or to a supplier.”⁹

‘Salience’ is the established approach under the UNGPs for assessing human rights risks and prioritising engagement and response.¹⁰ The expectation that NSW government entities should prioritise risks that are the most “significant and most severe” has been clear in relevant [guidance available through buy.nsw](#) since mid-2022. NSW government agencies nonetheless face practical challenges sourcing and evaluating modern slavery risk information from a diverse array of risk information providers, and from a wide array of suppliers. There are likely to be both efficiency and effectiveness benefits from a joint approach to risk identification, and from partnering with the Anti-slavery Commissioner to establish clear expectations about what due diligence steps are “reasonable” in different circumstances.

3.2 Source

3.2.1 Effective due diligence

Issue: What indicators of effective due diligence and modern slavery risk management should NSW public procurers look for when evaluating suppliers? Does this depend on the risk in question and/or the capabilities of the supplier?

Proposition: *Procurers should evaluate suppliers based on six areas of their management of modern slavery risks: 1) governance; 2) stakeholder engagement; 3) risk identification and prioritisation; 4) acting on identified risks; 5) monitoring and evaluating effectiveness in addressing risks; 6) providing and enabling remedy. (See Annex 2.) Which steps are “reasonable” in each area will depend on the salience of the modern slavery risk, the involvement of the supplier in the modern slavery risk, and the supplier’s capabilities.*

Justification: The legislation requires ongoing assessment of the effectiveness of due diligence by NSW public procurers. In order for due diligence to be effective, procurers must base procurement decisions on suppliers’ own adoption of effective due diligence and modern slavery risk management practices. International practice offers insights into what has proven effective in achieving desired outcomes, going beyond mere ‘output’ indicators such as the adoption of a ‘modern slavery policy’. (See Annex 2.) How these steps manifest, and thus what is “reasonable” to expect of a given supplier will depend on the salience of risk involved, on the involvement of the supplier in the modern slavery risk (see further section 3.3.1), and on the capabilities of the supplier (including size).¹¹ Where procurers are purchasing goods or services from a known high-risk supply-chain, heightened due diligence may be reasonable.

3.2.2 Contracting

Issue: What contracting arrangements are “reasonable steps” to remove products of modern slavery from NSW public procurement?

Proposition: *NSW public procurers should both: 1) ensure that contracting arrangements do not contribute to modern slavery risks, for example by purchasing goods or services at a price that does not allow payment of a living wage; and 2) use contracting arrangements to set the foundation for use of leverage to ensure suppliers can identify, mitigate and remedy modern slavery risks. Leverage is the ability to effect change in the wrongful practices of another party that are causing or contributing to modern slavery risk. Where possible contracting should create enforceable performance conditions, and not rely only on warranties or certification. Contracting should create leverage and opportunities for collaboration with suppliers to promote modern slavery prevention and mitigation, and remedy where modern slavery occurs – and not only creating a basis for termination or suspension.*

Justification: Recent international research highlights how contracting arrangements can contribute to modern slavery risks.¹² Good practice in social procurement and human rights due diligence is moving away from certification and audit based models, on the basis that they often fail effectively to address risks to people, especially those relating to modern slavery.¹³ A performance-based contracting model, such as that developed by the American Bar Association, may provide a foundation for buyer-supplier collaboration to address modern slavery risks, and assist procurers in measuring and reporting effectiveness (understood as progress towards prevention, mitigation and remedy of modern slavery risks).¹⁴

NSW public procurers, working with the Anti-slavery Commissioner, will need to consider how supplier performance can be reliably assessed given: 1) limited resources; 2) transnational supply-chains; and 3) the reality that modern slavery often occurs in contexts where state and commercial monitoring infrastructure is weak. Groups such as Electronics Watch, which works with public procurers to address modern slavery and other risks in global ICT supply-chains, provide a solution based on the use of a network of approved worker-monitors to conduct due diligence on an ongoing basis during contract performance.¹⁵ Electronics Watch provides model contract conditions that obligate supplier cooperation with these monitors and remedy of breaches of labour rights and safety standards.

