



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of A91252-55 and
substitution of authorisation A91354-57

lodged by

the Homeworker Code Committee Incorporated

in respect of

the Homeworkers Code of Practice

Date: 21 June 2013

Authorisation number: A91354-A91357

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Dimasi

Summary

The ACCC proposes to grant authorisation to a revised version of the Homeworkers Code of Practice (the Code) for five years.

The ACCC granted interim authorisation on 8 March 2013 to allow the Code to operate in the form previously authorised by the ACCC. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. In particular, the ACCC is seeking submissions regarding the feasibility of broadening the existing dispute resolution procedures and providing businesses with the option of an alternative auditor to the TCFUA (at the audited business's expense).

The applicant to the authorisations and interested parties may also request a pre-decision conference be held to allow oral submissions on the draft determination.

The application for reauthorisation of the Homeworkers Code of Practice

The Homeworker Code Committee (the Code Committee) sought authorisation for five years to permit the operation of a revised version of the Homeworkers Code of Practice (the Code).

The Code is a mechanism within the textile, clothing and footwear industry designed to assist businesses to ensure that they and their supply chains comply with relevant Awards and workplace laws. An objective of the relevant Awards and workplace laws is to protect vulnerable workers, in particular, homeworkers.

The Code contains a number of measures to do this, including:

- yearly compliance auditing of retail signatories' and accredited suppliers' supply chains by the Textile, Clothing and Footwear Union of Australia (TCFUA). This assists businesses to identify and assess the risks associated with sub-contracting practices within their supply chain;
- education of businesses as to their legal obligations, as a component of the auditing process and through training programs overseen by the Code Committee;
- the right for accredited businesses to use the Ethical Certification Trademark series in association with their products, thus signalling their compliance to customers; and
- education of industry workers and customers regarding the Code and its operations.

The ACCC notes that proposed revisions to the Code reflect changes in the underlying laws and relevant Award with which the Code seeks to promote compliance.

The ACCC received a number of submissions in support of the arrangements under the Code. For example, Oxfam stated that it promotes the Code internationally as one of the few examples of a code of practice which successfully protects vulnerable workers.

The ACCC considers that the Code is likely to lead to public benefits by providing businesses with a means to efficiently ensure their supply chains are compliant with relevant

Awards and workplace laws, and a means to efficiently signal this compliance. The ACCC also considers that public benefits are likely to arise from reduced incidence of unlawful treatment of workers.

Businesses which oppose the Code have expressed concern that participation in the Code is not voluntary in certain circumstances. In particular, accreditation is a condition of participation in Commonwealth procurement tendering and accessing industry assistance programs. In addition, accredited manufacturers and retail signatories to the Code must ensure that all businesses in their Australian supply chains undertake the compliance auditing process. Therefore, businesses in these supply chains incur some additional auditing costs and must undergo auditing by the TCFUA as to whether they are compliant with workplace laws and the Textile, Clothing and Footwear Award 2010 (if relevant). Some businesses have raised concerns about the role of the TCFUA in conducting the audit process.

The ACCC accepts that some public detriment is likely to arise from increased business costs. However, the ACCC considers that these detriments are limited by the following factors:

- a) the Code is a voluntary Code, although the ACCC acknowledges that businesses in the supply chains of retail signatories and accredited manufacturers or which are seeking accreditation to meet the Commonwealth Procurement Rules may regard it as involuntary;
- b) retail signatories and accredited manufacturers are only able to agree to boycott other businesses who are not compliant with their legal obligations; and
- c) the Code contains safeguards against inappropriate accreditation or boycott decisions.

Given the concerns expressed in some submissions, as outlined above, the ACCC invites further submissions from the Code Committee and other interested parties regarding:

- a) whether the Code's dispute resolution mechanisms should be broadened to include all potential stakeholders in the Code and whether there is a practical means of doing so; and
- b) the feasibility and utility of including provision under the Code for an alternative auditor to the TCFUA, with the cost of the auditor to be met by the audited business.

On balance, 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 operation of the Code.

