



# Draft Determination

Application for revocation of A91354-A91357 and the substitution of authorisation AA1000418

lodged by

Homeworker Code Committee  
Incorporated

in respect of

the Homeworkers Code of Practice  
(to be renamed 'Ethical Clothing  
Australia's Code of Practice  
incorporating Homeworkers')

Date: 6 July 2018

Authorisation number: AA1000418

Commissioners: Sims  
Keogh  
Court  
Featherston

## Summary

**The ACCC proposes to re-authorise the Homeworker Code Committee to give effect to a revised version of the Homeworkers Code of Practice for five years.**

**The ACCC will seek submissions in relation to this draft determination before making its final decision.**

The Homeworkers Code of Practice, which is to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers' (the **Code**), is a voluntary mechanism within the textile, clothing and footwear (**TCF**) industry designed to assist businesses to ensure that they, and their outsourced supply chains (if any), comply with relevant Awards and workplace laws.

The TCF industry, as noted by the Fair Work Ombudsman in 2015, has the following features:

- pressure on the price of local production, rendering those at the lower levels of the varied and fragmented supply chains particularly vulnerable,
- relatively high levels of female workers, including from culturally and linguistically diverse backgrounds who may not be aware of their rights and entitlements, and
- high contravention rate of industry awards and legal obligations (40%), which may reflect difficulties in navigating supply chain arrangements, which are both varied and fragmented.<sup>1</sup>

The Code is a response to these industry features and provides education of, and auditing against, the legal requirements. Signatories must be able to demonstrate compliance with relevant Australian Awards and workplace laws in relation to all workers directly engaged by them and in any outsourced supply chain, in order to gain accreditation. Accredited businesses with compliant supply chains are permitted to display insignias from the Ethical Certification Trade Mark series (**Ethical CTM series**) to promote their compliance to consumers.

Under the Code, principal businesses that use suppliers who do not comply with their legal obligations may be required to boycott those suppliers in order to retain their accreditation. However, to date, this has not been required as the Code Committee works with businesses to address issues.

Various versions of the Code have been authorised by the ACCC since 2000. A number of revisions to the Code are now proposed which streamline the accreditation application and renewal processes, clarify and modernise the Code. The most substantial being the removal of several statutory declarations confirming whether businesses utilise homeworkers and recording details around their employment. The ACCC previously identified that these statutory declarations were likely to be the most costly of the requirements that businesses had to comply with under the Code.

The information available to the ACCC indicates that the Code has resulted, and is likely to continue to result, in public benefits in the form of increased compliance by businesses with legal obligations relating to workers, efficiencies in the management of supply chains and efficiencies in businesses' signalling their compliance with legal obligations which provides better information to customers.

The ACCC has considered whether the Code has resulted, or is likely to result, in public detriments including restricting competition between suppliers and increasing costs and

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<sup>1</sup> Fair Work Ombudsman. Designed to Fit – Insights and outcomes from the Fair Work Ombudsman's education phase of the National Textile, Clothing and Footwear Campaign 2015.  
<<https://www.fairwork.gov.au/ArticleDocuments/557/TCF-campaign-report.docx.aspx>> page 3.

administrative burdens for businesses. However, since obtaining accreditation under the Code is voluntary, the ACCC considers the operation of the Code is likely to result in little if any public detriment.

Based on the information before it, the ACCC considers that the likely public benefits will outweigh the likely public detriments. Accordingly, the ACCC proposes to grant authorisation for five years to permit the continued operation of the Code, as varied.

# Contents

<b>Summary</b> .....	<b>i</b>
<b>Contents</b> .....	<b>iii</b>
<b>Abbreviations</b> .....	<b>iv</b>
<b>The application for authorisation</b> .....	<b>1</b>
The Proposed Conduct .....	1
The Applicant .....	1
The Code.....	1
Revisions to the Code.....	2
Previous authorisations.....	2
<b>Background</b> .....	<b>3</b>
The industry.....	3
Legal obligations in the industry .....	3
<b>Consultation</b> .....	<b>4</b>
<b>ACCC assessment</b> .....	<b>4</b>
Relevant areas of competition .....	4
Future with and without .....	5
Public benefit .....	5
<u>Increased compliance with legal obligations in relation to workers</u> .....	5
<u>Efficiencies in the management of supply chain risks</u> .....	7
<u>Efficiencies in signalling compliance with legal obligations</u> .....	9
Public detriment.....	10
<u>Restriction of competition between suppliers and the ambit of the Code</u> .....	10
<u>Increased costs and administrative burdens imposed by the Code</u> .....	12
<u>Adverse consequences resulting from the Union as acting as auditor under the Code</u> .	13
Balance of public benefit and detriment .....	15
Length of authorisation.....	15
<b>Draft determination</b> .....	<b>15</b>
The application.....	15
The net public benefit test .....	16
Conduct which the ACCC proposes to authorise .....	16
Next steps.....	16

