



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

**Applications for revocation of authorisations A90722,  
A90723, A90724 and A90725**

**and their substitution by authorisations A90975, A90976,  
A90977 and A90978**

lodged by

**Homeworkers Code of Practice Committee Inc.**

*in relation to the:*

*Homeworkers Code of Practice*

**Date: 26 October 2005**

**Commissioners:**

Samuel  
Sylvan  
King  
Martin  
McNeill  
Smith  
Willett

**Authorisation nos.** A90975, A90976,  
A90977 and A90978

**Public register no.** C2005/12573

## **Executive Summary**

The Australian Competition and Consumer Commission (ACCC) proposes to grant re-authorisation to the Homeworkers Code of Practice Committee (the Code Committee) in respect of arrangements that comprise the Homeworkers Code of Practice for a period of five years from the time the final determination is granted.

### **The applications**

On 22 July 2005, the Code Committee lodged applications for revocation of authorisations A90722, A90723, A90724, A90725 and substitution of new authorisations A90975, A90976, A90977, and A90978. The applications concern various arrangements that comprise the Homeworkers Code of Practice (the Code). The Code Committee applied for authorisation of arrangements and conduct under the Code for an indefinite period.

The Code is a voluntary self-regulatory scheme and provides for accreditation of parties along the textile, clothing and footwear supply chain to assist in ensuring that homeworkers are employed according to relevant Award conditions (whether Federal or State award).

### **Assessment of public benefit and anti-competitive detriment**

In terms of public benefits, the ACCC is satisfied that the arrangements under the Code assist in:

- lessening the risk of exploitation of a susceptible group
- improving the flow of information to homeworkers and
- facilitating compliance with statutory requirements.

The ACCC recognises that the arrangements have the potential to constrain retailers, suppliers and contractors, but concludes that the arrangements would not substantially affect participating parties' ability to compete. The ACCC considers that there are adequate safeguards in place to ensure that adverse effects on competition resulting from trading sanctions would be minimised.

The ACCC considers that the public benefit likely to be generated by the relevant provisions of the Code will outweigh the anti-competitive detriment arising from the arrangements and conduct.

### **Term of authorisation**

The ACCC proposes to grant authorisation for a period of five years from the time the final determination is granted.

### **Interim authorisation**

The ACCC granted interim authorisation to relevant provisions of the Code on 17 August 2005. Interim authorisation will continue to protect the relevant provisions of the Code from action under the TPA until the date the ACCC's final determination comes into effect or until a decision to revoke interim authorisation is made.

# Table of contents

	<b>Summary</b>	i
<b>1.</b>	<b>Introduction</b>	1
<b>2.</b>	<b>Background to the textile, clothing and footwear industry</b>	2
	Awards	2
	Legislation	3
<b>3.</b>	<b>The applications and submissions</b>	4
	Authorisations A90722, A90723, A90724 and A90725	4
	The current applications for revocation and substitution	4
	The Applicant	4
	The Homeworkers Code of Practice	5
	Part 1 – The Retailers Agreement	6
	Part 2 – The Suppliers Agreement	7
	Submissions	8
<b>4.</b>	<b>Statutory provisions</b>	10
<b>5.</b>	<b>ACCC assessment</b>	13
	Relevant market	13
	The future with and without test (the counterfactual)	13
	Effect on competition	14
	Public benefit	17
	Balance of public benefits and anti-competitive detriments	18
	Term of authorisation	19
<b>6.</b>	<b>Draft determination</b>	20

# 1. Introduction

- 1.1. The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. Broadly, the ACCC may ‘authorise’ businesses to engage in anticompetitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

## *Revocation and substitution of authorisations*

- 1.5. Section 91C of the TPA allows a party to apply to the ACCC to have its existing authorisation revoked and to have a substitute authorisation granted in its place. Before the ACCC may allow an application to revoke an existing authorisation and grant a substitute authorisation, it must assess the proposed substitute authorisation in the same manner that it would consider a new authorisation application.
- 1.6. In this instance the ACCC must consider the arrangements and conduct against the relevant tests set out in sections 90(6), 90(7) and 90(8) of the TPA which, in short, require the ACCC to be satisfied that the arrangements and conduct would be likely to result in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
- 1.7. In making its decision, the ACCC conducts the same public consultation process as it would for a new application for authorisation, including informing interested parties about the application, inviting submissions and issuing a draft determination. The ACCC then invites further submissions prior to issuing a final determination.
- 1.8. This document is the draft determination in relation to the applications for revocation and substitution lodged by the Homeworkers Code of Practice Committee (the Code Committee) concerning the Homeworkers Code of Practice (the Code).

