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Re: Inquiry into the Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020 (the 'Bill')

SUMMARY

- There is considerable reliable evidence from multiple, independent, governmental and non-governmental sources supporting allegations of widespread and systematic use of forced labour in Xinjiang Uyghur Autonomous Region (XUAR), to manufacture goods that enter the Australian market, notably cotton-related products.
- Conditions on the ground in XUAR make reliance on traditional supply-chain due diligence tools, such as on-site inspection, ineffective. Firms can no longer reliably discharge their obligations of due diligence under the *Modern Slavery Act 2018* (Cth) and analogous overseas legislation. Organizations should assume that goods sourced from XUAR, or from suppliers elsewhere in PRC that are using XUAR-sourced labour, are at high risk of having been made with forced labour.
- There is consequently growing support around the world for bans on whole categories of goods made in XUAR, or even for bans on importation of *all* goods from XUAR, as proposed in this Bill. This includes executive and parliamentary action in the US, UK, Canada and EU.
- Whether a prohibition singling China and XUAR would survive international legal challenge is unclear. Trade bans on labour standards grounds are largely untested in the WTO, and it is unclear whether this ban, as drafted, would survive a challenge under the China-Australia Free Trade Agreement (ChAFTA).
- A rules-based approach should apply the same rule similarly to similar cases, not ban imports made with forced labour from only one country. A ban that applied to goods made with forced labour *whatever their provenance*, is likely to be more effective. It is: i) more likely to survive legal challenge; ii) less likely to induce hostile counter-measures from China; iii) more self-evidently consistent with defence of the rules-based international order; and iv) more likely to prove a flexible and responsive tool for promoting human rights in future. This is the approach in the US, Canada and, soon, Mexico.
- A unilateral ban by Australia is unlikely to achieve much. Evidence suggests restrictive measures are much more likely to be successful in influencing target behaviour if they are taken by actors representing a large aggregated market share. This suggests a need for Australia to coordinate with like-minded actors.
- An approach that bans imports of goods tied to XUAR forced labour imports, but not of capital tied to XUAR forced labour, or exports to or investment in such companies, risks policy incoherence. An integrated response is preferable.
- Relying on frontline customs officers to determine whether goods are made with forced labour may not be effective or efficient. A better approach may draw on the US system of Withhold Release Orders, adapted to the Australian context.

RECOMMENDATIONS

1. **Do not single out PRC or XUAR:** Any arrangement prohibiting importation of goods produced or manufactured with forced labour should apply to all such goods regardless of their geographic origin. Singling out XUAR & PRC may weaken the chances of such a provision surviving legal challenge, and could weaken the argument that the measure is intended to promote universal human rights and defend the rules-based international order.
2. **Prohibit domestic trade and commerce in goods made with forced labour:** The Bill should be amended to formally prohibit domestic trade and commerce in goods produced or manufactured with forced labour and modern slavery. This will help ensure that any import or other controls that are adopted do not discriminate between goods made in Australia and other goods, and will also send a powerful signal to Australian markets, banks and investors.
3. **Integrated response:** Restrictions on doing business with entities using forced labour should not be limited to import controls, but rather use multiple policy levers in an integrated manner, including *Modern Slavery Act 2018* (Cth) reporting, anti-money-laundering & proceeds of crime obligations, investment rules, and sanctions & export controls.
4. **Modern Slavery List:** The Bill should be revised to amend the *Modern Slavery Act 2018* (Cth) to create a Commonwealth 'Modern Slavery List' – a list of goods, classes of goods, regions and/or entities rebuttably presumed to be using forced labour or modern slavery. Importation of such goods, handling of funds from, investment in or export to companies or regions on the Modern Slavery List would be prohibited. Additions and removals from this List could be achieved through Ministerial declaration or secondary legislation, drawing on appropriate inter-departmental expertise.
5. **Public submissions:** The Bill should create a mechanism for members of the public to submit information to assist the decision-making authority in determining additions to and removals from the Modern Slavery List.
6. **Engagement with Listed entities:** The Bill should establish the power of the relevant Minister or Commonwealth entity to engage in dialogue with a Listed entity to establish remedial conditions and take meaningful steps to ensure respect for human rights, in order to be eligible for removal from the List. The Bill should ensure such engagement is transparent and consistent with the UN Guiding Principles on Business and Human Rights.
7. ***Modern Slavery Act 2018* reporting:** The Bill should amend the *Modern Slavery Act 2018* (Cth) to require Modern Slavery Act statements to specifically report on Modern Slavery List dealings.
8. **Work with like-minded actors:** The government should encourage like-minded actors such as the US, UK, Canada, New Zealand and EU to adopt similar arrangements, and coordinate restrictive measures.