3.3 Manage

3.3.1 Leverage

Issue: What “reasonable steps” are required of procurers to act on identified risks during contract management?

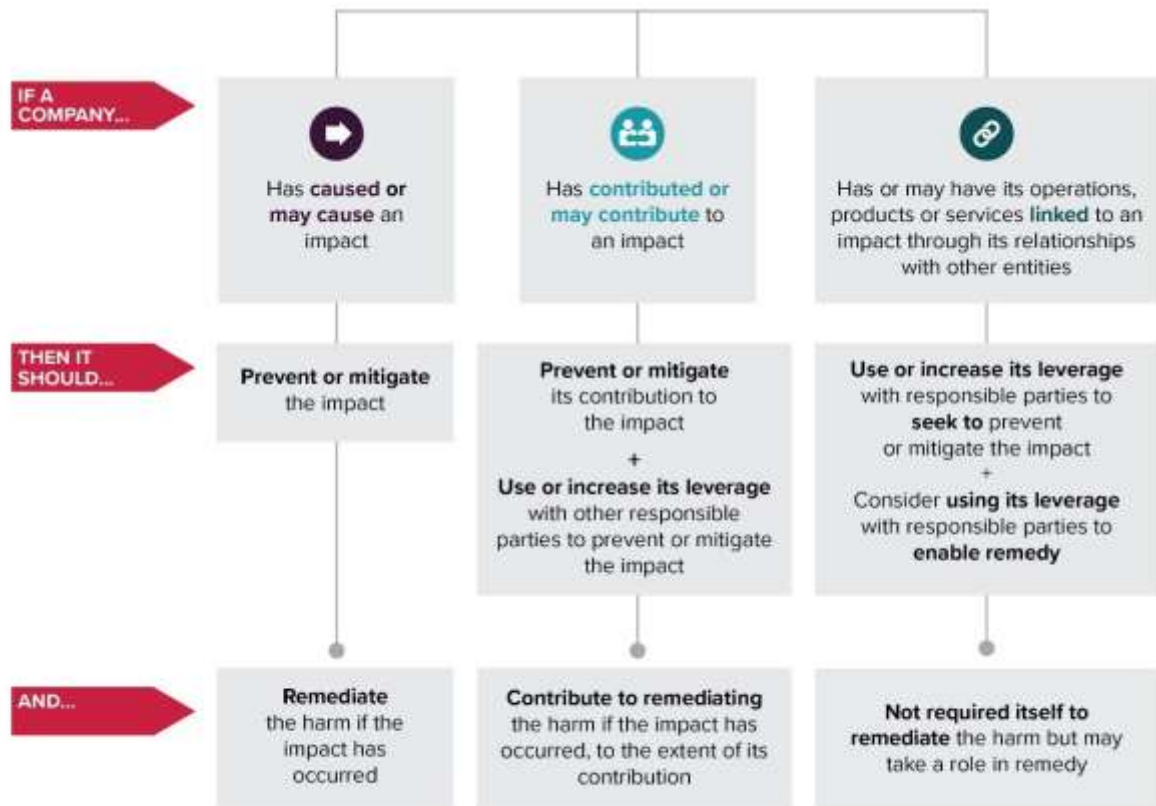
Proposition: *NSW public procurers should build and use leverage to address modern slavery risks within procurement relationships. Leverage should seek to change outcomes for affected stakeholders through constructive engagement with those parts of the supplier that can influence outcomes. This includes use of both contractual (e.g. Supplier Code of Conduct) and non-contractual mechanisms, to include supplier training, active engagement and remediation of business practices – as well as, where needed, peer collaboration and policy engagement. Leverage should be used to address salient modern slavery risks and should be proportionate to those risks. Termination or disengagement should be considered only where leverage is unavailable or proves ineffective, and should itself be considered as a source of leverage.*