## **2. Background to the textile, clothing and footwear industry**

- 2.1. The textile, clothing and footwear industry in Australia operates at all levels of the supply chain, from the early stage processing of basic fibres, to the manufacture of fabric, to the design and construction of garments, to the wholesale supply of finished products and finally, to the retail supply of end products to consumers.
- 2.2. Extensive structural change in the textile, clothing and footwear industry, including ongoing tariff reduction, has resulted in a move away from a factory-based workforce to outworkers. Outworking and other subcontracting methods are now so prevalent that much of the industry is structured around them.
- 2.3. An outworker or homeworker is an employee who, for the purposes of the business of the employer, performs work at premises that are not the business or commercial premises of the employer.
- 2.4. The textile, clothing and footwear industry has been the subject of a number of inquiries and reviews, including the 1996 Senate Economic Reference Committee which recommended the establishment of the Code.

### **Awards<sup>1</sup>**

- 2.5. Awards set out minimum wages and conditions of employment for specified employees. Awards may be Federal or State. Federal awards are made by the Australian Industrial Relations Commission (AIRC).
- 2.6. Federal awards normally cover key terms and conditions of employment. These include:
  - minimum rates of pay and allowances
  - overtime, shift penalty and other penalty rates
  - hours of work
  - leave provisions; eg sick/personal leave, recreation leave.
- 2.7. Awards may include provisions about specific issues such as superannuation or long service leave. More than one award may apply to an employee but provide for different parts of the overall employment package.
- 2.8. The Federal and State workplace relations systems are administered separately. Federal awards are the responsibility of the AIRC. State awards are the responsibility of State industrial tribunals.
- 2.9. Federal awards are generally made by the AIRC as a settlement of an inter-State dispute (a dispute involving employees and employers in more than one State). Victoria, the Northern Territory and the Australian Capital Territory are only covered

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<sup>1</sup> The information in this section is drawn from the website of the Department of Employment and Workplace Relations.

by Federal awards and rely on other reasons as the basis for their Federal award coverage.

2.10. State awards are made by State industrial tribunals. State awards are similar in content to federal awards, and also set out minimum pay and conditions of employment for groups of employees.

2.11. A significant difference between Federal and State awards is the way they apply to employers:

- Federal awards or agreements can apply to an employer (and therefore relevant employees working for that employer) when:
  - the employer is specifically named in the parties bound clause
  - the employer is a member of a federally registered employer organisation named in the parties bound clause; eg. the Australian Hotels Association
  - an employer buys a business that is already named in a Federal award
  - (only in the ACT or NT) where the AIRC under s141 of the Workplace Relations Act 1996, declares an award to be a common rule award for a particular industry. In the ACT and NT ‘Common Rule’ awards can apply to all employees in a particular industry whether or not their employers are named in the award as being respondents to the award.
- A State award generally applies to every employer who employs a person in an industry or occupation covered by the award.

## Legislation

2.12. In addition to Award regulations, a number of other legislative instruments prescribe the environment in which homeworkers are employed. Since the ACCC granted authorisation (A90722-A90723) to the Code in 2000, there have been a number of relevant legislative developments including.

- In Victoria, the *Outworkers (Improved Protection) Act 2003* was implemented. In addition to establishing the Ethical Clothing Trades Council of Victoria, this legislation deems all outworkers to be employees, provides that they are entitled to common minimum conditions and establishes new mechanisms for investigation and enforcement by authorisation officers of the State Government and the Clothing and Footwear Union (TCFUA).
- In New South Wales, the *Industrial Relations (Ethical Clothing Trades) Act 2001* was implemented. This legislation established the Ethical Clothing Trades Council of New South Wales and also underpins a new mandatory code of practices called the Ethical Clothing Trades Extended Responsibility Scheme.
- In Queensland, the Queensland Industry Relations Commission has made awards providing minimum entitlements for outworkers while the *Industrial Relations and Other Acts Amendment Act 2005* has been passed which contains provisions modelled on those enacted in Victoria and New South Wales.

### **3. The applications and submissions**

#### **Authorisations A90722, A90723, A90724 and A90725**

- 3.1. On 31 July 2000 the ACCC granted authorisation to four applications lodged by the Council of Textile and Fashion Industries (A90722 and A90723) and the Textile, Clothing and Footwear Union of Australia (A90724 and A90725). The applications were lodged under subsections 88(1), 88(7) and 88(7A) of the TPA.
- 3.2. The applications concerned various arrangements that comprised the Code.
- 3.3. In granting authorisation, the ACCC noted that the arrangements under the Code have the potential to constrain competition but considered there were adequate safeguards in place to ensure any anti-competitive effects were minimised.
- 3.4. The ACCC was satisfied that the arrangements under the Code were likely to generate a number of public benefits relating to minimising the risk of homeworkers not receiving the wages or conditions they are entitled to receive from their employer.
- 3.5. Authorisation was granted for a period of five years.