# Abbreviations

ACCC	Australian Competition and Consumer Commission
accredited manufacturer	a supplier or manufacturer in the textile, clothing and footwear industry who has gained accreditation under Part 1 the Code.
CCA	the <i>Competition and Consumer Act 2010 (Cth)</i>
Code	the Homeworkers Code of Practice (proposed to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers') in the form provided to the ACCC on 26 April 2018.
Code Committee	the Homeworker Code Committee Incorporated.
ECA	'Ethical Clothing Australia', the Code Committee's trading name
Ethical CTM series	means the series of trademarks described by Certification Trademark No. 1338510
Fair Work Act	the <i>Fair Work Act 2009</i>
outworkers	individuals and employees who perform work in the textile, clothing and footwear industry from home (homeworkers) or at other premises that would not commonly be regarded as business premises.
Proposed Conduct	Has the meaning set out in paragraph 2 of this draft determination.
retail signatory	a retailer in the textile, clothing and footwear industry which has become a signatory to Part 2 of the Code.
TCF Award	the Textile, Clothing, Footwear and Associated Industries Award 2010. This is the current Federal employment award which covers workers in the textile, clothing and footwear industry.
TCF	Textile, Clothing and Footwear.
Union	Construction, Forestry, Maritime, Mining and Energy Union of Australia; in particular, the TCF sector.
work record	A written record relating to work which is contracted out by a principal, the required details are specified by clause F.2.2 of Schedule F of the TCF Award.

# The application for authorisation

1. On 26 April 2018 the Homeworker Code Committee (**the Code Committee**) lodged with the ACCC an application for the revocation of authorisations A91354-A91357 and the substitution of AA1000418 (**re-authorisation**).<sup>2</sup>

## The Proposed Conduct

2. The Code Committee seeks re-authorisation to give effect to a revised version of the Homeworkers Code of Practice (the **Code**) for five years (the **Proposed Conduct**).<sup>3</sup>
3. The Code Committee seeks re-authorisation because the Code may constitute an agreement affecting competition and contains compliance measures, including boycotts of businesses which are not compliant with their legal obligations, that may otherwise breach the *Competition and Consumer Act* (CCA).

## The Applicant

4. The Code Committee oversees the operation and management of the Code through a joint employer and Union initiative and receives funding from the Victorian Government Department of Economic Development, Jobs, Transport and Resources.
5. The Code Committee trades under its registered business name, 'Ethical Clothing Australia' (**ECA**).

## The Code

6. The Code is a mechanism within the textile, clothing and footwear industry which seeks to encourage industry compliance with legal obligations relating to workers' entitlements and working conditions.
7. The intention of the Code is to require compliance with existing legal obligations in relevant Awards and legislation, rather than to extend these obligations, with one exception. Clause 9.4(d) of Part 1 of the Code extends the liability of some accredited manufacturers to cover unpaid remuneration to outworkers within their outsourced supply chains (see paragraph 19).<sup>4</sup>
8. In order to protect vulnerable workers (in particular, outworkers) and assist businesses to ensure that they are compliant with their legal requirements, the Code provides the following measures:
  - a) Yearly compliance auditing of retail signatories' and accredited suppliers' supply chains by the Construction, Forestry, Maritime, Mining and Energy Union of Australia (the **Union**). This assists businesses to identify and assess the risks associated with sub-contracting practices within their supply chains.

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<sup>2</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010. Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>3</sup> The revised version of the Code is in Appendix 1 and Appendix 2 of the application for authorisation AA10004178 which is available on the [ACCC's public register](#).

<sup>4</sup> Due to differences in the legal requirements that apply to incorporated vs unincorporated businesses and differences between laws applicable in each State and Territory, Australian law does not always impose liability for unpaid remuneration to outworkers on the principal manufacturer.

- b) Education of businesses as to their legal obligations, as a component of the auditing process and through training programs overseen by the Code Committee.
  - c) The right for accredited businesses to use the Ethical Certification trade mark series (see below) in association with their products, thus signalling their compliance to customers.
  - d) Education of industry workers and customers regarding the Code and its operations.
9. The Code Committee has registered the following series of trademarks as Certification Trademark No. 1338510:



These marks comprise the **Ethical CTM series** and are available to accredited businesses to use as a means of communicating that they hold accreditation under the Code and observe its requirements.

## Revisions to the Code

10. The following changes to the Code, as compared to the version considered by the ACCC in 2013, are proposed to be made or have already come into effect:
- a) Changing the title from 'Homeworkers Code of Practice' to 'Ethical Clothing Australia's Code of Practice, incorporating Homeworkers' in Part 1 and Part 2 of the Code.
  - b) Removing schedules 1, 2, 4 and 5 (statutory declarations) and schedule 3 (agreement between accredited principal companies and their contractors) from Part 1 of the Code and minor amendments to reflect this change.
  - c) Renaming Schedule 6 (letter to Homeworker) as Appendix A in Part 1 of the Code.
  - d) Updating terminology and titles in Clauses 10 (Licensing and use of Trade Marks) and 12 (Code Funds) of Part 1 of the Code.
  - e) Updating definitions, dispute resolution clauses and further minor amendments in Clauses 1 (definitions), 3 (records), 4 (obligations of each retailer) and 7-10 (dispute resolution, trade marks, fees, termination of agreement) in Part 2 of the Code.