Justification: The proposition is based on a decade of practice in the implementation of the UNGPs, with which Australia and NSW’s modern slavery efforts and legislation align. The concept of leverage has been extensively developed and applied by commercial, governmental and international organisations worldwide.¹⁶ Commonwealth government guidance to reporting entities (which now include NSW state owned corporations¹⁷) mandates consideration of leverage in addressing modern slavery risks in supply-chains.¹⁸ Procurers may wish to consider how existing mechanisms, such as Supplier Codes of Conduct, could be adapted to create additional leverage.¹⁹

Assessing which steps are “reasonable” through reference to available leverage ensures that procuring entities are incentivised to do what they can to achieve the legislature’s intended social outcome (reduced modern slavery in supply-chains), not what is easy. At the same time, it ensures that what is “reasonable” is determined with reference to the procuring entity’s actual situation and influence within procurement relationships, not an abstract standard. What is “reasonable” in terms of leverage building and use will depend in part on how a procurer is involved with modern slavery risks, as Figure 1, below, shows; and also on the capacity of the procurer.

Termination should not be the first use of leverage, but rather the last – where constructive engagement proves ineffective. Potential termination (or suspension) can however provide a source of leverage that can be used effectively during contract management to induce changes in supplier practice to address modern slavery risks, including in the provision or enabling of remedy.

Figure 1. How involvement with modern slavery risks affects mitigation and remediation expectations under the UN Guiding Principles on Business and Human Rights



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3.3.2 Remedy

Issue: What “reasonable steps” are required of procurers to remedy instances of modern slavery in supply-chains when they are identified?

Proposition: NSW public procurers should provide or enable effective remedy if they contribute or are linked to modern slavery in their supply-chains.²⁰ This could include supporting engagement with judicial and non-judicial grievance mechanisms, including the Office of the Anti-slavery Commissioner and the hotline mandated by the Modern Slavery Act 2018 (NSW) and the [Australian National Contact Point for Responsible Business Conduct](#). In some cases procurers may wish to consider collective enabling of remedy.

Justification: The proposition is based on a decade of practice in the implementation of the UNGPs, with which Australia and NSW’s modern slavery efforts and legislation align. Commonwealth government guidance to reporting entities (which now include NSW state owned corporations²¹) mandates consideration of remedy obligations in addressing modern slavery risks in supply-chains.²² The UNGPs mandate cooperation with both judicial and, in certain cases, non-judicial grievance mechanisms. Procurers should promote awareness of

available grievance mechanisms in New South Wales, including the Australian National Contact Point for Responsible Business Conduct, based in the Commonwealth Department of Treasury. The NSW Anti-slavery Commissioner is also empowered to receive information about modern slavery offences and concerns, and could provide another non-judicial grievance mechanism or a referral pathway to such mechanisms. Procurers may wish to work with the Anti-slavery Commissioner to consider whether or how the hotline mandated by the *Modern Slavery Act 2018* (NSW) could support such a function. And in some cases, procurers may wish to consider collective enabling of remedy, through cooperative action amongst themselves or with relevant private sector peers and civil society organisations. There is a growing corpus of such initiatives, such as collaboration by public, private and non-profit actors to secure compensation for workers subjected to excessive recruitment fees and other abuses in the Thai ICT sector and Malaysian rubber glove manufacturing.²³

3.4 Cooperate

Issue: How can NSW public procurers cooperate to more effectively address modern slavery risks in procurement?

