



CLEANING
ACCOUNTABILITY
FRAMEWORK

Cleaning Accountability Framework Submission

*Targeted review of modern slavery offences in Divisions 270 and 271
of the Commonwealth Criminal Code Act 1995*



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About the Cleaning Accountability Framework (CAF) and Modern Slavery

Cleaning has previously been recognised as a key risk area for modern slavery¹ in Australia by the Department of Home Affairs.² Withholding of wages, immigration-related coercion and threats, deceptive recruitment, excessive overtime, debt bondage, confiscation of personal and travel documents, and dangerous and substandard working conditions are all practices that are present, or very likely to be present, in the cleaning industry in Australia.

The Cleaning Accountability Framework (CAF) was created to directly address these issues. CAF is an independent, multi-stakeholder initiative that seeks to improve labour standards in the cleaning industry in Australia. CAF promotes the rights of cleaners, responsible contracting practices and transparent supply chains. We do this through the CAF Certification Scheme, recognising and rewarding good practice in the cleaning industry.

CAF has been recognised as an anti-slavery mechanism by leading business and human rights experts for the work we do in relation to worker-driven compliance, robust third-party auditing, and tripartite collaboration and education.³

CAF was founded in 2013 by AustralianSuper, the United Workers Union and a coalition of industry leaders that included the Fair Work Ombudsman, property owners, building managers, and cleaning contractors who shared the common aim of protecting cleaners from exploitation and driving responsible contracting practices in the cleaning industry with the development of an industry standard, the 3 Star rating.

The CAF Core Principles, the CAF 3 Star Standard, the CAF Pricing Schedule (a mechanism to bring transparency and accountability to contract pricing), and CAF's unique worker engagement model were derived through our stakeholders' collaborative efforts. CAF certification for commercial office and retail mall buildings was launched in March 2019. As of 2022, CAF has assessed 36 commercial and retail sites nationally for its 3 Star rating and we will expand to include higher education providers in 2023.

CAF's approach to modern slavery risk management is effective, worker-voice-led human rights due diligence in action. CAF is one of Australia's foremost multi-stakeholder anti-slavery mechanisms, which is driving change in one of the highest risk industries nationally for modern slavery: cleaning. The multi-stakeholder CAF model goes beyond social audits by engaging all levels of the value chain and holds lessons for other industries. Further details regarding CAF's approach to modern slavery can be found at our website.⁴

¹ Including conduct that could constitute a criminal offence against Divisions 270 and 271 of the Criminal Code.

² Department of Home Affairs (Cth) Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities (2018) p.44

³ Michael Rawling, Sarah Kaine, Emmanuel Josserand and Martijn Boersma (2021). "Multi-Stakeholder Frameworks for Rectification of Non-Compliance in Cleaning Supply Chains: The Case of the Cleaning Accountability Framework". Federal Law Review, 49(3), 438–464, <https://doi.org/10.1177/0067205X211016575>; Sarah Kaine and Michael Rawling (2019) "Strategic 'Co-enforcement' in Supply Chains: The Case of the Cleaning Accountability Framework" Australian Journal of Labour Law, 31(2), 305-334, [https://www.uts.edu.au/sites/default/files/2019-06/Kaine%20Rawling%20\(2019\)%2031%20AJLL%20305.pdf](https://www.uts.edu.au/sites/default/files/2019-06/Kaine%20Rawling%20(2019)%2031%20AJLL%20305.pdf) .

⁴ Modern Slavery in Cleaning Supply Chains Cleaning Accountability Framework <https://www.cleaningaccountability.org.au/modern-slavery/>

CAF's experience with, and knowledge of, conditions in the cleaning industry in Australia

In making this submission CAF draws on our first-hand experience in direct worker engagement and social auditing of the commercial cleaning industry in Australia. This includes regular and ongoing interaction and in-person meetings with individuals who are employed as cleaners. In 2022, for example, CAF organised and participated in over 80 confidential meetings with different groups of individuals working as commercial cleaners across multiple states and territories in Australia.

As a very broad overview CAF will be engaged often by an investor, commercial building owner or manager or a provider of contract cleaning services to assess whether a site is compliant with the CAF standard and can therefore be certified with the CAF 3-Star Standard. CAF will then re-check each site annually to ensure ongoing compliance.