Contents

SUMMARY 1
About the author 2
1. Is there widespread forced labour in Xinjiang Uyghur Autonomous Region? 2
2. What is the rationale for an import ban? 5
3. Is a ban permissible under global trade rules? 7
4. What are the foreign and trade policy implications of the Bill? 7
China's reaction 7
The rules-based international order 8
The need for coordination with like-minded actors and integration across policy domains 8
5. How can an import ban be effectively enforced? 9
6. Recommendations 10
Notes 11

About the author

I am an Australian citizen, resident in Byron Bay, NSW. I am:

- Professor of Global Politics & Anti-Slavery at the University of Nottingham, UK;
- an invited member of the advisory group to the Australian Department of Foreign Affairs and Trade as it prepares an International Strategy on Human Trafficking and Modern Slavery;
- Chair of the Study Group on Trafficking in Persons of the (US) Council on Foreign Relations. Members include the last four US Ambassadors on Trafficking in Persons; Ms Cindy Hensley McCain (McCain Institute); Ms Sharan Burrow (ITUC); Dr Jean Baderschneider (Chair, Global Fund to End Modern Slavery); Mr Nick Grono (CEO, Freedom Fund); and many others.
- Founder of the Liechtenstein Initiative on Finance Against Slavery and Trafficking (FAST), a public-private partnership that receives funding from the Australian Department of Foreign Affairs and Trade, amongst other donors;
- former Principal Legal Officer in the Transnational Crime and Extradition Units, Commonwealth Attorney-General's Department.

This submission is written in my private capacity. It draws, amongst other sources, on *Developing Freedom: The Sustainable Development Case for Ending Modern Slavery, Forced Labour and Human Trafficking* (www.developingfreedom.org). This eighteen-month study (which I led and authored), commissioned by the UK government, examines how fighting slavery can contribute to sustainable development.

1. Is there widespread forced labour in Xinjiang Uyghur Autonomous Region?

1.1 There is considerable reliable evidence from multiple, independent, governmental and non-governmental sources supporting allegations of widespread and systematic use of forced labour of Xinjiang Uyghur Autonomous Region (XUAR) populations, both in XUAR and in other parts of People's Republic of China. This evidence and analysis are found in:

- Chinese Community Party (CCP) records;
- analysis of a large group of UN Special Rapporteurs and special procedure mandate-holders;
- a bipartisan US Congressional Commission report;
- the US Department of State 2020 *Trafficking in Persons Report*;
- a report by the Canadian Parliament's human rights sub-committee;
- independent investigation and analysis, notably by the Australian Strategic Policy Institute.[1]

1.2 These reports set out a consistent picture of CCP involvement in the policy and financing infrastructure underpinning use of forced labour in XUAR. This policy, known as 'Xinjiang Aid' (援疆), is framed in terms of domestic development and poverty-alleviation for XUAR province, one of China's poorest.[2] CCP sources frame this policy regime as a way to "get rid of poverty" (*tuōpín gōngjiān*, 脱贫攻坚) through "industrial poverty-alleviation" (*chǎnyè fúpín*, 产业扶贫).[3] A Chinese government White Paper in 2020 puts development at the heart of its justification for labour policies in XUAR, arguing that government labour policies have led to significant household income increases and welfare improvements.[4] It claims:

> *From 2013 to the end of 2019, Xinjiang wiped out poverty in 25 poor counties and 3,107 poor villages, and the poverty incidence dropped from 19.4 percent to 1.24 percent. From 2014 to the end of 2019, a total of 2.92 million people from 737,600 households shook off poverty. By the end of 2020, poverty will be completely eliminated in Xinjiang.*

1.3 The Xinjiang Aid strategy is based on attracting low-skilled, labour-intensive industry,[5] and mandating participation of minority households as 'rural "surplus labour" (*fùyú láodòngli*, 富余劳动力),[6] or "destitute labour" (*pínkùn láodòngli*, 贫困劳动力). The result is a system that may compel as many as hundreds of thousands of Uyghurs and other minorities to work in textile, agriculture and electronic industries, as a livelihood creation exercise.[7]

1.4 In the White Paper, issued in response to concerns raised about forced labour practices in XUAR, the Chinese government State Council Information Office stated that the total number of people employed in Xinjiang rose by 17.2 per cent in just five years (2014 to 2019). This included "average annual relocation of surplus rural labor [of] more than 2.76 million people" – or about 10 per cent of all residents of the region "relocated" each year.[8] The Chinese government describes this as the state "guiding" or "helping" people "to find work" and "guid[ing] the orderly flow of labor" to industry.[9]

1.5 The CCP contests that these employment and reeducation regimes amount to forced labour. *Global Times*, a CCP-controlled media outlet, indicated that government research into more than 70 companies, including on-the-ground conversations, had found "[n]o evidence of forced labour".[10] The White Paper mentioned above asserts that all incidents of forced labour lead to criminal prosecution, and that international labour standards and rights are respected.[11] China has, it argues, "taken a resolute stance against forced labor and eradicated it in any form".[12] Above all, it emphasizes, this strategy alleviates poverty and "protects human rights through development".[13]