## Previous authorisations

- 11. The Code has been authorised by the ACCC in various forms since 2000, generally for periods of five years.
- 12. The most recent re-authorisation of the Code (as it then stood) was granted by the ACCC on 3 October 2013 for five years, expiring on 26 October 2018 (authorisations A91354-A91357).

# Background

## The industry

13. The textile, clothing and footwear manufacturing industry covers all stages of production of textile, clothing, footwear and leather products.
14. Despite the broad coverage of the Code to include the entire industry, auditing under the Code only applies to accredited manufacturers and their outsourced supply chains.
15. Purchasing in the industry is, broadly, conducted via two different models:
  - a) Businesses in the industry buy products or product lines from suppliers on an arms-length basis. These products may either be finished items (e.g. a t-shirt) or they may be intermediate goods (e.g. fabric). The products are then resold or used to manufacture a value added product.
  - b) Businesses in the industry contract for products to be made for them, typically finished products (eg a t-shirt), or services to be provided to them (e.g. embroidery on the t-shirt), using materials supplied by them. The contractor they retain may fulfil the contract in-house or may sub-contract some or all of the work to one or more other businesses. This second model is referred to in the industry as 'giving out work'. Any business which contracts or sub-contracts out work is referred to as a 'principal'.
16. A business has different legal obligations (some of which are unique to the industry) under existing awards and workplace laws depending upon whether:
  - a) all of its textile, clothing or footwear inputs are bought at arms-length from suppliers and any production is conducted in-house;
  - b) any of its textile, clothing or footwear inputs or products are produced for the business by a contractor. However, that contractor (or its sub-contractors) use in-house workers only, so that no work is performed by an outworker; or
  - c) any of its textile, clothing or footwear inputs or products are produced for the business by a contractor and at least some of the work outsourced to that contractor is ultimately performed by an outworker.
17. The Fair Work Ombudsman's 2015 report identified that in 2012 there was a high contravention rate (40%) in the TCF industry and those at the lower levels of the varied and fragmented supply chains present are particularly vulnerable.<sup>5</sup>

## Legal obligations in the industry

18. The Code requires compliance with existing legal obligations and is intended to complement those obligations. For example, the auditing of outsourced supply chains is intended to ensure that each business in an accredited supply chain has fulfilled its record keeping and other obligations under existing laws. The Code also relies upon the obligations of businesses to permit entry to the Union, under existing law, in order to implement an effective supply chain audit mechanism.
19. The main source of businesses' legal obligations in this context are the *Fair Work Act 2009* (the **Fair Work Act**) and the Textile, Clothing and Footwear Award 2010 (**TCF Award**). Since Western Australia does not apply the national workplace

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<sup>5</sup> Fair Work Ombudsman. Designed to Fit – Insights and outcomes from the Fair Work Ombudsman's education phase of the National Textile, Clothing and Footwear Campaign 2015.

<<https://www.fairwork.gov.au/ArticleDocuments/557/TCF-campaign-report.docx.aspx>> page 3.



relations system to all businesses,<sup>6</sup> those businesses which are not subject to the national workplace relations system are subject to state law and awards.<sup>7</sup> The Code obliges unincorporated businesses in Western Australia to comply with the outworker provisions of the TCF Award, which obligations may differ from those that the businesses would otherwise be required by adhere to.<sup>8</sup> Incorporated Western Australian businesses are subject to the Fair Work Act and the TCF Award in the same way as incorporated businesses in other States. In addition, other more general, workplace laws also apply to and protect textile, clothing and footwear industry workers. These include State and Federal laws relating to: occupational health and safety, anti-discrimination, child labour, public holidays, long-service leave and superannuation.

## Consultation

20. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
21. The ACCC invited submissions from a range of potentially interested parties including accredited and non-accredited businesses, customers of accredited businesses, academics, relevant industry associations or peak bodies, state and federal government and relevant regulatory bodies.<sup>9</sup>
22. The ACCC received 34 submissions in support of the application from accredited businesses, industry associations, government bodies and academics. The ACCC also received one submission opposing the application from a business requesting that their identity be kept confidential.
23. The submissions by the Code Committee and interested parties are considered below as part of the ACCC's assessment of the application for re-authorisation and are available on the [ACCC's public register](#).