Proposition: *NSW public procurers should work with the Anti-slavery Commissioner (ASC) to explore benefits of cooperation in each phase of procurement, such as:*

Plan:

- *Whole of government or multi-procurer contracting with a commercial risk information provider*
- *Joint risk analysis of shared supply-chains*
- *Tasking the ASC to identify higher (or tiered) risk products, suppliers or regions*

Source:

- *Joint supplier questionnaires and/or a shared questionnaire response database*
- *Common model contract performance conditions*

Manage:

- *Shared performance monitoring capacity for higher risk/spend supply-chains*
- *Shared active engagement, supplier training and other collective leverage capacity*
- *Shared grievance mechanisms or remedy initiatives, potentially together with private sector actors*

Justification: The supply chain for NSW government agencies extends to hundreds of thousands of suppliers. A significant proportion of these businesses supply multiple government agencies. In aggregate, agencies made payments of \$104.7 billion to more than 127,000 suppliers in financial years 2019, 2020 and 2021.

Around 38,000 of these suppliers provide goods and services to more than one government agency, receiving payments of \$87.6 billion. There are likely to be both efficiency and effectiveness gains from a collaborative approach amongst NSW public procurers to engagement with these suppliers on modern slavery issues.

Since 2010, Sweden’s County Councils have collaborated in efforts to promote respect for human rights in their supply-chains, including through use of a common supplier code of conduct, common supplier questionnaires and joint factory audits. Since 2012 this collaboration has had a formal national structure, with a coordinator, steering committee, expert group and a dedicated contact point in each county council. That structure has developed a shared risk analysis and allocated limited resources accordingly.²⁴ Studies have found this approach to be effective in reducing labour risks in those supply-chains.²⁵

4. Implementation timeline

Affected entities are required to report on activities during FY 2023. This imposes some urgency on the development of guidance offering clarity on what constitutes “reasonable steps” and how affected entities should implement their modern slavery risk related obligations. At the same time, it is important to allow stakeholders an opportunity to comment on and shape the framework for implementation of these obligations. This will help ensure both buy-in and effectiveness. It will also allow better identification of the resourcing, training, materials and other needs of those impacted by these changes in the NSW public procurement system. This can then inform planning by the Anti-slavery Commissioner’s office to support affected entities and drive up the effectiveness of due diligence in the coming years. With those different needs in mind, I propose to work with affected stakeholders on the timeline detailed below.

19 September 2022	Discussion Paper released. Response period opens. Consultancy RFQ for research and advisory support to ASC.
Mid-October 2022	Consultant appointed, commences comparative study on anti-slavery/human rights reforms of public procurement.
October-November 2022	ASC-organised consultations on the Discussion Paper with affected entities, suppliers and other stakeholders.
25 November 2022	Response period closes.
Dec 2022 – March 2023	ASC works with NSW procurement stakeholders to develop formal guidance, resources and materials.
January 2023	Consultant study on comparative lessons learned.
April – June 2023	Training of affected entities and suppliers.

5. Invitation to respond

Responses to this Discussion Paper are invited until 25 November 2022. Responses will by default be compiled and published through the Anti-slavery Commissioner's website. Confidential submissions may be accepted upon request to the Anti-slavery Commissioner.

To submit a response, or to learn more about the consultation meetings to be held in October-November 2022, contact antislavery@justice.nsw.gov.au.

Dr James Cockayne
Anti-slavery Commissioner
September 2022

Annex 1 - Anti-slavery changes in the NSW public procurement system

Procurement Board

Modern slavery Objective: amendment of the Objectives of the NSW Procurement Board to include ensuring “that goods and services procured by and for government agencies are not the product of modern slavery” (the ‘modern slavery Objective’) (*Public Works and Procurement Act 1912* s 171(b1))

Directions and Policies on ‘reasonable steps’: empowering the Procurement Board to issue directions or policies to government agencies regarding “reasonable steps” to achieve the modern slavery Objective (see *Public Works and Procurement Act 1912* s 175(3)(a1)).