1.6 Individuals are however apparently tracked and sanctioned by the state if they do not comply with state directions on where and when they will work. The *New York Times* cited one local government instruction under the programme as bluntly directing state agents to "[m]ake people who are hard to employ renounce their selfish ideas. Turn around their ingrained lazy, lax, slow, sloppy, freewheeling, individualistic ways so they obey company rules."[14] Workers are allegedly forced to accept lower-than-market wages.[15] Local governments and private brokers are allegedly paid a price per head by the XUAR provincial government to organize labour assignments,[16] drawing on workers who have been through involuntary 'vocational training'.

1.7 This 'vocational training' allegedly forms part of a larger mass detention, without trial, of Muslim residents of XUAR, for "concentrated educational transformation" (集中教育转化).[17] The Chinese government acknowledges that it organized vocational training for an average of 1.29 million workers in XUAR each year from 2014 to 2019, but describes this training as the basis for the emergence of a "large knowledge-based, skilled and innovative workforce" in XUAR.[18] The training, it claims, improves the "employability of workers" and promotes "stable employment".[19]

1.8 Detainees made to work appear to be housed in internment camp workshops, large industrial parks and village-based satellite factories,[20] and may be forced to undergo mandatory political and military education and family separation.[21] Some of these worksites are explicitly styled "poverty alleviation workshops". Many of these worksites rely on government security forces and are allegedly run under "paramilitary management" (*bàn jūnshì huà guǎnlǐ*, 半军事化管理).[22] In early February 2021, the BBC ran testimony of reported inmates of these camps claiming systematic torture and sexual violence.[23]

1.9 This paramilitary management is framed in terms of the counter-terrorism and counter-radicalization aims of CCP action in XUAR. The State Council Information Office's White Paper argues

the programme is necessary for dealing with those in Xinjiang who "resist learning the standard spoken and written Chinese language, reject modern sciences, and refuse to improve their vocational skills, economic conditions, and the ability to better their own lives." This includes "chang[ing] people's outdated mindset", to inculcate a commitment to hard work.[24] Yet the same source argues that these programmes provide for "voluntary actions made based on individuals' own choices", and that "China applies international labor and human rights standards to effectively safeguard workers' rights".[25] The programme, alleges the White Paper, "ensures that people can make their own choices about work".[26]

1.10 In this narrative, forced labour is reframed as 'vocational training', re-skilling and re-education of Uyghurs and other minorities, transforming them into a low-wage, low-skill workforce.[27] That narrative must be evaluated, however, in the context of China's longstanding systems of 'Reform through Labour' (*láodòng gǎizào*, 劳动改造) aimed at criminal rehabilitation, and 'Re-education through Labour' (*láodòng jiàoyǎng*, 勞動教養) aimed at political re-education. The latter was a system of administrative, extra-judicial detention run by the police, and used from 1957 to 2013 to detain not only petty criminals but also political dissidents and Falun Gong. 'Re-education through Labour' formalized a programme begun in 1955 by the CCP to deal with "counter-revolutionaries", which was used to coerce dissidents into ideological and political conformism. It was repeatedly singled out for expressions of concern and critique by UN human rights bodies, including the UN Working Group on Arbitrary Detention.[28] It was abolished by the Standing Committee of the National People's Congress on 28 December 2013.[29]

1.11 The system of mass internment and 'vocational training' in XUAR allegedly shares many of the characteristics of the 'Re-education through Labour' system, except that it is allegedly being used to intern and 'vocationally train' entire minority ethnic groups.[30] By late 2018, cheap labour emerging from 're-education camps' associated with the Xinjiang Aid strategy had become an important driver of Xinjiang's economy, according to an official statement by the Xinjiang Development and Reform Commission.[31] This suggests that state development instrumentalities are being used in ways that have led to large numbers of rural workers being forced into industrial labour both inside XUAR and, increasingly, after transfer, in other Chinese provinces. Critics argue these transfers are involuntary. Chinese sources, such as *Global Times* and the White Paper, dispute this, and Chinese authorities argue these policies "protect the human rights of all ethnic groups in Xinjiang".[32]

1.12 The government's subsidies incentivize employers, especially in cities and towns in eastern China 'paired' with urban centres in XUAR under earlier development policies, to hire this 'reeducated' labour force.[33] Importantly, these subsidies seem to draw on "poverty alleviation and development funds" (*fúpín fāzhǎn zījīn*, 扶贫发展资金) provided by the central government – worth around 6.9 billion yuan in 2018 (around AUD 1.4 billion at the time). Some companies involved in the scheme have received credit from China's Agriculture Development Bank.[34] Other funds come from local and provincial governmental authorities in the east, encouraging local firms to pair with Xinjiang entities to foster labour flows from XUAR.[35] Documents associated with some of these pairing schemes specifically refer to the need to find employment for Xinjiang residents undergoing re-education.[36] Some of these factories are alleged to feed into the global supply-chains of brand-name companies from Apple to BMW to Zara. There can be little doubt these goods enter the Australian market.