## ACCC assessment

24. Pursuant to subsections 91C(7) and 90(7) of the Competition and Consumer Act 2010 (Cth) (the CCA), the ACCC must not make a determination granting re-authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

## Relevant areas of competition

25. The Code applies to businesses in the TCF industry that manufacture products in Australia. Consistent with previous decisions, the ACCC considers that the relevant areas of competition encompass the breadth of the TCF supply chain; through the processing of fibres for textile manufacture, to design, construction and manufacture of garments or footwear, wholesaling of finished products, concluding in retail of those products to the end consumer.

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<sup>6</sup> In Western Australia sole traders, partnerships, non-trading corporations and other unincorporated entities are not covered by the national system.

<sup>7</sup> See <https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system>.

<sup>8</sup> Clause 9.4 of the Code.

<sup>9</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## Future with and without

26. To assist in its assessment of the Proposed Conduct against the authorisation test, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
27. The ACCC notes that in the absence of the conduct for which authorisation is sought, TCF businesses would continue to be required to comply with existing State codes, the relevant award, the Fair Work Act, and other applicable legislation.
28. The ACCC considers that without authorisation it is unlikely that the Code Committee would fully implement the Code because it includes conduct which is at significant risk of breaching the CCA.
29. If it did not have authorisation, the Code Committee could potentially amend the Code to lessen the risk of breaching the CCA, but the ACCC considers that this would constitute a significant dilution of the Code. The effectiveness of the Code in encouraging compliance with legal obligations depends upon those provisions of the Code which potentially raise concerns under the CCA. In particular, the potential trading sanctions which retailers and manufacturers agree to impose on non-compliant suppliers along the production chain is a powerful mechanism to ensure compliance.
30. The ACCC therefore considers that the relevant future without the Proposed Conduct is the situation in which the proposed revised Code is not implemented and, potentially, a significantly diluted version of the Code is introduced in its place.

## Public benefit

31. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>10</sup>
32. The public benefits claimed by the Code Committee may be summarised as:
  - a) Increased business compliance with legal obligations in relation to textile, clothing and footwear workers.
  - b) Efficiencies for business in the management of their supply chain risks.
  - c) Efficiencies for business and industry in the way they signal their ethical status to interested consumers and for consumers to gain assurance as to the ethical status of accredited products.
33. Each of the public benefits are considered in more detail below.

## **Increased compliance with legal obligations in relation to workers**

### **The Code Committee's submissions**

34. The Code Committee submits that:

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<sup>10</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- a) Compliance officers usually observe multiple breaches of the TCF Award, the Fair Work Act and/or other legislation in the supply chains of first time applicants for accreditation under the Code. When audits are carried out for businesses seeking re-accreditation, compliance officers generally observe a narrower range of non-compliance issues.
- b) Where breaches are identified, the Code Committee aids businesses and supply chain participants in understanding their obligations and allows an opportunity for the breaches to be rectified before requiring the principal to make a decision about continuing to use that supply chain participant.<sup>11</sup>
- c) The Code Committee has prepared and continues to update resources assisting businesses through the accreditation process which summarise obligations and entitlements applicable in the industry.
- d) The Code Committee continues to provide a number of education and outreach programs, including:
  - i. advising outworkers about their pay and legal entitlements,
  - ii. supporting events that educate outworkers and allow the sharing of experiences,
  - iii. producing resources for outworkers that raise awareness of the TCF Award and their entitlements, and
  - iv. providing multilingual information.

### **Interested party submissions**

- 35. Submissions received from government representatives and accredited businesses noted that the Code and Code Committee play an important role in informing businesses of their legal obligations.
- 36. Submissions received from Dr Shelley Marshall (RMIT University), Dr Annie Delaney (RMIT University) and Prof. Christina Cregan (University of Melbourne) support the application, noting that the Code plays an important role in improving the conditions of workers in the industry. Dr Marshall states that her research indicates a trend of increased compliance with legal obligations since the study conducted by Professor Cregan in 2001. Dr Marshall's submission states:
 

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 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.
- 37. Asian Women at Work praises the Code Committee for providing information to workers in multiple languages to benefit workers from non-English speaking backgrounds, allowing them access to information about their pay and entitlements which was previously difficult to access.

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<sup>11</sup> Accreditation will not be granted unless all supply chain participants become compliant within the Code Committee's specified timeframe.

## **ACCC consideration**

38. The ACCC notes that there is evidence that some businesses in the industry have failed to comply with their legal obligations in relation to workers. The Code and initiatives of the Code Committee appear to have improved compliance. The ACCC considers that the Code Committee's activities in managing the Code and providing education and auditing against the legal obligations are likely to result in public benefits from increased compliance by businesses with their legal obligations.

