



CAF Submission into the Review of the *Anti-Discrimination Act 1977 (NSW)*

About the Cleaning Accountability Framework (CAF)

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.

CAF was founded in 2013 by Australian Super, 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 are currently piloting an expansion to include higher education providers. 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 (<https://www.cleaningaccountability.org.au>).

Because of the vulnerability of cleaners to exploitation they are often subject to discrimination on various grounds.

CAF therefore has a significant interest in the review of the *Anti Discrimination Act 1977 (NSW)* and CAF's submission is as follows.

Reform of regulator

There is currently a lack of an effective NSW regulator with positive powers to investigate and remedy a breach in NSW, unlike most equivalent and Federal Government bodies. The



Anti-Discrimination Board has only an advisory and conciliation service and matters that cannot be resolved by voluntary settlement must generally be referred to the NSW Civil and Administrative Tribunal.

Given that most cleaners are low income, vulnerable and often temporarily in Australia they will, in many cases, not have the resources and support to conduct litigation. A state agency should, in CAF's view, have an investigation and enforcement role with the ability to conduct investigations, interview witnesses, require employer attendance/documentation, issue findings, issue compliance notices and fines (although obviously with an appeal mechanism provided).

Vicarious Liability

Under the NSW legislation principals and employers can be held vicariously liable for the discriminatory acts of their agents or principals. However, this traditional test may not capture the actions of actors within modern supply chains with cascading levels of contracting. Multiple subcontracting can also be used as an express form designed to avoid vicarious liability.

In CAF's experience, the knowledge, cooperation and leverage of those at the top of the supply chain (the building owners or managers) is often the most effective way of regulating the conduct of the contracted commercial cleaning companies. For example, procurers often have a contractual right to direct cleaning contractors in industrial relations or safety issues. In CAF's view if owners and/or managers have knowledge or involvement in discriminatory acts and fail to reasonably act on these when they could do so (based on the accessory liability test in the *Fair Work Act*) they should also potentially also be liable for the conduct under accessory liability provisions.

Protected Attributes

CAF also advocates a broadening of the attributes protected under the Act to ensure those at risk of slavery and slavery-like conditions are better protected.

As an organisation CAF's primary role is the detection of Modern Slavery, and slavery-like conditions in certain industries. In CAF's experience workers in Australia are at greater risk of exploitation and unfair treatment because of their immigration status which can be, unfortunately used as leverage and threats by some employers or individuals (e.g. direct threats made to their passports or immigration status or pressure not to report issues or accept unfavorable conditions). CAF would therefore support a broadening of the characteristics protected to also include a category of "immigration status" to recognise and provide protection for workers in NSW who are subject to immigration conditions but the discrimination against them may not qualify as discrimination on grounds of nationality, descent or national origin as is currently provided for under the Act.



However if a protected attribute of this nature was included an exemption would need to provide for an exception for legitimate employment checks and requirements (e.g demonstrating right to work in Australia. roles which require applications to be citizens or permanent residents).

The Commonwealth-State exemption.

CAF also supports harmonising the protections under the NSW Act with the Commonwealth *Fair Work Act* to provide greater protection in relation to workplace-related discrimination.

Section 351(2)(a) of the *Fair Work Act* (Cth) includes an exemption for action that is not unlawful under anti-discrimination legislation in force in the place where the discriminatory action takes place.

This creates confusion and limits the protection in relation to workplace discrimination. For example, attributes such as political opinion and the newly-announced *Fair Work Act* protection for those who have experienced Family and Domestic Violence are (or will be) protected under the *Fair Work Act* but are not protected under the *Anti-Discrimination Act*.

Whilst the case law is not clear, this can lead to a situation where discrimination on these grounds occurring in NSW is not protected under either the *Anti-Discrimination Act* or the *Fair Work Act*. This weakens the protections in the NSW Act considerably and creates uncertainty in obligations for employers that operate in different jurisdictions (which most employers that CAF deals with do).

Cleaning Accountability Framework

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