Office of the NSW Anti-slavery Commissioner

OFFICIAL

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Dear Ms Cass-Gottlieb

Anti-slavery collaborations and Australian competition law

I am writing by way of follow up to my earlier letter to you dated 26 July 2024 (our reference: D24/2041367), laying out my concerns about the ACCC's draft Guide, *Sustainability collaborations and Australian competition law: A guide for business* ('draft Guide').

I greatly appreciated our conversation on 16 August 2024. During that conversation, you and your colleagues kindly invited me to solicit and collate examples, from Australian business and charities, of ongoing anti-slavery collaborations.

I apologise that this has taken a little longer than anticipated. I am however pleased to now be able to write with information about 23 ongoing – and additional contemplated – anti-slavery collaborations involving Australian organisations

subject to competition law. These collaborations encompass more than 2,000 organisations across 11 market sectors. I trust that the ACCC will consider this information as it works to revise and strengthen the draft Guide.

As we discussed when we spoke, the draft Guide as previously published has created some anxiety for certain organisations about the lawfulness of anti-slavery collaborations in which they are already involved. Consequently, as we agreed, I have solicited the information provided to me on the basis that it would be anonymised before being shared with the ACCC, as a way to assure those who shared information that it would not become the basis for unanticipated enforcement action.

The information below is structured in three parts. First, I share information relating to 23 ongoing anti-slavery collaborations involving Australian organisations that were identified to me. Second, I focus on a specific real-life example that was shared with me, which illustrates succinctly why it may be necessary in some cases for organisations to share commercially sensitive information and collaborate to tackle modern slavery – and why requiring a case-by-case approval from the ACCC appears likely to prove problematic. Third, I share information about areas in which organisations have told me they *wish* to collaborate, to meet anti-slavery obligations, but fear they will not be able to, absent ACCC authorisation – or a class exemption.

Existing collaborations

Since we last spoke, I have worked with a wide array of business, civil society and industry organisations to identify ongoing anti-slavery collaborations and their key features. Table 1, below, summarises information regarding 23 collaborations.

These collaborations involve competing organisations within 11 distinct market sectors: automotive, charities, complex manufacturing, finance and investment (6 separate collaborations), medical, primary industry (5), professional services, property and construction (3), travel and hospitality, universities and utilities (2). On average these collaborations were started around 3 and a half years ago. This suggests that many have come into being as a result of – or at least since – the coming into force of the *Modern Slavery Act 2018* (Cth), and related signals from government that anti-slavery collaboration is desirable. All of these collaborations involve competing organisations, most of them facilitated by a non-profit organisation or neutral third-party for-purpose commercial entity. The collaborations vary in size from fewer than 10 organisations (3 collaborations) to 10-100 organisations (15 collaborations), to more than 100 organisations (5 collaborations).

In nearly all of these collaborations, participating entities share information about modern slavery risks in their sector and supply-chains. Many collaborations keep this information at a high level. This often involves discussion of new, emerging and geographic-specific modern slavery risks; hearing from guest speakers on how to

address these risks; and development of joint guidance for member implementation. The draft Guide seems to suggest that this kind of conduct would fall under 'low risk sustainability collaborations' under the draft guidance.

Most of the collaborations have specific safeguards in place to address concerns regarding potential anti-competitive behaviour. These typically include a reminder of competition law obligations at the beginning of meetings, provision of more detailed written guidance to participants, and in some cases specific measures to ensure commercially sensitive information is not shared amongst competitors. In some cases, concerns about sharing commercially sensitive risk information were further addressed in part through the creation of an independent third-party mechanism or scheme. This independent body generally conducts risk analysis on pooled information from members, which is then shared back in aggregated or deidentified form with members; undertakes monitoring of suppliers; and conducts or coordinates outreach to suppliers on behalf of participating buyers.

In other collaborations, however, information about modern slavery risks and incidents *is* shared directly amongst competing buyers, to allow them to better identify and manage their own risks. As noted below, this might include agreement to purchase (or refrain from purchasing) from particular suppliers or classes of suppliers or sharing of commercially sensitive information, including information about prices.

These latter types of collaborations overseas have achieved significant anti-slavery results:

- UK higher education sector buyers collaborated to induce a Taiwan-based electronics supplier, present in their commercial supply-chains, to alter its student employment practices;
- Buyer collaboration induced a semiconductor manufacturer to reimburse illegal wage deductions and assist with the regularisation of workers; and
- Buyer collaboration led to suppliers reaching multi-million dollar settlements with workers to remedy forced labour and related abuses.