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Glossary of terms

ACCC	Australian Competition and Consumer Commission
accredited supplier	a supplier or manufacturer in the textile, clothing and footwear industry who has gained accreditation under Part 1 the Code
Act	the <i>Competition and Consumer Act 2010</i>
Applicants	the entities listed in paragraph 8 of this draft determination
Board of Reference	an entity within the Fair Work Commission which maintains a register of information provided by textile, clothing and footwear businesses which contract out work.
CCIQ	Chamber of Commerce and Industry Queensland
Code	the Homeworkers Code of Practice in the form provided to the ACCC on 7 March 2013
Code Committee	the Homeworker Code Committee Incorporated
Commonwealth outworker entity	defined by section 12 of the Fair Work Act as: a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory or (broadly) a person who subcontracts work commonly performed by outworkers in a way that is connected with a Territory.
ECA	Ethical Clothing Australia
Fair Work Act	the <i>Fair Work Act 2009</i>
legal obligations	in the context of the ACCC's consideration of this authorisation application, legal obligations refers to obligations imposed under relevant awards and all relevant workplace laws including (but not limited to) the Fair Work Act, occupational health and safety, anti-discrimination, child labour, public holidays, long-service leave and superannuation
outworkers	individuals and employees who perform work in the textile, clothing and footwear industry from home or non-conventional business premises.
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.
TCFUA	The Textile, Clothing and Footwear Union of Australia

TFIA	Council of Textile and Fashion Industries of Australia Limited
Work agreement	A signed, written agreement between a principal and an outworker which must be entered into prior to the commencement of work by the outworker. The contents of the work agreement are specified by clause F.3 of Schedule F of the TCF Award.
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 reauthorisation

The application

1. On 21 February 2013, the Homeworker Code Committee Incorporated (the Code Committee) lodged an application for the revocation of authorisations A91252-A91255 and the substitution of A91354-A91357 for the ones revoked (reauthorisation) with the ACCC under section 91C(1) of the *Competition and Consumer Act 2010* (the Act). The Code Committee also requested interim authorisation under section 91 of the Act as the current authorisations were due to expire on 11 March 2013.
2. On 7 March 2013, the Code Committee amended its application for reauthorisation, seeking authorisation for five years of a revised version of Homeworkers Code of Practice.
3. The Homeworkers Code of Practice 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. The Code has been authorised by the ACCC in various forms since 2000. The Homeworkers Code of Practice has a number of compliance measures which includes potential boycotts of businesses which are not compliant with their legal obligations, although these have not occurred to date.
4. On 8 March 2013, the ACCC granted interim authorisation to permit the ongoing operation of the Homeworkers Code of Practice in the form previously authorised by the ACCC (and as provided in the Code Committee's authorisation application dated 21 February 2013).
5. On 17 May 2013, the Code Committee proposed a number of potential variations to the version of the Homeworkers Code of Practice provided on 7 March 2013. These include:
 - a) an additional clause to the effect that: with the exception of clause 9.4(d) of Part 1 of the Code, the Code is intended to reflect requirements of the Award and relevant workplace laws. A party who complies with an Award or workplace law will also have complied with a provision of the Code that is intended to reflect the relevant requirement of the Award or workplace law as in force from time to time.
 - b) amendments to clause 4.19 of Part 1 to confirm that 'work agreement' is analogous to the term 'written agreement' in the Textile, Clothing, Footwear and Associated Industries Award 2010; and
 - c) an amendment to Part 2 to substitute 'an independent mediator' for the reference to the Ethical Clothing Trades Council in the dispute resolution section (the Ethical Clothing Trades Council no longer exists).
6. This draft determination considers the Code Committee's amended application for authorisation of the Homeworkers Code of Practice including the further amendments proposed on 17 May 2013 (the Code).