## **Efficiencies in the management of supply chain risks**

### **The Code Committee's submissions**

39. The Code Committee considers that the Code assists accredited businesses and signatories in:
- a) Managing legal and reputational risk.
  - b) Understanding legal obligations through the tools and information kits provided by the Code Committee.
  - c) Demonstrating that their products are Australian Made and manufactured under ethical conditions through the use of the independent Ethical CTM series.
  - d) Increasing their connection to potential customers, including consumers, government and major purchasers, through ECA promotion and advocacy.
  - e) Being part of a wider community, increasing their connection to other local and ethical manufacturers.
40. In support of this view, the Code Committee notes that it provides a range of educational materials to businesses as part of the accreditation process, has introduced new end of year audit reports (which provide direct feedback to businesses audited) and cited findings from a survey it conducted of accredited businesses in 2018 which shows:
- a) 94% of respondents either strongly agreed or agreed that their businesses valued its accreditation under the Code.
  - b) 74% either strongly agreed or agreed that the ECA helped manage risks throughout their supply chain.
  - c) When asked about the benefits of ECA accreditation, the top three responses given were: being able to demonstrate Australian made, independent certification to show customers, and having support in ensuring the company is compliant with the law.

### **Interested party submissions**

41. Interested parties provided submissions supporting the Code Committee's claim that the Code results in efficiencies in the management of supply chain risk. These include a number of accredited businesses, which together provided comments supporting each of the elements identified by the Code Committee in paragraph 39.
42. The Union's submission notes that through the accreditation process "[t]ransparency in TCF supply chains is greatly enhanced. Workers undertaking TCF work can be found and wages and conditions, and health and safety audited. Where contraventions of the award and other laws are identified, steps can then be implemented to remedy the breaches." In addition, "[f]or the accredited

manufacturers themselves, the Code provides a degree of assurance that workers producing their garments have not been abused or exploited in the process”.

43. The ACCC received a confidential submission from an interested party opposing the re-authorisation because:
  - a) It is unethical and potentially unlawful for audits to be conducted along the supply chain (and not just limited to signatory businesses). Requiring transparency on the part of supply chain businesses by requiring information to be provided to the Code Committee (and passed on to the union) poses a privacy risk and bypasses legal constraints imposed on the union.
  - b) The Code requires businesses to keep extensive time costing for each job and the obligation to provide a minimum amount of work to casual employees goes beyond what is required for any other casual worker in Australia and has led manufacturers to cease operating in Australia. “The cost to administer the giving of work to the homemaker is huge and outweighs the cost of the homemaker in many cases”.
44. The Code Committee notes:
  - a) With respect to record keeping and privacy concerns, the Code only seeks to ensure compliance with Australian workplace laws and does not seek any information about individual employees beyond what is required to demonstrate compliance.
  - b) Any obligation to keep records and provide a minimum amount of work to particular workers is based on the relevant award and workplace laws (rather than a requirement stemming from the Code). The Code does not impose obligations on employers beyond what is already required by law.

### **ACCC consideration**

45. The TCF Award and the Fair Work Act impose a range of legal obligations upon businesses which give out work to ensure the payment of workers who perform that work. The majority of existing accredited manufacturers are incorporated<sup>12</sup> and thus, to the extent that these businesses give out work (that is, outsource), they are subject to the full range of obligations under the Fair Work Act and the TCF Award.
46. The ACCC notes that businesses in this industry are also vulnerable to other supply chain risks as a result of non-transparent outsourced supply chains. In particular, businesses may suffer from quality control issues and delivery delays.
47. Transparency and auditing obligations in the Code may assist many participating businesses to manage the risks which arise from outsourcing their supply chains.
48. The ACCC considers that the Code is 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.
49. The ACCC also considers that the identification of sub-contracting practices may incidentally help businesses to more efficiently manage supply chain risks arising from quality control and delayed delivery.
50. Overall, the ACCC considers that the Code is likely to improve many businesses’ efficiency in managing outsourced supply chain risks and that this constitutes a likely public benefit.

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<sup>12</sup> Appendix 4 to the Application for Authorisation.

## **Efficiencies in signalling compliance with legal obligations**

### **The Code Committee's submissions**

51. The Code Committee submits that the Code, in conjunction with the Ethical CTM series, provides a benefit to businesses and signatories by signalling that they are compliant with their legal obligations.
52. The Code Committee's licensing agreement permits accredited companies to use the ECA trade mark and Ethical CTM Series on swing tags, garment tags, websites, packaging and promotional materials. Significant use of these trade marks has been observed.
53. The Code Committee's 2018 survey of accredited businesses found that:
  - a) 83.67% of companies mention ECA accreditation on their websites.
  - b) 69.39% of companies promote ECA accreditation via social media.
  - c) 61.22% of companies communicate their ECA accreditation to customers in-store.
  - d) 55.1% of companies mention ECA accreditation when speaking at public events or to the media.
54. The survey also found that 63.27% of accredited companies agreed or strongly agreed that customers were asking more questions about labour rights and/or the people who make their clothing.
55. A literature review conducted by the Code Committee in 2017 found that the use of accredited labelling schemes (and social media influencers) is effective in communicating the ethical message to potential consumers and possibly converting them to ethical purchasing behaviour.
56. The information conveyed by the Ethical CTM series is supported and developed through public events, education and training instigated by the Code Committee where the purpose and remit of the Code is explained.