Table 1 also identifies collaborations that seek to set standards to be applied to suppliers. In some cases, suppliers' achievement of this standard is certified. In a small number of cases, buyers agree to give preference to suppliers that meet this standard or exclude suppliers that do not, from business dealings.

In other cases, information about supplier anti-slavery efforts and performance is shared. It is then used by competing buyers, working together, to create and use leverage over suppliers (as required by the UN Guiding Principles on Business and Human Rights ('UNGPs') and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ('OECD Guidelines'), to induce them to remedy actual harms and mitigate and prevent future harms.

Table 1: 23 anti-slavery collaborations involving Australian organisations

Sector	Duration (years)	Number of organisations involved	Does this include competing organisations?	Information sharing and/or supply-chain mapping	Shared Supplier Questionnaire or Platform	Joint risk analysis	Joint training	Joint monitoring	Standard setting for suppliers (production, audit, etc.)	Supplier/business partner engagement	Certification	Supplier exclusion	Competition safeguards
Automotive	3	6	Yes	Yes	Yes	Yes							Yes
Charities	3	11	Yes	Yes	Yes	Yes							Yes
Complex manufacturing	5	1514	Yes	Yes		Yes		Yes				Yes	
Finance and investment	4	7	Yes	Yes	Yes	Yes				Yes			Yes
Finance and investment	4	53	Yes	Yes		Yes		Yes		Yes			Yes
Finance and investment	2	Hundreds	Yes						Yes	Yes		Yes	
Finance and investment	3	Dozens	Yes	Yes		Yes	Yes					No	Yes
Finance and investment	3	20	Yes	Yes		Yes	Yes	Yes		Yes		Yes	
Finance and investment	3	>250	Yes	Yes		Yes				Yes			Yes
Medical	3	138	Yes	Yes		Yes	Yes						
Primary industry	10	59	Yes	Yes				Yes	Yes	Yes			Yes

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Primary industry	3	Hundreds	Yes	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	
Primary industry	5	33	Yes	Yes									Yes
Primary industry	2	11	Yes	Yes		Yes		Yes					
Primary industry	<1	10	Yes	Yes		Yes	Yes		Yes	Yes			
Professional services	2	50	Yes	Yes			Yes						Yes
Property and construction	6	19	Yes	Yes									Yes
Property and construction	2	45	Yes	Yes	Yes	Yes							Yes
Property and construction	4	22	Yes	Yes		Yes		Yes	Yes		Yes		Yes
Travel and hospitality	<1	4	Yes	Yes									
Universities	3	41	Yes	Yes	Yes	Yes	Yes	Yes		Yes			Yes
Utilities	2	11	Yes	Yes	Yes	Yes				Yes			Yes
Utilities	3	15	Yes	Yes	Yes	Yes							Yes

When competition law produces unfair competition

One organisation we were in touch with provided a real-life example that succinctly illustrates why many organisations see sharing of commercially sensitive information as necessary to fight modern slavery and comply with the UNGPs and OECD Guidelines. This example also makes clear how the prohibition on sharing such information can lead to perverse outcomes from a fair competition perspective.

> *An Australian company (Company A) found credible evidence of a link to modern slavery in their supply chain. The supplier's factory was shown to be sourcing raw materials from Xinjiang province in China. They also found strong evidence of forced and bonded labour of workers in the factories. The volume sourced from the factory was a substantial part of Company A's supply. This meant they could not easily or quickly cease sourcing from the factory. They were seeking ways to take action to remediate the situation.*
>
> *Company A was aware that an Australian competitor (Company B) also sourced a substantial volume from the same factory. Due to the circumstances [Ed.: including the difficulty of conducting effective supply-chain audits in Xinjiang], it was unlikely Company B had or would also uncover what Company A had uncovered. Being aware of the policies and practices of Company B, the staff of Company A were certain that Company B would also wish to take action if they knew about the sourcing of Xinjiang commodities and the factory's ties to forced labour.*
>
> *[Ed.: Sharing this information would almost certainly have required Company A to share commercially sensitive information with Company B.]*
>
> *Company A and B's combined volumes would have likely amounted to a significant majority (possibly 90%+) of the volume produced by the factory. Staff of Company A were of the belief that if the two Australian companies were to work together, they would be able to remediate the forced labour situation and assure the factory owners of their continued viability should they change their practices. [Ed.: typically, such collaborative remediation also includes the potential for coordinated termination of contracts, unless or until the factory remediates deficient labour practices.]*
>
> *Company A personnel were however instructed not to discuss the situation with Company B. Company A had [internal legal] advice that Australian Competition law prevented sharing information to inform Company B (as they were a competitor) or collaborate on remediation, to address what was a clear modern slavery risk.*
>
> *Company A was unable to remediate the situation satisfactorily through acting alone and, in line with prevailing guidance and their obligations under the UN*

Guiding Principles, ceased their commercial relationship with that factory. Company B is still unaware of what is happening in the factory with raw products and forced labour.