When CAF is assessing a site or a contractor against the CAF standard for certification, CAF will review relevant documentation (e.g. payslips, employer policies, contractual relationship between stakeholders) and anonymously survey and then meet with the cleaners on site (without the presence of employer representatives or managers).

However, CAF is not an investigative body and has no statutory standing or inherent power to investigate criminal offences or breaches of industrial legislation. CAF effectively relies on cooperation and participation of the stakeholders in cleaning supply chains who voluntarily engage in the CAF process. Where serious non-compliance with industrial or work health and safety legislation is identified, CAF engages with the relevant union or the regulator (the Fair Work Ombudsman) to assist in remediation and enforcement.

Key Concerns

CAF does not propose to make a submission with respect to all forty-two discussion questions posed in the review's Discussion Paper.

CAF does not prosecute offences and does not regularly encounter any conduct or information in the cleaning industry which would be relevant to some of the questions posed in the review; for example, in relation to forced marriage or child-related offences.

CAF makes the following submissions in relation to the following specific discussion questions posed by the review's Discussion Paper.

Question 1: Are stakeholders observing interactions between offences in Divisions 270 and 271 and other laws and frameworks that are impeding, or have the potential to impede, effective investigations and prosecutions of offences in Divisions 270 and 271?

In relation to discussion question 1, and a number of the other discussion questions responded to below, CAF submits there is a significant overlap and an uncertain "grey-area" between circumstances where in relation to discussion question 1, and a number of the other discussion questions responded to below, CAF submits there is a significant overlap and an uncertain "grey-area" between circumstances where offences against the current Modern Slavery provisions have occurred or where breaches of employment or work, health and safety legislation have affected workers who are also vulnerable to Modern Slavery offences. In

some circumstances breaches of employment or work, health and safety legislation could form part of offences against the current division 270 or 271 offences, whereas in other instances they may not.

Delineating between slavery and slavery-like offences and general breaches of workplace laws can be difficult. The Discussion Paper acknowledges that whilst workplace offences are “less serious” and are “dealt with in other legal and non-legal frameworks” it also notes that they are still “forms of exploitation”.⁵ Similarly the report of the Standing Committee which recommended the enactment of Australia’s Modern Slavery legislation noted that multiple parties to the inquiry submitted that modern slavery practices encompass a continuum of exploitation which does not just include the criminal offences currently provided for in the Criminal Code.⁶ The Standing Committee’s report also highlighted that the Parliamentary Joint Committee on Law Enforcement has found that Modern Slavery Offences are particularly difficult for law enforcement and Federal Government agencies to recognise, investigate and prosecute⁷ and that there had only been 20 successful prosecutions in the thirteen years to 2017. It is not surprising that vulnerable workers such as migrants are often the victims of serious and widespread breaches of workplace laws such as the systemic underpayments and wage fraud that were revealed in 7-Eleven franchises in the last decade. Writing in relation to the 7-Eleven scandal in Precedent, lawyers for some of the victims noted that many 7-Eleven workers were especially vulnerable to exploitation because they possessed little understanding of Australian industrial law or their entitlements, were generally not union members and often spoke English as a second language. The authors specifically noted that the 7-Eleven situation had “demonstrated the inadequacy” of existing laws and processes “for dealing with widespread wage fraud, especially where vulnerable migrants are its victims.”⁸

CAF agrees that workplace laws inadequately protect vulnerable migrants from widespread and serious exploitative practices. Further, as is outlined below, CAF submits that some of the current offences in the Criminal Code that are the subject of the review are too narrow to encompass many exploitative practices and thus some exploitative practices are not adequately addressed by either workplace or criminal laws.

In summary CAF submits that several of the Criminal Code offences could be expanded to include elements of economic duress or pressure and that the workplace practices and record of an accused should also be relevant to specific offences in some circumstances. This broad concept and CAF’s experience in Worker Engagement is relevant to several of the discussion questions posed in the review as follows:

Question 8: Do the definitions of coercion, threat and deception collectively capture the types of conduct used in offending in Divisions 270 and 271, including subtle forms of coercion? If not, why not, and are specific solutions recommended?

Question 9: Are stakeholders observing serious forms of exploitative conduct that are not captured by Australia’s definition of exploitation and are appropriate for consideration as part of Australia’s response to modern slavery (i.e. involving very serious forms of exploitation that are not captured by other laws and frameworks)? If so, what is being observed?

