NEW SOUTH WALES ETHICAL CLOTHING TRADES COUNCIL

TWELVE MONTH REPORT 2003

NSW Ethical Clothing Trades Council – Twelve month report to the Minister for Industrial Relations

Contents

Section 1

New South Wales Ethical Clothing Trades Council
Twelve month reporting requirements

Extract from the *Industrial Relations (Ethical Clothing Trades) Act 2001,*

Section 9 - Report on implementation of ethical clothing industry practices

(1) The Council is to evaluate, and report to the Minister on action (whether voluntary or otherwise) taken by the clothing industry during the period of 12 months after the commencement of this section to improve compliance in the industry with obligations to ensure outworkers in the clothing trades receive their lawful entitlements.

(2) The report is to include the Council's recommendations as to:

(a) whether, if a mandatory code were made, it would improve compliance, and

(b) the content and suggested penalties for failure to comply with such a code.

(3) The report is to be forwarded to the Minister as soon as practicable after the end of the 12 month period.

(4) The Minister must, as soon as practicable after receiving the report, lay a copy of the report, or cause it to be laid, before both Houses of Parliament.

(5) If a House of Parliament is not sitting when the Minister seeks to comply with subsection (4), the Minister must present copies of the report to the Clerk of the House of Parliament.

(6) A report presented to the Clerk of a House of Parliament:

(a) is taken on presentation, and for all purposes, to have been laid before the House of Parliament, and

(b) may be printed by authority of the Clerk of the House, and

(c) for all purposes is taken to be a document published by order or under the authority of the House, and

(d) on the first sitting day of the House after receipt of the report by the Clerk, must be recorded:

(i) in the case of the Legislative Council in the Minutes of the Proceedings of the Legislative Council, or
(ii) in the case of the Legislative Assembly in the Votes and Proceedings of the Legislative Assembly

Introduction

The exploitation of home-based workers in the clothing industry is a serious industrial and social problem in Australia and several other parts of the world. A significant number of fashion garments and other clothes are made in Australia by persons who are paid extremely low wages in poor and undesirable working conditions.

The conditions under which clothing outwork is performed have been considered over the last 10 years by a number of State and Federal Government and Industrial Relations Commission inquiries. Investigation is characterised by first-hand evidence from outworkers and submissions from industry groups and community organisations acting in an advocacy capacity.

These reports have found that outworkers within the textile, clothing and footwear (TCF) industry often receive payment and work under conditions which are inferior to their statutory and award entitlements. Conditions are characterised by allegations of:

- low piece-rates, which translate to low hourly wage rates contrary to industry award standards;
- late payment or non payment of wages;
- unreasonable and improper rejection of work by contractors/employers;
- lack of basic industrial entitlements such as paid annual leave;
- long working hours without appropriate penalty rates;
- often impossible or unreasonable deadlines for completion of work;
- substandard working environments affecting occupational health and safety; and
- stress associated with combining work and family responsibilities.

In summary, the clothing industry faces a number of challenges including:

- widespread non-compliance with minimum NSW employment standards by employers of home-based clothing workers;
- the difficulty of existing methods of enforcement to address this issue;
- the employment of vulnerable workers, particularly women, caught in the home-based clothing sector with adverse consequences to their health and well-being, and that of their families; and
- the allegation that it is an industry focused on surviving through suppressed labour costs.

Reference material and a comprehensive analysis of the working conditions of outworkers and the clothing industry can be found be in the Office of Industrial Relations (OIR) 1999 *Behind the Label* Issues Paper and on the OIR'S website.

1.1 Background to 'Behind the Label'

In 1999 the NSW Government made a commitment to address the factors that lead to the exploitation of home-based clothing workers in NSW as a key plank of its industrial relations plans.

This commitment was developed as proposals in a 1999 Issues Paper prepared by the OIR. Submissions were received from and consultations held with a variety of interested parties, including representatives of retailers, manufacturers and outworkers, as well as community organisations dedicated to improving the situation of outworkers.

Subsequent to these industry consultations, the proposals in the Issues Paper were redeveloped and refined. On 25 March 2001, the Premier announced *Behind the Label*, the NSW Clothing Outwork Strategy, a $4 million initiative which focuses on new approaches to resolving the issues that cause outworkers to be amongst the most exploited members of our community.

1.2 Key elements of the Strategy

Behind the Label is a comprehensive Strategy with five key elements:

- **Amendments to the *Industrial Relations Act 1996***

New legislation, the *Industrial Relations (Ethical Clothing Trades) Act 2001* commenced on 1 February 2002. The Act inserts special provisions into the Industrial Relations Act 1996.

- **Establishment of an Ethical Clothing Trades Council**

The Act provides for the establishment of the Ethical Clothing Trades Council to advise the Government on developments in the clothing industry.

- **Appointment of bilingual inspectors/advisers to work with the clothing industry**

OIR has appointed bi-lingual inspectors/advisers, who work with the Vietnamese, Chinese and other communities to provide practical assistance and information to employees and employers in the clothing industry to help them comply with their industrial obligations and enforce any breaches of industrial law.

- **Industry assistance**

Agencies such as OIR and WorkCover NSW are working with employers in the clothing industry to raise the level of occupational health and safety and industrial awareness in the industry. Education campaigns, workplace inspections, seminars and employment publications form part of this assistance package.

- **Establishment of education and retraining programs for outworkers**

OIR in conjunction with the NSW Department of Education and Training has established education and retraining programs for outworkers. These programs provide for the recognition of prior skills, upskilling and reskilling of outworkers, and assist in the development of a skilled workforce for the clothing industry while providing alternatives for outworkers who wish to leave the industry.

1.3 Amendments to the Industrial Relations Act 1996

The *Industrial Relations (Ethical Clothing Trades) Act 2001* commenced on 1 February 2002. It established the NSW Ethical Clothing Trades Council and enacted special provisions for inclusion in the *Industrial Relations Act* 1996 as follows:

- the provision that deems clothing outworkers to be employees (paragraph (f) of Schedule 1) was modified to remove the phrase '*for which a price or rate, is fixed by an industrial instrument'* and other modifications were made which will avoid any possible restriction on the employee status of outworkers within the meaning of s5(1) of the Act;

- in order to assist outworkers to recover unpaid remuneration from principal contractors and/or other apparent employers in the clothing production chain, new sections, s127A-s127G, specific to the clothing industry have been inserted into the Act. Clothing outworkers are able to recover unpaid remuneration by serving a statutory declaration on an apparent employer stating that the work was done and not paid for (or not paid in full). If necessary, the apparent employer may transfer that liability to the actual employer. The new provisions make it clear that retailers cannot be the subject of such claims unless they are the principal contractor in a supply chain; and

- the powers of industrial inspectors have been amended to clarify in s385 (2) that inspectors have the power to inspect records required to be kept by any person or company with obligations under the *Clothing Trades (State) Award* for work done under that award and to amend s386 so that inspectors have powers of entry for premises used both for residential purposes and for work in, or in connection with, the clothing trades.

Section 2

2.1 Overview of the NSW Ethical Clothing Trades Council

The Act provides for the establishment of an Ethical Clothing Trades Council (the Council).

2.2 Composition

The Council comprises representatives of industry groups including manufacturing and retail employers, trade unions and community groups.

The Council is chaired by the Hon Joseph Riordan, AO, former Federal Government Minister, former Senior Deputy President of the Australian Industrial Relations Commission, Chair of WorkCover NSW and a member of the Administrative Decisions Tribunal.

The Council consists of the following representatives appointed by the NSW Government on 9 April 2002 for a period of up to three years.

Council members	**Nominated by**
Hon Joe Riordan AO	Minister for Industrial Relations
Stan Moore	Australian Retailers Association (New South Wales Division)
Leigh Brooks	Australian Business Limited
Ashley Jones	Australian Industry Group (New South Wales Branch)
Nancy Carl	Labor Council of New South Wales
Barry Tubner	Textile Clothing and Footwear Union (New South Wales Branch)
Debbie Carstens	Fair Wear Campaign New South Wales (representing consumer and community interests)

The Council would like to acknowledge the efforts of Mr Kevin Elkington (Company Secretary, Coles Myer Ltd up to April 2003 and Council member representing the Australian Retailers Association) in assisting with the drafting

and implementation of the Retailers Ethical Clothing Code of Practice and his work for the Council in general.

2.3 Council role

The role of the Council is to:

a) advise the Government on developments in the clothing industry and their effects on the lives of outworkers, including levels of compliance with outworker related obligations, and ways to improve those levels of compliance, with a special focus on the efficacy of self regulatory mechanisms such as the Homeworkers Code of Practice and the scope for expanding the Retailers Ethical Clothing Code of Practice (Retailers Code) to cover greater number of retailers;

b) provide quarterly reports to the Government on retailer and manufacturer activities in relation to the Homeworkers Code of Practice and uptake by retailers of the Retailers Code;

c) 12 months after its establishment, report to the Government on progress towards improving compliance in the industry, and to advise on whether, if a mandatory code were made, such a code would improve compliance;

d) make recommendations on components for a mandatory code, backed up by penalties for non-compliance, for retailers and manufacturers in the clothing industry (which may be based on but not limited to the elements of the voluntary Homeworkers Code of Practice and of the Retailers Code) - but noting that the mandatory code will not come into operation unless the Government is satisfied that current self regulatory mechanisms are inadequate to achieve improvements in the level of compliance or that relevant parties are not in good faith attempting to negotiate improvements or extensions to those voluntary mechanisms, and in any case not before the Council has delivered its 12 month report; and

e) provide for the amendment of a mandatory code if one exists, if, at any time, the Government is satisfied, on the advice of the Council or otherwise, that amendment is necessary to achieve optimal compliance outcomes.

As part of its functions, the Council is to:

f) enter into discussions with the Homeworkers Code of Practice Committee, clothing retailers and clothing manufacturers, to encourage the adoption of the Homeworkers Code of Practice by all parties, to offer assistance in the promotion of that Code and to those who comply with its requirements, and to lobby for improvements to that Code that would increase its effectiveness in overcoming the ongoing exploitation of outworkers in the clothing industry; and

g) facilitate discussions between clothing retailers and the Textile Clothing and Footwear Union (TCFUA) concerning the making and implementation of voluntary industry agreements by persons who are not already parties to the Retailers Code.

The Council's functions are detailed in the Act at Part 2, Section 7, pages 5-6.

Section 3

Report on the operation of the current self-regulatory mechanisms

The Council is to report on action (whether voluntary or otherwise) taken by the clothing industry during the period of 12 months after the commencement of the *Industrial Relations (Ethical Clothing Trades) Act* 2001 to improve compliance in the industry with obligations to ensure outworkers in the clothing trades receive their lawful entitlements. This section of the report details the activities of and participation by clothing industry retailers and manufacturers in relation to the self regulatory mechanisms operating in the industry – the Retailers Ethical Clothing Code of Practice and the Homeworkers Code of Practice (HWCP). It should be noted that the HWCP contains the Retailers Ethical Clothing Code of Practice as part one and a manufacturer's code as part two.

Existing self regulatory mechanisms

3.1 Homeworkers Code of Practice

The HWCP was agreed to by unions and industry during 1996-97. The HWCP is a voluntary agreement entered into by retailers, manufacturers and unions and consists of two parts. Part one relates to retailers and part two to manufacturers and fashion houses. In 2002 part one of the HWCP was rescinded and replaced by the Australian Retailers Association and Textile Clothing and Footwear Union of Australia, Retailers Ethical Clothing Code of Practice (Retailers Code). The Retailers Code was negotiated under the auspices of the Council and is now the self regulatory mechanism applicable to all retailers in the clothing industry.

The Council notes that the HWCP is designed to complement the relevant awards and to make the contracting chain transparent and enable homeworkers to receive their lawful entitlements. It involves an accreditation process for manufacturers (including fashion houses and suppliers), an agreement by retailers to use suppliers that comply with employment laws and minimum award conditions and a process to identify and resolve unethical employment practices. It also includes a label system for consumers to identify ethically produced clothing – the *No Sweat Shop Label.* The Code is a self-regulatory system that seeks to regulate and monitor the production chain from the retailer to the homeworker. The intention of the Code has not been fully realised.

3.2 Code of Practice Committee

The HWCP established a Code of Practice Committee, whose role is to oversee the establishment and ongoing management of the HWCP. The HWCP Committee is comprised of members of the Textile Clothing and Footwear Union (TCFUA), Australian Industry Group (AIG), Australian Business Limited (ABL) and the Council of Textile and Fashion Industries of Australia (TFIA). It has the following functions:

- to accredit manufacturers;
- to register and maintain trademarks, logos and other identification items;
- to administer education, publicity and compliance funds;
- to establish grievance procedures and settle disputes; and
- to develop standard product specification.

