# THE ETHICAL CLOTHING TRADES COUNCIL OF NSW

The following document provides an account (from Mr. Igor Nossar) about the history and operation of the Ethical Clothing Trades Council of NSW [as constituted pursuant to the Industrial Clothing (Ethical Clothing Trades) Act 2001 NSW] – along with Mr Nossar's observations in relation to this Council and further recommendations about its possible future scope and direction.

For the purposes of this document, the Ethical Clothing Trades Council of NSW [as constituted pursuant to the Industrial Clothing (Ethical Clothing Trades) Act 2001 NSW] will henceforth be referred to as "the Council".

## 1. THE HISTORY OF THE COUNCIL:

1.1 THE INDUSTRY CONTEXT:

Historically, Australian clothing production involved principal clothing suppliers, such as fashion houses, handing out manufacturing work to multiple factories, many of them engaging substantial onsite workforces. Traditional responses to seasonal peaks in retail demand were met by engaging home-based clothing workers (also known in Australia as 'homeworkers' or 'outdoor workers' or 'outworkers'), a reserve labour force in the clothing industry.

1.1.1 The Modern Operation of Clothing Supply Chains in Australia:

Fifty years ago, the Australian government's removal of tariff barriers against overseas imports resulted in a change from factory-based clothing manufacturing to an industry of interlocking pyramidal contracting arrangements and workforces heavily composed of outworkers. At the apex of these contractual chains, the 'effective business controllers' of these supply chains – a small number of commercially dominant retailers – typically entered into arrangements for the supply of clothing products with principal manufacturers and/or fashion houses. These principal manufacturers and fashion houses then contracted production from multiple smaller manufacturers or offsite contractors. In some instances, these production orders were successively handed down through a sequence of intervening parties until the goods were finally constructed by an outworker. The finished goods were then delivered back up the contractual chain to the original principal manufacturer or fashion house.

Each step down the pyramid involved an increasing number of commercial players, each of which exerted a lesser degree of commercial influence over the supply chain than those on the step above them. At the base were clothing outworkers, with little influence over their working conditions. The commercial power of major retailers enabled them to secure favourable terms (price, quality control and turnaround time), proactive rights of inspection for quality control and exacting indemnity provisions in their contractual arrangements with principal manufacturers, whether domestic or international. These arrangements gave the retailers considerable legal authority to intervene actively into key aspects of the operation of their supply chains, so that in the past major retailers have presided over contractual arrangements providing them with quickly produced, quality clothing and high profit margins - derived at the expense of outworkers who were sufficiently distant (in a legal sense) from the retailers to minimise the retailers' legal liability for workers' pay and conditions. [In the absence of government intervention, contractual 'governance structures' of this kind have rarely, if ever, provided effective protections for outworkers].

1.2 THE REGULATORY CONTEXT:

1.2.1 Historical Legal Regulation of Clothing Supply Chains in Australia:

During the previous century, clothing outworkers' working conditions were predominantly regulated by federal and state (industry-specific) industrial award provisions, which were established by industrial tribunals (usually to cover employees).

1.2.1.A **Problems of Avoidance of Legal Regulation**:

This traditional labour law framework suffered from three systematic deficiencies limiting the effective regulation of working conditions for clothing workers - and for clothing outworkers in particular.

First, the traditional regulatory framework displayed an 'entitlement gap', because it generally only covered 'employees' directly employed by an 'employer' under a 'contract of employment'. In response to this feature of the traditional framework, clothing work providers sought to minimise their exposure to regulation by formally characterising outworkers as 'independent contractors', or even sometimes as 'trust unit holders', rather than as 'employees'. Such corporate structuring arrangements also enabled employers to avoid (or minimise) worker compensation insurance premiums (and to manipulate claims).

State and territory parliaments responded to these issues by inserting deeming provisions in workers' compensation and some state industrial relations and WHS statutes. These provisions assigned legal responsibilities and obligations of an 'employer' to parties that immediately and directly dealt with outworkers, who then became the 'deemed employees' of those work providers.