⁵ Attorney General’s Department Targeted review of modern slavery offences in Divisions 270 and 271 of the Commonwealth Criminal Code Act 1995 (Discussion Paper) December 2022 at 28

⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at 3.45-3.49, 3.59

⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at 7.1- 7.13

⁸ Giri Sivaraman, and Patrick Turner "The 7-Eleven wages scandal: the need for law reform" (2016) 135 Precedent 53

Question 14: Should subsection 270.10(1) be expanded to make explicit that factors at subsection 270.10(2) can apply to deliberation of whether a reasonable person in the position of a victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing those labour or services?

Question 15: Do the list of matters at subsection 270.10(2) provide appropriate guidance? If not, why not, and what additional or different factors should be considered?

Question 16: Do the definitions of servitude and forced labour adequately capture the circumstances that are relevant to establishing whether a person has offered themselves voluntarily to provide labour or services? If not, why not, and are specific alternatives recommended?

Generally, and in relation to discussion questions 8, 9, 14, 15, 16 CAF submits as follows:

With respect to questions 14, 15 and 16 as is noted in the Discussion Paper only a specific list of factors at Division 270.10(2) can be considered in determining whether distinct elements of some of the slavery-like offences have been established; including whether an alleged victim has been coerced, threatened or deceived or whether a person has caused another to enter into debt bondage.⁹ It is also the case, as is stated in discussion question 14, that these factors are not explicitly considered in determining whether a reasonable person in the position of a victim and survivor would have felt free to cease providing labour or services or to leave the place where they are providing that labour or those services.

The factors in question which can be considered under the current formulation of the legislation are¹⁰

- 1) The following matters are covered by this subsection:
 - a) the economic relationship between the alleged victim, the alleged offender or a family member of the alleged victim or alleged offender, and any other person;
 - b) the terms of any written or oral contract or agreement between the alleged victim, the alleged offender or a family member of the alleged victim or alleged offender, and any other person;
 - c) the personal circumstances of the alleged victim, including but not limited to:
 - i) whether he or she is entitled to be in Australia under the Migration Act 1958; and
 - ii) his or her ability to speak, write and understand English or another language;
 - iii) the extent of his or her social and physical dependence on the alleged offender or any other person.

CAF makes a similar submission in response to discussion question 16; in CAF's submission the definitions of "servitude" and "forced labour" may not adequately capture all the circumstances that are relevant to establishing whether a person has offered themselves voluntarily to provide labour or services. Pressure on migrant workers to accept conditions which are unsafe or do not meet legal minimums may not meet the current legislative definitions of the "servitude" or "forced labour" offences.

⁹ 270.10(1)(a)

¹⁰ 270.10(2)

In the case of servitude, the test is whether a reasonable person in the position of the victim would consider themselves free to cease providing the labour or services or to leave the place or area where the victim provides labour/services and that they have been significantly deprived of personal freedom in respect of aspects of their or their life other than the provision of the labour or services. The forced labour offence has a similar test except that there is not the requirement for a deprivation of personal freedom.

CAF has uncovered only very limited examples of conduct or practices which could satisfy the servitude definition (such as when an employee's travel documents have been seized). The far more common circumstances CAF encounters is when there is subtle or nuanced pressure on vulnerable migrant employees to accept unlawful or unsafe standards at an employer due to their particular vulnerability.

CAF's Recommendation is that this could be addressed, in part, by adding "economic dependence" between the victim and the accused as one of the factors (or a factor) which could be considered in relation to whether an offence has been committed. This could also potentially be expanded to include a factor or factors which consider the employment practices of the accused, e.g. does the accused have a history of contraventions of industrial and/or work, health and safety legislation.

Deception by Omission, Questions 5 & 6

Question 5: What kind of conduct may constitute deception through omission as relevant to offences in Divisions 270 and 271 of the Criminal Code?

Question 6: Should reforms be considered to broaden the application of Divisions 270 and 271 to explicitly include conduct that includes deception by omission?

In relation to questions 5 and 6 CAF submits that a relevant omission by an accused should certainly be able to be considered as a factor as to whether a victim had been "deceived" for the purpose of the relevant offences, particularly where the omission is deliberate.