3.3 Monitoring

The TCFUA is responsible for monitoring compliance with the HWCP. This includes identifying problems and providing details to the manufacturer / fashion house / wholesaler or retailer. If the problem is not rectified within a short time frame, the company responsible risks losing its contract to supply the retailer or accredited manufacturer. The HWCP Committee is able to revoke a manufacturer's accreditation.

3.4 Manufacturers' responsibilities under the Homeworkers Code of Practice

Part two of the HWCP sets out the criteria for participating manufacturers, wholesalers, warehouses and fashion houses - the suppliers.

Manufacturers seeking accreditation must:

- provide statutory declarations of their compliance with legal requirements and award provisions for outworkers, including rates of pay, hours of work, workers compensation insurance, superannuation, and notices of termination;
- maintain up-to-date records of orders taken, retailers to be supplied and addresses of outworkers and contractors employed; and
- ensure that any contractors engaged, sign contracts obliging them to observe and comply with relevant award provisions, according to law.

Suppliers must maintain lists of contractors and outworkers, and provide a copy of these lists to the TCFUA on demand. Manufacturers risk losing accreditation and contracts with retailers if their contractors fail to pay outworkers correctly or do not comply with all parts of the HWCP. (This requirement is consistent with the essence of the agreement between the TCFUA and retailers who have signed the Retailers Ethical Clothing Code of Practice).

3.5 Activities of manufacturers in relation to their obligations under the Homeworkers Code of Practice

The Council is aware that some aspects of the HWCP are not yet fully operational and the intent of the HWCP has not been realised. The Council is aware that while the HWCP seeks to oversee and monitor the production process it does not have broad application with only four manufacturers accredited under part two of the Code. The vast majority of manufacturers are not accredited under the HWCP.

The four accredited manufacturers are:

- Poppets Schoolwear Pty Ltd (makers of school uniform items as the Beare & Ley brand);
- Australian Defence Apparel Pty Ltd (Government contracts);
- Qualitops Pty Ltd; and
- the Brotherhood of St Laurence - Hunter Gatherer label.

It is anticipated that with appropriate promotion of the HWCP, combined with the obligations placed on retailers through the Retailers Ethical Clothing Code of Practice to inform their suppliers and manufacturers about the Code, an increased number of manufacturers will recognise the benefits of accreditation. The Council notes the recent efforts made by the Victorian branch of the TCFUA in encouraging a significant number of manufacturers to become accredited.

The Council will concentrate its activities on encouraging the remaining segment of the retail market to sign the Retailers Ethical Clothing Code of Practice and promoting the Homeworkers Code of Practice to manufacturers.

3.6 Retailers Ethical Clothing Code of Practice

In the mid 1990s, the TCFUA signed voluntary Deeds of Cooperation with a number of retailers including Target Australia Pty Ltd. These Deeds obliged the retailer to provide regular information about suppliers to the union, and to keep records of their contracts for inspection by the union on reasonable

notice. The Target Code provided the basis for negotiations on an industry wide code for all retailers in the clothing industry.

In September 2002 after extensive negotiation between the TCFUA and the ARA under the auspices of the NSW Ethical Clothing Trades Council, agreement was reached on a new Retailers Ethical Clothing Code of Practice. On 9 October 2002 the national bodies of the TCFUA and ARA signed the national version of the NSW code.

The agreement by retailers to assist in the identification of instances of exploitation of outworkers creates a uniform tracking mechanism that can be used to make the supply or contracting chain transparent from the top down. The Council recognises the key role that retailers in the clothing industry can play in addressing the issue of exploitation of outworkers. While there are a number of underlying issues in relation to compliance with legal employment obligations by employers in the industry, retailers as significant purchasers of locally made clothing goods can play an important role in ensuring that domestic clothing manufacture is performed under the appropriate working conditions. It is this top down approach in relation to the voluntary mechanisms that the Council has thought most appropriate to pursue in its attempts to protect the legal entitlements of clothing industry workers, in particular those working from home. The ARA, with the TCFUA, has worked under the auspices of the Council to develop the Retailers Code, consulting widely with many of its significant members. Signatories such as David Jones, Coles Myer and Woolworths companies have recognised the vital role that retailers can play in influencing the conditions under which clothing is manufactured domestically.

The Retailers Code commits retailers to working closely with their suppliers and the TCFUA to resolve instances of exploitation of clothing workers and puts in place measures that will assist in preventing such instances occurring in the future. Importantly the Code establishes a working relationship between retailers, their suppliers and the TCFUA which formalises record keeping requirements, dispute resolution and workplace inspections. The Code also places an obligation on retailers to include in future contracts with their suppliers, information relating to where the work is to be performed and that the work is to be performed under the conditions prescribed by the relevant award and industrial legislation.

3.7 Retailer responsibilities under the Code

On signing the Code the retailer is obliged to carry out the following actions:

- provide the TCFUA with full lists of suppliers within 14 days of signing and maintain detailed records;

- forward a copy of the Code to all their suppliers; and

- advise all suppliers that the TCFUA will visit them on a regular basis.

In addition the retailer must:

- ensure all current and future suppliers are registered in accordance with State and Federal Awards for the purposes of sub-contracting out any work associated with the manufacture of textile clothing and footwear items;

- ensure all suppliers they contract keep appropriate records of where and to whom they have further contracted the retailer's work;

- inform the supplier that records must be kept for at least 12 months after a contract has been entered into and be made available on the retailer's request;

- ensure the supplier acknowledges the Code's existence;

- ensure that the retailer is able to either terminate the contract or refuse to enter into future contracts should the supplier fail to comply with the award notification requirements or if an incidence of exploitation is not remedied; and

- inform the TCFUA immediately if they become aware that a supplier has been using the services of sub-contractors who have been or may be engaging in exploitative work practices.

The retailer must also endeavour to amend any existing supplier contracts' standard terms and conditions to meet applicable manufacturing laws and regulations.

The Retailers Code is designed to capitalise on the unique position of retailers at the top of the clothing supply chain and capture information on where the production of the clothing ordered is to take place. Consequently this allows the TCFUA access to the records of those suppliers.

There is already evidence that suggests that the Retailers Code is beginning to take effect.

Firstly, advice from the Homeworkers Code of Practice Committee indicates that there has been a considerable increase in inquiries from suppliers and manufacturers in relation to their responsibilities under the new Retailers Code as well as the relevant manufacturers' voluntary mechanism - the Homeworkers Code of Practice.

Secondly there has been at least one example where non- compliance with the NSW Clothing Trades (State) Award has been remedied through the relationship between suppliers and retailers enshrined in the Retailers Code. In this example a supplier nominated through the Code's reporting

requirements by a retail signatory was found to be giving work out without being registered as an employer under the award. Through appropriate intervention by the TCFUA all award breaches have been rectified.

The Retailers Code links the information contained in contracts with suppliers on where clothing production is taking place and places a commercial responsibility on those suppliers to ensure that production occurs under the appropriate conditions.

While there is promising feedback from the HWC Committee that the message is beginning to filter through to suppliers and manufacturers that change needs to occur, many are still not making the link to the HWCP. The record keeping and inspection elements of the Retailers Code are but one component of demonstrating compliance with legal obligations. This is an area in which the Council and the OIR will work together to ensure that information is provided to manufacturers as to what their responsibilities are in relation to the retailers they supply, and also under the HWCP.

3.8 Activities of retailers in relation to their obligations under the Retailers Ethical Clothing Code of Practice

The ARA and TCFUA have worked together to sign up 22 clothing industry retailers, representing 32 brand stores.

On 4 December 2002 Coles Myer companies signed individual Retailers Ethical Code of Practice agreements with the TCFUA.

At the time of writing, the following retailers had signed the Retailers Ethical Clothing Code of Practice:

K-mart
Grace Bros
Target
Woolworths (Big W);
Cue Clothing Co;
David Jones Limited;
Sussan Corporation;
Suzanne Grae Corp Pty Ltd;
Sportsgirl;
Gowings Retail Ltd;
Just Jeans (Jay Jays, Portmans, Jaqui E);
Noni B Ltd;
Best and Less;
Dotti;
Man to Man Menswear;
Colorado Group (JAG, Mathers Shoes, Williams the Shoeman, Diana Ferrari, Colorado Adventure Wear);
Lowes Manhattan;
Millers (Millers Fashion Club, Katies, 1626, Crossroads, Silhouette);

Country Road;
Syndicate;
Fashion Fair; and
Roger David.

At the time of writing this report all 22 signatories had complied with the requirements of the Retailers Code and provided lists of their suppliers to the TCFUA.

The current signatories to the Retailers Code account for approximately 70% (source – Australian Bureau of Statistics and company reports) by value of the Australian retail market. This figure does not distinguish Australian made clothing from imported garments. Australian Bureau of Statistics figures from 1998-99 and earlier show that there were approximately 1895 clothing retail management units in NSW. This figure includes multi store retailers and 'one off' boutique style clothing retailers. The Council notes that there is still much work to be done in securing the commitment of retailers who have yet to sign the Code and those signatories who have signed but not complied fully with all of its terms.

The TCFUA and the ARA have standardised the reporting requirements of retailers under the Retailers Code to create a uniform reporting mechanism, which should simplify and facilitate the relevant processes.

3.9 The NSW Government Code of Practice (Government Code) on employment and outwork obligations – TCF suppliers

The Government Code applies to all contracts for the supply of textile articles, clothing, footwear and related goods and components to Government agencies. Government agencies and their employees or agents are required to implement the Government Code as part of their responsibilities to Government.

The Council notes that the Government Code establishes NSW Government policy, procedures and performance standards expected of the parties in all dealings between NSW Government agencies and the textile, clothing and footwear industry including contractors, agents, suppliers and all employers in the industry. The Government Code covers employment obligations for employees and outworkers in the procurement of textile, clothing, footwear and related goods.

The specific objectives of the Government Code are to:

- eliminate unlawful work practices;

- ensure that suppliers comply with relevant industry awards and agreements and relevant industrial legislation relating to employees including outworkers;

- achieve proper standards in occupational heath and safety; and

- ensure that all industry members comply with their obligations in relation to training and skill formation, EEO and affirmative action.

Tenderers for NSW Government contracts are required to provide evidence of compliance with applicable industrial awards, legislation and other legal obligations relating to employees, including outworkers. The evidence must be provided in the form of a statutory declaration.

The NSW Office of Government Procurement is currently conducting a review of the implementation guidelines for the Government Code. Government agencies including OIR, the Textile Clothing and Footwear Union and representatives from the business community have been invited to participate in this review.

3.10 Future work

The Council has been active in promoting the retailer voluntary mechanism resulting in a large number of retailers signing the Retailers Ethical Clothing Code of Practice.

The Council has had preliminary discussions on the Homeworkers Code of Practice (HWCP) regarding the Code's operation, effectiveness and possible changes.

While significant numbers of manufacturers have not yet become accredited under the Homeworkers Code of Practice, advice from the Code Committee indicates that an increasing number are seeking information on how to become accredited under the Code. The Code Committee is currently reviewing the implementation guidelines to streamline the accreditation process for manufacturers.

The Council is committed to becoming more involved in exploring strategies that will both promote the voluntary codes of practice and encourage more companies to sign up and commit to ethical principles.

It is important to note that that there are aspects of both the Retailers Code of Practice and the Homeworkers Code of Practice that are not fully implemented. The Council is aware that there are a number of issues contributing to the low take up rate of manufacturers wishing to accredit under the Code including:

- the resource intensive and unclear process required to audit suppliers' compliance with industrial obligations;

- concern by manufacturers of the commitment of retailers to support accredited companies;

- apparent ignorance and/or indifference of certain manufacturers to obligations under the Code;

- concern with the direct linkage between the reporting system and the TCFUA;

- the requirement to sever the relationship with a supplier within 10 days where a breach has occurred and is not remedied and the potential impact on production;

- the flat licensing cost of $2,200; and

- access to the incomplete Product Standards Manual.

3.11 Council notes other OIR activities:

In the coming months there are a number of activities that the OIR will pursue in an effort to firstly increase the number of retailers who have signed the Code and secondly work with the HWCP Committee to convince manufacturers of the need and worth of committing to the voluntary mechanism.

These activities include:

- working with the HWCP Committee to actively promote voluntary regulation to manufacturers;

- employing an OIR officer to approach manufacturers and retailers who have not signed/become accredited. This officer will liaise with HWC committee members;

- working with retailers to promote the *Behind the Label* initiative in stores to encourage consumers to support companies that support fair labour practices;

- developing a consumer campaign that will include the above and actively engage consumers with the issue;

- releasing a Best Practice Employment Guide for employers in the clothing industry. The Guide is due to be published in the second half of 2003; and

- presenting a series of employer seminars focussing on employment issues in the industry – second half of 2003.

Compliance Reports

The lawful entitlements of outworkers (for example minimum pay, leave, a safe working environment) are prescribed by a range of legislative instruments.