#### **The current applications for revocation and substitution**

- 3.6. On 22 July 2005, the Code Committee lodged applications for revocation of authorisations A90722, A90723, A90724, A90725 and substitution of new authorisations A90975, A90976, A90977, and A90978.
- 3.7. In addition to its application for substitute authorisation, the Code Committee requested that the ACCC grant interim authorisation to allow the arrangements under the Code to continue while the ACCC considered the Code Committee's substantive applications.
- 3.8. On 17 August 2005, the ACCC granted interim authorisation to Code Committee in the same terms as authorisations A90722, A90723, A90724 and A90735.

#### **The Applicant**

- 3.9. The Code Committee is made up of six members and comprises an equal number of representatives from the TCFUA; employers and employer bodies including:
  - The Council of Textile and Fashion Industries Ltd (TFIA)
  - The Australian Industry Group
  - The Australian Business Limited
  - Yakka Pty Ltd
  - The Brotherhood of St Laurence (Hunter Gatherer)
  - Poppets Schoolwear.

- 3.10. The Code Committee is established by Part 2 of the Code (the Suppliers Agreement). It manages the development and implementation of the Code and:
- accredits suppliers and oversees the accreditation process
  - re-accredits and dis-accredits companies
  - registers and maintains the ‘No Sweatshop’ trademarks, logos and other identification items
  - administers education, publicity and compliance funds
  - establishes grievance procedures and settles disputes
  - developments and maintains the Garment Sewing Timing Manual.

### **The Homeworkers Code of Practice**

- 3.11. The Code was established in 1997 following the 1996 Senate Economics Reference Committee inquiry into outworkers in the garment industry which recommended that “... an industry ‘Homeworkers Code of Practice’ should be adopted by all participants in the garment retailing and manufacturing process....<sup>2</sup>”
- 3.12. It is a voluntary mechanism which aims to regulate and monitor the supply chain from homeworker to retailer to ensure that homeworkers are employed according to relevant Award conditions (whether Federal or State award). It applies to contractors, manufacturers, wholesalers, warehouses, fashion houses and retailers.
- 3.13. The relevant Federal Award provisions are contained within the *Clothing Trades Award 1999* and are summarised below:
- Clause 46: Contract Work - governs the relationship between the parties in the production chain to help ensure that outworkers’ conditions are equal to those of factory workers. In addition, it helps to limit award evasion and simplify and aid award enforcement. The mechanisms under Clause 46 include record keeping requirements and the presentation of statutory declarations.
  - Clause 47: Outworkers - sets out terms and conditions of employment for outworkers and provides various mechanisms to ensure parity with the terms and conditions of factory workers.
  - Clause 48: Registration for the Purposes of Outwork and Contract Work - provides for the registration requirements of employers. It is a means of monitoring outworkers, their employers and their locations.
- 3.14. The TCFUA is responsible for monitoring compliance with the Code. This includes identifying problems and making them known to retailers, manufacturers, wholesalers, warehouses and fashion houses. The TCFUA also takes responsibility for securing compliance through the promotion of the Code and ensuring compliance with the Award by non-signatories to the Code.
- 3.15. The arrangements that comprise the Code consist of two parts:

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<sup>2</sup> Senate Economic Reference Committee report (1996): *Outworkers in the Garment Industry*



- Part 1 - Retailers' Agreement<sup>3</sup> and
- Part 2 – Suppliers Agreement (manufacturers, wholesalers, warehouses and fashion houses agreement).

### **Homeworkers Code of Practice (Part 1) – Retailers Agreement**

3.16. The Retailers Agreement is essentially an agreement between the TCFUA, the Australian Retailers Association (ARA) and individual retailers. Currently ninety-eight retailers are signatories to the Retailers Agreement.

3.17. Parties to the Retailers Agreement commit to the principle that all employers of homeworkers should pay to them no less than the appropriate award skill level rate or product rate calculated on the loaded award skill level in the Federal Award or the relevant State Award.