As the Discussion Paper specifically notes an accused "intentionally withholding information (for example about workplace conditions or pay) may not meet the definition of deceive at section 271.1 because it is an omission and not a positive act".¹¹ Through worker engagement CAF regularly encounters workers who have very little awareness of their rights and entitlements under Australian law and the relevant industrial instruments which apply to their employment. The employees have, at times, received very little information on their rights and entitlements from their employer. This can lead to workers not being aware of their basic terms and conditions; for example, that they are entitled to different forms of paid and unpaid leave, their minimum rates of pay and allowances, rostering rules and entitlements to meal breaks. Inadvertent non-compliance with industrial law obligations by an employer is on one end of the spectrum and occurs in many industries. However, when an omission is deliberate or an employer deliberately takes advantage of vulnerable employees through an omission CAF believes this is conduct that certainly warrants at least potentially comprising an element of an offence.

Question 10: If the definition of exploitation were expanded, how should this be done? For example, through stipulating additional forms of exploitation, adding to the definition with a 'catch-all' description of exploitation, or amending the definition so that it is a non-exhaustive definition?

In response to Question 10 CAF submits that an expansion of "exploitation" is warranted, currently it is a somewhat circular definition which only applies to conduct comprising one of the specific offences in the

¹¹ Attorney General's Department Targeted review of modern slavery offences in Divisions 270 and 271 of the Commonwealth Criminal Code Act 1995 (Discussion Paper) December 2022 at 27

Code. CAF's view is that a "catch all" definition should be drafted; one which references the specific concept of unfairly taking advantage of a vulnerable worker. This would not necessarily create a stand-alone offence of "exploitation" but CAF's submission is that the definition should not rely on conduct which is already criminalised by other offences.

Other forms of exploitation – Offences involving Passports

A further specific submission CAF would make in relation to Questions 9 and 10 relates specifically to passports. In CAF's anonymous¹² worker engagement survey workers are specifically asked if an employer has ever seized or retained their passport. Whilst it is not common CAF does, from time to time, receive positive answers to that question. If any positive answers are given CAF always attempt to follow up with the workers who responded and will encourage that group of workers to come forward. However, the CAF survey is anonymous unless workers voluntarily leave details and, in CAF's experience, workers who answer that question in the affirmative are generally reluctant to either leave their details or identify themselves in a meeting of workers.

CAF notes that specific offences in relation to "Australian travel documents" are provided for in the Australian Passports Act 2005 (Cth)¹³ including damaging or interfering with an Australian travel document, dishonestly obtaining an Australian Travel Document and improper use or possession of an Australian Travel Document.

CAF's submission on this point is essentially that it seems somewhat illogical that there are not specific offences relating to passports or travel documents within Division 270 and 271 and that there is no explicit reference to improperly obtaining or seizing an individual's passport (or threatening to do so). As an example, it is not specified to be one of the matters the trier of fact may have regard to in relation to determining where a slavery-like offence has been committed. In most of the case examples detailed in the Discussion Paper it is specified that the victim/ survivor's passports were seized or confiscated. CAF understands that an organisation or individual who unlawfully obtains or retains a worker's passport in relation to their employment will, in most cases, have committed one of the offences in Division 270 and 271 and evidence of this will form part of the case. However, this may not always be the case, especially when considering the unclear overlap between Modern Slavery offences and industrial breaches detailed by CAF above. Given that the unlawful obtaining or retaining of a worker's passport in relation to their employment is a serious offence and relatively obvious indication of exploitation CAF submits it warrants at least being specified as a factor which indicates a slavery-like offence has been committed.

CAF also notes that the Committee of inquiry into the establishment of the Modern Slavery Act found that the awareness of the specific offence in the Passports Act was low, especially among workers¹⁴.

Question 21: Does the debt bondage offence continue to be fit-for-purpose and provide an appropriate investigation and prosecution option where more serious labour exploitation offences cannot be made out?

CAF does not make a specific submission in relation to debt bondage, or the current debt bondage offence in the Criminal Code. What CAF does however note is that it is extremely common, during its Worker Engagement process, for workers to (generally anonymously) acknowledge that they have paid someone and owe a debt (for example a recruiter or migration agent) to travel to Australia and/or secure

¹² Unless the worker chooses to provide details

¹³ Division 2, Part 4

¹⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at 7.38 and 7.47

employment. Unfortunately, CAF has little information on the size and circumstances of most of these payments as workers normally report them anonymously or do not wish to discuss them if they are identified.