The award and legislation applicable to clothing industry employers in NSW are:

- *Clothing Trades (State) Award*
- *NSW Industrial Relations Act 1996*
- *Workers Compensation Act 1987 and Workplace Injury Management and Workers Compensation Act 1998*
- *Occupational Health and Safety Act 2000*
- *Occupational Health and Safety (Clothing Factory Registration) Regulation 2001*
- *Industrial Relations (Ethical Clothing Trades) Act 2001*
- *Long Service Act 1955*
- *Annual Holidays Act 1944*

OIR is the NSW Government agency responsible for enforcing NSW industrial instruments and related legislation. WorkCover NSW is the agency responsible for administering workers compensation and occupational health and safety legislation.

The compliance reports of the OIR and the TCFUA cover the period February 2002 (the commencement date of the *Industrial Relations Ethical Clothing Trades Act 2001*) to March 2003.

New legislation

The *Industrial Relations (Ethical Clothing Trades) Act 2001*:

- constitutes the Ethical Clothing Trades Council;
- allows for the making of a mandatory code of practice; and
- makes amendments to the *Industrial Relations Act 1996* to strengthen the deeming provisions that make outworkers in the clothing trades employees and provides outworkers with a new method of recovering unpaid wages and entitlements.

Office of Industrial Relations Compliance Report

Preamble

This report contains information relating to the compliance and enforcement activities undertaken by the NSW Department of Commerce, Office of Industrial Relations (OIR) in the NSW clothing industry. The Compliance Services Division of OIR and the *Behind the Label* Unit's bi-lingual investigators address the issue of industrial compliance by way of educating employers, resolving individual industrial complaints, workplace targeting techniques and prosecution action when necessary.

The relevant award and legislation applicable to the Department's compliance work in the clothing industry includes:

- *Clothing Trades (State) Award*
- *NSW Industrial Relations Act 1996*
- *Industrial Relations (Ethical Clothing Trades) Act 2001*
- *Long Service Act 1955*
- *Annual Holidays Act 1944*

This report covers the period February 2002 to March 2003.

Part 1 Clothing Manufacturers: Industrial Investigations: 2002-2003

Workplace Investigations

During the period February 2002 to March 2003, the Office of Industrial Relations (OIR) undertook 398 workplace investigations in the clothing manufacturing industry. The focus of these investigations was to bring employers into compliance with the record keeping aspects of industrial relations legislation.

Non-compliance may result in prosecution action in some matters. The breaches include technical and award infringements.

Statistics from the NSW Industrial Relations Commission show that in the six months leading up to March 2003, 61 employers registered under clause 33 of the Clothing Trades (State) Award. Clause 33 of the award requires employers who give work out to be manufactured outside of their own premises, to apply for registration to the Industrial Committee. This is a significant recent increase and may in part be due to the increased profile of industrial compliance generated by the Ethical Clothing Trades Council and OIR compliance work. During the period 1996 to October 2002 a total of only 72 firms had registered.

OIR has identified 101 employers for intensive investigation during the second half of 2003.

Investigations undertaken in 2002

OIR's Clothing Industry Taskforce was briefed to complete 200 investigations between March and November 2002. During this time it conducted 398 investigations.

The campaign was divided into phases depending upon how the employers had been identified for inspection.

The following table summarises the activities undertaken throughout 2002.

	Phase 1	Phase 2	Phase 3	Phase 4	Phase 5	All Phases
Status of investigations						
Businesses covered	45	77	428	54	48	652
Premises inspected	42	71	171	15	24	323
Private residences entered	3	13	26	1	7	50
Investigations completed	45	67	192	54	26	384
Percentage complete	100%	87%	45%	100%	54%	58%
Currently under investigation	0	7	3	0	1	11
Awaiting prosecution action	0	3	0	0	0	3
Recommended for 2003 investigation	5	27	56	1	12	101
Outcome of completed investigations						
Employees covered	24	139	228	0	26	417
Contractors covered (no duplicates)	92	93	75	2	12	274
No breaches identified	5	16	62	0	5	88
Tech breach/employer cautioned	2	9	0	0	1	12
Employer under Federal Award	6	2	8	8	0	24
Employer left known address	3	2	32	10	3	50
Ceased trading/ in liquidation	7	18	36	6	6	73
Not under Clothing Trades Award.	22	20	51	30	10	133

A synopsis of the findings of the investigations made in each phase of the investigations now follows.

Phase 1 Investigations

The Taskforce concentrated initially on 45 employers referred to the Department by WorkCover NSW as clothing manufacturers. All investigations have been completed. No businesses under Phase 1 were referred for prosecution. Generally, the level of compliance with the Award and NSW industrial relations legislation was acceptable.

Phase 2 Investigations

Investigations under this phase targeted 77 employers identified by the 2001 Workers' Entitlements Taskforce (WET) as clothing manufacturers. All investigations into these employers are either complete (87%) or being finalised (13%). Again, the results obtained show a generally acceptable level of compliance with the Award and NSW industrial relations legislation.

Phase 3 Investigations

By November 2002, 428 contractors had been identified by either the 2001 WET investigations or the 2002 Taskforce's investigations. Investigations have been completed in relation to 192 employers.

Phase 4 Investigations

The Taskforce also completed its preliminary investigation of the 54 employers referred from the Office of Government Procurement, Department of Commerce (formerly the Department of Public Works & Services). Workplace inspections were warranted in 15 of the businesses referred, and these investigations generally showed activities beyond the scope of the Award.

Phase 5 Investigations

During September 2002, the Taskforce commenced receiving referrals from the Office of Industrial Relations '1800 Clothing Industry Hotline'. While a considerable number of referrals related to businesses captured by the earlier-phase investigations, 48 additional contractors were identified for investigation. By November 2002, 26 investigations had been concluded.

Outcomes of Taskforce investigations in 2002:

- The 384 completed investigations identified 417 employees and 274 contractors working under the Clothing Trades (State) Award.
- 22% of the investigations involved workplaces with employees working under the Clothing Trades (State) Award. Where employees existed, the average size of the workplace ranged from 4.0 to 7.5 employees.
- 16% of the investigations involved workplaces with contractors working under the Clothing Trades (State) Award.
- A total of 323 workplaces were formally inspected, including 50 private residences (using the discrete powers under the Act in relation to such premises).

2003 Workplace Targeting Activities

OIR has identified 101 employers as a priority for investigation in 2003.

Industrial Complaints

During the period 1 February 2002 to March 2003 13 formal complaints have been registered through the OIR complaints handling procedures. The average amount claimed in these matters was $1,570.92.

Since 1 July 2002 the bi-lingual investigators have investigated 39 complaints from clothing outworkers and factory employees about various matters including underpayment of wages, leave and other entitlements. A total amount of $124,994 was claimed with an amount of $84,667 recovered for workers by investigators.

Part 2 Community Report

The Council notes that OIR is implementing an important element of the *Behind the Label* Strategy - an education and retraining program for outworkers. OIR has established and is coordinating the design and delivery of community-based programs to assist outworkers to access training and other opportunities. The Council notes that the community based programs provide the opportunity for information to be made available to the Council from outworkers about levels of compliance with their entitlements.

Community Development Programs

OIR is co-ordinating the design and delivery of community based programs which support and assist outworkers to participate in training and other opportunities. OIR funds projects to improve the situation of clothing outworkers by increasing opportunities for training, identifying outworker training priorities, matching needs with available training, and encouraging and supporting outworkers to participate in training. Outworkers who are underpaid or face other industrial problems are encouraged to lodge complaints with OIR.

Specific projects have been developed to support the design of training programs and include funding community development workers to build and develop outworker networks in the Chinese, Korean and Khmer communities, based on the successful model developed and documented in the *Daring to Act* (Asian Women at Work) report (the Vietnamese Women Outworkers Network Project in 2001) and working with a Vietnamese community worker funded by Planning NSW.

The projects are increasing outworkers knowledge and information in relation to general community services available as well as industrial issues in the clothing industry and encouraging and supporting outworkers to access training programs.

The strategies that are being used to build the networks and achieve these objectives include: promotional activities through community radio, building and developing links with identified outworkers already participating in English classes and other activities, publishing information brochures, social activities and meetings of area groups of outworkers and one-on-one support as required, placement in training programs and providing support to make the training fully accessible. Support for outworkers includes bi-lingual assistance, venue hire in the community, appropriate scheduling of programs, childcare and transport.

Feedback provided from outworkers through community workers funded by OIR to build outworker support and information networks

A total of over 400 Chinese, Vietnamese, Korean and Cambodian outworkers were contacted during the period 1 February 2002 to 1 March 2003.

Outworkers were contacted via training classes, home visits, social activities, support group meetings, promotional activities and through friends and relatives.

Rates of pay reported

The following information about rates of pay was reported:

- The majority of members of the outworker networks receive pay below the minimum Clothing Trades (State) Award rate ($12.39 per hour for skill level 2). The most commonly reported rates of pay fluctuate between $5 and $7 an hour;

- A small number of outworkers receive award rates. These outworkers are highly skilled sewing machinists and have usually worked for the same employer for up to 10 years. Their situation is unusual compared with the experience of most outworkers in the networks;

- Most outworkers reported no change in rates of pay over the last few years;

- The lowest rates are less than $2 an hour. The majority of outworkers who reported this rate are making parts of garments, not whole garments; and

- In the Vietnamese and Korean networks there are reports of a few highly skilled outworkers who have been working for rates of $8 to $10 per hour.

Late Payment, Part-payment and Non-payment for work completed

Late payment and part-payment are reported as normal for the outworkers in all outworker networks contacted. Many outworkers report that payment two weeks after delivery of the completed order is normal or is received along with a new order. Outworkers are used to being asked to be 'patient' (stated by outworkers). It is common practice for some outworkers to wait three to four weeks for payment. Most outworkers from the networks reported that they often receive between half and two thirds of their payments and the rest is held until the next order. It appears that this type of arrangement is designed to keep outworkers working for a particular employer who retains the outworkers payment.

If the garments are required to be reworked outworkers reported that they are not paid for the additional work.

Occupational health and safety issues

Many outworkers in the networks complain of work related injuries, in particular, neck and shoulder injuries and back pain problems. It is not known if any outworkers have lodged workers compensation claims.

The *Behind the Label Unit* has been working closely with WorkCover NSW to identify shared opportunities to improve the health of clothing outworkers. In the next financial year WorkCover NSW will fund the *Better Health Outcomes for Clothing Outworkers* project to be undertaken by the Fairfield Multicultural Health Service. The project will be jointly managed by OIR and WorkCover and aims to build the capacity of clothing outworkers to address occupational risks and improve health outcomes for themselves, through education and health improvement programs.

Issues/Trends reported

1. Pressure on outworkers

Outworkers report being told by their subcontractors that if they complain about pay rates they will not be given any more work. The fear of losing a guaranteed source of income is still pervasive amongst all groups of outworkers. Outworkers also point out that because there is no guarantee they will have work all the time (especially during the quiet season), they undertake as much work as they can even with very low rates of pay.

2. Change in flow of work

The general perception among outworkers in the networks is that the amount of work available has decreased in recent years. The amount of work available to outworkers continues to fluctuate through the seasons.

The highly skilled outworkers who make and complete whole garments in women's fashion are receiving regular orders. The group of lower skilled outworkers who make parts of garments have experienced irregular work flows.

A major issue for many outworkers is the concern of having no work or less work, which directly affects them and their family's livelihood. This often dissuades outworkers from seeking to assert their industrial rights.

Community workers' initiatives in relation to compliance

Fear of loss of work and income, fear of harassment and intimidation remain the biggest issues preventing outworkers in the networks from asserting their industrial rights with sub-contractors or lodging complaints for award breaches with OIR. In order to break this cycle of fear, community workers have been distributing success stories of outworkers who have been successful in recovering unpaid wages from their employers.

There have been positive reactions from outworker network members who have read or heard about the success stories. They are very encouraged by the stories and many are now beginning to believe that action against their employers may yield a similar result. Many successful actions to recover unpaid remuneration are a direct result of outworkers accessing OIR services through referral within the networks.

Community initiatives include:

1. encouraging outworkers to provide the names of their employers to the OIR so they can be added to the OIR database of employers;

2. stressing the importance of record keeping and what information to record forms an important aspect of the community education strategy. Information is disseminated by community workers and OIR bi-lingual inspectors;

3. encouraging outworkers to take the step of lodging complaints with OIR in circumstances where they are unpaid for their work, and contacting *Behind the Label* Unit's bilingual investigators to get further information relating to their entitlements;

4. distributing newsletters throughout the various outworker networks;

5. utilising training programs for outworkers as forums in which to encourage outworkers to come forward with entitlements issues; and

6. close networking between the community workers and the OIR bi-lingual inspectors who share and exchange information, and provide support to outworkers with industrial issues.