3.18. Under the Retailers Agreement:

- retailers agree to the principle that employees and contractors to suppliers are engaged according to terms and conditions no less favourable than those contained in either the Federal Award or the relevant State Award
- retailers must maintain appropriate records and full details of all contracts entered into with their suppliers
- retailers will require their suppliers to undertake to conform with all the laws and regulations contained within the relevant award and the provisions of the Code
- retailers agree, where possible, to amend the standard terms and conditions of trading contracts entered into with suppliers to reflect the provisions outlined in the Code
- retailers will investigate any suspected case of exploited labour with their suppliers; giving a fair opportunity for the supplier to demonstrate that it is complying with the Code
- retailers agree, where legally possible, to terminate any contract with a supplier who is found to be in breach of the Code. Retailers are to refrain from entering into any further contracts with such a supplier until the retailer and the TCFUA are satisfied that the breach has been remedied
- any dispute between a retailer and the TCFUA that cannot be settled will be referred to mediation conducted by the Chairperson of an Ethical Clothing Trades Council or a mediator agreed to by both parties and
- each retailer agrees to enter a separate Deed of Agreement with the TCFUA whereby the provisions of that separate Deed of Agreement will mirror the obligations contained in the Retailers Agreement.

3.19. Under the Retailers Agreement, the TCFUA is obliged to provide information to the ARA and individual retailers with respect to the Federal and State Awards and inform

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<sup>3</sup> The Code authorised in 2000 included a Part 1 (Retailers agreement) and a Part 1A (Retailers agreement for ARA members). Part 1 and Part 1A have now been combined into one document.

retailers if it believes that homeworkers may not be receiving Award conditions.

- 3.20. The term of the Retailers Agreement is ongoing with a review every twelve months. Parties to the Retailers Agreement may withdraw from the agreement on giving three months notice to each other party to the agreement.

### **Homeworkers Code of Practice (Part 2) – Suppliers Agreement**

- 3.21. The Suppliers Agreement forms Part 2 of the Code and operates at two levels. At the first level, the agreement operates between the TCFUA, The Council of Textile & Fashion Industries (TFIA), the Australian Industry Group (AIG) and Australian Business Limited (ABL). At the second level, the Suppliers Agreement operates between the TCFUA and individual manufacturers, fashion houses and wholesalers (together known as Suppliers).

- 3.22. The Suppliers Agreement has the same broad objectives as the Retailers Agreement. Parties to the agreement commit to ensure that homeworkers receive their appropriate award entitlements. The Suppliers Agreement seeks to achieve this objective by establishing an accreditation scheme. The Code Committee administers the accreditation and reaccreditation process. Currently twenty-two companies are accredited while fifteen applications for accreditation are under consideration.

- 3.23. The Code Committee assesses accreditation in accordance with the following criteria which are set out in the Suppliers Agreement and which the Applicant submits are consistent with full adherence to the relevant Award provisions and legislative obligations:

- homeworkers are paid the appropriate rate per product calculated on the appropriate loaded Award skill level hourly rate
- homeworkers will receive a minimum workload per fortnight which is the equivalent of the number of products that could be sewn in 30 hours, and a maximum workload per fortnight which is the equivalent of the number of products that could be sewn in 76 hours
- homeworkers can not be required to work Saturday or Sunday or more than 7.6 hours in any one day
- homeworkers are covered by workers compensation
- homeworkers will receive appropriate superannuation contributions paid on their behalf into the relevant superannuation fund
- Suppliers will maintain and provide records in respect of retailers supplied, homeworkers engaged, details of the contract, the name of the contractor, product specification, the date for delivery to the Supplier and
- Suppliers are to provide a standard letter of information regarding TCFUA membership to homeworkers (a standard letter is provided at a schedule to the Suppliers Agreement).

- 3.24. Suppliers demonstrate their compliance with the accreditation criteria by providing statutory declarations to the Code Committee. Template statutory declarations are provided as schedules to the Suppliers Agreement.
- 3.25. The Suppliers Agreement requires accredited Suppliers to require their contractors to also adhere with the above conditions, as well as certain record keeping requirements. Contractors demonstrate their compliance with these conditions by providing statutory declarations to the Code Committee. Template statutory declarations are provided as schedules to the Suppliers Agreement. Under the Suppliers Agreement, Suppliers agree to cease further commercial dealings with contractors found to be in breach of the Suppliers Agreement unless or until the breach has been remedied.
- 3.26. Accreditation is granted for twelve months followed by annual applications for re-accreditation. Reaccreditation is automatic based on updated statutory declarations or an accredited Supplier declaring that its circumstances have not changed, unless it can be demonstrated that the Supplier does not have a satisfactory compliance record.
- 3.27. Retailers who agree only to deal with accredited Suppliers may also be accredited. Such accreditation is automatic upon the retailer providing evidence to the Code Committee that all their suppliers also possess current accreditation.
- 3.28. Parties who gain accreditation under the Suppliers Agreement are licensed accordingly and are entitled to:
- promote their compliance with the Award and their acceptance of the Code
  - affix to their products the registered *No Sweatshop* trademark
  - gain access to the Garment Sewing Timing Manual and
  - receive promotion via the website [www.nosweatshoplabel.com](http://www.nosweatshoplabel.com).