The Applicants

7. The Code Committee is a not-for-profit committee which oversees the operation and management of the Homeworkers Code of Practice, with six representatives from the Textile, Clothing and Footwear Union of Australia and six representatives from business groups and individual businesses.
8. The Code Committee has applied for authorisation on behalf of itself and:
 - a) the entities which have one or more representatives on its board. These currently include:
 - Textile Clothing and Footwear Union of Australia (TCFUA)
 - New South Wales Business Chamber
 - Australian Industry Group (AiG)
 - Australian Retailers Association
 - Jets Swimwear
 - Pacific Brands Limited
 - Cue Clothing Company
 - b) current accredited businesses and signatories to the Code¹
 - c) future accredited businesses and signatories to the Code (collectively, the Applicants).

Reauthorisation process

9. Authorisation is a transparent process whereby the ACCC may grant protection from legal action for conduct that might otherwise breach the Act. Broadly, the ACCC may 'authorise' businesses to engage in anticompetitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
10. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation, the ACCC must first issue a draft determination.²
11. The holder of an authorisation may apply to the ACCC under section 91C of the Act to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (reauthorisation). In order for the ACCC to reauthorise conduct, the ACCC must consider the application for reauthorisation under the same statutory test as if it was a new application for authorisation under section 88 of the Act.

¹ The Code Committee provided a list of the businesses which are accredited or signatories under the Code. This listing is available at **Attachment B**.

² Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation, available on the ACCC's website, www.accc.gov.au.

Previous authorisations

12. On 31 July 2000, the ACCC granted authorisation for five years to the Council of Textile and Fashion Industries of Australia Limited (A90722 and A90723) and the TCFUA (A90724 and A90725). The authorisations provided statutory protection to various arrangements that comprised the Homeworkers Code of Practice, in the form which existed at the time.
13. On 12 December 2005, the ACCC granted reauthorisation to the Homeworkers Code of Practice for five years (A90975-A90978).
14. On 17 February 2011, the ACCC granted reauthorisation for two years until 11 March 2013 (A91252-A91255). The shorter length of the reauthorisation was sought by the Code Committee in 2011 as the Code Committee was in the process of conducting a review and relaunch of the Homeworkers Code of Practice.
15. The copy of the Homeworkers Code of Practice provided to the ACCC on 7 March 2013 incorporates the changes made following this review. A version of the Homeworkers Code of Practice with the changes tracked compared to the previously authorised version was provided as an attachment to the Code Committee's submission dated 7 March 2013. Further amendments proposed by the Code Committee are noted at paragraph 5.

Industry background

The textile, clothing and footwear industry

16. The textile, clothing and footwear manufacturing industry covers all stages of production of textile, clothing, footwear and leather products. This includes the processing of raw materials such as cotton, wool, leather and synthetics, through to the production of final goods such as clothes, shoes, household linen, carpets and industrial textiles.
17. Purchasing in the industry is, broadly, conducted via two different models. Under one model, 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.
18. Under the second model, businesses in the industry contract for products or product lines to be made for them or services to be provided to them (e.g. pressing of garments). Under this model, the purchaser provides detailed specifications and instructions to the contractor on how the products are to be made or services provided and generally provides the consumables needed to fulfil the contract. The contractor may fulfil the contract in-house or may sub-contract some or all of the work to one or more other businesses. The 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.
19. A business has different legal obligations (some of which are unique to the industry) depending upon if:

- 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 using in-house workers, 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 is ultimately performed by an outworker.

20. The following table is based on the most recent statistics available from the Australian Bureau of Statistics regarding the distribution of businesses in the industry.³

Table 1 - Textile, Clothing and Footwear businesses by number of employees and by state and territory June 2011

State	Non employing	1-19 employees	20-199 employees	200+ employees	Total
New South Wales	1339	1157	133	7	2636
Victoria	1165	1134	183	11	2493
Queensland	690	540	80	0	1310
South Australia	246	161	31	0	438
Western Australia	360	286	43	0	689
Tasmania	62	30	9	0	101
Northern Territory	13	12	3	0	28
Australian Capital Territory	44	15	0	0	59
Total	3919	3335	482	18	7754

Industry reviews and reports

21. The ACCC notes that the Homeworkers Code of Practice was originally developed in response to the findings of a number of reviews and reports into industry working conditions. For the purposes of providing context to the Homeworkers Code of Practice, a selection of these reviews and reports are summarised below.

