

21 May 2018

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Dear Mr Darrell Channing

Re: AA1000418 – Homeworker Code Committee – submission

I write in support of the Homeworker Code Committee's application for re-authorisation from the ACCC in order to continue to give effect to the Homeworkers Code of Conduct, to be renamed 'Ethical Clothing Australia's Code of Practice, Incorporating Homeworkers' (the Code).

I am an academic expert in the fields of corporate accountability and ethical production in the garment industry. I have written extensively on the two topics in peer reviewed journals. In recognition of my expertise I am on the Steering Committee of the Australian Corporate Accountability Network and am currently contracted by the International Labour Organisation to provide advice to the Thai Government regarding protection of homeworkers of a similar type to those covered by the Code in Australia. I have researched the Australian fashion industry and the conditions of homeworkers, publishing my work in various articles listed in the appendix to this letter.

I note that the ACCC characterised the Code as one that:¹

assists businesses in the textile, clothing and footwear industry in Australia to ensure compliance with the legislative requirements applying to homeworkers or outworkers by providing education and imposing obligations on participants in the supply chain to provide award wages and conditions. Businesses under the code are able to promote their credentials to consumers by displaying the Ethical Clothing Australia license mark and trade mark.

I further note that although the ACCC states that 'Non-compliant businesses may be subjected to or (sic) boycotts', no reference to boycott is made in the Code and nor have boycotts been called for by the Homeworker Code Committee in the history of its operation to my knowledge. Consumer organisations peripheral to, and not associated by the Homeworker Code Committee ask consumers to give preferential treatment to ethical brands. *Choice* provides this advice, for

¹ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/homeworker-code-committee-incorporated> , accessed 21 May 2018.

example, in its article titled 'Ethical clothing: The real cost of clothing - who makes your clothes and how much are they paid?':²

Shop with certified brands

[Ethical Clothing Australia](#) certifies cut, make and trim for Australian-made clothes. It lists 85 accredited brands including Cue, Jets swimwear, Nobody Denim, RM Williams, Collette Dinnigan and Carla Zampatti.

[Fairtrade](#) certifies the supply chain for cotton production. Accredited brands include Etiko, 3Fish, Audrey Blue, Nudie Jeans Co, RREPP.

[GOTS](#) certifies organic textiles and ethical labour conditions in textile manufacturing.

I cannot currently find evidence of an organisation proposing that non-Code compliant brands be boycotted.

In this letter of support I wish to comment briefly on the public benefits associated with the code.

In its 2013 determination, the ACCC identified three broad key public benefits associated with the Code, as follows:

- a. Efficiencies in the management of supply chain risk for Code participants, relating to non-compliance with workplace legal obligations;
- b. Efficiencies in signalling compliance with legal obligations for Code participants;
- c. Increased compliance with legal obligations in relation to TCF workers.

I believe good evidence exists that these public benefits still exist today.

Efficiencies in the management of supply chain risk for Code participants, relating to non-compliance with workplace legal obligations

In its 2013 determination, the ACCC concluded that the Code was likely to improve business efficiency in managing outsourced supply chain risks, particularly in relation to the risk that a sub-contractor is not compliant with its legal obligations to workers. The obligation of business to manage human rights risks within supply chains is gaining ever greater recognition within international law, and is promoted by the Australian Government. The *UN Guiding Principles on Business and Human Rights* (UNGPs) were unanimously endorsed by the United Nations Human Rights Council in June 2011.³ The Australian Government co-sponsored this resolution and has continued to express its strong support for the UNGPs within various international fora. It also encourages businesses to apply the UNGPs.⁴

The UNGPs articulated businesses' responsibility to respect human rights, which was said to be grounded in widely shared social expectations of appropriate business conduct.⁵ The UNGPs⁶ were an attempt 'to provide concrete and practical recommendations for ...

² <https://www.choice.com.au/shopping/everyday-shopping/clothing/articles/ethical-clothing>, accessed 21 May 2018.

³ UN Human Rights Council Resolution 17/4, UN Doc. A/HRC/RES/17/4, 16 June 2011.

⁴ See, eg, <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>>.

⁵ Protect, Respect and Remedy: A Framework for Business and Human Rights, Report to the UN Human Rights Council (Framework Report), UN Doc. A/HRC/8/5, 7 April 2008, available at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs), UN Doc. HR/PUB/11/04 (2011), available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

implementation [of the Framework]'.⁷ The UNGPs have since been incorporated in a range of international regulatory instruments addressing corporate responsibility for human rights violations.⁸

Due diligence is at the heart of the Guiding Principles. As Ruggie explained, '[t]o discharge the [corporate] responsibility to respect [human rights] requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.⁹ Five of the 31 Guiding Principles appear under the heading 'Human Rights Due Diligence', reinforcing the centrality of the concept in Ruggie's scheme.¹⁰ Two other Guiding Principles (4 and 15) refer to due diligence, as does the Commentary to several other Guiding Principles. The concept of 'due diligence' is understood both as a standard of conduct required to discharge an obligation,¹¹ as well as a process to manage business risks.