### **Interested party submissions**

57. A number of accredited businesses advise that they value the Ethical CTM series as a means of conveying to customers that their products are ethically produced or Australian made. Business such as Thinksideways, Bluegum and Fraser and Hughes identified that they used the Ethical CTM series in social media, on swingtags, websites, and promotional materials and knew that the accreditation was important to their customers. To Barwyn and Back also states that the ECA accreditation program "assists my brand in creating a truly ethical product, guides my brand to find other brands to work with ...and gives my brand exposure".
58. Thinksideways states: "[t]oo many businesses in this industry make claims without any evidence or validation as pure marketing ploy. Despite being in a busy space where the term 'Ethical' is used along with many others, it's good to have a certified trade mark that differentiates our businesses that have actually taken real steps to be audited and accredited."
59. Dr Shelley Marshall from RMIT University considers that one of the most important aspects of the Code is the way that it allows brands to demonstrate that their products are manufactured under ethical conditions through the use of the independent, third-party ECA trade mark, stating that "the ECA trade mark is the most credible of its type".

## **ACCC consideration**

60. The ACCC accepts that the Code provides a method by which businesses can effectively signal to customers that Australian manufactured TCF products have been produced in compliance with the TCF Award and workplace laws.
61. The use of the Ethical CTM series by businesses allows these businesses to differentiate their products from those of competitors, who may not observe the same standards, and communicates this information to consumers. The ACCC considers that the Ethical CTM series facilitates the communication of manufacturing practices to consumers, improving transparency in the TCF industry.
62. The ACCC considers that this signalling provides more information to customers and results in a public benefit by enabling them to make better informed purchasing decisions.

## **Public detriment**

63. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>13</sup>
64. The ACCC has considered the following potential public detriments:
  - Restriction of competition between suppliers and the ambit of the Code.
  - Increased business costs and administrative burdens imposed by the Code.
  - Adverse consequences resulting from the Union acting as auditor under the Code.
65. The ACCC's assessment of the likely public detriments from the Proposed Conduct follows.

## **Restriction of competition between suppliers and the ambit of the Code**

### **The Code Committee's submissions**

66. The Code Committee submits that:
  - a) There is no evidence that the operation of the Code has had any adverse effect on competition to date and the Code is unlikely to do so in the future.
  - b) Participation in the Code is voluntary.
  - c) The Code seeks to ensure that existing legal obligations are being complied with. It does not impose new obligations on suppliers.
  - d) It is reasonable for businesses seeking accreditation to wish to ensure that their suppliers are also compliant with existing workplace laws (particularly having regard to their existing legal obligations).
  - e) It is critical that the Code Committee has the ability to act on breaches within the supply chain in order to maintain integrity, efficacy and effectiveness of the Code.

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<sup>13</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

67. The Code Committee submits that in practice, when a breach is identified, compliance officers bring the breach to the attention of the principal and allow them the opportunity to take steps to rectify the breach identified without needing to rely on the formal processes set out in the Code. This leads to rectification of the issue/s in the majority of cases. The formal processes set out in clause 9.5 of Part 1 and 6.1 of Part 2 are used where inadequate progress is made by the principal in getting their supplier/manufacturer to comply.
68. The Code Committee submits that there have been instances of principals choosing to discontinue trading with non-compliant suppliers, however in these instances recourse has not been had to the mechanism in the Code.

### **Interested party submissions**

69. A number of interested parties, including Dr Annie Delaney (RMIT University), Minister Grace Grace (Queensland Minister for Education and Industrial Relations), Oxfam Australia, Asian Women at Work, and some accredited businesses do not consider that the Code has resulted in any public detriment.
70. The interested party that opposes the re-authorisation submits:
  - a) The revisions to the Code are more than just a name change and extend the reach of the Code beyond just homeworkers.
  - b) The amended Code extends the audits performed by the Applicant to businesses which do not employ homeworkers and outworkers, not just to signatories to the Code.
71. In response to the confidential submission, the Code Committee submits:
  - a) The changes being made do not widen the reach of the Code.
  - b) The Code has covered TCF workers whether they are employed directly on premises or as homeworkers since its inception. The strength and integrity of the accreditation program comes from ensuring compliance throughout the supply chain.

### **ACCC consideration**

72. As part of the consideration of the previous Code, the ACCC strongly recommended that the Code Committee amend the name of the Code to clarify that it covers all workers in the industry and not just homeworkers.<sup>14</sup> This has been done as part of the revisions to the Code.
73. The ACCC considers that the proposed revisions to the Code do not extend the ambit of the Code. The ACCC accepts that the effectiveness of the accreditation program is strongly tied to its whole-of-supply-chain reach.
74. The ACCC acknowledges that the Code imposes restrictions on accredited manufacturers' and retail signatories' dealings with other businesses in order to provide an effective mechanism for businesses to ensure compliance with legal obligations. However, the ACCC considers that any anticompetitive detriment is likely to be limited because:
  - a) The Code is voluntary.