Exploratory profiling to ascertain the extent of outwork in emerging migrant communities

Whilst considerable effort and resources have been placed into identifying and working with outworkers in established South East Asian communities, additional work needs to be done in identifying outworkers from other backgrounds and in other communities. It is difficult to access such data due to the largely 'invisible' nature of outwork.

OIR is funding research to provide a statistical and geographical profile of Sydney based outworkers and whether clothing outworkers are from established or emerging communities. This information will ensure that Strategy resources are appropriately and effectively targeted to meet the areas of greatest need.

Textile Clothing and Footwear Union Compliance Report

Workplace Investigations conducted by the TCFUA

During the twelve months following proclamation of the Industrial Relations (Ethical Clothing Trades) Act 2001 in New South Wales, the TCFUA has deliberately directed its resources into the identification (and persuasive correction) of failures to comply with obligations relevant to the provision of outworker entitlements. This (investigative and educational) strategy has complemented the TCFUA's ongoing enforcement of employee legal entitlements by more traditional means.

The central focus of this investigative strategy has been effective enforcement of the previously mentioned *NSW OHS (Clothing Factory Registration) Regulation 2001*. To achieve this outcome, the TCFUA has focused upon intervention **throughout the clothing supply chain** in order to assess (and then encourage improvement in) the level of compliance with the obligations imposed (by the NSW factory registration regulation) upon contracting employers.

The relevant award provisions require that clothing work can only be given out to either outworkers working in their own homes or to factories registered in accordance with the appropriate state regulations.

In New South Wales, the appropriate state regulation is the **Occupational Health and Safety (Clothing Factory Registration) Regulation 2001**. The Regulation requires all factories in the New South Wales textile clothing and footwear sector to be registered on a publicly available register. The factory registration regulation requires disclosure of the address at which each registered factory is located.

The enforcement of this factory registration regulation has complemented the TCFUA's earlier efforts (in the immediately preceding period) to investigate employer compliance (with their legal obligations) as the TCFUA's part in the earlier conduct of the Clothing Outworkers Entitlements Taskforce. This earlier investigation concentrated upon workplace safety and workers compensation insurance obligations.

During the same period of twelve months following proclamation of the Industrial Relations (Ethical Clothing Trades) Act 2001 in New South Wales, the NSW Public Works and Services Directorate implemented an auditing arrangement for relevant suppliers providing TCF products to NSW State Government agencies. This auditing arrangement required all relevant suppliers to disclose (to the TCF Union) all locations where the relevant TCF products were to be worked on. This auditing arrangement also required suppliers to permit inspection by the TCF Union of all relevant manufacturing processes, records and locations.

The Structure of the Clothing Industry in New South Wales

Domestic clothing manufacture in Australia can be characterised as a pyramid of interlocking contract arrangements. At the apex of this integrated system are the major retailers who enter into arrangements with principal manufacturers (including fashion houses) whereby the principal manufacturers agree to supply the retailers with clothing products. In turn, the principal manufacturers enter into arrangements with smaller manufacturers, contractors or subcontractors (commonly referred to as makers) for the supply of these products. These smaller makers can also further contract the orders (for production of these goods) through varying intermediary stages of middlemen until the order for actual production (of the clothing product) is finally given to an outworker working at home.

In its efforts to effectively enforce the NSW factory registration regulation, the TCFUA has focussed its attention upon two sectors at each end of this chain of contracting parties.

One of the sectors in the NSW clothing supply chain to be investigated by the TCFUA consisted of NSW principal manufacturers (including fashion houses) which give out orders for the performance of clothing work (outside of the principals' own premises) by makers and contractors.

The TCFUA established a principals project team consisting of two union officers in order to directly contact 57 of these principals for the following purposes. The principals project team explained the content of the NSW factory registration regulation to each principal visited, and further informed each of these principals about the interaction between this new regulation and the existing award provisions. In addition, among its other tasks, the principals project team assessed whether the principals' own workplace was complying with this regulation. Where a principal was found to not be fulfilling its obligations under this regulation, the principals project team supplied appropriate factory registration application forms and offered to assist each of these principals with the process of registration.

During the same period of operation as this principals project, the TCFUA also established a second (small employers) project team which consisted of a further two union officers. In the period ending 19 February 2003, this small employers project team visited the premises of 229 makers in the NSW clothing industry for the following purposes. The small employers project team explained the content of the NSW factory registration regulation to each of these makers, and then assessed whether the workplace of that maker was complying with that regulation, as well as assisting makers who failed to comply.

Together with its efforts relating to factory registration, the principals project team also assessed the levels of compliance with relevant workers compensation insurance obligations which were demonstrated by each of the principals visited – as well as the levels of compliance which were

demonstrated by the makers or contractors to whom these principals gave out work.

During the same period of project operation, the small employers team supplemented its factory registration investigations by also assessing whether each of the makers (which they themselves visited) was complying with the obligation upon that maker to insure for workers compensation purposes.

Clothing Industry Levels of Compliance with NSW Factory Registration Obligations

The following table summarises the findings of these two teams in relation to factory registration obligations:

	Principal Manufacturers	Small Employer
Premises Inspected	57	229
Premises Complying With Factory Registration Obligations	15	43
Premises Not Complying With Factory Registration Obligations	42	186

Thus, at the time of their visits and inspections, the principals project team discovered that less than a third of these principals were complying with the factory registration regulation.

During the same period of operation for the project, the small employers' team discovered that less than one fifth of all the makers visited were complying with the factory registration regulation. This last finding raises immediate concerns not only about the unregistered makers themselves, but also about the principals supplying work to those unregistered makers – particularly in relation to the apparent failure of those principals to comply with the most fundamental obligations imposed by the contract work clause of the appropriate award.

Clothing Industry levels of Compliance with NSW Workers Compensation Obligations

The following table summarises the findings of these two teams in relation to workers compensation insurance obligations:

	Principal Manufacturers	Small Employers
Premises Inspected	57	229
Premises at which evidence Was present to confirm compliance With workers compensation insurance Obligations	20	0
Principal Manufacturers alleging Workers compensation insurance Obligation compliance by their small Employer suppliers	17	
Principal Manufacturers who provided evidence of workers compensation insurance obligation compliance by their small employer suppliers	11	
Principal Manufacturers who admitted knowing that their small employer suppliers failed to comply with workers compensation insurance obligations	9	
Small Employers who admitted their failure to comply with workers compensation insurance obligations		58

Thus, out of the total number of fifty seven (57) principals visited, only about a third of these principals could supply any evidence (in the form of policy renewal information or certificates of currency) to demonstrate that they were themselves complying with the obligation to insure workers at their own workplaces for workers compensation purposes.

In an even more alarming finding, less than a third of the principals visited by the team even bothered to assert that their makers and contractors were complying with the obligation for each maker to take out a workers compensation insurance policy.

Less than one fifth of the total number of principals visited could actually supply any evidence to demonstrate that their makers were complying with this particular workers compensation insurance obligation.

In an equally disturbing finding, almost one principal out of every six principals visited by the team directly admitted about actually knowing that the makers (to which that particular principal was supplying work) had failed to comply with the relevant workers compensation obligations.

At the time of their visits and inspections, the small employers project team discovered that more than a quarter of the makers visited openly admitted about a failure to have any workers compensation insurance policy at all. As for the remaining makers who tried to assert that they did actually have a workers compensation insurance policy, almost none of them were in a position to provide the requested certificate of currency at the time of the visits. During its visits, the small employers project team repeatedly observed that the number of those people working (in the workplace under investigation) greatly exceeded the number of employees for whom workers compensation coverage was apparently obtained.

Section 4

Council Recommendations

Recommendation One

The following majority of Council members support recommendation one; Textile Clothing and Footwear Union (NSW), Labor Council of NSW, Australian Industry Group, Australian Retailers Association and Fairwear.

Council notes the importance of the recently negotiated 'National Retailers- TCFUA Ethical Clothing Code of Practice' as a voluntary mechanism by which ethical retailers can contribute to remedying the plight of clothing outworkers.

Council further notes that it would be appropriate for all clothing retailers to adopt this voluntary mechanism by signing the "National Retailers- TCFUA Ethical Clothing Code of Practice" (hereinafter referred to as 'the voluntary retailers code') and by complying fully with its provisions.

However, Council also notes the reluctance of some clothing retailers to adopt this responsible course of action. Should some clothing retailers fail to thus act responsibly, Council sees no reasonable alternative for the Minister other than to make a mandatory code of practice (within the following terms) pursuant to the provisions of sections 7 and 9 and Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (Number 128).

Content of mandatory code

(I) The mandatory code of practice will apply to all those whose business in connection with the clothing industry is sale of clothing by retail in New South Wales (hereinafter referred to as "retailers"), regardless of whether those products had been manufactured within the confines of this State.

(II) The mandatory code of practice will apply to all retailers who have failed either to sign the voluntary retailers code or to comply fully with the provisions of the voluntary retailers code (after signing).

(III) The mandatory code of practice will take effect no later than 30th June 2004. In the event that fewer than two thirds of retailers are both signatory to the voluntary retailers code and fully compliant with the provisions of the voluntary retailers code by 31st January 2004, the mandatory code of practice will take effect no later than 1st March 2004.

The mandatory code of practice will contain the following provisions:

“Part A: Mandatory Retailer Code

Section 1 DEFINITIONS

"Contract" means a contract between the Retailer and a Supplier for the supply or manufacture of Goods which have been manufactured in Australia and includes the manufacture of all of the Retailer’s products in Australia for resale by the Retailer.

“Contractor” means a person, company or organisation directly or indirectly engaged by the Supplier to assist the Supplier to manufacture Goods or part of Goods for resale by the Retailer.

“Employee” means a person employed by a Supplier and includes any person whose usual occupation is that of an employee.

"Exploitation" occurs where a Supplier breaches the Federal Award or State Award or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement in Australia of Outworkers or Contractors who perform work outside a factory or workshop.

"Federal Award" means the Clothing Trades Award 1999 as amended from time to time, or any award replacing that Award.

"Goods" means:

(a) the whole or any part of any male or female garment or of any article of wearing apparel including articles of neckwear and headwear;

(b) handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain;

(c) ornamentations made of textiles, felts or similar fabrics, and artificial flowers; and

(d) footwear items.

“Manufacture in Australia” means the process of manufacturing products in Australia or the process of altering or working on products in Australia (whether such products are imported into Australia or produced in Australia) by way of any process currently covered by either the Federal Award or the State Award or any other applicable industrial instrument.

“Non-compliance” occurs where a Supplier breaches the Federal Award or State Award or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement of

Contractors who perform work in a factory of workshop or the employment of its Employees or the engagement of Outworkers.

“Outworker” means a person who performs work (including making, constructing or finishing) in relation to the supply or manufacture of Goods or part of Goods ultimately on behalf of the Supplier outside the Supplier’s workshop or factory under a contract or arrangement between that person and the Supplier or that person and any other party involved in the supply or manufacture of Goods or part of Goods.

“Persons properly authorised in writing by the TCFUA” means those persons employed by the TCFUA who have been nominated by the Secretary of the TCFUA for the purposes of Sections 3.3 and 3.7.

"Records" means the contracts referred to in Section 1 and the records required to be made under Section 2.

“State Award” means a Clothing Trades award or equivalent legislation that applies in each State, which in New South Wales means the Clothing Trades (State) Award (NSW).

"Supplier" means a person, company or organisation in Australia which agrees with the Retailer under a Contract to supply or manufacture or arrange for the manufacture in Australia of Goods or part of Goods for resale by the Retailer.

“TCFUA” means the Textile, Clothing and Footwear Union of Australia (New South Wales Branch).

Section 2 RECORDS

2.1 The Retailer must make and retain for not less than 6 years records of all Contracts entered into with Suppliers except the sample garment referred to in Section 1.2(e) which must be kept for 12 months. The obligation on the Retailer under this Section operates from the date of commencement of this Code. In relation to such Records as have been maintained prior to the date of commencement of this Code, the Retailer must retain those prior existing Records for a period of three years from the date of commencement of this Code and make these Records available to the TCFUA in accordance with Section 3.3. This section does not diminish any existing or future Federal Award and/or State Award and/or legislative requirements and/or other obligations to keep and maintain Records.