## **Submissions**

### ***The Applicant's supporting submission***

- 3.29. The Code Committee submits that the arrangements under the Code have provided and would continue to provide the following public benefits:
- lessening the risk of exploitation of homeworkers
  - providing information to homeworkers so that they are in a better position to understand their entitlements
  - facilitating compliance with statutory requirements
  - helping to ensure award pay and conditions for women who choose to stay at home
  - promoting improved occupational health and safety by providing more established working conditions for homeworkers and
  - improving the social environment of the children of homeworkers by providing more standardised working conditions for parents (the homeworkers themselves).

3.30. The Code Committee did not identify any detriments arising from the arrangements.

*Submissions from interested parties*

3.31. The ACCC received submissions in support of the Code Committee's applications for authorisation from:

- The New South Wales Department of Commerce (Office of Industrial Relations)
- The Queensland Department of Industrial Relations
- The Victorian Department of Innovation, Industry and Regional Development
- David Jones and
- Best and Less.

3.32. While invited, no submission was received from the Commonwealth Department of Employment & Workplace Relations.

## 4. Statutory provisions

- 4.1. Under section 91C of the TPA, the ACCC may allow an application to revoke an existing authorisation and grant a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party.
- 4.2. In order for the ACCC to allow an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation as it would under the standard authorisation process.

### The statutory tests

- 4.3. Code Committee has applied for revocation and substitution of four authorisations. The tests which apply to the revocation and substitution of each authorisation are set out below.
  - In respect of application A90975, which concerns giving effect to a contract, arrangement or understanding that may contain an exclusionary provision within the meaning of section 45 of the TPA, Code Committee must satisfy the test outlined in sub-section 90(8) of the TPA.
  - In respect of application A90976, which concerns giving effect to a contract, arrangement or understanding that may substantially lessen competition within the meaning of section 45 of the TPA, Code Committee must satisfy the test outlined in sub-section 90(7) of the TPA.
  - In respect of application A90977, which concerns engaging in conduct that may hinder or prevent the supply or acquisition of goods or services by a third person within the meaning of Section 45D; 45DA or 45DB of the TPA, Code Committee must satisfy the test outlined in sub-section 90(8) of the TPA.
  - In respect of application A90978, which concerns giving effect to a contract, arrangement or understanding with an organisation of employees that contains a provision that may have the purpose of preventing or hindering the first person supplying goods or services to, or acquiring goods or services from, another person within the meaning of Section 45E or 45EA of the TPA, Code Committee must satisfy the test outlined in sub-section 90(8) of the TPA.
- 4.4. Sub-section 90(6) of the TPA provides that the ACCC shall not make a determination granting authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition unless it is satisfied that:
  - the contract, arrangement or understanding would be likely to result in a benefit to the public and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contact, arrangement or understanding.
- 4.5. Sub-section 90(7) of the TPA provides that the ACCC shall not make a determination granting authorisation unless it is satisfied in all circumstances that:

- a provision of a contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public; and
  - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result from giving effect to the provision.
- 4.6. Sub-section 90(8) provides that the ACCC shall not make a determination granting an authorisation unless it is satisfied in all circumstances that the provision or the conduct would result, or be likely to result, in such a benefit to the public that the contract or arrangement should be allowed to be made, the understanding should be allowed to be arrived at, or the conduct should be allowed to take place.
- 4.7. While there is some variation in the language between the test in section 90(6) and the test in section 90(8), the ACCC has until recently adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.<sup>4</sup>
- 4.8. This view has now been reconsidered by the Australian Competition Tribunal (the Tribunal) and it has found that the two tests are not precisely the same.<sup>5</sup> In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(8) was not so limited.

### **The public benefit test**

- 4.9. In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater. This is referred to as the 'public benefit test'.
- 4.10. Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 4.11. Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>6</sup>

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<sup>4</sup> *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

<sup>5</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

<sup>6</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

4.12. Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

...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>7</sup>

4.13. The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.

4.14. Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

#### ***Other relevant provisions***

4.15. Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the arrangements in the future.

4.16. Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

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<sup>7</sup> *Re 7-Eleven Stores* at 42683.

## **5. ACCC assessment**

5.1. The ACCC's evaluation is in accordance with the statutory tests outlined in section 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess and weigh the likely public benefits and detriment arising from the arrangements and conduct for which authorisation is sought.

