Submission No 7

INQUIRY INTO ETHICAL CLOTHING EXTENDED RESPONSIBILITIES SCHEME 2005 (NSW)

Name: Igor Nossar, John Owen, Luigi Amoresano

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SUBMISSION

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Modern Slavery Committee

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Igor Nossar
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PART ONE: Where did the TCF Mandatory Retailer/Supplier Code come from? And what is the TCF Mandatory Retailer/Supplier Code? (And exactly how does it operate?)

Australia has a federal system of government, characterised by a division of legislative powers between the (national) "federal" jurisdiction and the respective (provincial level) "state" jurisdictions. Historically, the minimum pay and industrial working conditions for almost all workers in Australia have been set down – by a range of (various federal and state) industrial tribunals – in the form of (respectively federal and state jurisdiction) industrial awards.

Since the mid-1980s, trade union and community groups have campaigned for legal mechanisms that establish minimum hours and rates of pay – in addition to reasonable working conditions and OHS and workers' compensation entitlements – for clothing outworkers. (The term "outworkers" refers to those workers labouring in their own homes to perform work for others.) This pressure led the federal industrial tribunal, in 1987 and 1988, to adopt novel award provisions designed, inter alia, to permit regulatory agencies, including the relevant trade union, to *track the contracting process* from the level of principal manufacturers, and fashion houses, down to the industrial outworkers themselves. In addition, this package of award provisions established the legal right of clothing outworkers to receive pay rates and, in general, conditions no less than the legal minimum entitlements of factory-based clothing workers. These important provisions were supplemented by an equally significant federal industrial tribunal decision in 1995 giving regulatory agencies full legal access to contract details of *pricing* at each level of the contracting process.

However, unavoidable issues of industrial legal jurisdiction enabled the most significant players in the contracting process – the major retailers – to escape the scope of these new award provisions. Further, these new award developments were isolated to the realm of 'industrial relations law', so that the potential advantages of these novel industrial award provisions remained unavailable in relation to the equally pressing concerns about the OHS of clothing outworkers and the lack of their insurance coverage for workers' compensation. The effective enforcement of OHS provisions and workers' compensation coverage for outworkers is equally dependent upon the knowledge of regulatory agencies about the *location* of these outworkers and the *conditions* (including payment rates and hours of work) under which they labour. In addition, the past inability of governmental regulatory agencies to provide sufficient resources for enforcement ensured that real compliance with such formal legal provisions remained sporadic at best.

In response to these deficiencies, further trade union and community pressure led in 1995 and 1996 to the adoption of voluntary codes of practice by retailers and manufacturing employers aimed at securing these entitlements for outworkers. Predictably, however, such voluntary schemes tended to place the more ethical retailers at substantial commercial disadvantage, since less ethical retailers who refused to volunteer could consequently benefit commercially from the exploitation of outworkers that more ethical retailers had agreed to forego.

Only one major retailer adopted a form of voluntary retailer code that facilitated effective enforcement. The retailer was obliged, by that particular code of practice, to comply with parallel obligations for contractual disclosure and the provision of regular supply lists. This particular voluntary code of practice also created a specific commercial incentive mechanism for the effective commercial remedy of supply chain failures to comply with outworkers' entitlement obligations. The retailer was obliged to designate a specific corporate officer to whom the relevant signatory trade union could bring specific instances of outworker exploitation, and was also obliged to respond to proven instances of outworker exploitation by means of a range of commercial disciplinary measures aimed at the relevant supplier of clothing. In particular, this innovative voluntary code of practice obliged the signatory major retailer to consider discipline of the relevant supplier by terminating the contract for supply between that retailer and that supplier, and by refusing to enter into further contracts of supply, if the supplier failed to remedy the disclosed breaches of the outworker legal protections.

A range of integrated proposals was put forward in June 1999 to deal with the remaining deficiencies in the legal system of protection for outworkers in general (as opposed to merely clothing outworkers in particular). (These integrated proposals were put forward by one of the co-authors of this submission.) The first Australian state jurisdiction to act in response to this set of proposals was New South Wales, where the enactment of both the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) and more recent provisions such as the addition of the new s 175B into the Workers' Compensation Act 1987 (NSW) have together combined to achieve the three following key outcomes.