Clearly, the result here defeats not one but two stated public policy objectives of the Australian Government – fighting modern slavery *and* ensuring fair market competition:

- Company A and Company B might have been able to exercise collective leverage (as that term is understood in the UNGPs and OECD Guidance) and successfully induce the factory to alter its business practices in a manner that reduced the incidence of modern slavery at an absolute level. Because they understood that they could not discuss the situation with Company B, Company A was not able to achieve or even pursue this objective. Modern slavery continued.

- Company A was in effect penalised by meeting its anti-slavery obligations. It was forced, at significant cost, to find a new supplier. Company B, in contrast, has continued procuring goods that appear to be at higher risk of modern slavery, and has not incurred these costs. Company B has enjoyed a competitive advantage over Company A, because Company A has complied with both competition law and its anti-slavery obligations. Company B is, in effect, enjoying a subsidy as a result of its non-compliance with its anti-slavery obligations (and the absence of effective enforcement of those obligations).

Clearly, over-emphasis on the need not to collude in such circumstances risks creating perverse incentives that defeat the Australian consumer's interest in not buying goods made with forced labour, and the broader objective of fair market competition.

This example also helps to make clear how problematic it would be for a company (here, Company A) to have to apply for authorisation from the ACCC in order to discuss its concerns with Company B and seek to exercise collective leverage. This is likely to take at least six months, during which time Company A would be knowingly purchasing goods likely made with forced labour – while it awaited a response from the ACCC. If it were to cease purchasing from the factory, while the ACCC considered the application for an authorisation, Company A would have lost its leverage over the factory. And if it stays, with knowledge of the ongoing modern slavery risks, it could be considered, under the UNGPs, to have 'contributed' to ongoing salient modern slavery risks. As the 2018 case of *EC & IDI v ANZ* in the Australian OECD National Contact Point makes clear, such cases can lead to organisations facing multi-million dollar payouts.

Contemplated collaborations

In this final section, I discuss the many ways in which the organisations we engaged with told us they would like, in future, to be able to collaborate to fight modern slavery. Some of these collaborations have been under active exploration, but in many cases that exploration has been paused as a result of the publication of the ACCC draft Guide.

Collaborative supply-chain mapping and supplier engagement

Numerous business we engaged with stressed that while modern slavery risks are often at the deepest recesses of the supply-chain, where work is most likely to be performed informally and workers are most vulnerable to exploitation, it is not commercially viable or systemically efficient for each buyer to unilaterally map their entire supply-chain. It is not efficient for each buyer to separately engage shared suppliers, and to provide different directives to suppliers about what is required to mitigate and address modern slavery risks. Only through collaboration amongst buyers (including competing buyers) and suppliers, we were told, can such supply-chain mapping to identify modern slavery risks, and remediation of those risks, be efficiently and effectively carried out.

Yet, we were told, this almost certainly requires sharing of commercially sensitive supplier-related information, such as supplier location, volume of spend and even contractual terms. In some cases, buyers will agree to share the results of supplier audits, in order to develop a joint corrective action plan. We were told by numerous buyers that they are reluctant to pursue such opportunities after the publication of the draft Guide, and risk falling behind international competitors who are better able to map and manage supply-chain risks, and have a clear legal basis for doing so.

Industry standards and supplier exclusion

Several of the collaborations mentioned above were contemplating moving towards the creation of voluntary standards for suppliers. These initiatives would see suppliers that do not meet these standards being excluded from selling to these buyers. In some cases, these efforts have been paused after the release of the draft Guide, due to concern whether this will violate Australian competition law.

A good example is the consideration by some businesses of adoption of the Employer Pays principle, a long-accepted global ethical recruitment norm, though somewhat new to the Australian market. Collaborations based on multiple buyers agreeing to adopt and implement the Employer Pays principle seek to reduce the risks of debt bondage and deceptive recruiting (both modern slavery offenses under Australian law), by creating an industry standard by which buyers would voluntarily refrain from sourcing from suppliers that do not prohibit the payment of recruitment fees by workers. I was told by several major retailers that their participation in global industry standards that incorporate such a principle may be

at risk as a result of the publication of the draft Guide, because it was feared that such supplier exclusion could be deemed anti-competitive and illegal.