Though business is expected, in accordance with these international norms, to conduct risk assessment and due diligence practices, there is little guidance about how to do so. The risks of not identifying human rights breaches within supply chains are considerable. There are reputational risks for business as well as the risk of non-compliance with the law leading to prosecution. The Code provides clear guidance about how to manage these risks, by setting out a publicly recognised method of checking the entire supply chain for exploited labour. ECA has a range of tools and information kits available, providing clear instructions in easy to understand, non-legal language. Further, participation in ECA provides business with access to a "learning community" of local and ethical manufacturers who can share experiences about how they undertook supply chain due diligence.

This is highly beneficial in a context in which most brands are small or medium in size, and lack the capacity to independently navigate complex interlocking state and federal laws and awards. By complying with the Code, businesses can rest assured that they are acting in accordance with the law and complying with their obligations under the UNDPs.

Efficiencies in signalling compliance with legal obligations for Code participants

One of the most important aspects of the Code is the way that allows brands to demonstrate that their products are Australian made and manufactured under ethical conditions through the use of the independent, third-party ECA trade mark. Without an accredited means of this type, consumers have no way of receiving valid information concerning the ethics of production. Instead, consumers must rely on information from the brands themselves, or information from

⁷ Report to the UN Human Rights Council on 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Report on Guiding Principles), UN Doc. A/HRC/17/31, 21 March 2011, para. 9.

⁸ E.g., Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises, available at <http://oecd.org/daf/inv/mne/48004323.pdf>; International Finance Corporation, Sustainability Performance Standards, available at www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES; Equator Principles on Project Finance Requirements, available at www.equator-principles.com/index.php/ep3, which all now incorporate human rights due diligence requirements based on the Guiding Principles, *supra* note 3.

⁹ Framework Report, para. 56.

¹⁰ Guiding Principles, at 17–21.

¹¹ In his first use of the term in the Framework Report, *supra* note 1, para. 25, Ruggie defines due diligence as a standard of conduct, referring to the definition of due diligence in *Black's Law Dictionary*: '[T]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.'

advocacy and interest groups, which may or may not be reliable. Without credible information, consumers can become confused and lost. The ECA trade mark is the most credible of its type. One reason for this is because it provides a means for Compliance Officers to monitor the supply chains of applicant companies. Over the years that I have been studying the Australian initiative, I have come to understand that this is perhaps the most important aspect of the Code compared with other accreditation schemes which rely on private, third party monitors who 'fly in' to conduct one of monitoring. The work conducted by Compliance Officers is highly labour intensive. Compliance Officers methodically organise data collected about middle people and homeworkers that are lodged by companies. They then contact homeworkers, using the registered information, to check their conditions of work and inform them of their rights. Because workers are in their homes, this contact must be made individually, instead of collectively (as it can be in a factory). The work is slow and costly. It is the backbone of the mechanism and it provides the strongest signal to consumers that the ECA trade mark is credible.

Increased compliance with legal obligations in relation to TCF workers

My research indicates increased compliance with legal obligations in relation to TCF workers. It shows increased compliance with legal obligations compared with the earlier study conducted by Christina Cregan of the University of Melbourne in 2001.¹² Cregan surveyed 119 homeworkers using a snowballing technique to recruit the interviewees. All had come to Australia from 1979 onwards. They had travelled in small boats and arrived via transit camps in South East Asia. They were ethnic Vietnamese from the South. She surveyed 116 females and 3 males whose ages ranged from 17 to 64. The average age was 39 and the mode was 50.

Cregan found that, on average, workers received around AUD \$0.50 to \$5.00 an hour for their work — less than half the legal minimum — once piece rates are converted to hourly rates.¹³ (The legal minimum Australian wage, as of 1 July 2014, has been set at \$16.87 per hour (or \$640.90 per 38 hour week before tax).) Around 62 per cent of the workers worked seven days per week, and 95 per cent of respondents did not receive holiday leave, sick leave or public holiday pay.¹⁴ Another study comparing the occupational health and safety (OHS) experience of factory-based workers and outworkers in the clothing industry found that outworkers suffered three times the level of injuries experienced by factory-based workers. The two main reasons for the differences in injury rates were the use of a piecework payment system and the long hours worked by outworkers.¹⁵ Working hours were particularly long. Nearly two-thirds (62 per cent) spent 7 days a week sewing, with a further 26 per cent working for 6 days. Almost all of them worked during the school holidays and on public holidays.