First, they impose liability almost throughout the entire supply chain (for example, upon principal manufacturers) for outworker entitlements, and create a highly innovative recovery mechanism for outworkers. Under this recovery mechanism, clothing outworkers are entitled to serve a claim for unpaid industrial entitlements upon any entrepreneur throughout the relevant clothing supply chain up to, and including, the level of the principal manufacturers themselves. The form of the claim is cheap and simple. Once served with such a claim, the principal clothing manufacturer effectively experiences a reversal of the traditional onus of proof for civil law recovery. In other words, unless the principal manufacturer could prove that the outworker serving the claim had not done the work or that the claim calculation was erroneous, the principal manufacturer served with such a claim would thereupon be obliged to pay that claim within a relatively short fixed period of time, regardless of how many entrepreneurial parties had intervened in the succession of contractual arrangements between the principal manufacturer and the clothing outworker who ended up performing the work.

Second, under s175B of the NSW Workers' Compensation Act, obligations have been imposed upon principals generally (that is, not only in the clothing industry) either fully and accurately to disclose full details of supply chain subcontracting or else bear the liability for any unpaid workers' compensation insurance premiums throughout that supply chain. This provision contains elements that are very similar to the novel statutory recovery mechanism contained in the original ss 127A to 127G created by schedule 2 of the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW). (The provisions contained in the original ss 127A to 127G were later repealed and replaced by the broadly equivalent ss 129A to 129J within the most recent version of the NSW Industrial Relations Act.)

Third, in relation to major retailer obligations, these statutory provisions created a tripartite stakeholder consultation process with a fixed timetable triggering the potential exercise of ministerial statutory powers unilaterally to proclaim mandatory retailer obligations. (This tripartite stakeholder consultation process was conducted within the Ethical Clothing Trades Council of NSW.) These powers were not confined to consideration of industrial legal entitlements alone: rather, any such mandatory retailer obligations were to be predicated on the delivery of all relevant employment protections for outworkers, both in relation to industrial legal entitlements and also explicitly in relation both to OHS obligations and also access to workers' compensation insurance.

Even before the expiry of the timetable for this tripartite process, the dynamic created by these statutory provisions (and most notably by the limited timetable prior to potential proclamation of mandatory retailer obligations) rapidly produced, in the private sector, a new improved voluntary retailer code of practice – now promptly embraced by most major Australian retailers – and also a separate, new corporate wear(and sportsgoods) code of practice, along with separate auditing arrangements authorised as an Australian state government tender requirement by a public sector effective business controller.

This new improved voluntary retailer code of practice was initially embodied in the "NSW Retailers/TCFUA Ethical Clothing Code of Practice 2002". (See Appendix 1.) Within one month, this new improved voluntary retailer code of practice was also adopted at a national level in the form of the "National Retailers /TCFUA Ethical Clothing Code of Practice" (see Appendix 2) - which shortly thereafter was subsequently signed by all the major retailers (see, for example, Appendix 3 and Appendix 4). [The latest manifestation of this (nationally operative) new improved voluntary retailer code of practice currently appears as Part 2 (Retailers) of Ethical Clothing Australia's Code of Practice (incorporating the previous Homeworkers Code of Practice). (See Appendix 5.)]

Following protracted negotiations (conducted by one of the co-authors of this submission and others), high profile transnational clothing firms such Nike (see Appendix 6) and Reebok (see Appendix 7) - and (more locally in Australia) R.M.Williams - have become signatories to this new Australian corporate wear and sportsgoods code of practice. This new corporate wear and sportsgoods regime entrenches targeted compliance auditing and enforcement measures by requiring the effective business controllers of the relevant clothing supply chains to contractually secure both identification of all sites of production (without exception) and also access by the relevant trade union to those sites, without any requirement for prior notification of inspections. These contractually secured measures are underpinned by the potential loss of supply contracts for any suppliers who attempt to avoid compliance. (One of the co-authors of this submission had first proposed this package of targeted compliance auditing and enforcement measures to an agency of the New South Wales government, during the government's review of implementation guidelines concerning government purchase of textile, clothing and footwear products.)