'Collusion' on pricing to ensure a living wage

A particular concern was raised with us that collaboration by buyers to set price floors – based on analysis of minimum wages and entitlements, and on productivity limits – may be perceived by the ACCC as illegal collusion on pricing.

In at least one case, an existing scheme includes a component whereby buyers work together to ensure they are not sourcing from suppliers that quote prices that cannot guarantee fair wages and entitlements for workers. This scheme has previously been threatened with legal action by hostile actors, who seek to continue quoting prices that do not guarantee workers will be exploited.

Yet in Victoria, the Labour Hire Authority publishes guidance setting out for security industry actors the minimum cost per worker of meeting legal obligations. It is unclear why it would anti-competitive for buyers to agree not to entertain tenders for work that do not align with such guidance, or equivalent guidance prepared by private market actors.

Collaboration in sourcing strategy

Several organisations that we engaged with queried whether they would be permitted, under existing competition law, to collaborate on sourcing strategy.

The aim of modern slavery due diligence laws, such as those in place in NSW, is not merely to de-risk individual organisations, but to encourage the market to move away from business models that rely on modern slavery for the production and distribution of goods and services. Without this approach, modern slavery risk will not be removed from the system – it will just be shuffled around the system.

Buyers that take unilateral measures to develop new, slavery-free sources of supply are likely to incur a significant cost penalty, not least for the R&D costs incurred in working with suppliers to find cost-effective alternative business models.

There is thus a public policy incentive to encourage collaboration by buyers to develop new, slavery-free sourcing strategies. This is often, however, likely to require the sharing of information amongst competitors on how they identify and address modern slavery risks in their supply chains. This will almost certainly include commercially sensitive data that provides insight into market strategies (e.g. approaches to moving sourcing away from higher risk geographies for modern slavery). Several businesses we engaged were contemplating working together in this way – until the publication of the draft Guide.

An obvious example here is solar panels. Nearly all solar panels purchased in Australia contain polysilicon from Xinjiang that may be tainted by forced labour. At present it is almost impossible to source 'slavery-free' polysilicon. Yet there are significant barriers for most businesses to developing alternative, slavery-free supply. For example, the sunk costs of a polysilicon refinery are very significant – around $500 billion, with a lead-time of 2 or more years from breaking ground to first delivery. And even supply-chain tracing is very difficult, given the lack of provenance information in most solar panel supply-chains. This means that without working together, buyers in Australia will find it very difficult to both increase use of photovoltaic solar panels and, at the same time, reduce the risk of modern slavery in their supply-chain. Only through close collaboration to develop alternative sourcing options – collaboration that will almost certainly require sharing commercially sensitive data – will both sustainability goals be achievable.

Collective leverage

The UNGPs and the OECD Guidelines both *require* businesses to create and use leverage to tackle human rights concerns. This includes collective leverage. It goes beyond shareholder relationships (where Australian competition law clearly allows exercise of collective leverage by shareholders), to situations where a business is simply a buyer and has no equity or ownership position in the relevant business.

We were told of multiple situations in which businesses identify common suppliers that appear to rely on forced labour. In such cases – as noted in the example above – they may look to use their collective leverage to mitigate the impact and prevent it from reoccurring (as required by the UNGPs and OECD Guidelines). This includes competing businesses jointly approaching the supplier, borrower or invested company to explain their expectations and set agreed timelines for the supplier to remediate the identified harm. Several businesses raised concerns with us that this may no longer be feasible or prudent, given the publication of the draft Guide.

Conclusion

I hope this information proves useful to you and your colleagues as you revise the draft Guide.

The organisations that we have engaged in while gathering this information have been clear with me that they see utility in the Guide, if it sets out clearly that the ACCC's aim is to smooth the path to effective and lawful sustainability collaborations.

Many fear that the approach currently contemplated in the Guide – which will require pre-authorisation for many of the ongoing and contemplated anti-slavery collaborations discussed in this letter – risks tying them up in red tape. This could significantly slow the momentum towards anti-slavery collaboration that government signals and industry initiative has generated in recent years, with more than 2,000 organisations involved in such collaborations.

I hope that this information might go some way to convincing you and your colleagues that a structural solution – such as a class exemption for collaborations that meet defined anti-slavery criteria – may be a more effective way to achieve both anti-slavery and fair competition public policy objectives.

Please do not hesitate to be in touch if I can provide any clarification or further information on anything discussed here.

Yours sincerely,

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