The current offence of debt bondage requires the debt or payment to be manifestly excessive, that the employees' services are not applied towards the debt and the length of service be undefined. With very limited information on the size or type of payments cleaning workers make it is therefore difficult for CAF to comment accurately on whether debt bondage is occurring, or to what degree it is occurring, in the commercial cleaning industry. We note that, as noted during the Parliamentary Committee's report, the fact that there is a debt contract or costs paid for migration services and to secure working rights do not mean a debt bondage offence has taken place.¹⁵ We also note that the Discussion Paper states there has yet to be a single conviction for the debt bondage offence since its enactment.

One issue is certain; that the practice of cleaning workers making payments to travel to Australia and secure working rights are common and warrants investigation as to whether debt bondage or similar practices are occurring in the commercial cleaning industry.

Questions 41 and 42 – The rights of victims/survivors and the non-punishment Principle

Question 41: Do stakeholders have recommendations about how Divisions 270 and 271 can take a victim and survivor centred approach and reduce reliance on victim and survivor testimony while maintaining the core elements of the offences that align with international law and standards?

Question 42: Do the general defences in the Criminal Code (including duress) sufficiently capture the contexts in which a victim and survivor may commit an offence in connection to their experience of trafficking in persons, slavery or slavery-like practices? If not, why not, and what are the deficiencies? What form might additional protections for victims and survivors take?

In relation to discussion questions 41 and 42 one area in which CAF suggests there should be reform and additional protections for victims and survivors is reliance on their evidence and the enactment of particular defences to some offences they may have been implicated in in connection to their experience.

During Worker Engagement CAF will quite often, for example, receive anonymous responses to survey questions that workers have been asked or pressured to work in contravention of their visa conditions.

The inquiry which led to the enactment of the Commonwealth Modern Slavery Act heard considerable concerns about the lack of legal and practical support (for example access to financial assistance and special classes of visas) that were available to victims. The Committee also heard that even when such support was available, it was dependent on victims cooperating and participating in law enforcement investigations and prosecutions.¹⁶

CAF supports what is described as the Principle of Non-Punishment and agrees with several bodies who have highlighted the vulnerability of victims of Modern Slavery offences to themselves being implicated in an offence and advocated for a specific legal defence to be included in the Criminal Code.¹⁷ As the Federal Government's Joint Standing Committee on Foreign Affairs, Defence and Trade heard, one of the key challenges in securing prosecutions for anti-slavery offences is securing the cooperation and participation

¹⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade *Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia* December 2017 at 7.147

¹⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade *Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia* December 2017 at 6.60-6.83

¹⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade *Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia* December 2017 at 6.91

of victims.¹⁸ We note that, when the UK introduced its Modern Slavery legislation in 2015 it provided for a specific legislative defence for victims of slavery or trafficking who were compelled to commit an offence due to their exploitation.¹⁹

As the discussion paper notes²⁰ there has not been a government commitment to implement the non-punishment principle in law through a specific legislative defense for victims and survivors but that the AFP and CDPP give effect to the principle of non-punishment of victims and survivors, including through their prosecution policy. The Discussion Paper also notes that the National Action Plan to Combat Modern Slavery 2020–25 includes an initiative to undertake a targeted review of support, and legislative protections, defences and remedies available to victims and survivors. As the Discussion Paper notes the general defence of duress is also available. However, the defence of duress relies on a specific threat and the effect of the threat and is unlikely to be applicable and able to be utilised protect victims and those vulnerable in all circumstances.

To consider some of the more common practices that CAF may receive reports of, for example, an individual has been pressured to work in contravention of their visa conditions (for example exceeding the maximum number of hours they are permitted to work) or paid an agent or a recruiter to arrange their migration and/or secure a job. These employees may have breached their visa conditions and therefore committed offences themselves by being involved. A victim often has very little to gain, and potentially much to lose (employment/income, visa status) by reporting the conduct and assisting in investigation and prosecution, particularly where it is not certain that the exploitative conduct constitutes a criminal offence and a prosecution will be successful.

CAF therefore supports the enactment of a specific legal defence, modelled on the defence in the UK act, to be available to those who have committed an offence due to their exploitation²¹ or vulnerability caused by Modern Slavery practice.

¹⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at at 6.85

¹⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at at 6.88

²⁰ Attorney General's Department Targeted review of modern slavery offences in Divisions 270 and 271 of the Commonwealth Criminal Code Act 1995 (Discussion Paper) December 2022 at 58

²¹ Joint Standing Committee on Foreign Affairs, Defence and Trade Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia December 2017 at 6.88



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