The reason for the longest hours were rush jobs. When workers had to finish rush jobs they worked from very early in the morning to midnight or later. The workers expressed no choice about taking on rush jobs, since any job was needed. Another factor is that workers need to work for as many hours as possible in order to make a living wage. The excessive hours and worry inevitable leads to strains on the physical and mental health of the outworkers. Physical problems included exhaustion, dizziness, eye problems and aches and pains. Often, after a long day, workers

¹² Cregan C. (2011) Vietnamese outworkers in the Australian garment industry: Sweated labour and the social wage. *IREC*. Barcelona.

¹³ Cregan C. (2002) *Home Sweat Home*. Melbourne: Department of Management, University of Melbourne.

¹⁴ *Ibid*.

¹⁵ Mayhew C and Quinlan M. (1998) *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*. Sydney: Industrial Relations Research Centre, University of New South Wales.

complained of difficulty getting to sleep. Respondents to Cregan's study reported constantly worrying about irregular work and gaps between the end of a job and the beginning of a new one. A number of homeworkers reported receiving unfair treatment. They were intimidated and controlled by their need for work and pay.

In 2013, I interviewed 31 Vietnamese workers in the western suburbs of Melbourne.¹⁶ The first four of these interviews were used as pilots for the development of questions. 26 of these interviews were then conducted with a group of closed questions. Further interviews were conducted with union and community campaigners, employers and fashion designers, as well as countless conversations over the years with players in the industry which inform the views expressed in this chapter.

Conducting interviews with workers entailed visiting the homes of industrial outworkers who migrated from Vietnam in the late 1970s, 1980s and 1990s, where I recorded their life histories and observed them work, as their homes also serve as workplaces. Often husband and wife teams or good friends worked together. Sometimes children helped. Other relatives and friends lent a hand during particularly busy periods. They had purchased sewing machines and other materials and set up a production site in their garages, sheds and spare rooms. I witnessed the labels of a number of well-known Australian brands being sewn into jackets, blouses and pants.

For most of these people's working lives as machinists they had never received the legal rate of pay, paid holidays or sick leave. The families I interviewed reported frequently spending 16 hours a day in these rooms, sewing clothes. They worked long hours in order to earn enough money to support their families. Most told stories of not being paid at all for weeks of work, as the "outworker boss" who gives them work had disappeared or simply refused to pay. Some workers interviewed had very recently begun to enjoy something close to their legal entitlements.

Unlike Cregan study, and previous studies of home-based workers, my research found evidence that these regulatory levers were having some impact. In contrast with Cregan's study, in which she found no evidence of workers receiving their legal entitlements, a number of workers that I interviewed were either receiving legal wages and other entitlements or close to them. These interviewees were all working in supply chains that are linked to lead companies that accredited under the Homeworkers Code of Practice through Ethical Clothing Australia. For all of the interviewees who were receiving close to their legal entitlements this was a relatively new phenomenon. Only a few months earlier, they have been receiving less favourable conditions close to those described by Cregan.

Five of the workers interviewed for my study were receiving work as "employees" receiving the full entitlements expected for an employee, including sick pay, holiday pay and superannuation. They were paid a set wage on a fortnightly basis. These people were sewing labels accredited under the Ethical Clothing Australia system, and the factories or intermediaries that gave out the work had been inspected by Compliance Officers. Four of these workers elected to work on a part-time basis because the pay they could receive as employees was the same as working long hours as a contractor, when the breaks between orders were taken into account.

¹⁶ All but two of the respondents to my interviews had arrived in Australia between 1990 and 1995 from Vietnam, and all were aged between 35 and 55. Equal numbers of men and women were interviewed, which differs from the general population of outworkers who are understood to be female. All but two were married and had dependent children. The eldest children of the respondents were in their late teens or 20s. All interviewees are referred to by pseudonyms.

Other workers interviewed were also working for factories operating within accredited label supply chains, but were not receiving their full entitlements. They were still receiving their pay on a piece rate basis. The piece rate had been calculated so as to ensure that they received around AUD \$17 per hour. Yet these workers were not receiving holiday pay, sick pay or superannuation. This is evidence that there is some “creative” interpretation of the rules. Regardless of the fact that the workers were not receiving their full entitlements, the pay rate received is still well above that recorded by previous studies. Encouragingly, it suggests that the state outworker laws combined with the Homeworkers Code of Practice and operation of the Ethical Clothing Council is having an incremental improving effect within the industry.

Three of the workers interviewed were earning under AUD \$10 an hour, when they translated piece-rates to hourly rates of pay. Two said they were earning AUD \$7-8 an hour. The highest rate of pay was AUD \$20 an hour.