In the clothing industry, however, the majority of the direct work providers to outworkers were small commercial entities (with limited commercial power and resources to meet their labour law obligations). These entities tended to be transient, and outworkers were frequently unable to initiate and complete legal proceedings (for enforcing obligations or recovering debts) before these providers exited the industry. In addition, the use of strategies such as falsified business records, shelf companies and complex group company structures protected these entities from traditional enforcement proceedings.

The use of these strategies for evading the operation of awards and deeming provisions reveals the second deficiency of traditional regulatory frameworks – even workers who were formally protected found the mechanisms for enforcement to be inadequate. Government inspectorate regimes were traditionally designed for permanent employees, usually located at large workplaces. Inspectors were often confused about business responsibilities to subcontractors and other precarious workers under award provisions, a problem exacerbated by inadequate resourcing of government industrial inspectorates. Where there were complex subcontracting arrangements, inspectors struggled to identify the relevant employer, or otherwise determine the employment status of particular parties. In addition, inspectors had difficulty locating isolated, easily mobile home-based workers. Regulatory oversight was thus inhibited by workers' relative 'invisibility'. **Effective enforcement of supply chains requires regulators to be able to locate all work sites in a chain, so that they can physically inspect premises, check documentary records and determine the conditions under which each individual worker labours.**

The final systemic regulatory deficiency arose from the absence of any formal legal obligation upon the major retailers at the apex of the supply chains. Traditionally, retail sale activity fell outside the jurisdictional scope of clothing industry manufacture, and thus outside the scope of clothing trades awards, especially in the Commonwealth system. This deficiency provided an economic context in which parties further down the supply chain could only survive commercial pressures by reducing their costs, often through non-compliance with their labour law or WHS obligations.

1.2.2 Regulatory Development Beyond the Traditional Framework:

Following campaigns by trade unions and community groups highlighting these issues, the federal industrial tribunal inserted innovative provisions into the federal clothing award in 1987/1988, enabling union and government regulatory agencies to track the contracting process from the level of principal manufacturers down, through each successive level of the supply chain, down to the outworkers themselves. The award required each employer who gave out clothing work to proactively provide a list of the destinations (both identity and location) of their garment manufacture work. Each employer was to provide the required list every six months and was also required to keep a record of the sewing time for each clothing product. The award provisions also empowered regulatory agencies to access records of work orders (most importantly, the number of goods ordered – known as "**volume**") and to crosscheck the validity of the assigned sewing time for each type of goods (by conducting time tests in comparable factory contexts). [All of these innovative award obligations applied to every business at each level of the supply chain from the principal manufacturers and fashion houses downwards.] Any failure to provide this information was automatically a breach of industrial law. [These award provisions were later supplemented (in 1995) by a federal industrial tribunal decision giving regulatory agencies access to contract details of pricing (for each of the goods ordered) at each level of the contracting process (known as "**value**") from the level of principal manufacturers downwards. These new award provisions were soon incorporated into the counterpart state clothing awards in a number of state jurisdictions.

However, these new award provisions (in 1987/1988) failed to impose any enforceable obligations upon the most significant players in the clothing supply chains: the major retailers at the apex of the contracting chain pyramid. The "first tier" suppliers to these major retailers were the principal manufacturers and fashion houses, who were now each bound (by the new award provisions) to disclose (to the regulators – including the union) the "volume" of work being given out (by each of these principal suppliers) through further sub-contracting down the supply chain. But there was no ability for regulators to determine whether these principal suppliers were **fully** disclosing (to the regulators) the **full** volume of the work being given out (further down the supply chain) UNLESS the regulators could also cross check with information from the major retailers about the full amount of work ORDERED (from the "first tier" principal suppliers) by the MAJOR RETAILERS (as disclosed in the retailer supply contracts with the principal manufacturers and fashion houses). In short, the ability of the regulators to successfully implement the novel award provisions was considerably restricted in the absence of additional parallel obligations (upon the major retailers) for full contractual disclosure (of their retailer supply contracts) and the provision of regular supplier lists.