### **Relevant market**

- 5.2. The first step in assessing the public benefits and anti-competitive detriment of the arrangements and conduct for which authorisation is sought is to consider the relevant market in which that conduct occurs.
- 5.3. Identifying the market affected by the arrangements or conduct for which authorisation is sought assists in assessing public benefit and public detriment arising from any lessening of competition from the arrangements or conduct. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant market, as it may be apparent that a net public benefit will or will not arise regardless of the definition.
- 5.4. The arrangements and conduct under the Code for which authorisation is sought are likely to impact upon participants in the clothing, textile and footwear industry. This industry comprises a number of functional levels ranging from the early stage processing of basic fibres, to the manufacture of fabric, to the design and construction of garments, to the wholesale supply of finished products and finally, to the retail supply of end products to consumers. The nature of the participants and the nature of the competition at each functional level varies. The likely impact of the Code on each functional level is also likely to vary.
- 5.5. The ACCC is of the view that it is not necessary to define the relevant market. It is the ACCC's view that its assessment will not be overly affected by the possible variations in market definition.

### **The future with and without test (the counterfactual)**

- 5.6. The ACCC uses the 'future with-and-without test' established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements and conduct for which authorisation is sought.<sup>8</sup>
- 5.7. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by the arrangements and conduct in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

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<sup>8</sup> See, for example, *Re Australasian Performing Rights Association* (1999) A TPR 41-701



- 5.8. In this instance, the ACCC considers that the arrangements and conduct under the Code for which authorisation is sought are at risk of breaching the TPA. Given this risk, and given the applicant has sought authorisation for the arrangements and conduct previously, the ACCC considers it unlikely that the Code would operate in its current form in the absence of authorisation.
- 5.9. While it may be possible for the applicant to amend the Code to lessen concerns under the TPA and operate the amended code, this would constitute a significant dilution of the current code.
- 5.10. The ACCC notes that the effectiveness of the Code to prevent and deter the exploitation of homeworkers is enhanced by those provisions of the Code which potentially raise concerns under the TPA.
- 5.11. Federal and state legislation to protect the rights of homeworkers is in place which suggests an amended version of the Code would be implemented.
- 5.12. The ACCC therefore considers that the relevant counterfactual is the situation in which the current version of the Code is not implemented and at best, a significantly diluted code is introduced in its place.

### **Effect on competition**

- 5.13. As discussed in section 4, the ACCC must assess the extent to which the arrangements and conduct are likely to result in a benefit to the public, and that benefit is sufficient to outweigh any detriment to the public constituted by any lessening of competition that is likely to flow from the arrangements and conduct.

### ***Retailers agreement***

- 5.14. The ACCC considers that certain arrangements under the Retailers Agreement section of the Code relating to the accreditation scheme could be seen to restrict market participants.
- 5.15. Under the Retailers Agreement, retailers agree to:
- amend the standard terms and conditions contained within contracts with suppliers to include obligations on the suppliers regarding compliance with relevant laws and regulations (including Awards) and record keeping requirements and
  - if legally possible, cancel purchase contracts and/or terminate relationships with those suppliers which they believe exploit homeworkers.
- 5.16. In general, a commitment by retailers to only deal with those suppliers which agree to certain conditions generates some anti-competitive concerns. It has the potential effect of constraining the number of suppliers which may access retail channels. A constraint on suppliers is likely to affect their demand for inputs, which may impact upon those businesses which supply goods or services to suppliers. Similarly, a constraint on suppliers is likely to affect the supply of finished garments, which may impact upon businesses at the retail level of the supply chain.

- 5.17. In this case, the ACCC notes that retailers agree to only deal with suppliers which comply with relevant laws and regulations. Given that it is a requirement of the law that homeworkers be employed under terms and conditions consistent with the Award, it is difficult to assign any public detriment to these restrictions.
- 5.18. In any event, the ACCC considers that a number of features of the Retailers Agreement serve as safeguards against the inappropriate cancellation of purchase contracts:
- the requirement that an investigation of any allegation of homeworke exploitation by the TCFUA be carried out by the relevant retailer and the outcome of the investigation be reported within 14 days to the TCFUA
  - the requirement that if, following an investigation, it is concluded that exploitation has occurred, the relevant retailer and the TCFUA will work together with the supplier to remedy the situation within a specified time period
  - the provision of a dispute resolution procedure in the event that a retailer and the TCFUA disagree as to whether exploitation has occurred and
  - the provision of a mediation process in the event that a dispute cannot be resolved.
- 5.19. Additionally, the ACCC notes that the potential anti-competitive effect of the agreement between retailers is mitigated by:
- the possibility that if contracts cannot be cancelled for legal reasons, they will not be cancelled and
  - the voluntary nature of the Retailers Agreement and the ability of retailers to withdraw from the Retailers Agreement on giving three months notice to each party to the agreement.