Consultation with ASC: The Board must regularly consult with the NSW Anti-slavery Commissioner about the form and content of directions that should be issued during the year and take into account any recommendations of the Commissioner. (*Public Works and Procurement Act 1912* s 175(4))

Agencies, departments and statutory bodies

Reasonable steps: obliging government agencies to take “reasonable steps” to ensure that goods and services procured by and for the agency are not the product of modern slavery (*Public Works and Procurement Act 1912* s 176(1A))

Reporting obligations: obliging government Departments and statutory bodies to include in their annual report statements of: 1) the action taken in relation to any issue raised by the Anti-slavery Commissioner during the financial year then ended concerning the operations of the entity and identified by the Commissioner as being a significant issue; and 2) steps taken to ensure that goods and services procured by and for the entity during the financial year then ended were not the product of modern slavery. (*Annual Reports (Departments) Regulation 2015* cl 6(b1) and 6(b2), *Annual Reports (Statutory Bodies) Regulation 2015* cl 8(b1) and 8(b2)).

Local councils

Reasonable steps: From 1 July 2022, obliging councils to take reasonable steps to ensure that goods and services procured by and for the council are not the product of modern slavery (*Local Government Act 1993* s 438ZE)

Reporting obligation: From 1 July 2022, obliging councils to include, in their annual reports, a statement of steps taken to ensure that goods and services procured by and for the council during the year were not the product of modern slavery (*Local Government Act 1993* s 428)

State owned corporations

Cth reporting: Obliging NSW state owned corporations that are not “reporting entities” under the *Modern Slavery Act 2018* (Cth) to make voluntary modern slavery statements under that Act (*Modern Slavery Act 2018* (NSW) s 25A)

Disclosure: Obliging all NSW state owned corporations to publish their modern slavery statements on a public website and give the Commissioner written notice that the statement has been published (*Modern Slavery Act 2018* (NSW) s 25B)

NSW Anti-slavery Commissioner

Public register: Keep a public, freely-available electronic register that: 1) identifies any government agency failing to comply with directions of the NSW Procurement Board relating to reasonable steps to achieve the modern slavery Objective; 2) identifies any state owned corporation not reporting under the *Modern Slavery Act 2018* (Cth); and 3) includes other information that the Commissioner thinks appropriate, or information required by the regulations. (*Modern Slavery Act 2018* (NSW) s 26(1))

Codes of practice: Develop, and make publicly available, codes of practice for the purpose of providing guidance in identifying modern slavery taking place within the supply chains of organisations and steps that can be taken to remediate or monitor identified risks (*Modern Slavery Act 2018* (NSW) s 27)

Awareness and advice: Promote public awareness of and provide advice on steps that can be taken by organisations to remediate or monitor risks of modern slavery taking place in their supply chains, including encouraging organisations to develop their capacity to avoid such risks (*Modern Slavery Act 2018* (NSW) s 28)

Consultation: To “regularly consult” with the Auditor-General and the NSW 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 (*Modern Slavery Act 2018* s 25)

Reporting to Parliament: Report annually to Parliament on various matters, including “an evaluation of the response of relevant government agencies to the recommendations of the Commissioner” (*Modern Slavery Act 2018* s 19(2)(c))

NSW Auditor-General

Risk-based modern slavery audits: Creation of a power of the Auditor-General to, when the Auditor-General considers it appropriate to do so, conduct a risk-based audit of all or any particular activities of a government agency to determine whether the government agency is ensuring that goods and services procured by and for the agency are not the product of modern slavery. Such a modern slavery audit is to consider whether the government agency has exercised due diligence in relation to procurement of goods and services, and in certain cases, complied with the directions of the NSW Procurement Board. In assessing the exercise of due diligence, due diligence “includes taking reasonable steps (whether by way of contractual terms or otherwise) to ensure the primary supplier of goods and services is responsible for implementing processes to eliminate or minimise the risk of the goods or services supplied being products of modern slavery”. The Auditor-General is to advise the Anti-slavery Commissioner as to the result of any such audit, and may recommend identification of the agency in the Anti-slavery Commissioner’s electronic register. (*Public Finance and Audit Act 1983* Division 2B)