1.13 The global cotton supply-chain is particularly implicated. Around a sixth of world cotton supply comes from China, with around 85 per cent of that production in XUAR. In July 2020, the US government sanctioned nine Chinese companies allegedly involved in the programme,[37] with additional sanctions against specific production sites and companies following in September 2020, including several involved in cotton production and processing.[38] One of the targets of US sanctions, the Xinjiang Production and Construction Corps (XPCC) or *Bingtuan* (兵团), a paramilitary organization closely involved in CCP administrative policy for Xinjiang since 1949, including repopulation policies, is heavily involved in this supply-chain, running cotton farms and processing facilities.[39] It is reported to have over 800,000 holdings in other companies. Cotton production and textile and apparel manufacture are central to the Chinese government's development plans for the region, with the Xinjiang Textile and Apparel Industry Development Plan 2018-2023 aiming to create one million jobs, 650,000 of them in southern Xinjiang, where the XPCC controls perhaps 20 per cent of production.

2. What is the rationale for an import ban?

2.1 Both the Explanatory Memorandum to the Bill and Senator Patrick's second reading speech locate the rationale for the Bill's adoption in the promotion of human rights. The Explanatory Memorandum states that Australia should

> *"take a strong stand against the well documented human rights abuse of hundreds of thousands of Uyghur people in Xinjiang Province in China…This Bill supports Australia's longstanding commitment to internationally recognised human rights to freedom from slavery and forced labour such as in Article 8 of the International Covenant on Civil and Political Rights and related international conventions against slavery and forced labour."*[40]

2.2 Yet the Chinese Foreign Ministry has suggested that a ban "violates international trade rules and sabotages global industrial, supply and value chains" and "seriously infringe upon other countries' basic human rights".[41] Which view is correct?

2.3 Nothing in international human rights law, trade law, or general international law strictly prohibits the sale or purchase of goods made with forced labour. What is prohibited is the forced labour itself (and related forms of exploitation, such as slavery).[42] Trading in goods produced through forced labour may however in some circumstances constitute handling the proceeds of crime under Australian law (see *Proceeds of Crime Act 2002* (Cth) s 329; and *Commonwealth Criminal Code* ss 270.6, 270.6A). And nothing in general international law or human rights law *prevents* Australia adopting a ban on the trade in such goods. (The position under international trade law may, though, be somewhat more complex (see section 3 below).)

2.4 Even if a ban is permitted, the question still arises whether it is the best instrument for achieving the intended policy result. A blanket trade ban on all goods from a certain point of origin is a blunt approach to promote human rights. Import bans mean a loss of export earnings for producers, which puts downward pressures on labour costs and may in fact *increase* the risks of forced labour in the short-term. Moreover, blanket bans affect all producers from a given point of origin equally – regardless of whether they rely on forced labour or not. And if exports can switch to new markets, bans may have little effect.

2.5 The more targeted restrictive measures are to the precise source of forced labour risks, the less likely that they will negatively affect legitimate production and trade, and that they will have the desired effect of promoting respect for human rights and labour standards by the producer. This is why the default position in Australia, as elsewhere, has not been to block trade with whole regions, but rather to place the onus on individual companies to ensure respect for human rights in their supply-chains. Indeed, on 16 January 2021 Foreign Minister Payne urged "any Australian company sourcing products from Xinjiang to undertake due diligence into their supply chains and suppliers."[43]

2.6 That encouragement expands on the expectation already enshrined for companies with consolidated revenue of AUD 100 million, in the *Modern Slavery Act 2018* (Cth). It, in turn, reflects expectations on all business to respect human rights, as set out in the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises. These expectations include human rights due diligence, use of leverage in business relationships (i.e. with suppliers) to address human rights risks, and provision or enabling of remedy.[44]

2.7 Some countries have responded to allegations of XUAR forced labour by building on the frameworks they have in place for implementing the UNGPs. On 17 December 2020, the European Parliament adopted a resolution calling for the introduction of mandatory human rights due diligence and an EU ban on products made with Uyghur forced labour.[45] On 12 January 2021, the UK and Canadian governments each announced measures to prevent "complicity" in forced labour in Xinjiang. In the UK, this included proposed introduction of penalties for companies not complying with the *Modern Slavery Act 2015* (UK),[46] and issuing guidance to business on its Responsibility to Respect human rights under the UNGPs.[47] This followed inquiries within UK Parliament.[48] The Canadian measures likewise followed a parliamentary inquiry, by the Subcommittee on International Human Rights of the Canadian Parliament's Standing Committee on Foreign Affairs and International Development. In its report on 20 October 2020, it described CCP mass detention of Uyghurs as "the largest mass detention of a minority community since the Holocaust." The Canadian measures are extensive. They include:

- the prohibition of imports of goods produced wholly or in part by forced labour;

- a Xinjiang Integrity Declaration for Canadian companies. Companies are required to make a declaration that acknowledges that the company: is aware of the human rights situation in Xinjiang; abides by all relevant Canadian and International laws, respects human rights, and seeks to meet or the UNGPs and OECD Guidelines;
- a Business Advisory on Xinjiang-related entities, enhanced advice to Canadian businesses, and programming to increase awareness for Responsible Business Conduct linked to Xinjiang;
- export controls; and
- a government-backed study on forced labour and supply chain risks.[49]

2.8 Yet there are good reasons to believe that where forced labour is widespread and systematic – as it appears to be in XUAR – corporate human rights due diligence may not be effective, and divestment, exclusion, withdrawal and trade bans may be the only safe approach. Allegations of forced labour are by their nature hard to verify, given the illegality of such conduct and the likelihood it takes place in informal, remote and secluded work settings. In XUAR, the challenges of investigating such allegations in supply-chains are compounded, as the Fair Labor Association, a multi-stakeholder partnership set up during the Clinton Administration to promote respect for labour standards in global supply-chains, explains:

> *"Normally forced labor can be detected and remediated through effective due diligence measures. In the case of Xinjiang, however, companies cannot rely on normal due diligence activities to either confirm—or rule out—the presence of forced labor. Impediments to effective due diligence and effective remediation of forced labor stem from:*
>
> - ***Restricted access:*** *The Chinese government has restricted regular travel to the region and imposed heavy surveillance on those who do travel there. Independent auditors are not able to gain unfettered access to work sites.*
> - ***Unreliable information:*** *Workers are not able to communicate freely about their status at the work site or the working conditions without fear of political reprisal against themselves or their family members. Other individuals in the region, including auditors, may not be able to communicate freely about their findings without fear of reprisal.*
> - ***Lack of effective remediation options:*** *Suppliers operating in the region may face a situation in which the Chinese government, not the company, mandates and controls recruitment of affected workers. This may limit their ability to communicate freely about the situation as well as their ability to protect affected workers."*[50]

2.9 Concerns about the serious obstacles to reliable due diligence in XUAR have led to a growing push in Europe and North America for import, investment and other business bans applying across XUAR, and to companies outside XUAR that participate in the XUAR forced labour regime. More than 330 organizations, including UK retailer Marks & Spencer, have endorsed the Coalition to End Forced Labour in the Uyghur Region's 'Call to Action'. This commits signatories to exit business relationships where certain indicators of connection to XUAR forced labour are identified.[51] Calls for action have issued from across the political spectrum, from the UK Conservative Party[52] to the Australian Council of Trade Unions.[53]

2.10 In the last year, US government actors have taken numerous, increasingly stringent and bipartisan steps to stem the flow into the US of goods and funds linked to XUAR forced labour:

- **June 2020:** US Congress adopts the *Uyghur Human Rights Policy Act of 2020* (P.L. 116-145), under which the U.S. government will receive periodic reports on these alleged forced labour policies, and can freeze the assets of individuals and entities found responsible for human rights abuses in Xinjiang, as well as ban the identified individuals from entry to the United States.
- **July 2020:** The US federal executive warns entities with exposure to US markets and banking systems to beware handling goods produced through the scheme, or the proceeds of trade in such goods, and notes the difficulties of conducting HRDD in XUAR.[54]
- **September 2020:** US Customs and Border Protection (CBP) announces orders preventing goods from four XUAR companies and one factory from entering the US market.[55]
- **October 2020:** CBP detains a shipment of women's gloves as a California port after tracing it to a factory of the Yili Zhuowan Garment Manufacturing Company in Xinjiang.[56]
- **December 2020:**CBP bans all cotton and cotton products from the Xinjiang Production and Construction Corps (XPCC), which controls about one third of all cotton production in the Uyghur Region and more than 6 per cent of the global cotton supply.[57]
- **13 January 2021:** CBP announces a ban on all cotton and tomato-product imports from XUAR.[58]
- **27 January 2021:** Senators Marco Rubio (R-FL), Jeff Merkley (D-OR), and Senate colleagues reintroduced the *Uyghur Forced Labor Prevention Act*, which would ban all goods made with XUAR forced labour from entering US markets.[59]