### ***Suppliers Agreement***

- 5.20. The ACCC considers that certain arrangements under the Suppliers Agreement could be seen to restrict market participants.

### ***Accreditation and reaccreditation***

- 5.21. A feature of the accreditation process set out in the Suppliers Agreement is the ability of accredited Suppliers to use the *No sweatshop* trademark. The ACCC notes that the use of the *No Sweatshop* trademark to advertise accreditation has the potential to provide suppliers and retailers with a marketing advantage over those who are not accredited under the Code. In this context, the ACCC considers that the rules which apply to accreditation and reaccreditation must be fair and transparent, to ensure accreditation is granted appropriately and not used in a discriminatory manner with an adverse competitive effect.
- 5.22. The ACCC notes that the accreditation and reaccreditation of a retailer is dependent upon that retailer only dealing with accredited Suppliers. This situation has the potential to distort a retailers choice of supplier, with possible anti-competitive effects.

The ACCC, however, has not received any information which suggests such distortions are taking place.

- 5.23. A number of features of the Suppliers Agreement serve as safeguards against inappropriate accreditation or inappropriate denial of accreditation:
- any member of the Code Committee may raise concerns and seek to review the accreditation of a Supplier at any time and
  - a 28-day notice and appeal period is established within which the Code Committee must advise a Supplier that it intends to cancel its accreditation and the Supplier appeal to the Code Committee and present arguments as to why its accreditation should not be cancelled.
- 5.24. Additionally, the relevant retail markets appear to be competitive.
- 5.25. In its 2000 authorisation, the ACCC noted that the Suppliers Agreement prescribed that re-accreditation may be denied on the basis of unsatisfactory compliance record but did not define what constitutes 'unsatisfactory compliance'. When the ACCC authorised the arrangements and conduct under the Code, it noted this deficiency in detail in the Code and imposed a condition of authorisation that the Code be amended to clarify what constitutes an unsatisfactory compliance record for the purposes of re-accreditation. It does not appear that this condition has been complied with.
- 5.26. At the time of granting authorisation in 2000, the ACCC noted that the applicant had provided information advising that a Supplier's compliance record would be deemed unsatisfactory at the time of re-accreditation if it fails to provide the Code Committee with a statutory declaration and a sample of documents kept or it was involved in a dispute situation for non-compliance.
- 5.27. While the ACCC has been able to rely on this information for the purposes of the draft determination, it will expect the Code Committee to demonstrate its compliance with the past condition in a more formal manner prior to the ACCC issuing its final determination.

#### *Trading sanctions*

- 5.28. Under the Suppliers Agreement, Suppliers agree to:
- ensure that, when a product is purchased from a contractor and that contractor employs homeworkers, that contractor complies with the requirements of the Suppliers Agreement which apply to contractors and
  - cease further commercial dealings with contractors which do not comply with the requirements of the Suppliers Agreement.
- 5.29. In general, a commitment by Suppliers to only deal with those contractors who agree to certain conditions generates some anti-competitive concerns. It has the potential effect of constraining the number of contractors which may access manufacturing/distribution channels. A constraint on contractors is likely to affect their demand for inputs, which may impact upon those businesses which supply goods or services to contractors.

Similarly, a constraint on contractors is likely to affect the supply of finished garments, which may impact upon businesses at the wholesale and retail level of the supply chain.

- 5.30. In this case, the ACCC notes that Suppliers agree to only deal with contractors which comply with relevant laws and regulations. Given that it is a requirement of the law that homeworkers be employed under terms and conditions consistent with the Award, the ACCC considers that it is difficult to assign detriment to the restriction but for the potential for misapplication.
- 5.31. The ACCC considers that the following features of the Suppliers Agreement serve as safeguards against the inappropriate cancellation of purchase contracts:
- the requirement that an investigation of any allegation of homeworke exploitation by the TCFUA be carried out by the relevant Suppliers and the outcome of the investigation be reporting within 14 days to the TCFUA and the Code Committee; and
  - the requirement that if, following an investigation, it is concluded that exploitation has occurred, the contractor will be provided with 14 days to remedy the situation.
- 5.32. Additionally, the ACCC notes that the potential anti-competitive effect of the agreement between Suppliers is mitigated by the voluntary nature of the Code and the ability of Suppliers to withdraw from the Code on giving three months notice to each party to the agreement.
- 5.33. The ACCC would expect information from the applicant as to the practical operation of the Code since the ACCC's authorisation of 2000 prior to releasing its final determination.