All outworkers interviewed had, in the past, been given instructions by intermediaries to take steps to obfuscate the employee relationship as a condition of receiving work. Many had been told to apply for an Australian Business Number, referred to as a “license to work” in the industry (thus, they would be considered self-employed contractors rather than employees under law). More recently, many had been told to incorporate as proprietary limited companies and employ someone. A number of outworkers who had set up such an arrangement had employed a relative. In one case, the outworker had employed an international student who was renting a room in their house. These findings suggest that there is an effort to evade the employment relationship being made within the industry.

Twelve of the interviewees reported having a problem or dispute in relation to their work in the last year, particularly in relation to pay disputes. The most commonly reported problem was that they been told to fix problems with the sewing of garments without any pay, or were refused payment for sewing on the grounds that the sewing quality was not high enough. For the latter problem, the respondents disputed that there was a genuine problem with the quality of the sewing. Research participants from the Textile Clothing and Footwear Union of Australia reported that this is a common way of under-cutting the pay of outworkers. One respondent told me that she had received faulty fabric, and a dispute with the middle-person erupted over responsibility. Three respondents described not being paid at all for work they had completed. They had contacted the Union for assistance recovering these unpaid wages. One of these workers had not been paid for two months of pay, causing considerable financial hardship.

A number of interviewees who said they had not had any problems in the past 12 months explained that they had experienced frequent problems in the past, and that these had stopped once they signed agreements to become employee outworkers, rather than contractors. They attributed this partly to the paperwork that now governed any working arrangement under the Award, bolstered by the Code. Intermediaries who gave them the work could no longer deny that work had been completed or dispute the volume or hours taken, because these items were set out on the paperwork. Otherwise, paperwork associated with work covers only the pattern and design, not details related to pay. For workers who are called “contractors” (although this may not be legally correct, regardless of the registration of ABNs or companies), they generally negotiate pay rates per piece orally. This means that there is either no paper trail or a limited paper trail if a dispute erupts over pay rates of unpaid wages.

For all interviewees who were receiving either their full legal entitlements or close to their legal entitlements, this was a relatively new phenomenon. Perhaps the most significant finding was the difference that the change in conditions had made to the interviewees’ lives. Interviewees who received higher pay reported a lessening in pain related to injuries thanks to the capacity to take

breaks, time to spend with family and leisure time, which they had not enjoyed since arriving in Australia.

This was evidenced most clearly in the interview I conducted with a couple in their 50s. Both suffered from back pain and discomfort in their forearms. They told me that they were going on holidays this year for the first time since arriving in Australia 19 years ago. Only three months earlier, a Compliance Officer had contacted them through the Ethical Clothing Australia initiative, and because the brand they were sewing was becoming accredited under the Code, they began to receive close to their legal entitlements. The biggest impact for them was that they no longer needed to work long hours. Because they were receiving close to the hourly rates, they had decided to work part-time. They told me that they did not need a lot of money, now that they only had one child living at home, but they wanted to work less and finally have some time to themselves. Just the day before I met them, they had received large envelopes with information about their superannuation (pension plan). This was the first superannuation payment of their working lives.

I welcome the opportunity to discuss my letter of support to Ethical Clothing Australia's application further. Please feel free to contact me directly should you require any further information.

Best wishes

A handwritten signature in black ink, appearing to read 'Shelley Marshall', written in a cursive style.

Shelley Marshall

Appendix One: Shelley Marshall's publications about the Code and Ethical Clothing Australia

1. Shelley Marshall, A comparison of four experiments in extending labour regulation to non-standard and informal workers, (2018) *International Journal of Comparative Labour Law and industrial Relations*, Forthcoming.
2. Marshall, S., How Does Institutional Change Occur? Two Strategies for Reforming the Scope of Labour Law, (2014) 43(3) *Industrial Law Journal*, 286.
3. Macdonald, K. & Marshall, S., Transnational Business and the Politics of Social Risk: Re-embedding Transnational Supply Chains Through Private Governance, in *Regulatory Transformations: Rethinking Economy - Society Interactions*, Lange, B., Haines, F. & Thomas, D. (eds.), Hart Publishing, Oxford UK, 2016, pp. 105-127.
4. Marshall, S., 'Australian Textile Clothing and Footwear Supply Chain Regulation', in *Legal Protection of Workers' Human Rights: Regulatory Change and Challenge*, Fenwick, C. & Novitz, T. (eds.), Hart, 2010, pp.555-584.
5. Macdonald, K. & Marshall, S., 'Experiments in Globalizing Justice: Emergent Lessons and Future Trajectories', in *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice*, Macdonald, K. & Marshall, S. (eds.), Ashgate, 2010, pp. 265-386 .
6. Marshall, S., 'An Exploration of Control in the Context of Vertical Disintegration, and Regulatory Responses', in *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution, and Regulation of Labour Markets and Work Relationships*, Arup, C. et al. (ed.), Federation Press, 2006, pp.542-560.