Annex 2 – Good practice in modern slavery due diligence

Since the adoption of the UN Guiding Principles on Business and Human Rights in 2011, a rich body of due diligence practice has emerged worldwide. This has allowed the identification of recurring features of good practice in human rights due diligence, which is directly applicable to modern slavery due diligence including under the NSW Modern Slavery Act 2018 (NSW). Both in their own due diligence efforts, and in evaluating suppliers, procurers can assess modern slavery risk management efforts in six areas. In each area, which steps are “reasonable” will depend on the salience of the risks involved, the involvement of the organisation with those risks, and the capabilities of the organisation. How these areas translate into operational guidance for NSW public procurers is to be determined, through consultations in months ahead.

Governance

The organisation’s most senior governing body discusses progress and challenges in addressing the organisation’s modern slavery risks, supported by appropriate expertise, informed by the perspective of affected stakeholders and with knowledge of leading practice.

The organisation’s most senior governing body reviews the organisation’s business model and strategy, and any proposed changes to them, to ensure any inherent modern slavery risks are identified and addressed.

The organisation’s most senior governing body formally approves high-level targets for addressing salient modern slavery risks and evaluating the organisation’s progress in that regard. The organisation’s most senior governing body ensures that organisation leadership is accountable for addressing the organisation’s salient modern slavery issues, including through performance incentives where those are used for other aspects of performance.

Stakeholder engagement

The organisation identifies which stakeholders in which settings are likely to be the most vulnerable to modern slavery impacts in connection with its operations and value chain and seeks insight into their perspectives. The organisation has structures or processes to hear and respond to the perspectives of affected stakeholders and/or their legitimate representatives, including at senior levels, whose use is not limited to the organisation’s own needs or transactions.

The organisation’s decisions and actions with regard to identifying, assessing and prioritising risks, and tracking how effectively it addresses them, are informed by the perspectives of affected stakeholders and/or their legitimate representatives. The organisation engages with affected stakeholders and/or their legitimate representatives to identify whether they are aware of and trust existing structures or processes as a way to raise concerns or grievances and have them addressed.

Risk identification and prioritisation

The organisation’s processes for identifying modern slavery risks: a) Encompass its operations and business relationships throughout its value chain; b) Include impacts the organisation may cause, contribute or be linked to; c) Include risks inherent in its business model and strategy; d) Go beyond identifying impacts that the organisation considers it can control or impacts that could lead to liability for harms; e) Draw on a variety of well-informed sources to identify relevant risks; f) Are iterative and responsive to changes in the risk environment.

The organisation’s prioritisation of its salient modern slavery risks: a) Is determined by the severity of the potential impacts on people, not by risk to the business; b) Is not determined by where the organisation has leverage or what it considers easiest to address; c) Is updated in light of new or emerging risks.

Where the organisation focuses its initial assessment of risks on certain parts of the business, these are selected based on the severity and likelihood of the risks to people, and the organisation progressively expands its focus into other parts of the business. Where the organisation has a broader risk management system, the organisation ensures that its salient modern slavery risks are appropriately reflected in that system

Acting on identified risks

The organisation's main activities to prevent or mitigate modern slavery risks: a) Are focused on outcomes for affected stakeholders; b) Directly relate to the organisation's salient modern slavery risks and are proportionate to them; c) Directly engage those parts of the business whose actions or omissions can influence outcomes for affected stakeholders; d) Include measures to address any contribution of the organisation's own activities to its salient risks.

The organisation takes deliberate steps to build leverage to influence others where its existing leverage is insufficient to prevent or mitigate risks, including considering the role of disengagement as a form of leverage. The organisation identifies where collective leverage with others is needed, and collaborates with relevant stakeholders, peer companies and/or experts to advance outcomes for affected stakeholders through processes that demonstrably align with international human rights standards.