3. Is a ban permissible under global trade rules?

3.1 It might seem obvious that a measure intended to prevent Australian producers and manufacturers being undercut on price by competitors relying on internationally outlawed labour practices is a measure designed to protect the level playing field of global trade. The PRC's reliance on forced labour is arguably an illegal subsidy that leads to 'social dumping' in Australia and elsewhere of goods manufactured with forced labour.[60]

3.2 Yet the Bill, as drafted, could be vulnerable to legal challenge under the China-Australia Free Trade Agreement (ChAFTA). ChAFTA prohibits the adoption of non-tariff measures – prohibiting or restricting importation of a good "originating in the territory" of the other Party – except in accordance with Article XI of GATT 1994. It is not clear whether international dispute settlement bodies would interpret Article XI (and thus ChAFTA) to permit a ban on importation of goods that is imposed solely on the grounds that the goods were made with forced labour.

3.3 WTO Members have long been split over whether to allow trade actions based solely on labour standards. Developing countries, in particular, have argued that industrialized countries could use labour standards as a smokescreen for protectionism and to undermine the comparative advantage of lower wage trading partners. Nonetheless, at the 1996 Singapore Ministerial Conference, WTO members – which did not yet include PRC – committed to a narrow set of internationally recognized 'core' labour standards, including a prohibition on forced labour.[61] The 2001 Doha Ministerial Conference – which PRC attended as a Member – affirmed the Singapore declaration and the position of WTO members that labour standards should be enforced through the ILO, not the WTO.

3.4 The Chinese government might claim that the ban created in this Bill constitutes a violation of the foundational GATT/WTO principle that 'like' products be treated alike, and served as a smokescreen for protection. This could however be met by the response that *all* goods manufactured with forced labour, including those so manufactured *in Australia*, are prohibited from sale and trade in Australia.[62] Such a claim would be stronger if the prohibition provided for by the Bill applied not only to China and PRC, but to import of goods manufactured with forced labour *from any origin*; and stronger still if there were a specific provision in Commonwealth law banning internal trade and commerce in goods made with forced labour, perhaps on the grounds they constitute proceeds of crime.

3.5 The Chinese government might, in the alternative, claim that even if trade in goods made in Australia or elsewhere is prohibited in Australia, it is not permissible under ChAFTA to equate geographic origin with manufacturing process. In other words, while it might be permissible to prohibit import of goods *actually* made with forced labour, this argument runs, it is not permissible to prohibit import of all goods from a certain geographic area on the *suspicion* that they *may* be manufactured with forced labour. Defences of the Australian ban would then turn on technical questions of trade law and policy, including:

- the 'necessity' of the measures;
- whether consumer perceptions of XUAR goods make them unlike equivalent goods;[63]
- whether the ban was permitted on 'public morals' grounds under GATT Article XX(a);[64]
- whether GATT Article XX(e) – which permits trade restrictions on 'prison labour' products – would justify these measures.[65]

4. What are the foreign and trade policy implications of the Bill?

China's reaction

4.1 The Chinese government would almost certainly react with open hostility to adoption of the ban envisaged in this Bill. China's top diplomat has recently indicated that "meddling" on XUAR is a "red line" for the country.[66] The Chinese government strongly contests descriptions of the Xinjiang Aid policy as amounting to 'forced labour', describing the allegations as a "smear",[67] and a "political maneuver" by other countries.[68] China's Foreign Ministry is quoted stating that "'[f]orced labour' is the biggest lie of the century made by persons and agencies in some Western countries ... with an aim to restrict and suppress the relevant Chinese authorities and companies and contain China's development."[69] The Chinese authorities point to statements by "nearly 70 countries" at the UN General Assembly in September 2020 "in support of China's

position" and opposed to "interference in China's internal affairs", including a statement made by Cuba on behalf of 45 countries relating to Xinjiang.[70]

4.2 This might suggest that China would dispute these measures through trade litigation. Yet such litigation would risk inviting scrutiny and ruling by an international body on labour management practices in XUAR. For Australia, such litigation might thus be seen as offering an opportunity to highlight these practices on the world stage. Yet there may also be a risk, were Australia to lose such a dispute, that it could open the way to potentially painful countermeasures by China, given the broad-based nature of the ban envisaged in this Bill. Such countermeasures ('suspension of concessions and obligations') are usually limited to the sector in which the initial measure has been taken (see eg ChAFTA Art 15.16(5)). Since there is no sectoral limit envisaged for the ban created by this Bill, this could open the path to China to take countermeasures, if the ban were found impermissible, in any sector.