2.2 The Records must contain at least the following:

(a) the name of the Supplier;

(b) the address of the Supplier;

(c) the date of the Contract;

(d) the date for the delivery of the Goods to be made under the Contract;

(e) the relevant standard product specification for that garment in accordance with the operation of Schedule 7 of Part 2 of the TCFUA Homeworkers Code of Practice and both a sample of the garment and the working time allowed for that garment and any other specifications provided by the Supplier for the work concerned;

(f) a drawing and size specification of the Goods to be made;

(g) the number of Goods to be made;

(h) the price to be paid for each item of Goods to be made;

(i) the total price to be paid for the Goods under the Contract;

(j) a copy of the standard clause in the Contract requiring disclosure by each succeeding party (as required by Section 5.5); and

(k) A copy of the relevant provisions in the contract concerning termination (as required by section 5.5);

2.3 The Retailer must:

(a) make the Records available to a person properly authorised in writing by the TCFUA, after that person has given reasonable notice to the Retailer of a request for access to the Records;

(b) allow the TCFUA, to make appropriate copies of the records as reasonably required by the TCFUA; and

(c) give a copy of the Records to the Supplier upon entering into a Contract or Purchase order; and

(d)

(i) require the Supplier to retain that copy of the Records for not less than 6 years; and

(ii) further require the Supplier to make that copy of the Records available to a person properly authorised in writing by the TCFUA, after that person has given

reasonable notice to the Supplier of a request for access to the Records; and

(iii) further require the Supplier to allow the TCFUA to make copies of the Records as required by the TCFUA.

Section 3 OBLIGATIONS OF THE RETAILER

3.1 The Retailer must send to the National Secretary of the TCFUA, the name and address of each Supplier contained in a Record made in the preceding 6 calendar months within 14 days of the last working day of

(a) February; and

(b) August, in each year.

3.2 The Retailer shall inform all Suppliers of the existence of this Part by taking the following action:

(a) The Retailer will forward a copy of this Part to each Supplier immediately following signing of each Contract with that Supplier.

(b) The Retailer will include a copy of this Part in its "Information For New Suppliers" package which is provided to all new Suppliers to the Retailer, and

(c) The Retailer shall advise all Suppliers that, in accordance with this Part, the TCFUA will be entitled to make regular visits to those establishments operated by the Supplier.

3.3 The Retailer shall require each Supplier with whom it enters into a Contract to:

(a) keep appropriate records of where and with whom the Supplier may further contract to perform the work under the Contract between the Retailer and the Supplier;

(b) retain a copy of the Records provided to it by the Retailer under section 2.3(c) for a period of not less than six years. The obligation on the Supplier under this clause operates from the date of commencement of this Code;

(c) make a copy of the Records available to the TCFUA within 5 business days of a request by the TCFUA to the Supplier for production being made;

(d) allow the TCFUA to make copies of the Records retained by the Supplier;

(e) inform the TCFUA about the address of each location where Goods are being manufactured and the identity of the

parties responsible for the manufacture of the Goods at each of those locations; and

(f) require the Supplier to be registered under the provisions of clause 48 of the Federal Award or the relevant clause under the State Award where the Contract between the Retailer and the Supplier does not prohibit the Supplier from further contracting the performance of the work under the Contract to another person, company or organisation.

3.4 The Retailer shall appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the TCFUA for the purposes of this Part.

3.5 The name of the liaison officer (or officers if more than one) appointed by the Retailer shall be communicated to the TCFUA. Any changes to the identity of the liaison officer (or officers) must be advised to the TCFUA by the Retailer.

3.6 If the Retailer becomes aware that a Supplier has been or may be, or is using the services of sub-suppliers who have been or may be engaging in Exploitation or Non-compliance, then the Retailer shall immediately inform the TCFUA of this fact.

3.7

(a) The Retailer shall not enter into any Contract with a Supplier unless the Supplier agrees in writing to permit persons properly authorised in writing by the TCFUA to:

(i) visit any establishment operated by the Supplier (or any other establishment where Goods are being manufactured or otherwise worked on) at any time during normal working hours without notice. If a person properly authorised by the TCFUA visits a Supplier's premises without notice, he or she must immediately notify the Supplier of his or her presence as soon as reasonably practicable after entering the premises;

(ii) inspect any Records between the Supplier and the Retailer, together with any records at those establishments that are relevant to the manufacture (or supply or sale) under a Contract of Goods or part of Goods for resale by the Retailer. Persons properly authorised by the TCFUA may also inspect at those establishments any time and wage records and any work records (as defined in clause 46.2 of the Federal Award) and the relevant documents that evidence superannuation contributions being made on behalf of an employee and also the currency of workers'

compensation insurance (including, but not restricted to, certificates of currency for workers compensation insurance and renewal documentation for worker's compensation insurance policies) and also the currency of public liability insurance policies;

(iii) undertake an inspection at those establishments in order to determine compliance with the Federal Award, the relevant State Award and any other applicable industrial instrument and compliance with any relevant occupational health and safety legislation;

(iv) interview, without causing unreasonable interruption to the production process, personnel who are present at those establishments in relation to the manufacture (or supply or sale) of any such Goods; and

(v) interview personnel (not present at those establishments) who are in any way involved in the manufacture (or supply or sale) of any such Goods, whether such personnel are described as Outworkers or Contractors or otherwise.

(b) The Retailer will forward to the TCFUA a clear photocopy of the agreement in writing by the Supplier.

(c) The Retailer will forward any such photocopy to the TCFUA as soon as possible after the Retailer has received the original agreement in writing (or at least a clear photocopy of that agreement) from the Supplier.

3.8 The Retailer will comply with all applicable provisions of the Federal Award and any relevant State Award and any other applicable industrial instruments as long as the Retailer remains directly involved in the manufacture or supply of Goods (or part of Goods).

Section 4 OBLIGATIONS OF THE TCFUA

The TCFUA must:

(a) provide the Retailer with a current copy of the Federal Award and promptly provide the Retailer with any variations to that Award;

(b) provide reasonable assistance to the Retailer in interpreting the provisions of the Federal Award or the State Award;

(c) promptly inform the Retailer in writing of any Exploitation or suspected Exploitation or Non-compliance or suspected

Non-compliance of which it becomes aware and provide the Retailer with any material it has which supports the allegation;

(d) upon request promptly meet with the Retailer to consider any matter arising out of this Part; and

(e) keep confidential the copy Records made available to it by the Retailer and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or as required by law or in enforcement proceedings in a court or in industrial dispute resolution proceedings in an industrial tribunal without the written consent of the Retailer.

Section 5 CONDUCT BETWEEN RETAILER AND SUPPLIER/S

5.1 If the TCFUA has notified the Retailer that it believes a Supplier is engaging in Exploitation or Non-compliance, then the Retailer shall immediately investigate the claims made by the TCFUA and further agrees that it will within 14 days (or such other period of time as is mutually agreed) of receipt of the notice either advise the TCFUA as follows:

(a) that the Retailer believes that Exploitation or Non-compliance has occurred,

(b) that the Retailer believes that neither Exploitation nor Non-compliance has occurred, or

(c) that the Retailer has not been provided with sufficient information to formulate a belief as to whether or either Exploitation or Non-compliance has occurred, and in such event, the Retailer must request such further evidence as is reasonable from the TCFUA to enable a belief to be formulated.

5.2 If the Retailer believes that Exploitation or Non-compliance by a Supplier has occurred, the Retailer shall take all action reasonably required by the TCFUA (to remedy any Exploitation or Non-compliance) or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 14 days (or such other period of time as is mutually agreed) of that requirement by the TCFUA.

5.3 If the Retailer advises the TCFUA that it does not believe that Exploitation or Non-compliance by a Supplier has occurred and the TCFUA continues to assert that Exploitation or Non-

compliance has in fact occurred, then this issue must be mediated pursuant to section 6 of this Part.

5.4

(a) Every Contract between the Retailer and a Supplier for the manufacture of Goods for resale by the Retailer must contain an enforceable (and effective) standard clause which obliges each succeeding party who is involved in the manufacture or purchase of the Goods (or part of the Goods) (or who is involved in giving out orders for the manufacture or purchase of the Goods or part of the Goods) to inform the TCFUA (or to inform both the TCFUA and the Retailer) about the number and type of articles (and the price per article) to be supplied by each succeeding party.

(b) The form and content of the standard clause referred to in Section 5.4(a) of this Part must be approved by the TCFUA, unless the Contract includes terms in the form of Schedule Z.

(c) The Retailer will send to the TCFUA a copy of the standard clause referred to in section 5.4(a).

5.5 If a Supplier fails to:

(a) comply with a requirement of the Retailer to remedy the Exploitation or Non-compliance or submit to an Agreed Outcome; or

(b) retain a copy of the Records for not less than six years (which obligation operates from the date of commencement of this Code); or

(c) make a copy of the Records available to the TCFUA within 5 business days of a request (to the Supplier) for production being made by the TCFUA; or

(d) allow the TCFUA to make copies of the Records retained by the Supplier; or

(e) inform the TCFUA about the address of each location where Goods (or part of the Goods)are being manufactured and the identity of the parties responsible for the manufacture of the Goods (or part of the Goods) at each of those locations; or

(f) allow persons properly authorised in writing by the TCFUA to enter and inspect premises and records and to interview personnel in accordance with the agreement in writing between the Retailer and the Supplier under section 3.7,

the Retailer must:

(g) if the Retailer becomes aware that a Supplier has not complied with the matters set out in sections 5.5(b), (c), (d), (e) or (f) immediately inform the TCFUA about the specific nature and dates of the failure to comply and the identity of the Supplier concerned and what action the Retailer will be taking in light of the Supplier's failure to comply (including whether the Retailer will elect to terminate the Contract with the Supplier concerned and, if so, the specific date of any such termination);

(h) terminate the relevant Contract in a manner consistent with its terms and conditions ; and

(i) not enter into any further Contracts with that Supplier or extend the period of operation of an existing Contract with that Supplier until the Retailer and the TCFUA agree that the Exploitation or Non-compliance has been remedied unless, following discussions between the parties to this Deed, it is reasonable for the Retailer to enter into further Contracts with the Supplier.

5.6

(a) The Retailer will ensure that the ability of the Retailer to terminate the relevant Contract in circumstances where a Supplier has not complied with the matters set out in sections 5.5 (b), (c), (d), (e) or (f) is included as a term in any new Contract entered into between the Retailer and a Supplier. The Retailer will also request Suppliers with current Contracts entered into before the date of commencement of this Code to agree to such an amendment and, if the Supplier agrees, the Retailer will amend the Contract to include such a clause.

(b) The form and content of the contractual provisions which permit termination of the Contract in accordance with section 5.6 (a) of this Part must be approved by the TCFUA.

5.7 The Retailer will ensure that no current Contract entered into before the date of commencement of this Code continues to operate or is extended to operate beyond twelve months after the commencement of this Code without the Retailer and the Supplier entering into a separate agreement or arrangement to comply with the requirements of new Contracts in accordance with section 5.6.

5.8 Any action to be taken by the Retailer in relation to the conduct of the Supplier under section 5.5 shall be reasonable and

appropriate, taking into consideration the seriousness of the conduct of the Supplier.

5.9 Where any Goods have been provided to the Retailer pursuant to a Contract between the Retailer and a Supplier, the Retailer will not discourage that Supplier from attaching the sew-in "No Sweat Shop" label to those Goods as a sign of the Supplier's accreditation under the Homeworkers Code of Practice. This would not preclude the Retailer attaching any additional labels to Goods in order to highlight that these Goods have been made free of exploitation.

Section 6 DISPUTE RESOLUTION

(a) If

(i) either the Retailer or the TCFUA considers the obligations under this Part are not being performed; or

(ii) the TCFUA considers that Exploitation or Non-compliance is occurring and the Retailer disagrees; or

(iii) the TCFUA believes that the Retailer has not acted reasonably in continuing to contract with the Supplier pursuant to section 5.5 (i) of this Part:

then the TCFUA and the Retailer concerned must meet to consider the issue.

(b) If agreement on the issue referred to in (a) cannot be reached or a Retailer refuses to observe its obligations under this Part, the matter may be referred by the TCFUA (or by the Retailer concerned) to the Industrial Relations Commission of New South Wales.**"**

Suggested penalties

The *Industrial Relations (Ethical Clothing Trades) Act 2001* (the Act) provides for penalties, under a mandatory code, to be imposed on employers or other persons engaged in the clothing industry. If a party to the mandatory code fails to comply with requirements of the mandatory code, then Part 3 section 13 of the Act applies to impose a maximum penalty of up to 100 penalty units.

The TCFUA must have the legal right to conduct the proceedings against offending retailers in relation to violations of the provisions of the mandatory code.

Retailers who fail to fulfil any of the mandatory code obligations will be subjected to substantial financial penalties directly related to the monetary quantum of the relevant contract or arrangement.

Where the relevant proceedings have been brought against the offending retailer by the TCFUA, it is recommended that half of any such penalties levied upon defaulting retailers be paid to the TCFUA and that the remainder of any such penalties be paid into a fund. It is further recommended that this fund be available to compensate those outworkers who have validly claimed remuneration under sections 127A to 127G of the New South Wales Industrial Relations Act 1996 (as amended) but who have been unable to obtain the full amount of compensation owing to a lack of funds held by the relevant principal contractor (against whom the valid claim has been made in accordance with section 127A to 127G of the New South Wales Industrial Relations Act 1996).