Further trade union and community campaigning induced the industry bodies representing retailers and manufacturing employers to adopt voluntary codes of practice aimed at securing entitlements for outworkers. The retailer and manufacturing employer voluntary codes were united under the single umbrella of the **Homeworkers Code of Practice (HWCP)**, but both exhibited inherent regulatory flaws. The manufacturing employer code, for example, relied upon documentary assertions by the manufacturers themselves (in the form of statutory declarations). The various versions of voluntary retailer codes adopted by the retailer representative body were even weaker – as evidenced in the 1996, 1997 and 1998 versions of the Homeworkers Code of Practice (HWCP).

By contrast, on 28 July 1995, one major retailer (**Target** Australia Pty Ltd) adopted a different kind of voluntary retailer code. The form of voluntary retailer code agreed to by Target facilitated effective enforcement of outworker entitlements by the regulators. This **Target Code** included provisions (resembling those in the federal award) obliging this retailer to proactively provide (to inter alia the union) regular lists of suppliers - along with reactive obligations (upon this retailer) for disclosure (to the union) of all supply contracts. Most importantly, this particular voluntary retailer code of practice (adopted by Target) also created a specific commercial incentive mechanism for the effective commercial remedy of supply chain failures to comply with outworkers' entitlement obligations. More specifically, the retailer Target was obliged to designate a specific corporate officer to whom the relevant signatory trade union could bring specific instances of outworker exploitation and Target was also obliged to respond to proven instances of outworker exploitation by means of a range of commercial disciplinary measures aimed at the relevant supplier of clothing. In particular, this innovative voluntary retailer code of practice obliged the signatory major retailer Target to consider discipline of the relevant supplier by terminating the contract for supply between that retailer and that supplier, and by refusing to enter into further contracts of supply (with the offending supplier), if that supplier failed to remedy the disclosed breaches of the outworker legal protections. This kind of **Target Code** was subsequently adopted by a handful of other effective business controllers, including Country Road, Ken Done and Australia Post.

Following the adoption of the Target Code (by Target Australia Pty Ltd), most major retailers (and their retailer representative body) failed to follow suit. Indeed, they adamantly refused to enter into the kind of voluntary arrangements required to assist regulators to achieve effective enforcement of outworker entitlements. The subsequent NSW Pay Equity inquiry conducted by Justice Glynn focused (inter alia) upon the plight of exploitation faced by outworkers (especially immigrant female outworkers). In her final report, Her Honour drew attention to the crucial role played by major retailers in the operation of modern clothing supply chains and the need for the commercial power of these retailers to be strategically harnessed in support of the necessary effort by regulators to counter such exploitation.

1.3 THE BIRTH OF THE COUNCIL:
Trade unions and community groups (notably the Fairwear campaign) campaigned against the refusal of major retailers to accept their appropriate responsibility for combatting outworker exploitation and together these social organizations lobbied the NSW state government to remedy this regulatory loophole. In response, the NSW state government legislated the Industrial Clothing (Ethical Clothing Trades) Act 2001 NSW. [For the purposes of this document, the Industrial Clothing (Ethical Clothing Trades) Act 2001 NSW will henceforth be referred to as "the Act"].

In relation to major retailer obligations, the statutory provisions of the Act created a tripartite stakeholder consultation process with a fixed timetable triggering the potential exercise of ministerial statutory powers unilaterally to proclaim mandatory retailer obligations. (This tripartite stakeholder consultation process was conducted within the Ethical Clothing Trades Council of NSW.)