Monitoring and evaluating effectiveness in addressing risks

The organisation sets both high-level and operational targets that are: a) Articulated in terms of the intended outcomes for affected stakeholders; b) Relevant to addressing the organisation's salient modern slavery risks as well as specific, measurable, achievable and timebound; c) Developed with input from internal or external subject-matter experts and, wherever possible, from affected stakeholders and/or their legitimate representatives.

The organisation monitors and evaluates progress towards the targets based on a set of indicators that together: a) Are used to evaluate progress towards the targets; b) Enable analysis of the reasons for progress or setbacks; c) Factor in feedback from affected stakeholders and/or their legitimate representatives.

The organisation discloses progress towards at least its high-level targets, including explanations of any setbacks and resulting changes in strategy.

Providing and enabling remedy

The organisation engages constructively when there are allegations of modern slavery impacts in its operations or value chain to understand the issues being raised and the perspectives of affected stakeholders. When providing remedy for impacts it has caused or contributed to, the organisation goes beyond measures to prevent the impact recurring to consider what other forms of remedy can best address the harms to affected stakeholders, taking into account their perspectives.

The organisation evaluates its actions to provide remedy for their effectiveness in delivering outcomes that are satisfactory to affected stakeholders. The organisation uses its leverage to support the development and implementation of effective grievance mechanisms in its value chain that are capable of providing remedy to affected stakeholders.

The organisation draws on information from its own grievance mechanisms to inform the early identification and mitigation of risks to people and to continuously improve its due diligence processes.

Source: Based on Shift, "*Signals of Seriousness*" for Human Rights Due Diligence (New York: February 2021).

Notes

¹ Principle 1 of *Principles to guide Government action to combat human trafficking in global supply chains*, Joint Statement of the Governments of Australia, Canada, New Zealand, United Kingdom and United States, 24 September 2018, available at <https://www.foreignminister.gov.au/minister/marise-payne/media-release/principles-guide-government-action-combat-human-trafficking-global-supply-chains>.

² See generally International Learning Lab on Public Procurement and Human Rights, at <https://www.humanrightsprocurementlab.org/>; Robert Stumberg, Anita Ramasastry and Meg Roggensack, 'Turning a Blind Eye? Respecting Human Rights in Government Purchasing', ICAR, 2014; Claire Methven O'Brien, Amol Mehra, Marta Andrecka and Nicole Vander Meulen, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions', International Learning Lab on Public Procurement, 2016, p. 20, <http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurementand-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf>; Olga Martín-Ortega, "Public Procurement as a Tool for the Protection and Promotion of Human Rights: a Study of Collaboration, Due Diligence and Leverage in the Electronics Industry", in *Business and Human Rights Journal*, vol. 3, iss. 1 (2018), pp. 75-95; Claire Methven O'Brien and Olga Martín-Ortega, "Human rights and public procurement of goods and services", in Surya Deva and David Birchall, eds, *Research Handbook on Human Rights and Business* (Elgar: Cheltenham, 2020), pp. 245-267.

³ See especially UNGPs 4-6. The authoritative commentary on the UNGPs from the UN Office of the High Commissioner for Human Rights says that states "should promote respect for human rights by business enterprises with which they conduct commercial transactions" and this includes through public procurement (UNGP 6 Commentary). UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, UN Doc. HR/PUB/11/4, January 2012, p. 8.

⁴ See Parliament of the Commonwealth of Australia, *Modern Slavery Bill 2018. Explanatory Memorandum*, pp. 19, 38; and see Commonwealth of Australia, *The National Action Plan to Combat Modern Slavery 2020-25* (Canberra, 2020), p. 39.

⁵ OECD, *Responsible Business Conduct in Government Procurement Practices* (Paris: 2017).

⁶ See e.g. Australian Government, *Sustainable Procurement Guide*, Department of Agriculture, Water and the Environment (Canberra: November 2021), at <https://www.awe.gov.au/environment/protection/waste/publications/sustainable-procurement-guide>. And see International Organization for Standardization, *Sustainable Procurement – Guidance* (ISO 20400:2017), 2017.