Rationale For Mandatory Retailer Code

Compliance with Outworker Entitlements:

The level of compliance with outworker entitlement obligations cannot even be ascertained, much less improved, unless the relevant policing authorities know both the actual **location** at which the outwork is being performed **and** the **conditions** under which that outwork is being performed.

Those conditions of work are largely determined by the commercial parties which give out the clothing work to be (ultimately) performed by outworkers. More specifically, the conditions under which outwork is being performed are particularly governed by those commercial parties' arrangements regarding both the amount of payment for work performed and also the nature of arrangements for payment and delivery (including frequency and witholding of payments as well as the time allowed for the completion of the work) - in addition to those commercial parties' arrangements (if any) for workers compensation insurance of the outworkers and precautions taken (if any) in relation to the occupational health and safety consequences of the outwork process.

Obviously, even if the actual locations of an outworker's workplace and the relevant contracting parties have been ascertained, the policing authorities will still be unable to determine the **conditions** under which outwork is being performed unless these authorities have unimpeded physical access to **unaltered** evidence of such specific arrangements - in particular, access to the required documentary records (of such arrangements) in a manner which minimises the risk of fabrication of those records.

Essential Preconditions for Improvement in N.S.W. Clothing Industry Compliance:

However, **accurate assessment** of existing levels of compliance is - by itself - **insufficient** to achieve any **real improvement** in those levels of compliance. Industry compliance levels will **still not** be improved unless relevant manufacturing employers and other contracting parties are sufficiently motivated to improve their individual fulfilment of relevant obligations. This observation raises the core issue of employer motivation – specifically, the key factors which currently stimulate employers to avoid compliance (on the one hand) as opposed to (on the other hand) potentially significant motivations for improvement in the level of compliance by clothing manufacturing employers.

Domestic manufacturing employers throughout the clothing manufacturing supply chain have been faced with considerable commercial pressures to lower the price for which they supply clothing products and also to reduce the turnaround time for supply (and production) – without much sustained countervailing commercial pressure to comply with clothing industry

legal obligations in general (or to comply with outworker entitlement obligations in particular).

The net result of this situation has been effective overall encouragement of clothing manufacturers to reduce that portion of the cost of clothing production which arises from the cost of compliance with relevant clothing industry legal obligations.

This effective commercial encouragement of reduced (manufacturing industry) compliance levels can only be minimised or negated by the presence of countervailing commercial pressures in favour of compliance. More specifically, the downward commercial pressures upon manufacturing industry compliance levels throughout clothing production supply chains can best be effectively countered by the most powerful commercial players in those supply chains consistently exercising their commercial power and legal authority to help ensure the legal protection of outworkers. The final step in those supply chains are the retailers who sell the manufactured clothing.

The necessary elements of any such commercial retailer mechanisms for the protection of outworkers can be readily deduced from the earlier analysis of the essential preconditions for improvement in clothing industry compliance.

First, such commercial mechanisms would require that the final step in the supply chain assists the relevant clothing industry policing authorities to track the flow of work orders along the contracting chain so that these policing authorities could determine both the locations at which clothing work is being performed and also the conditions under which that work is being performed. This particular requirement implies that the final step in the supply chain must disclose (to the policing authorities) both the contractual origins of all clothing work supplied and also the commercial terms of each instance of that supply – including quantities and descriptions and production times and prices of all such work supplied. In addition to such disclosure obligations, any appropriate commercial legal mechanisms would also require that parties occupying the final step in the clothing supply chain must structure their commercial arrangements (for the supply of clothing) to facilitate access (by the relevant policing authorities) to each step in the chain of supply (for the purpose of enforcing relevant clothing industry obligations).

Second, any such commercial legal mechanisms for the protection of outworkers would require that parties occupying the final step in the supply chain must utilise their commercial power and legal authority consistently to respond **commercially** for the **remedy** of compliance failures concerning outworker entitlement obligations. This particular requirement would represent the necessary countervailing commercial pressure in favour of compliance. In practical terms, this requirement would oblige parties occupying the final step in the supply chain to base the exercise of their contractual rights (for the supply of clothing) upon INTER ALIA the “track record” of the contracting parties in complying with relevant clothing industry legal obligations.

Recent Empirical Experience in relation to New South Wales Clothing Supply Chains:

In the private sector, most of the major retailers of clothing products in this state have become signatories to the National TCFU-ARA Ethical Clothing Code of Practice (in addition to signing parallel individual deeds of practice). This particular commercial mechanism for the protection of outworkers has required the retailer signatories to INTER ALIA regularly provide lists of those commercial parties which supply clothing products to each retailer signatory.

It is important to note the first findings which have been uncovered by even limited initial compliance with this particular (code of practice) obligation. First, these lists of suppliers disclosed that three (of the relevant) retailer signatories were being supplied clothing products by the same commercial entity. (For the purposes of this report, that supplier's commercial identity will hereinafter be referred to as "X. Pty. Ltd".)

During the ten years since the TCFU had first learnt of the existence of X. Pty. Ltd., that particular firm had **never registered** itself (**pursuant** to the contract work clause of the **appropriate clothing industry award**) as a party giving out clothing work to be performed outside of its own factory premises. Following the nomination of X. Pty. Ltd. as a clothing supplier to three of the relevant retailer (code of practice) signatories, the TCFU approached the principal of X. Pty. Ltd. about the precise locations at which the clothing products (supplied by X. Pty. Ltd.) were actually manufactured. At this point, the principal of **X. Pty. Ltd. openly admitted** (to the TCFU) that X. Pty. Ltd. had been **giving out orders** (for the production of clothing work) to yet another N.S.W. clothing manufacturer – and had been doing so **for the preceding five (5) years!**

X. Pty. Ltd. then promptly applied for registration (pursuant to the appropriate award contract clause) as an employer giving out orders for clothing work. This finding alone confirms the utility -- indeed, the necessity -- of N.S.W. retailers adopting the type of commercial mechanisms (for the protection of outworkers) discussed earlier in this report.

The revelation of the (hitherto concealed) supply role performed by X. Pty. Ltd. and that firm's (belated) compliance with certain crucial (clothing industry) legal obligations clearly justifies the imposition of requirements upon N.S.W. retailers to regularly inform the relevant policing authorities about exactly where the clothing work is being performed and to simultaneously adopt a **commercial incentive mechanism** aimed at stimulating compliance (by their suppliers) with relevant clothing industry legal obligations. Indeed, disclosure of the origins of the clothing work supplied enables the policing authorities to engage in **targeted enforcement** throughout N.S.W. clothing industry supply chains – surely a more cost (and resource) effective strategy for policing authorities currently hampered by considerable budgetary limitations.

In relation to the major N.S.W. retailers who occupy the final step in various N.S.W. clothing supply chains, some important historical observations are in order. As noted earlier in this report, some retailer commercial entities have become signatory to the National Ethical Clothing Code of Practice (and the parallel individual deeds). The overwhelming bulk of these retailer signatories had indicated their intention to sign that National Ethical Clothing Code of Practice **even before** the precise terms of that particular Ethical Clothing Code of Practice had been finalised! However, the remaining hundreds of NSW. clothing retailers who have so far failed to sign this Ethical Clothing Code of Practice have clearly failed to commit themselves to this (or any other) effective retailer commercial mechanism for the protection of outworkers. In other words, more than one thousand eight hundred (1800) clothing retail management units have not attempted to negotiate improvements or extensions in the existing retailer voluntary self regulatory mechanism.

This disparity in the willingness of various N.S.W. clothing retailers to adopt such commercial mechanisms perfectly illustrates the inherent fatal flaw in existing voluntary schemes for the protection of outworkers. In acting to protect ethical retailers, the New South Wales Government should beware of the inescapable dangers inherent in any proposal for "voluntary self-regulation of the retail sector". After all, any such "voluntary" scheme would automatically favour less ethical retailers who refused to "volunteer" (as would be their choice under such a scheme). These less ethical retailers would thus commercially benefit from their consequent remaining access to the (more profitable) products of exploitation. Any such scheme of "voluntary self-regulation" would thereby necessarily place the more ethical retailers at substantial commercial disadvantage. As a result, the ethical retailers may not be able to commercially sustain their roles in improving compliance with outworker entitlement obligations if their commercial position was undermined by less ethical retail competitors.

More than half of the principals visited in the preceding twelve months (by a principal projects team) **supplied** clothing to **independent boutique retailers** which have so far have not adopted any of the (already discussed) voluntary commercial mechanisms for the protection of outworkers. **Less than a third** of the **principals** visited (by this team) **supply** clothing products **exclusively to a major N.S.W. clothing retailer**. **More than a quarter of the principals** visited (by the team) **operated at least one clothing retail shop**. None of these principals has yet indicated any willingness to adopt appropriate commercial mechanisms (of the type discussed earlier in this report) for the securing of outworker entitlements.

Indeed, these very principals can offer a substantial cost advantage to each of these less ethical retail outlets since there is no effective commercial motivation which compels these principals to incur the costs of complying with outworker entitlement obligations. For this very reason, Justice Glynn noted with approval the appropriateness of commercial retailer mechanisms which made it "possible for the union to visit each fashion house and present the fashion house with a breakdown of each unit of clothing, which had been

supplied by that fashion house over the past six months, and the price paid for it by" the retailer. "The fashion house was thus forced to disclose … the names of the makers." In this way, such commercial retailer mechanisms have enabled the relevant policing authority to ensure honest reporting by fashion house principals in compliance with award reporting requirements.

Conclusions:

The NSW clothing supply chains which supply garments to less ethical retailers will certainly continue to resist any improvement in compliance with outworker entitlements obligations as long as they are commercially free to do so. Consequently, the imposition of a mandatory retailer code which imposes legal obligations upon the less ethical retailers will without doubt improve compliance with outworker entitlement obligations in precisely those NSW clothing supply chains which supply garments to the resistant, less ethical retailers.

In addition, failure to impose a mandatory retailer code upon less ethical retailers will undermine the potential efficacy of the "National TCFU-ARA Ethical Clothing Code of Practice". In particular, bona fide retailer signatories to this voluntary code of practice will be potentially placed at considerable competitive disadvantage in relation to those less ethical competitors who refuse to sign(or adhere to) the "National TCFU-ARA Ethical Clothing Code Practice".

Improvement in compliance with outworker entitlement obligations in New South Wales cannot be commercially sustained by more ethical clothing retailers unless **all** New South Wales **clothing retailers** assist appropriate **targeted enforcement** (by means of the disclosure requirements discussed earlier as well as the restructure of their retail supply commercial arrangements to facilitate such targeted enforcement) **and** unless these retailers **also adopt** the (earlier discussed) **commercial incentive mechanisms for the** effective commercial **remedy** of supply chain failures to comply with outworkers entitlement obligations.

Chairman's position on recommendation one of the Ethical Clothing Trades Council

The Chairman wishes to record his dissent from the recommendation of the majority, which he describes as being premature. The recommendation of the majority was described as being a consensus achieved by discussion between selected members outside of the Council meetings. The Chairman holds the view that there are matters of fundamental importance which require full and proper consideration before the Council could properly endorse a recommendation for the introduction of a mandatory code.

At the outset it must be observed that there is already a mandatory code covering manufacturers in the shape of the NSW Clothing Trades (State) Award. This award is a counterpart of the award made by the Australian Industrial Relations Commission, which is known as the Federal Clothing Trades Award 1999. There has been only limited successful action taken which has been designed to achieve the enforcement of the terms and conditions of these awards.

The right to make such a recommendation as decided by the majority, appears to be limited by the terms of *Industrial Relations (Ethical Clothing Trades) Act 2001* (the Act).

Section 7 of the Act provides that the Council 'has such functions as are conferred or imposed on it by or under this or any other Act.' This provision may be regarded by some as being unnecessary in that a body established by statute can have no power not granted by the statute.

It does provide however extremely useful guidance for those who might not understand a statutory body is so limited.

In sub section 2 paragraph 7 of the Act, particular powers are specified. It is, of course, concerned to advise the Minister on the level of compliance and to make such recommendation as may be appropriate in respect of the means by which compliance might be encouraged and enforced - see paragraphs (b) and (c) in section 7. Similarly the Council is required to 'foster the adoption and observance of self-regulatory mechanisms…through consultation with the Code of Practice Committee, clothing industry retailers and manufacturers, relevant industrial organisations and other interested persons and bodies' – see paragraph (d) in section 7.

The Council is also required 'to advise and make recommendations to the Minister on the operation, and any amendment or revocation of the mandatory code (if in force) and the scope of any exemptions that should be given by the regulations' – see paragraph (i).

The Chairman is of the view that these steps are required to be taken prior to the recommendation being made. Section 9 of the Act requires the Council to 'evaluate and report to the Minister on action (whether voluntary or otherwise) taken by the clothing industry during the period of 12 months after the

commencement of this section to improve compliance in the industry with obligations to ensure outworkers in the clothing trades receive their lawful entitlements' – section 9 (1). The report to be made 'to include the Council's recommendations as to: (a) whether, if a mandatory code were made, it would improve compliance, and (b) the content and suggested penalties for failure to comply with such a code' – see section 9 (2). It appears inappropriate to make the recommendation before complying with duties contained in the statute.