1996 and 1998 Senate Economics References Committee *Outworkers in the Garment Industry*

22. The Senate Economics References Committee produced two reports in 1996 and 1998 investigating the working conditions of outworkers in the garment industry. The reports found that most outworkers were not receiving their wage entitlements and serious exploitation of some outworkers, a situation which had probably

³ 8165.0 - Counts of Australian Businesses, including Entries and Exits , Jun 2007 to Jun 2011.

worsened over the past decade. The exploitation included physical and verbal abuse and dangerous work environments.⁴

23. The reports included recommendations that:

- the Australian Government clarify the employment status of outworkers;
- government clothing procurement include contractual terms to protect outworkers by requiring manufacturers to comply with workplace laws;
- the Homeworkers Code of Practice be finalised and adopted by all participants in the garment retailing and manufacturing process⁵;
- the Australian Government fund an education program to assist businesses to implement the Homeworkers Code of Practice⁶; and
- the industry adopt a label declaring that the employment conditions under which a garment was made complied with legislative requirements.

2001 Cregan, C. *Home Sweat Home*

24. In 2001, Professor Christina Cregan of Melbourne University published the results of a research project into garment outworkers, in a report titled 'Home Sweat Home'. Cregan's study interviewed 119 outworkers working in Melbourne. The outworkers made an average hourly rate of \$3.60. The ACCC notes this may be compared to minimum Award rates of \$10-\$12 at the time.⁷ Over 90% received no paid leave or public holidays.⁸ Cregan found that 62% sewed 7 days a week, 26% 6 days a week, and that the majority of outworkers sewed more than 10 hours per day. The study also found high levels of delayed or unpaid remuneration and other payment irregularities.

2007 Harpur, P. *Occupational health and safety duties to protect outworkers: the failure of regulatory intervention and calls for reform*

25. In 2007, Paul Harpur conducted a broad ranging review which collated information from a variety of sources including previous academic studies, court cases and Australian State and Federal government reviews of textile, clothing and footwear outworkers. This review cited previous studies that common occupational health and safety risks suffered by outworkers included overwork, poor lighting, dangerous unguarded equipment, exposure to dyes and bleaches which caused various skin conditions, and violence from their suppliers.⁹

⁴ Senate Economics References Committee (1997) *Outworkers in the Garment Industry 1996* p. xi.

⁵ Senate Economics References Committee (1997) *Outworkers in the Garment Industry 1996* p. xv.

⁶ Senate Economics References Committee (1998) *Review of the Inquiry into outworkers in the garment industry 1998* p. 6.

⁷ Australian Industrial Relations Commission (2000) *Re Clothing Trades Award 1999* Print S1147 <http://www.fwc.gov.au/alldocuments/PR904513.htm>.

⁸ Cregan, C (2001) *Home Sweat Home* Melbourne University p. 8.

⁹ Harpur, Paul D. (2007) *Occupational health and safety duties to protect outworkers: the failure of regulatory intervention and calls for reform* Deakin Law Review, 12(2) pp. 63, 64, 66, 67.

26. Harpur found that poor working conditions were common despite the fact that direct suppliers were often in close proximity to outworkers' premises (in order to deliver materials and collect products) and thus had the opportunity to inspect those premises and provide training. This was despite legislation in most states and territories that makes businesses responsible for the occupational health and safety conditions of any outworkers they directly contract to (and in the ACT, to any outworkers in their supply chain).¹⁰