The rules-based international order

4.3 Australia might nonetheless consider that adopting this measure could send important signals to the broader international community: that Australia will lead on modern slavery issues, and that Australia is committed to defence of the rules-based international order – including core labour standards and human rights. In his second reading speech, Senator Patrick stated that: "If Australia is to be true to the democratic values we hold, we need to leave the Chinese Government in no doubt that its conduct is unconscionable and unacceptable."[71]

4.4 Yet if this is true for China, it must also be true for other regimes that rely on widespread and systematic use of forced labour, such as Eritrea (as determined by a UN Commission of Inquriy chaired by Australian diplomat Michael Smith[72]) and DPRK (as determined by another UN Commission of Inquiry, that one chaired by Australian jurist and former High Court judge Michael Kirby[73]). A ban that is narrowly focused on XUAR and PRC, but does not allow for exclusion of goods made in other countries with similar records on forced labour, such as Eritrea and DPRK, could actually risk calling Australia's commitment to a 'rules-based' international order *into question*.

4.5 A rules-based approach should apply the same rule similarly to similar cases, not ban imports made with forced labour from only one country. The obvious solution is not to proceed with a ban focused narrowly on China and XUAR, but rather to declare a prohibition on the importation of goods made with forced labour *from any country*. This is the approach already adopted in the US and Canada and soon to be adopted in Mexico.[74]

The need for coordination with like-minded actors and integration across policy domains

4.6 Another aspect to consider is whether a ban adopted solely by Australia is likely to be effective in inducing policy change in PRC. The short answer, given the small fraction of exports from XUAR for which Australian demand accounts, is no. However, it is also clear that coordinated action by importing countries *can* induce countries to alter their labour management arrangements, where the aggregate demand affected is sufficiently large.[75] This implies that Australia should work with other like-minded countries, such as the US, UK and Canada, to coordinate the scope, timing and nature of any such ban.

4.7 Australia may find a willing partner in the US. The views of Kurt Campbell, newly-appointed 'Asia Coordinator' in the Biden White House, are worth quoting at some length. Creating a durable order in the Indo-Pacific, he recently wrote in *Foreign Policy*, "is not only a matter of international politics and security. Trade, technology, and transnational cooperation are also vital". Campbell explains that, in the Indo-Pacific, "coalitions" will be urgently needed on "questions of trade, technology, supply chains, and standards", to create "a predictable commercial environment if the country [PRC] plays by the rules".[76]

4.8 What this points to is the need not only for coordination between countries, but also an integrated policy response using multiple commercial, trade, investment and financial levers. Canada and the UK are taking action to constrain their exports to XUAR. The US has reminded companies with ties to the US financial system that they have anti-money laundering obligations related to funds generated through forced labour.[77] And in those countries that have adopted so-called 'Global Magnitsky' regimes, targeted sanctions are also now being used to freeze the assets of individuals with ties to forced labour.[78]

4.9 In contrast, while the Bill proposes a ban on imports, it does not address capital inflows. There are credible reports of investment in Australia by at least one company closely involved in the forced labour regime in XUAR. In February 2020 the ABC reported that the Chinese agriculture company Xinjiang Yikang purchased Florina station in Katherine in 2016, through a subsidiary, in order to grow cotton. Xinjiang Yikang allegedly owns shares in XPCC, and is involved in the cotton industry in Xinjiang.[79]

4.10 An approach that bans imports tied to XUAR forced labour, but permits the inflow of capital with ties to XUAR forced labour, risks policy incoherence. If Australia is to adopt a consistent and principled stance against doing business with actors with ties to XUAR forced labour, then the Bill should be revised to provide not only for a ban on importation of goods manufactured with forced labour, but for a more integrated policy response that also encompasses anti-money laundering and proceeds of crime obligations, investment rules, and sanctions and export controls.

5. How can an import ban be effectively enforced?

5.1 The Bill relies on existing administrative and enforcement arrangements under the *Customs Act 1901* (Cth). This will create a non-trivial and ongoing burden on relevant customs authorities to furnish frontline customs officers with the information they need to reliably distinguish goods prohibited under this ban from other, permitted goods. The costs of developing that information will be borne by the taxpayer, and are not identified or discussed in the Explanatory Memorandum. Given the challenges involved in reliably assessing whether goods are sourced from XUAR and/or produced with forced labour, the danger of this approach is that it will simply lead to lax and unpredictable enforcement. This may not undermine the efficacy of the legislation and create an uncertain commercial environment for importers.

5.2 An alternative, more effective approach, could draw inspiration from the arrangements developed in the United States in recent years, following the signature of the Trade Facilitation and Trade Enforcement Act of 2015 by President Obama in February 2016. Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labour – including forced child labour. Such merchandise is subject to exclusion from the U.S. market by U.S. Customs and Border Protection (CBP), and to seizure – and may lead to criminal investigation of the importer. When information reasonably indicates that such merchandise is being imported, the Commissioner of CBP may issue 'withhold release orders' (WROs).[80] At the time of writing this submission, there were 47 active WROs, around two thirds of which pertain to China.[81] 90 shipments were detained in the last quarter of 2020.[82] On 13 January 2021, CBP issued its first ever region-wide WROs, covering cotton, tomatoes and downstream products from XUAR.