The tripartite stakeholder consultation process in New South Wales culminated in a decision to recommend that the relevant minister unilaterally proclaim mandatory retailer obligations which specifically incorporate targeted compliance auditing and enforcement measures of the type to be found in the new corporate wear and sportsgoods code of practice. It should be noted that this recommendation was supported by five out of the (total of) six stakeholder organisations represented in this tripartite consultation process. More specifically, this recommendation was supported by the stakeholder organisations representing both the retailers and a segment of the manufacturing employers. The text of this recommendation could originally be found at <http://www.industrialrelations.nsw.gov.au/resources/ethicalclothingtcouncil.pdf> under the title 'New South Wales Ethical Clothing Trades Council (Twelve Month Report) 2003' as 'Recommendation One' from pages 36 to 52. (One of the co-authors of this submission served in the capacity of stakeholder organisation representative on the New South Wales Ethical Clothing Trades Council throughout its deliberations, in the course of which he designed and drafted the relevant Council recommendation.)

This recommendation was later effectively adopted by the relevant ministers and the resulting mandatory retailer obligations were proclaimed by order in gazette as a delegated legislative instrument entitled the "Ethical Clothing Trades Extended Responsibility Scheme". This legislative instrument took effect in New South Wales on 1st July 2005. Attention is particularly drawn to the legal obligations owed by retailers (to the relevant trade union) by virtue of clauses 11, 12(3), 12(4), and 20 – especially 20(8).

It should be noted that these provisions together empower the relevant trade union to exercise effective regulatory oversight over the entire clothing supply chain in relation to compliance with labour law minimum standards. While these provisions are legislated by an instrument pursuant to New South Wales state industrial relations legislative capacity, it should be noted that the resulting trade union regulatory powers permit the relevant trade union to effect compliance with workers compensation (as well as occupational health and safety) legal obligations – in addition to compliance with industrial relations legal obligations. (See the definition of "lawful entitlements" – in particular, the reference to "other legislation" – within Clause 5, Definitions, of the New South Wales Ethical Clothing Trades Extended Responsibility Scheme.)

More specifically, these provisions together require all clothing retailers to proactively inform the relevant trade union about all parties with whom the retailers contract for the supply of clothing products. In addition, these provisions also empower the relevant trade union to have complete access to all details of the consequent contracts. In summary, these provisions together now empower the relevant trade union to track down all sites of clothing production throughout Australia, even though (at the time of writing) these provisions have only been legislatively adopted in just one Australian State jurisdiction so far – namely, the state jurisdiction of New South Wales.

The effective cross-jurisdictional consequences of this novel type of public regulatory instrument are particularly evident in clause 19, Obligations of suppliers who carry on business outside the state. This particular provision interacts with the provisions in clause 5, Definitions, which define "agreement" and "lawful entitlements" (by inter alia reference to "other legislation") and "manufacture" and "manufactured", as well as defining the key terms "relevant industrial instrument" and "retailer" and "supply" and "transfer". Together with clause 19, these definitional provisions represent the practical embodiment of the potential inherent within "contractually entrenched forms of regulation" (C.E.F.O.R.) to overcome the regulatory obstacle of geographical jurisdiction.

Attention is also drawn to the contractually entrenched form of regulation (C.E.F.O.R.) legislated in Schedule 2 (Part B) as the compulsory standard contractual provision entitled "UNDERTAKING AS TO THE EMPLOYMENT OF OUTWORKERS UNDER RELEVANT AWARD".

It is most important to note that the "Ethical Clothing Trades Extended Responsibility Scheme" (IE. the TCF Mandatory Retailer/Supplier Code) was explicitly designed to aid compliance with outworker protections provided by **all relevant industrial awards – in particular, any federal clothing award** such as the *Textile, Clothing Footwear and Associated Industries Award 2020.* (See the definition of **"relevant industrial instrument"** – and the reference to "other legislation" – within Clause 5, Definitions, of the New South Wales Ethical Clothing Trades Extended Responsibility Scheme.)

The preceding expansion of federal jurisdiction in relation to industrial relations matters, therefore, has absolutely no bearing upon the continued relevance of the TCF Mandatory Retailer/Supplier Code.

Therefore, in essence, the TCF Mandatory Retailer/Supplier Code and all relevant federal legislative instruments are in no way competitor regulatory regimes – they are effectively complementary to each other.

PART TWO: How can the TCF Mandatory Retailer/Supplier Code be used?