2007 Brotherhood of St Laurence *Ethical Threads: Corporate social responsibility in the Australian garment industry*

27. The Brotherhood of St Laurence produced a report in 2007 concerning outworkers in the garment industry. Although the study interviewed a very small sample of outworkers (13), the outworkers interviewed indicated that a shortage of work meant that conditions had declined since the time of the Cregan study in 2001.¹¹
28. The study found limited awareness of legal obligations and outworkers' working conditions on the part of businesses. The businesses themselves, particularly smaller ones, cited difficulties in complying with legal obligations and the Homeworkers Code of Practice due to lack of access to suppliers who were compliant, small manufacturing bases and limited corporate capacity. In addition, there was a perception that due to lack of consumer interest, there was no business case in adopting corporate social responsibility measures.
29. Specifically in relation to the Homeworkers Code of Practice, businesses and business representative organisations felt that there was little support for it within the industry. The Code Committee was closely identified with the TCFUA and Fairwear (a labour rights organisation) by business respondents and there were concerns expressed regarding potential mismanagement.¹² Businesses were also concerned about the cost of accreditation (a flat rate fee of \$2000 at the time).
30. The study identified a variety of remedies including increasing dialogue between contracting companies, workers, suppliers and their representative organisations. The study recommended using industry events to increase awareness of labour rights issues and legal obligations. The study also noted that there was 'scope for governments to support vulnerable workers through their procurement activities'.¹³ Other strategies identified included targeting industry educational institutions and maintaining a list of Award compliant manufacturers.

2008 Green, R. *Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries*

31. In 2008, Roy Green produced a report commissioned by the Department of Innovation, Industry, Science and Research into exploring ways to improve the viability and capability of the Australian textile, clothing and footwear industries.

¹⁰ Harpur, Paul D. (2007) *Occupational health and safety duties to protect outworkers: the failure of regulatory intervention and calls for reform* Deakin Law Review, 12(2) pp. 53-56.

¹¹ Diviney, E and Lillywhite, S (2007) *Ethical Threads: Corporate social responsibility in the Australian garment industry* Brotherhood of St Laurence p. 4.

¹² Diviney, E and Lillywhite, S (2007) *Ethical Threads: Corporate social responsibility in the Australian garment industry* Brotherhood of St Laurence p. 9.

¹³ Diviney, E and Lillywhite, S (2007) *Ethical Threads: Corporate social responsibility in the Australian garment industry* Brotherhood of St Laurence p. 1.

32. The report acknowledged the growing consumer awareness and demand for products that have been designed and manufactured in accordance with ethical standards relating to labour conditions, animal welfare and environmental sustainability. The report noted the difficulty of defining and monitoring ethical standards. However, the report noted that Australian firms were seeking certification processes to gain a legitimate advantage in both Australian and overseas markets where consumers wish to be assured of ethical production standards and to have the opportunity to make an informed choice about purchasing. The report recognised the efforts of the industry in developing the Homeworkers Code of Practice to meet this need.¹⁴

2011 Senate Education, Employment and Workplace Relations Committee Report Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill

33. In 2011, the Senate Education, Employment and Workplace Relations Committee reviewed the proposed Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill. Following the report of this inquiry, the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 amended the Fair Work Act 2009. The main amendments included:
- more comprehensive provisions deeming outworkers as employees;
 - a process for outworkers to recover unpaid amounts from indirect principal businesses further up the supply chain;
 - increased rights of entry into business premises by unions; and
 - provision for the introduction for a mandatory industry code of practice via regulations.

Existing workplace legal obligations

34. The Code requires compliance with existing legal obligations and is intended to complement those obligations. The Code also relies upon the obligations of businesses to permit entry to the TCFUA, under existing law, in order to implement an effective supply chain audit mechanism.
35. 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 has not entered into the national industrial relations system and has no relevant Award, the Code obliges unincorporated businesses in that State to comply with the general minimum terms and conditions set under State law. 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.

¹⁴ Green, R. (2008) *Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries* Department of Innovation, Industry, Science and Research vol 1, p. 110.