5.3 A WRO suspends the importation of goods at a U.S. port of entry. Once a WRO has been issued, the goods are subject to detention. The importer can then re-export the goods to a location outside the U.S. within 3 months; or provide evidence demonstrating that the goods are not produced with forced labour and obtain a release of the goods from CBP custody.

5.4 This enforcement approach has numerous advantages over reliance on frontline customs officers to make determinations about whether specific goods are made with forced labour.

- First, it creates greater predictability for importers and the domestic market more broadly about which goods or categories of goods will be subject to enforcement action.
- Second, it enlists the broader public and civil society in the task of developing information to assess whether goods fall within the prohibited class. U.S. CBP has established formal procedures allowing for members of the public and non-governmental organizations to petition it to adopt WROs against specific importers. This not only spreads the cost of developing such information, but also strengthens the quality of information, given the specific expertise and global reach available to some NGOs.[83]
- Third, the WRO system gives CBP significant leverage over importers, allowing it to induce companies to change their labour management practices and adopt remedial measures, in order for access to the US market to be restored. This is a powerful and targeted tool for promoting respect for human rights and labour standards.
- And fourth, such a scheme is more responsive to changing facts on the ground than an approach that rests on adoption of primary legislation to add and subtract goods from the list of prohibited imports, as this Bill does.

5.5 Any Australian analogue to this system would need to be adapted to Australia's legislative, regulatory and administrative context. This might involve, for example, creation of a statutory mechanism allowing the Minister of Home Affairs, or another relevant authority, after consulting through an appropriate inter-departmental process, to add and remove categories of goods or goods produced or manufactured by certain companies, from a list of goods presumed to be produced or manufactured with forced labour. Such additions and removals might be better made through regulations or secondary legislation than through primary legislation, drawing on established precedents in the areas of extradition and sanctions. And, for the reasons outlined in previous sections, it may be advisable to link this list not only to import controls, but also to sanctions and export controls, anti-money laundering arrangements, investment rules, and also *Modern Slavery Act 2018* (Cth) reporting.

6. Recommendations

6.1 Based on the preceding analysis, I offer the Committee the following recommendations:

1. **Do not single out PRC or XUAR:** Any arrangement prohibiting importation of goods produced or manufactured with forced labour should apply to all such goods regardless of their geographic origin. It should not single out PRC or XUAR, as this may weaken the chances of such a provision surviving legal challenge, and weaken the argument that the measure is intended to promote universal human rights and defend the rules-based international order.

2. **Prohibit domestic trade and commerce in goods made with forced labour:** The Bill should be amended to formally prohibit domestic trade and commerce in goods produced or manufactured with forced labour and modern slavery. This will help ensure that any import or other controls that are adopted do not discriminate between goods made in Australia and other goods, and will also send a powerful signal to Australian markets, banks and investors.

3. **Integrated response:** Restrictions on doing business with entities using forced labour should not be limited to import controls. A more effective approach will use multiple policy levers in an integrated manner, including *Modern Slavery Act 2018* (Cth) reporting, anti-money-laundering and proceeds of crime obligations, investment rules, and sanctions and export controls.

4. **Modern Slavery List:** The Bill should be revised to amend the *Modern Slavery Act 2018* (Cth) to create a Commonwealth 'Modern Slavery List' – a list of goods, classes of goods, regions and/or entities rebuttably presumed to be using forced labour or modern slavery. Importation of such goods, handling of funds from, investment in or export to companies or regions on that list would be prohibited. Additions and removals from this List could be achieved through Ministerial declaration or secondary legislation.

5. **Public submissions:** The Bill should create a mechanism for members of the public to submit information to the relevant decision-making authority to assist it in determining additions to and removals from the Modern Slavery List.

6. **Engagement with Listed entities:** The Bill should establish the power of the relevant Minister or Commonwealth entity to engage in dialogue with a Listed entity to establish remedial conditions and take meaningful steps to ensure respect for human rights, in order to be eligible for removal from the List. The Bill should ensure such engagement is transparent and consistent with Australia's commitment to the UN Guiding Principles on Business and Human Rights.

7. ***Modern Slavery Act 2018* reporting:** The Bill should amend the *Modern Slavery Act 2018* (Cth) to require Modern Slavery Act statements to specifically report on any dealings with entities, or handling of funds or goods, on the Modern Slavery List.

8. **Work with like-minded countries:** The government should encourage like-minded actors such as the US, UK, Canada, New Zealand and EU to adopt similar arrangements, and should work with them to coordinate inclusions and withdrawals from the List, or other restrictive measures.

Prof. James Cockayne, 5 February 2021

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