The Chairman also adheres to the view that it is simply inappropriate for a mandatory code to be developed and implemented without there being serious discussion and negotiations with relevant manufacturers to achieve their co-operation with the implementation of terms, conditions and spirit of the agreements made with the Australian Retailers Association and its members and the Textile Clothing and Footwear Union of Australia.

Australian Business Limited position on recommendation one of the Ethical Clothing Trades Council

A majority of the parties on the Ethical Clothing Trades Council ("the Council") have agreed on the contents of the 12 month report and the recommendation that arises from the report. The parties that have agreed are:

- The Textile Clothing & Footwear Union (New South Wales Branch); and
- The Australian Retailers Association (New South Wales Division); and
- Australian Industry Group (New South Wales Branch); and
- Labor Council; and
- Fair Wear Campaign New South Wales.

Australian Business Limited (ABL) does not form part of the majority and does not support the majority recommendation of the Council.

The Council recommends the introduction of a mandatory code. ABL does not believe that the recommendation can be supported by reported evidence concerning the level of compliance of sectors of the clothing industry nor reported evidence on the impact of such developments as the re-negotiated clothing retailers part of the code. A significant part of the evidence adduced in the Report relates to instances of breach or alleged breach, a number of which pre-date the Council.

The Report does not contain adequate analysis of what is insufficient with the operation of the current code in sectors of the clothing industry to justify the significant step of imposing a mandatory code on the industry or a sector of it.

As well, ABL is not confident that the Council's majority recommendation is sufficiently justified in its own terms. It is understood that the majority recommendation for a mandatory code extends to the retail sector of the industry. The Retailers' Code was renegotiated during 2002 between the Australian Retailers' Association and the TCFUA NSW Branch and signed on the 18 September 2002. It has subsequently been signed by all major retailers, including Target which previously operated under its own code (the 'Target code' see s 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001*) ("the Act"). While ABL accepts that the TCFUA may not believe the new form of the code is all it could wish for, it finds it difficult to accept that the TCFUA would have signed the code had it reduced the protection to outworkers entitlements from what existed under its previous retail forms.

The actual effect on the industry of the voluntary Retailers' Code is not presently clear. It is certainly proper that mechanisms are put in place to allow such an assessment.

In ABL's view there has been insufficient time to assess the impact of the Retailers' Code on those people actually manufacturing the garments and insufficient time to satisfactorily promote the codes and build on other steps such as outwork networks and bi-lingual inspectors.

Nor does the evidence in the report and the majority recommendation support the content of the mandatory code. An example is that the mandatory code provides the TCFUA with the right to visit any site where goods are being manufactured without notice. There is no evidence in the report or the majority recommendation that the current provisions of the Industrial Relations Act 1996, section 298(4) have been utilised or if they have been utilised they have been unsuccessful. The majority of the Council support the introduction of a mandatory code. The majority provided that support before the content of the proposed mandatory code was determined. The only aspect of the proposed mandatory code that was clear at the time the majority provided their support was that the content of the proposed code, would be different in form from the recently concluded Retailers' Code. ABL believes the Minister can have little confidence in a recommendation based on this level of analytical support.

ABL recommends the Minister not consider the introduction of a mandatory code. There is no evidence that a mandatory code would improve levels of compliance above the level achieved, or to be achieved, by steps already taken in the industry.

There is evidence that steps taken to date have increased the numbers of complaints being made by outworkers about alleged underpayment or non-payment of entitlements. This is clearly a significant step forward in securing better observance of entitlements and should be allowed to continue. However, it is not evidence of falling compliance. Indeed, given the introduction of new outworker recovery procedures under the Act which allow recovery from the apparent employer, greater Departmental focus on compliance in this industry, supply of information and the increasing levels of publicity about outworker entitlements, it would be remarkable if there were not an increase in claims for underpaid entitlements.

A continuing steady level or a decline in claims would suggest failure in the strategy. The key need is to assess the extent of claims growth, trends over time and identify when amounts claimed as underpaid were earned.

ABL recommends that the Minister positively consider continuing the Council's role in fostering voluntary adoption of voluntary self-regulation, promoting the codes and those adhering to them, contributing to improving their efficacy, monitoring compliance levels and advising on them for an additional 12 month period.

The Minister may also wish to require the Council to develop a promotional programme to educate industry participants about relevant aspects of the outworkers' strategy and to educate consumers about 'no sweat shop' label.

Note

Three members of the Council, one of whom is a Member appointed on the nomination of the Textile Clothing and Footwear Union, one of whom is a deputy appointed on the nomination of the Labor Council of New South Wales and one who is the Member appointed on the nomination of Fairwear, object to the matters advanced by the Member appointed on the nomination of Australian Business Limited (ABL).

The majority report contains several assertions, as does the ABL dissent, some of which are without the support of hard evidence. Certain evidentiary material advanced in support of the majority has been provided to the Chairman on the understanding that it is not to be disclosed to any other person, except as required by law.

There were strong representations that a detailed number of further assertions made by the three members referred to in the opening paragraph of this section should be included in this report. This request was declined by the Chairman.

The compilation and finalisation of this report has taken an extended period of time and finality has now become essential and urgent.

It is clear enough that the Council is divided on the content of this report and this fact should be kept in mind by the reader. At the same time it is to be observed that those in the majority represent five of the six bodies entitled to nominate persons for Ministerial appointment as Members of this Council and their recommendations contained in this report are clear and unambiguous in favour of the creation of a mandatory code containing the several suggested provisions referred to herein.

Recommendation Two

The following recommendation was supported by all Council members.

Recognition and endorsement of the Labour Adjustment, Community Support and Vocational Education and Training (VET) elements of the *Behind the Label* Strategy

The Council acknowledges and endorses the success of the education and training program component of the OIR's *Behind the Label* strategy in assisting outworkers to access alternative employment situations and other opportunities both inside and outside the clothing industry.

The labour adjustment element provides for the establishment of education and retraining programs for outworkers to recognise prior skills, upskill and reskill outworkers, to provide a skilled workforce for the clothing industry and alternatives for outworkers who wish to leave the industry

This VET program has been one of the most successful elements of the Strategy to date and has resulted in more than 100 outworkers graduating from TAFE NSW in 2002 with nationally recognised qualifications in Clothing Production and 80 completing English language classes.

The *Behind the Label* Team and the OIR's VET Consultant work in partnership with TAFE NSW and the NSW Department of Education and Training, to coordinate the design and delivery of community-based programs that assist outworkers to access training and other opportunities. OIR also works with the TCFUA to deliver Workplace English Language and Literacy classes supported by the Commonwealth Department of Education, Science and Training. The Strategy also offers practical support, such as transport, bilingual support and funding for venues and childminding, to ensure that these courses are really accessible for outworkers.

The VET program has grown dramatically in the past year, with more than 140 outworkers now participating in English classes and many taking advantage of the opportunity to study and gain experience in alternative career areas.

In 2003 *Behind the Label* has expanded the range of non textile clothing and footwear (TCF) vocational education and training programs offered to outworkers following the exploration of alternative employment opportunities.

New training initiatives include the delivery of Child Care and Family Day Care courses for outworkers, TAFE courses in welfare and computing and the first patternmaking courses for outworkers (an area of skills shortage in the industry). Currently training pathway strategies are being developed for training opportunities in the hairdressing, hospitality and beauty therapy industries and traineeships in the health and community services industry are also being explored as an appropriate pathway to alternative employment.

Council notes that outworkers are extremely enthusiastic about training and education opportunities and the success of this element of the Strategy is a critical tool for the empowerment of outworkers and community development.

The Council also notes that much of the success of the Strategy is dependent upon the trust and strong relationships that the *Behind the Label* Team members have developed within the key ethnic communities involved in home based clothing work in NSW. OIR has worked closely with community workers in the Chinese, Vietnamese, Khmer and Korean communities.

OIR also supports applications by the TCFUA for Commonwealth Workplace English Language and Literacy (WELL) Program funding for English classes for outworkers in Western Sydney and for an English as Second Language (ESL) teacher to support the delivery of skills training that will be provided through the Skills Recognition Programs.

In making the recommendation to the Minister regarding additional allocation of resources the Council acknowledges the additional $600,000 already allocated to this training component in the recent budget (fulfilling a Government election promise). While the $600,000 is for additional programs within the life of the 3 year *Behind the Label* strategy, the Council is specifically seeking ongoing resources for training beyond the three year life of the strategy. Many outworkers will not have had the chance to participate in programs by the time the strategy ends in June 2004. It is unlikely that the Code mechanisms will have delivered comprehensive change in industry practice to ensure improved wages and conditions for outworkers in that timeframe.

Recommendation

The Council recommends that sufficient resources be allocated to ensure that access to education and training programs for outworkers is maintained beyond the end date of the *Behind the Label* Strategy.

Appendix

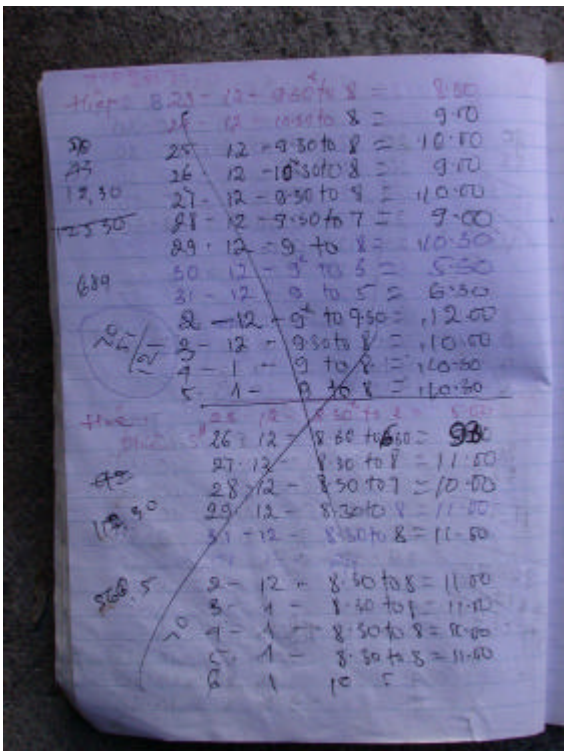
The TCFUA has handed to the Chair a document specifying the results of the following case studies on the condition that such information was not to be disclosed to any other person.

TCFUA CASE STUDIES

Below are 11 case studies of TCFU enforcement of awards and other industrial instruments in the clothing industry. If the TCFU fails to achieve voluntary compliance then options available to the TCFU include the dispute resolution process of the NSW IRC or prosecution. The TCFU is involved in enforcing compliance with OHS and W.C. legislation in the clothing industry. On some occasions the TCFU have utilised the assistance of WorkCover. The TCFU are also working with local councils on the issue of factories in domestic premises and domestic habitation in industrial factories. The names, addresses and exact dates relating to the following case studies have been kept confidential for the purposes of this report. However, upon request by the NSW Minister for Industrial Relations, this confidential information will be shared with that Minister.

Case Study 1

A Cabramatta based employer was employing up to 15 persons from a converted garage at the back of a domestic dwelling. The factory was not registered in compliance with OHS obligations and there were other suspected breaches of the OHS legislation. The employer's own children played amongst hot presses and industrial sewing machines as well as other hazards.



The record purports to show work performed on Christmas Day and other public holidays for up to 12 hours a day.

No risk assessment had been conducted in relation to manual handling issues. OHS requirements in relation to fire protection were not being complied with.

An investigation in July 2002 revealed that employees were working over 70 hours per week and were admitted by the employer in the N.S.W. I.R.C. to being paid as little as $5.50 per hour. A record discovered at the factory showed that employees worked up to 12 hours on Christmas Day, Boxing Day, New Years Day and Australia Day. The TCFU notified WorkCover. The matter was referred to the IRC where the TCFU was able to produce photographs of the record and persons working at the factory. Documentation from the employer's major principal suggested that the employer had been paid about $500,000.00 in the previous six months (to produce several hundred thousand clothing units), consistent with reports of up to 15 persons working on the premises in addition to over a dozen outworkers.

Part of the converted garage used to make garments.

Ultimately the employer conceded in the IRC that the persons witnessed working on site were his employees and produced the photographed record. Furthermore, the employer conceded that he had failed to pay award wages and conditions. The employer agreed to

The new factory is located in an industrial estate.

move his factory to an industrial unit and pay all employees award wages and conditions. This decision resulted in the remedy of the OHS breaches in addition, he registered pursuant to clause 33 of the Clothing Trades (State) Award. The employer now keeps time and wage records in accordance with statutory requirements and pays award wages, superannuation and other entitlements.