More specifically, the statutory provisions of the Act created a tripartite stakeholder consultation framework by constituting the Ethical Clothing Trades Council with a membership of seven (7) part-time members. Aside from the particular part-time member who was to be appointed as the Council's Chairperson, the Council's membership consisted of three (3) stakeholder representatives of businesses involved in domestic Australian clothing supply chains, sitting alongside three (3) other stakeholder representatives of key organizations involved in the campaign against outworker exploitation.

The Council's three (3) business stakeholder members consisted of a major retailer representative nominated by the Australian Retailers Association (ARA), New South Wales Division – along with another business member (representing inter alia a large NSW principal clothing manufacturer) nominated by The Australian Industry Group (AIG), New South Wales Branch, as well as a third business member (representing other NSW clothing manufacturers) nominated by Australian Business Limited.

The Council's three (3) other stakeholder members representing key organizations involved in the campaign against outworker exploitation consisted of a member nominated by The Textile Clothing and Footwear Union (TCFU) of New South Wales – along with another member nominated by Unions NSW and a third member (representing the Fairwear campaign) who was chosen by the relevant Minister to represent community interests. [The Council's Chairperson was chosen on the basis of that particular Council member having expert knowledge of outwork practices in the clothing trades. Indeed, the relevant Minister chose (as the Council's Chairperson) the member of the federal industrial tribunal who had personally inserted the innovative clothing supply chain provisions into the federal clothing award in 1987/1988.]

The Council's TCFU representative was Mr. Barry Tubner, the State Secretary of the TCFU NSW. The Council's Fairwear representative was Ms. Debbie Carstens, who had extensive experience and skills in relation to the issue of exploitation in the clothing industry as a result of her leading (founding) position in the organization "Asian Women at Work".

The Council's Unions NSW representative was Ms. Nancy Carl, with Mr. Igor Nossar nominated as the Council's alternative member representative of Unions NSW, and Mr. Nossar attended every meeting of the Council in that capacity. [Ms. Carl only attended the very first and very last meetings of the Council.]

The Council was **never intended to be a permanent ongoing** multi stakeholder representative **body**, as is revealed in the various relevant provisions of the Act [and accompanying Second Reading Speeches in the NSW Parliament]. The Council was **only ever intended to** evaluate, and **report** to the relevant Minister, **on** action (whether voluntary or otherwise) taken by **the clothing industry during the period of 12 months after the commencement of the Council's operations** to improve compliance in the industry with obligations to ensure outworkers in the clothing trades receive their lawful entitlements. [The Act's section 9, Report on implementation of ethical clothing industry practices, is especially pertinent to this point – as is section 8, Quarterly reports.] For this reason, each of the Council's members were only appointed for a strictly limited term [of no more than three (3) years].

In other words, **the Council's central objective** was the **delivery** (**to** the relevant **Minister**) **of** this particular report – known among Council members as **the twelve (12) month report** – with the explicit focus of this twelve (12) month report being "the Council's recommendations as to: (a) whether, if a **mandatory code** were made, it would improve" such "compliance, and (b) the content and suggested penalties for failure to comply with such a code." [This twelve (12) month report was to be forwarded to the Minister as soon as practicable after the end of the twelve (12) month period.]

Furthermore, the Council's production of this twelve (12) month report was preceded (and aided) by the statutory requirement (under the provisions of the Act) for the Council's prior production of a limited series of (**preceding**) **quarterly reports** (to the Minister) about the Council's findings as to whether outworkers in the clothing trades were receiving their lawful entitlements – by (inter alia) reporting on the activities of clothing industry retailers (and manufacturers) in relation to their obligations under the (already existing) Homeworkers Code (HWCP) and **especially focusing on** the **willingness of** clothing industry **retailers to adopt** voluntary retailer agreements "such as the **Target Code**". [Under the provisions of the Act, the Minister was empowered to waive the requirement that the Council make a quarterly report for any period specified by the Minister.]