### **Public benefit**

- 5.34. As discussed in section 4, the ACCC must assess the public benefit that is expected to flow from the arrangements and conduct for which authorisation is sought.
- 5.35. The ACCC considers that the arrangements and conduct for which authorisation is sought are likely to generate public benefits, as set out below.
- *Lessening the risk of exploitation of a susceptible group.* The ACCC acknowledges that the structure of the supply chain in the clothing, textile and footwear industry makes homeworkers susceptible to employment situations which do not comply with Award requirements. The ACCC considers that to the extent the provisions of the Code help to preserve the statutory entitlements of homeworkers, the Code generates a public benefit.
  - *Improving the flow of information to homeworkers.* The ACCC accepts that there is a public benefit in the provision of information to homeworkers so that they are in a better position to understand their entitlements. To the extent that the provisions of the Code assist in providing this information, the Code generates a public benefit.

- *Facilitating compliance with statutory requirements.* To the extent that the Code assists in facilitating compliance with Federal and State Awards, and other legislative or regulatory requirements, the ACCC considers this a public benefit.

5.36. The ACCC has had cause in the past to form a view as to whether securing compliance with legislative requirements can constitute a public benefit. On the one hand, it can be argued that there should be compliance with legislative requirements without authorisation and therefore that the benefit of compliance should not be attributed to the authorised arrangements. This argument seems particularly strong where it is the parties or beneficiaries to the application that claim they will consciously engage in unlawful conduct without authorisation.

5.37. The ACCC considered a public benefit claim of this nature in relation to the operation of a cartage allocation system by CSR Ltd<sup>9</sup>. CSR submitted that the cartage allocation arrangement improved public safety because it eliminated the carrier's perception that they were required to speed in order to obtain their share of available work.

5.38. It was the ACCC's view that adherence to statutory obligations, such as speed limits and laws relating to safety in the workplace, was in the public interest. However the ACCC considered that adherence with the law would not necessarily be determined by the cartage allocation arrangements, but rather by the professionalism of the individual carriers. As such the ACCC did not accept that improved compliance with legislative requirements was a public benefit that was likely to result from the cartage allocation system.

5.39. On the other hand, it would seem odd for a regulator to suggest that in the face of evidence that arrangements would lessen the likelihood of unlawful conduct that such would not constitute a public benefit. The ACCC therefore considers that claims of benefits arising from greater compliance with legal requirements must be considered on a case by case basis.

5.40. In the context of the Code Committee's applications, the ACCC considers a case has been made.

### **Balance of public benefits and anti-competitive detriments**

5.41. On the information currently before it the ACCC concludes that the public benefits likely to result from the arrangements under the Code will outweigh any anti-competitive detriment arising from the arrangements. This assessment relies to a considerable extent on the understanding that the requirements of the Code – save for enforcement mechanisms – do not impose restrictions on market participants above and beyond that required by relevant Industrial Relations laws.

5.42. The ACCC invites submissions on this issue particularly from relevant government departments.

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<sup>9</sup> CSR Limited (2003) – A90769

## **Term of authorisation**

5.43. The Code Committee has applied for authorisation of the Code for an indefinite period. The ACCC proposes to grant authorisation to applications A90975, A90976, A90977, and A90978 for a period of five years from the time it issues its final determination.

## **6. Draft Determination**

### **The applications**

6.1. On 22 July 2005, the Code Committee lodged applications for revocation of authorisations A90722, A90723, A90724, A90725 and substitution of new authorisations A90975, A90976, A90977, and A90978. The applications concerned various arrangements that comprise the Homeworkers Code of Practice. The Code Committee has applied for authorisation of the Code for an indefinite period.

### **Statutory test**

6.2. For the reasons outlined in this draft determination, the ACCC is satisfied that in all the circumstances that the arrangements and conduct for which authorisation is sought

- are likely to result in a benefit to the public and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the arrangements or
- that the arrangement or conduct should be allowed to be made or to take place.

### **Draft determination**

6.3. The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to applications A90975, A90976, A90977, and A90978 for the Code Committee to implement relevant provisions of the Code.

### **Term of authorisation**

6.4. The ACCC proposes to grant authorisation for a period of five years from the time the final determination is granted.

### **Interim authorisation**

6.5. The ACCC granted interim authorisation to relevant provisions of the Code on 17 August 2005. Interim authorisation will continue to protect the arrangements and conduct under the Code from action under the TPA until the date the ACCC's final determination comes into effect or until a decision to revoke interim authorisation is made.

### **Further submissions**

6.6. The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the ACCC hold a pre-determination conference pursuant to section 90A of the TPA.