⁷ See Christopher McCrudden, *Buying Social Justice. Equality, Government Procurement and Legal Change* (Oxford: Oxford University Press, 2007); Martín-Ortega, "Public Procurement as a Tool", op. cit..

⁸ Shift and UN Office of the High Commissioner for Human Rights, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision* (New York: October 2021).

⁹ Australian Border Force, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (Canberra, 2019), p. 84.

¹⁰ See UN Guiding Principles Reporting Framework, *Salient Human Rights Issues*, available at <https://www.ungpreporting.org/resources/salient-human-rights-issues/>.

¹¹ On leverage, see UN OHCHR, *Guiding Principles*, op. cit., pp. 19-22. On the relevance of supplier size to expectations under the NSW legislation, see further NSW Small Business Commissioner, *Modern Slavery: Information for small business* (n.d.).

¹² See e.g. Re:Structure Lab. *Forced Labour Evidence Brief: Commercial Contracts and Sourcing* (Sheffield: Sheffield, Stanford, and Yale Universities, 2021).

¹³ Re:Structure Lab. *Forced Labour Evidence Brief: Social Auditing and Ethical Certification* (Vancouver: Stanford, Simon Fraser and Yale Universities, 2022).

¹⁴ American Bar Association, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*. See the materials at https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/.

¹⁵ See Olga Martín-Ortega, "Public Procurement as a Tool", op. cit.; see also Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 *Business and Human Rights Journal* 198.

¹⁶ For an introduction see UN OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (New York and Geneva, 2012). See also Shift, *Using Leverage in Business Relationships to Reduce Human Rights Risks* (New York, November 2013).

¹⁷ See *Modern Slavery Act 2018* (NSW) s 25A.

¹⁸ See Australian Border Force, *Guidance for Reporting Entities*, op. cit., pp. 51, 84.

¹⁹ For an innovative approach see Export Development Canada, *EDC's Principles on Leverage and Remedy*, April 2021, available at <https://www.edc.ca/content/dam/edc/en/corporate/corporate-social-responsibility/environment-people/principles-leverage-remedy.pdf>.

²⁰ UN OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse*, UN Doc. A/HRC/32/19, 10 May 2016; and see BSR, *Access to Remedy* (August 2021); Ethical Trading Initiative, *Access to remedy: Practical guidance for companies* (London: 2019); Martina Trusgnach and Olga

Martín-Ortega, *Remedy for Human Rights Violations in Global Supply Chains: Essential Elements*. BHRE Research Series, Policy Paper n.7, July 2022.

²¹ See *Modern Slavery Act 2018* (NSW) s 25A.

²² See Australian Border Force, *Guidance for Reporting Entities*, op. cit., pp. 10, 10, 46, 87.

²³ Electronics Watch, *Cal-Comp: A Lesson in the Importance of Worker Driven Monitoring to End Forced Labour in Global Supply Chains*, February 2020; BHRRC, *Malaysia: Top Glove to refund recruitment fees to migrant workers*, available at <https://www.business-humanrights.org/en/latest-news/malaysia-top-glove-to-refund-recruitment-fees-to-migrant-workers/>.

²⁴ See Pauline Göthberg, "Public Procurement and Human Rights in the Healthcare Sector: The Swedish County Councils' Collaborative Model", in Olga Martín-Ortega and Claire Methven O'Brien, eds., *Public Procurement and Human Rights: Opportunities, Risks, and Dilemmas for the State as Buyer* (Cheltenham: Elgar, 2019).

²⁵ Swedwatch and British Medical Association, *Healthier Procurement: Improvements for Working Conditions for Surgical Instrument Manufacture in Pakistan*, Report no. 73 (2015); Electronics Watch, *Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation* (2016).