## 2. THE OPERATION OF THE COUNCIL:

2.1 Negotiations between Stakeholder Representative Council Members:

Even before the expiry of the timetable for this multi stakeholder process, the dynamic created by these statutory provisions (and most notably by the limited timetable prior to potential proclamation of mandatory retailer obligations) rapidly produced, in the private sector, a new improved voluntary retailer code of practice – now promptly embraced by most major Australian retailers. [Mr. Nossar and Mr. Tubner and the ARA Council representative were centrally involved in the crucial negotiations for this new improved voluntary retailer code of practice.]

This new improved voluntary retailer code of practice was initially embodied in the "**NSW Retailers/TCFUA Ethical Clothing Code of Practice 2002**". [See Appendix 1 of Submission No. 7 provided by Mr. Nossar, Mr. Owen and Mr. Amoresano to the Committee inquiry. (For the purposes of this document, this particular submission by Nossar, Owen and Amoresano will henceforth be referred to as "the Submission".)] Within one month, this new improved voluntary retailer code of practice was also adopted at a national level in the mirror form of the "National Retailers /TCFUA Ethical Clothing Code of Practice" (see Appendix 2 of the Submission) - which shortly thereafter was subsequently signed by all the major retailers (see, for example, Appendix 3 and Appendix 4 of the Submission). [The latest manifestation of this (nationally operative) new improved voluntary retailer code of practice currently appears as Part 2 (Retailers) of Ethical Clothing Australia's Code of Practice (incorporating the previous Homeworkers Code of Practice). (See Appendix 5 of the Submission.)] **All of these improved voluntary retailer codes incorporate all of the key features of the 1995 Target Code**.

The very same dynamic created by these statutory provisions (and most notably by the limited timetable prior to potential proclamation of mandatory retailer obligations) also rapidly produced (in the private sector) a separate, new corporate wear (and sportsgoods) code of practice. In particular, following protracted negotiations (conducted by Mr. Nossar and Mr. Tubner together with negotiators for the respective transnational firms), high profile transnational clothing firms such Nike (see Appendix 6 of the Submission) and Reebok (see Appendix 7 of the Submission) - and (more locally in Australia) R.M.Williams - have become signatories to this new Australian corporate wear and sportsgoods code of practice. This new corporate wear and sportsgoods regime entrenches targeted compliance auditing and enforcement measures by requiring the effective business controllers of the relevant clothing supply chains to contractually secure both identification of all sites of production (without exception) and also access by the relevant trade union to those sites, without any requirement for prior notification of inspections. These contractually secured measures are underpinned by the potential loss of supply contracts for any suppliers who attempt to avoid compliance. (Mr. Nossar had previously proposed this package of targeted compliance auditing and enforcement measures to an agency of the New South Wales government, during the government's review of implementation guidelines concerning government purchase of textile, clothing and footwear products.)

2.2 Council Recommendation for Mandatory Retailer Obligations:

The multi stakeholder consultation process (within the Council) culminated in a decision by the Council to recommend that the relevant minister unilaterally proclaim mandatory retailer obligations which specifically incorporate targeted compliance auditing and enforcement measures of the type to be found in the new corporate wear and sportsgoods code of practice. Most importantly, this recommendation by the Council was supported by five out of the (total of) six stakeholder organisations represented on the Council. More specifically, this recommendation of the Council was supported by the stakeholder organisations representing both the retailers and a segment of the manufacturing employers. The text of this recommendation could originally be found at <http://www.industrialrelations.nsw.gov.au/resources/ethicalclothingtcouncil.pdf> under the title 'New South Wales Ethical Clothing Trades Council (Twelve Month Report) 2003' as 'Recommendation One' from pages 36 to 52. [These five (5) stakeholder representatives on the Council agreed that Mr. Nossar should draft this recommendation – including all of the provisions of a fully developed proposed mandatory code – on behalf of this overwhelming majority of the Council members.)