Case Study 2

A CBD based employer making high end fashion garments failed to pay superannuation, Award wages and other Award benefits for the period 1995 to 2000 for two machinists. After several failed attempts to get the employer to voluntarily comply with the Award, action was taken to recover the superannuation component of the claims in the small claims jurisdiction of the Industrial Relations Commission of New South Wales. A total amount of over $11,000 was recovered in unpaid super for the two employees.

Prosecution action was initiated for the recovery of the underpaid wages and other entitlements. In early 2003 the CIM ordered the employer pay back pay to the employees in addition to $29,000.00 in costs and penalties to the TCFU by way of moiety.

Case Study 3

An employer failed to pay award wages and superannuation, public holidays and other award entitlements. In addition, in 1997 the full-time employees were terminated and re-employed on a part-time basis. Subsequently, their hours were reduced unilaterally to suit the needs of the business cycle. Employees were not paid redundancy as a result of this restructuring and were regularly stood-down without pay in contravention of the employer's award obligations.

Initially, ten breaches relating to this conduct by the employer were prosecuted in the CIM in May 2001. The TCFU recovered over $29,000.00 in back pay and fines and the company was convicted for each of the ten breaches. The Company is currently defending a further 118 prosecutions for breaches of the Award and other industrial instruments in the CIM's Court.

Case Study 4

A TCFU investigation in May 2002 found that a Canterbury clothing manufacturer was paying employees less than the Award, had not paid the correct amount of super, had not kept proper time and wage records and had failed to provide a safe workplace.

In addition, it appeared the employer was importing garments from China and replacing the “Made in China” labels with “Made in Australia” without ‘substantially transforming’ the product. The product was apparently being sold to tourists in duty free shops across Australia.

At the direction of the TCFU the employer complied with statutory record keeping requirements and commenced paying workers their correct entitlements. Money was spent on improving employee safety. The TCFU contacted the ACCC in relation to the matter of the labels.

Same t-shirt, different country of origin label..

Case Study 5

The TCFUA found in July 2002 that an employer had nine persons working inside a custom built extension at the back of residential house in Cabramatta. The employer did not have council approval for operating a home industry nor was the domestic premises a registered clothing factory in compliance with OHS requirements. The employer manufactured products for a major Sydney based fashion label.

Employees were paid by the piece and did not receive award rates of pay. Nor did employees receive award entitlements such as superannuation. When there was no work, employees were stood-down without pay and the employer was sub-contracting work out in contravention of the employer’s award obligations No proper wage records were kept. Outworkers alternated between working at home and in the factory. The employer did not provide award entitlements to these outworkers, claiming that these outworkers were not employees.


The house is ostensibly just a domestic residence in a quiet street but inside was a medium size clothing factory with nine employees.

The TCFU notified Fairfield Council about the premises and initiated a dispute in the NSW IRC. As a consequence of the TCFU's action the employer moved his operation to an industrial unit and commenced paying employees award rates of pay and other award benefits. The employer commenced keeping proper time and wage books and outworkers were provided with award (employee) benefits. All employees now work set hours. The business cycle is accommodated with the use of casual workers to supplement the full-time and part-time factory employees. Superannuation is now paid on time (in accordance with award obligations) Australian Retirement Fund as a consequence of the TCFU's intervention.

Part of the house extension where nine persons were found sewing garments. All persons ran into the bedrooms when the TCFU arrived.

The employer has registered as an employer giving out work to be performed outside his premises pursuant to clause 33 of the Clothing Trades (State) Award. The employer has applied for factory registration in accordance with OHS regulations.

Case Study 6

In June 2002 the TCFU discovered that a clothing screen printer had for almost one year failed to pay superannuation to the Australian Retirement Fund for all of its employees. The TCFU threatened legal action and the super was paid.

The State and Federal clothing awards provide that superannuation be paid to the ARF monthly.

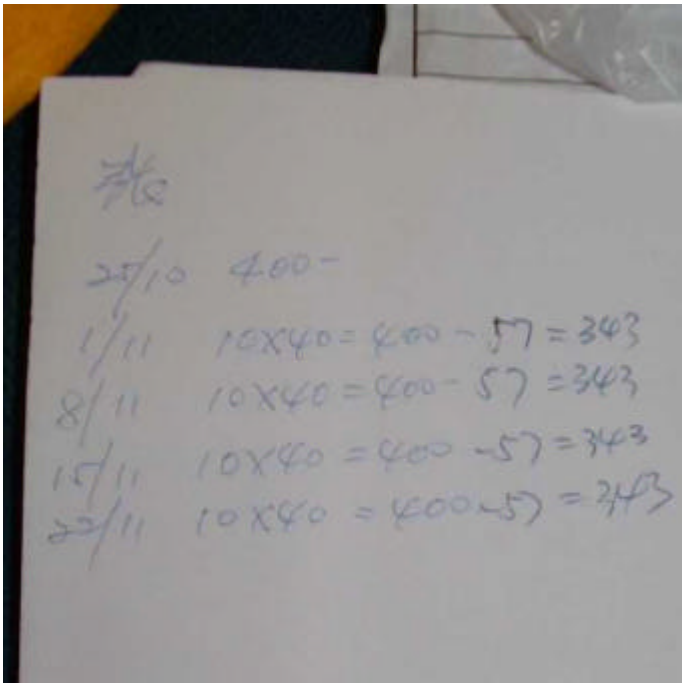
Case Study 7

An investigation in October 2002 revealed that a high profile fashion house had failed to provide annual leave when it fell due. In addition employees had complained about being compelled to work unreasonable over-time to the detriment of their family responsibilities.

The employer agreed to allow employees to take their annual leave when it fell due. In addition, employees were told that they would not be forced to work unreasonable amounts of overtime. Employees reported that they were satisfied with the change of attitude by management and no further action was taken as a result.

Case Study 8

An inspection at a small dye house in Marrickville in November 2002 discovered a workplace where four persons employed without wage records. When required to produce wage records the employer produced an A4 piece of paper which purported to record that employees were paid $10.00 per hour for a forty hour week. The employer later conceded that he had drafted the document after the TCFU had given him 24 hours to produce the records. The employer did not pay his employees superannuation nor did he have a current workers compensation policy. Employees were being paid less than the Award rate of pay and there was apparently no record of hours of work, apart from the documentation produced in response to the TCFU notification.



Part of the wage record the employer conceded he drafted after he was given 24 hours notice to produce employee records

The workplace did not comply with a number of OHS obligations. Passageways and exits were obstructed by scrap material and disused machinery. LPG gas cylinders were exposed to excessive heat because they were stored adjacent to unprotected gas burners contrary to Australian Standard 1596-89. The burners were used for heating cauldrons of water used to dye fabric accessories. Workers stirred fabric in these cauldrons of boiling water with a pair of kitchen tongs. Their only protection was a pair of dishwashing gloves. The work area was disorganised and dirty. There was no lunch area or adequate amenities as required by award and statutory obligations. Workers ate their lunch sitting in the dirty work area. Chemicals were apparently discharged into Sydney Water's sewer system in contravention of relevant discharge laws.


The only exit from the factory was obstructed by material and clutter. In the event of a fire it would have been unlikely employees would have been able to get out of the building safely.

The TCFU contacted Workcover and Sydney Water. The employer was fined by WorkCover for not having a workers compensation policy and Sydney Water investigated the contamination of the sewerage system. The WorkCover Authority also issued the employer with safety improvement notices. The local council was also contacted because it appeared the employer did not have DA approval. The employer threatened the TCFU that he would sack his employees if the TCFU enforced the Award. In January this year he sacked two of his employees. He did not pay any monies to these employees upon termination. The employer continues to pay less than the Award rate of pay and appears to have never paid super for his employees. He only took out a policy for workers compensation policy following the TCFU's initial inspection. The TCFU are taking prosecution action against this employer.

A LPG gas bottle stands adjacent to a gas burner used to boil water in a cauldron. The gas bottle is exposed to excessive heat due to its proximity to the open flame and boiling cauldron.

Case Study 9

In March 2003 a group of companies engaged more than forty persons to manufacture clothing for NSW and interstate schools. Most workers were paid less than the pay rate required by the Award. All sewing machinists were paid by the piece and there did not exist any system to ensure workers were being paid award rates of pay. For example, there was no record of actual hours worked. About half the machinists were treated as independent contractors by the employer. They paid their own tax and were paid a piece rate set by the boss. These workers contractors worked in the factory along side persons who the respective employers claimed were employees. Regardless of how the employer described them, all of the workers in the factory worked set hours and used the boss's tools and machinery. They were all supervised by a foreperson and all worked in accordance with the direction and instruction of that foreperson. They were all hired and fired in the same manner. In addition, they all had to work when work was available. However, if there was no work available then all the workers alike were sent home without pay (a practice in contravention of the Award). These workers termed by the employer as independent contractors did not receive superannuation or annual leave.

This dining chair has inadequate lumber support for the work so the employee makes do with an old cushion and some padding.

This non-ergonomic chair is not height adjustable so the employee has improvised by putting plastic cones (used by supplier of cotton thread) to give the chair height.

The workplace was characterised by breaches of OHS obligations. Knitting machines had their safety kill switches dismantled so that the machines would operate with their guards open. Sewing machines did not have appropriate seating to avoid risk of overuse injuries.

The TCFU took legal action against the employer in 2002 which resulted in $50,000.00 being paid in back pay and costs for two workers. Despite the successful legal action brought by the Union, the employer did not alter the workplace practices already described.

As a result of the failure of the employer to comply with the Award the TCFU had planned to institute prosecution proceedings for more than hundred breaches of the Award involving more than twenty employees. The Union achieved a major breakthrough, however, when pressure from NSW and Qld schools was brought to bear upon the principal supplier of the product to guarantee that the school wear was manufactured by workers provided with Award wages and conditions. In particular, the schools insisted that they wanted the supplier to become accredited under the Homeworkers Code of Practice. The principal was not in a position to give the guarantees necessary for accreditation. As a consequence the principal sought the assistance of the TCFU to bring their manufacturers into compliance with the Award and relevant industrial laws. Subsequently, the employers had told the TCFU that they wanted to take their industrial obligations seriously and they asked the TCFU to assist them achieve compliance. As a result, the TCFU successfully ensured that the employers were fully compliant with their obligations.

This case study highlights the potential effectiveness of how top down pressure can be applied to suppliers and manufacturers to achieve compliance with minimum industrial legal obligations. The retailers' and manufacturers' codes of practice are important vehicles for implementing this approach (concomitant with Fairwear consumer awareness campaigns).

Case Study 10

In May 2002 a Surry Hills employer conducted a clothing manufacturing operation in a factory basement which did not have amenities in accordance with award obligations. The employer set up a make shift lunch area at one end of the factory basement. Employees could only obtain drinking water from a tub (filled with water from a dripping tap) in an adjacent storeroom. The same tub was used to clean the lunch dishes of the employees.

Books used by employees to record piecework.

About two thirds of the machinists working at the premises were piece workers required to have their own ABN and business name. They worked along side about half a dozen persons who were paid by the hour. The piece rate workers did not receive super. After TCFU intervention, the employer agreed to record all payments to all workers on the wage records and pay them by the hour in accordance with award obligations. He agreed to deduct tax and pay superannuation to the ARF every month. The makeshift washroom was closed and employees were provided access to a proper canteen

The tubs used by employees to wash dishes and obtain drinking water. Note the water drains into an open pit in the floor.

located on an upper level of the building. The employer purchased a drinking fountain for the workers.

Case Study 11

The consequences of failure to adequately enforce workplace safety (and compensation) obligations should not be minimised. In just one recent instance, Justice O'Keefe of the New South Wales Supreme Court dealt with a matter involving the severe mutilation of a ten year old girl in a New South Wales clothing sweatshop.

Justice O'Keefe delivered his interlocutory determination on 6th February 2002 in the matter Yu Gee by her tutor Tao Ge v. River Island Clothing Pty.Ltd. & Ors. [2002] NSW SC 28 (under file number 12210/01).

At paragraphs 2 to 7 and paragraphs 21 to 22 of his judgement, Justice O'Keefe described how this little girl had been helping her mother with work in the sweatshop (where the mother was employed to perform clothing production duties). He further reported that this child was thus injured by machinery in the sweatshop on the 18th January 1999. The judgement passages (cited above) went on to describe the youngster's severe physical injuries, including the "complete…amputation" of portions of her "dominant hand".

In particular, the judgement described "the traumatic amputation of the distal half of her right hand and the top of her right thumb…whilst her hand was between" the "moving parts" of a "machine. The plaintiff also sustained damage to her right foot. This consists of a long scar which has unfortunately been the subject of keloid overgrowth. There is also impaired sensation… The damage to her foot is associated with a ¾ inch diminution in the girth of her right calf." It should finally be noted that the interlocutory matter before Justice O'Keefe arose from a dispute about the appropriate level of compensation to be awarded (in relation to the child's mutilation).