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<sup>14</sup> ACCC final determination authorisation A91354-91357 at paragraph 290.



- b) Only businesses which are noncompliant with their legal obligations are potentially subject to boycott (which the Code Committee has not implemented to date).
- c) There are safeguards against misuse of the Code, such as clearly defined roles for the Code Committee and the Union, and the inclusion of a dispute resolution mechanism in the Code.

## **Increased costs and administrative burdens imposed by the Code**

### **The Code Committee's submissions**

75. The Code Committee submits that, in relation to any costs imposed by the Code:
- a) The operation of the Code and of the Code Committee, its compliance work and its staff is supported by government funding.
  - b) The Code Committee has sought to keep accreditation fees as low as possible.
  - c) The Code Committee represents good value to businesses seeking accreditation, given the assistance provided in the accreditation process and reduced risk of legal non-compliance.
  - d) The Code Committee has sought to reduce the administrative burden on businesses by proposing the removal of schedules 1 to 5 (statutory declarations) from Part 1 of the Code.
  - e) The majority of the records accessed under the Code for audit purposes are records which businesses are required to keep in any event.

### **Interested party submissions**

76. The Australian Fashion Council welcomes the proposed removal of the statutory declarations at schedules 1-5 of the Code as these changes will make the application and renewal processes less intrusive and costly for businesses, making accreditation more accessible.
77. The interested party opposing the re-authorisation submits that:
- a) The cost to administer the giving of work to homeworkers is huge and outweighs the cost of the homeworkers in many cases.
  - b) The obligations to keep extensive records in time-costing each job and having to provide a minimum amount of work to casual workers, far in excess of any other casual worker in Australia, have led manufacturers to cease their operations in Australia.
  - c) Manufacturers who would have ordinarily operated in Australia but do not want to be a party to the Code for a range of reasons (including reasons unrelated to homemaker pay requirements) do not appear when quantifying the damage caused by the Code as they are likely to have established themselves outside Australia and no longer have reason to provide feedback in Australia.
78. In response, the Code Committee notes:
- a) The Code only seeks to ensure compliance with existing laws.
  - b) Any obligations to keep records and to provide a minimum amount of work is based on the relevant award and workplace laws.

- c) The Code Committee rejects that the existence of the Code, which is voluntary, has somehow impacted on the number of businesses which have moved their manufacturing offshore.
- d) Changes in the size and scale of the TCF industry in Australia are the result of shifts in tariffs and changes to trade-policies that have resulted in increased imports and off-shoring.

### **ACCC consideration**

- 79. In its 2013 determination, the ACCC identified that the requirement to obtain multiple statutory declarations was likely to be the most costly of the obligations that businesses would have to comply with in the accreditation process. The removal of schedules 1-5 of the Code is a significant step by the Code Committee in reducing the burden imposed by its accreditation process.
- 80. The ACCC acknowledges that the completion of work records and remuneration calculations imposes a cost on businesses. However, the legal obligation (and therefore any additional costs to business) is imposed by Schedule F of the TCF Award rather than the Code. To the extent that businesses have complied with Schedule F, the only cost imposed by the Code in relation to work records and remuneration calculations is the cost of providing a physical copy of the work record and remuneration records to Ethical Clothing Australia and the Union.
- 81. The ACCC recognises the Code imposes a number of different costs upon businesses from increased paperwork, compliance auditing and fees. However, the ACCC notes that accreditation under the Code is not a requirement under the Commonwealth Procurement Rules (when previously it was). Accordingly, the ACCC considers accreditation under the Code to be a voluntary process and that it is a matter for each business to assess the costs and benefits of becoming accredited or a retail signatory or supplying such a business.

### **Adverse consequences resulting from the Union as acting as auditor under the Code**

#### **The Code Committee's submissions**

- 82. The Code Committee submits that:
  - a) The choice of the Union as the auditor under the Code is due to the Code's reliance upon the existing powers and operations of the Union under workplace laws. In particular, the Fair Work Act and the TCF Award grants the Union wide powers to enter workplaces and inspect and copy documents.
  - b) Prior records from initial audits indicate a business's outsourced supply chain will rarely be compliant with the Award and relevant legislation.
  - c) Poor occupational health and safety is also very common in factories as well as amongst outworkers.
  - d) In relation to outworker specific requirements, it is common for suppliers not to be registered with the relevant Fair Work Commission Board of Reference and not record the details of their outsourcing contracts. The prescribed minimum safety net of terms and conditions for outworkers are almost uniformly not adhered to.
- 83. The Code Committee submits that the auditing undertaken by the Union does not just involve checking compliance but involves education and training of principal businesses and their supply chains of their obligations under the TCF Award and

relevant legislation. This element of compliance auditing under the Code is critical in ensuring systems and structures are in place to ensure ongoing compliance.