This majority recommendation of the Council [as contained in the 'New South Wales Ethical Clothing Trades Council (Twelve Month Report) 2003'] was later effectively adopted by the relevant ministers and the resulting mandatory retailer obligations were proclaimed by order in gazette as a delegated legislative instrument entitled the "Ethical Clothing Trades Extended Responsibility Scheme". [For the purposes of this document, the Ethical Clothing Trades Extended Responsibility Scheme 2005 (NSW) will henceforth be referred to as "the TCF Mandatory Code".] This legislative instrument took effect in New South Wales on 1st July 2005. Attention is particularly drawn to the legal obligations owed by retailers (to the relevant trade union) by virtue of clauses 11, 12(3), 12(4), and 20 – especially 20(8).

**Following** the Council's **delivery** (to the relevant Minister) **of** the 'New South Wales Ethical Clothing Trades Council (**Twelve Month Report**) 2003', **the Council fulfilled no further functions and it ceased to exist as the Council members' appointments collectively expired.**

The **Council** was **never intended to administer** any Mandatory legislative instrument such as **the** TCF **Mandatory Code**, since the multi stakeholder Council format is far too bureaucratically unwieldy for any efficient administration of the TCF Mandatory Code functions. **Rather**, it was always envisaged that the **TCFU and** the **NSW Government Department** responsible for industrial relations would **each respectively administer their** respective **powers** pursuant to the provisions **of the** TCF **Mandatory Code**. [In accordance with section twelve (12), Making of mandatory code of practice, of the Act, the **only remaining** intended **function of** the **Council is** to be reconvened for the purpose of **consultation by** the relevant **Minister prior to** that Minister "**amending or revoking**" the TCF Mandatory Code].

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

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

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

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

## 3. RECOMENDATIONS:

3.1 Recommendations for Future Operations of the TCF Mandatory Code:

The TCF Mandatory Code is currently a valid legislative instrument which can today be effectively implemented by the TCFU's successor union organization and the relevant NSW Government Department by means of exercise of their respective powers pursuant to the provisions of the TCF Mandatory Code.

It should be noted that virtually all of the expertise relating to the history and operation of the TCF Mandatory Code rests with both the TCFU's successor union organization and the three (3) co-authors of the Submission.

Accordingly, it is recommended that this body of expertise should be considered by the relevant NSW Government Department as a training resource in relation to the future operation of the TCF Mandatory Code. This reality should strongly suggest that the relevant NSW Government Department seriously consider offering a service level agreement (SLA) to the TCFU's successor union organization in order to access the cooperation and expertise of this union in relation to the future operation of the TCF Mandatory Code. [Such a proposed SLA between this union and the relevant NSW Government Department could well be informed by the existing SLA entered into by Ethical Clothing Australia (ECA) with this union (whereby this union provides the compliance services underpinning the ECA accreditation model). More specifically, such a proposed arrangement could well involve the provision of NSW Government funding to this union in order to train NSW Government Department personnel in the effective operation of their respective powers pursuant to the TCF Mandatory Code and/or to obtain expert compliance services from this union].

It is foreseen that no reason exists to reconvene the bureaucratically unwieldy multi stakeholder Council for the purpose of somehow administering the provisions of TCF Mandatory Code – a function whose exercise the Council was never intended to engage in. Rather, any practical administration of the TCF Mandatory Code functions would preferably rest with the relevant NSW Government Department and/or this union (as would any "housing" of resources or data associated with the future operations of the TCF Mandatory Code provisions).

3.2 Recommendations for Future Operations of the Council:

The **only remaining** intended **function of** the **Council is** to be reconvened for the purpose of **consultation by** the relevant **Minister prior to** that Minister "**amending or revoking**" the TCF Mandatory Code].

Any such amendment of the TCF Mandatory Code should be preferably be based on the recommendations of the TCFU's successor union organization in its submission to the Committee Inquiry.

**Igor Nossar**
**9th July 2024**