In conjunction with the operation of all relevant awards, the TCF Mandatory Retailer/Supplier Code now empowers the trade union regulator to access sufficient information from retailers which now provides that trade union regulator with the ability to track the real flow of clothing work orders to all locations of production across Australia. Under the TCF Mandatory Retailer/Supplier Code and those relevant awards, that union regulator can now access the price paid (including – finally – piece rates paid) and volume (of clothing products) ordered for **each** contract at **each** level of the clothing supply chain. [The access to the price paid permits the union regulators to track the value of clothing work orders being worked on at each level of that supply chain. This information empowers the union regulators to accomplish an accurate "value and volume" analysis of the flow of clothing work orders down throughout an entire supply chain.]

The combination of these **"value and volume"** measures has become a key tool in the practical operation of TCF regulation. Regulators can track the real flow of TCF work orders to all locations and access all relevant information, especially price paid and volumes ordered (the numerical output of garments and assigned working times for each particular product) for each of the contracts between all the commercial parties in the contracting chain. Regulators can aggregate this information to estimate the total minimum labour time required for clothing production at any level in that supply chain. As a result, regulators can thereby also estimate the equivalent minimum number of full time employees required to complete any particular production order. Union regulators can then utilize their legislative and contractually based powers to inspect all production sites without notice to check the accuracy of workplace records and locate the entire workforce. (See Appendix 8 and Appendix 9).

The union regulators utilized the opportunity thus provided in order to develop an innovative "Supply Chain Strategy" (SCS). This SCS has produced impressive results, in terms of locating the entire workforce (both in workshops and at homes) – and obtaining (at the very least) the legally required conditions of employment (including remuneration) – for a number of (quite diverse) individual clothing supply chains within Australia. (See Appendix 10 and Appendix 11 and Appendix 12.)

Most importantly, the TCF Mandatory Retailer/Supplier Code explicitly refrains from applying its mandatory provisions to any retailer or manufacturing supplier that is signatory to – and is compliant with – the voluntary codes and current provisions of the Home Workers Code of Practice [as now appear in Ethical Clothing Australia's (ECA) Code of Practice]. This approach exempting the application of the TCF Mandatory Retailer/Supplier Code has completely transformed the practical enforceability of the ECA provisions. Failure, by either retailers or suppliers, to comply with the "voluntary" ECA provisions now incurs the full application of the entire mandatory code regime, which is tougher in the scope – and severity – of the obligations imposed and is also enforceable in court with substantial financial penalties upon conviction. (See Appendix 9.) Thus, by one instrument or the other, all national Australian retailers are now compelled to provide details of their clothing supply contracts to NSW and union regulators.

Therefore, in essence, the TCF Mandatory Retailer/Supplier Code and the ECA Code of Practice are in no way competitor regulatory regimes – they are effectively complementary to each other.

In addition, it is most important to note the highly significant cross jurisdictional application of the TCF Mandatory Retailer/Supplier Code. (See Appendix 13.) As a result of this cross jurisdictional feature, the benefit provided by the TCF Mandatory Retailer/Supplier Code as an incentive in favor of the ECA Code of Practice cannot be simply assessed by solely referring to the number of ECA accredited manufacturers in NSW. In other words, the TCF Mandatory Retailer/Supplier Code has operated in such a way that interstate suppliers of clothing products to NSW retailers have also been induced into ECA accreditation in order to avoid the operation of the TCF Mandatory Retailer/Supplier Code.

PART THREE: How can the TCF Mandatory Retailer/Supplier Code model be adapted to other industries (IE other than the TCF industries)?
And how can the TCF Mandatory Retailer/Supplier Code model be adapted to cross jurisdictional contract networks (such as international supply chains)?

The TCF Mandatory Retailer/Supplier Code is eminently suitable for adaptation to provide effective regulation of contract networks (including supply chains) which concern industries **other than** the TCF industries – as well as contract networks (including supply chains) which are **transnational** in their geographical scope. (See Appendix 13 and Appendix 14 and Appendix 15).

Authoritative commentators on the appropriate form of regulation to counter the phenomenon of modern slavery have drawn attention to the applicability of the TCF Mandatory Retailer/Supplier Code model in this respect. They have emphasized that this particular model is an international example of good practice for cross jurisdictional supply chain regulation. (See Appendix 16.)