84. In particular, the Code Committee considers that an alternative commercial auditor would be unable to effectively replace the Union because:
- a) Audits would be significantly more costly because the Union currently subsidises audits, a new auditor would require costly training and may not operate as efficiently as the Union.
  - b) Audits may not be as effective or fast due to a replacement auditor's likely lack of familiarity with the TCF industry and a lack of an existing relationship of trust between the auditor and businesses being audited, which in turn may lead to less forthcoming interviews.
  - c) Legal issues are likely to arise from the use of a private auditor as the Union relies on its existing legal powers in order to access workplaces in order to conduct audits.
  - d) Credibility and national consistency issues may arise if a commercial auditor (or auditors) are used, which in turn may require the Code Committee to audit the commercial auditors, adding complexity and expense.
85. The Code Committee submits that since the ACCC granted reauthorisation in 2013, it has not received any complaints (formal or informal) about the Union acting as auditor, or in relation to the accreditation process. Nor has the dispute resolution process been utilised since its introduction.

### **Interested party submissions**

86. The interested party opposing re-authorisation submits that auditing should be kept separate from administration of the Code and should be undertaken by an independent body. By performing audits, the Code Committee is effectively subsidising the unions.
87. In reply, the Code Committee submits that the auditing and compliance process is kept separate from the administration of the Code. The administration of the Code is undertaken by staff employed by the Code Committee who carry out their work and duties under the Code independently from the compliance and auditing work undertaken by the Union. The staff employed by the Code Committee are not privy to a range of information that is ascertained during the independent compliance process.

### **ACCC consideration**

88. The ACCC considers that competition between auditors of various ethical assurance schemes can promote efficiencies in the delivery of such schemes, which may potentially lead to reduced costs and higher quality service. The use of the Union as the sole auditor under the Code removes the potential for such competition. However, the ACCC notes that the majority of the auditing costs are subsidised through government grants and that the business being audited does not pay auditing fees. The cost of engaging the auditor in this instance is effectively paid by government grants, through the Code Committee.
89. The ACCC also notes that complaints regarding the auditing process may be submitted to the Code Committee for resolution in accordance with the dispute resolution provisions of the Code. The ACCC notes that the Code Committee has not received any complaints since 2013 about the Union's involvement as auditor.

## **Balance of public benefit and detriment**

90. Broadly, the ACCC must not re-authorise the Proposed Conduct unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
91. The information available to the ACCC indicates that the Code has resulted in public benefits in the form of increased compliance by businesses with legal obligations relating to workers; efficiencies in the management of supply chains; and efficiencies in businesses' signalling their compliance with legal obligations which provides better information to customers. The ACCC considers that the Code is likely to continue to result in these public benefits during the next five years.
92. The ACCC notes that accreditation under the Code is a voluntary process, and therefore businesses will only go through the process if they consider the costs are worthwhile. The ACCC does not consider that there are any significant competitive detriments from the operation of the Code.
93. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely result in a public benefit that would outweigh any likely public detriment from the Proposed Conduct. Accordingly, the ACCC proposes to grant authorisation.

## **Length of authorisation**

94. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>15</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
95. In this instance, the Code Committee seeks authorisation for five years.
96. There were no interested party submissions on the appropriate length of authorisation.
97. The ACCC proposes to grant re-authorisation for a period of five years, which is consistent with previous authorisations and allows an opportunity for the effect of the Code in the TCF industry to be reviewed after that time.

## **Draft determination**

### **The application**

98. On 26 April 2018, the Code Committee lodged an application under section 91C(1) of the CCA to revoke authorisations A91354-A91357 and substitute them with authorisation AA1000418 (re-authorisation).
99. The Code Committee seeks re-authorisation to give effect to a revised version of the Homeworkers Code of Practice for five years (the Proposed Conduct). The Code Committee seeks re-authorisation for the Proposed Conduct as it may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA, hinder or prevent the supply or acquisition of goods or services by a third person within the meaning of sections 45D, 45DA, or 45DB of

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<sup>15</sup> Subsection 91(1) of the CCA.

the CCA or constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA.

## **The net public benefit test**

100. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to subsection 91C(7) of the CCA, that in all the circumstances the Proposed Conduct for which authorisation is sought would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

## **Conduct which the ACCC proposes to authorise**

101. The ACCC proposes to grant authorisation to the Code Committee to give effect to the Proposed Conduct described at paragraph 99, which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA, hinder or prevent the supply or acquisition of goods or services by a third person within the meaning of sections 45D, 45DA, or 45DB of the CCA or constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA.
102. Any changes to the Code during the term of the proposed authorisation would not be covered by the proposed authorisation.
103. The ACCC proposes to grant authorisation AA1000418 for five years commencing from the date the ACCC's determination comes into effect.
104. This draft determination is made on 6 July 2018.

## **Next steps**

105. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.