The *Fair Work Act 2009*

36. The Fair Work Act commenced operation on 1 July 2009, replacing the previous *Workplace Relations Act 1996*. Under section 26, the Fair Work Act applies to the exclusion of all State or Territory industrial laws 'so far as they would otherwise apply in relation to a national system employee or a national system employer'. However section 27(2) preserves the operation of State laws in relation to a number of matters including outworkers.
37. The following sections of the Fair Work Act are relevant to the legal obligations and liability of businesses in the textile, clothing and footwear industry which contract out work:
- an employer is prohibited from misrepresenting to an individual that a contract for employment is actually a contract for services under which the individual would perform work as an independent contractor (sham contracting);¹⁵
 - an outworker is defined as:¹⁶
 - (a) an employee who, for the purpose of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises; or
 - (b) an individual who, for the purpose of a contract for the provision of services, performs work:
 - i) in the textile, clothing or footwear industry; and
 - ii) at residential premises or at other premises that would not conventionally be regarded as being business premises;
 - in many circumstances, outworkers in the textile, clothing and footwear industry are taken to be employees of any business for which the outworkers perform work either directly or indirectly.¹⁷
38. The effect of the above provisions is that, for many businesses which outsource work which is ultimately performed by an outworker, those businesses are liable should the outworker not get paid their full legal entitlements.¹⁸ This makes such a business reliant on the compliance of all contractors in its supply chain, even if the work has been further sub-contracted out by other businesses. There are certain exceptions for retailers depending upon the retailers' oversight of the work performed.¹⁹
39. The Fair Work Act also grants unions the ability to enter workplaces and access records and documents to investigate suspected contraventions of the Fair Work Act or a related instrument. As well as these general provisions, there are also

¹⁵ Sections 357-359 *Fair Work Act 2009*.

¹⁶ Section 12 *Fair Work Act 2009*.

¹⁷ Section 789BB *Fair Work Act 2009*.

¹⁸ In this case, business, means a defined Commonwealth outworker entity: a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory or (broadly) a person who subcontracts work commonly performed by outworkers in a way that is connected with a Territory. Section 12 *Fair Work Act 2009*.

¹⁹ Division 3, Part 6-4A *Fair Work Act 2009*.

special provisions which facilitate easier union access to investigate suspected contraventions relating to textile, clothing and footwear outworkers.²⁰

The Textile, Clothing and Footwear Award 2010

40. The TCF Award is an instrument created under the Fair Work Act which establishes the minimum terms and conditions of employment in the textile, clothing and footwear industry. Prior to the decision of the Fair Work Commission which established the TCF Award, these minimum terms and conditions of employment were established by a mixture of State legislation and State and Federal Awards which covered particular sections of the industry (e.g. the Clothing Trades Award 1999 (Cth)).
41. In addition to provisions dealing with minimum conditions for standard full time, part-time and casual employees, Schedule F to the TCF Award also contains various special provisions in relation to outworkers. Broadly:
- any principal business which contracts out work is obliged to be registered with the relevant Fair Work Commission Board of Reference. Such arrangements are referred to as 'giving out work'. If a business gives out work to another business which in turns gives out the work, then both businesses are considered to be principals;
 - a principal is required to make and retain a written record of work which is contracted out (work record), which is also to be provided to the person with whom the principal has made the arrangement;
 - there are further record keeping obligations if a principal gives out work directly to a worker or a worker's family business. Alternatively, a principal may give out work only to other principals or to businesses which will perform the work using in-house employees;
 - a principal must make and retain a list of each person to whom it has given out work and the dates this occurred. A copy of the list is to be provided quarterly to the Fair Work Commission and the state branch of the TCFUA;
 - principals who give work directly to outworkers are required to provide workers entitlements as though the outworkers are full-time or part-time employees;
 - a principal is liable if a business to which it has given out work owes unpaid amounts to the workers who performed the work (whether due to non-payment or incorrect payments). This extends the Fair Work Act obligations to more businesses and workers.
 - principals require the consent of the TCFUA or the TCF Award Board of Reference (the Fair Work Commission) in order to give out work to more than 10 workers at any time; and
 - upon request, principals are required to provide relevant documents to the TCFUA for inspection and copying.

Fair Work Commission

42. Previously known as Fair Work Australia, and established on 1 January 2010, the Fair Work Commission is the national workplace relations tribunal. The Fair Work

²⁰ Chapter 3 Part 3-4 *Fair Work Act 2009*.

Commission also maintains the Boards of Reference for the purposes of the TCF Award. The Fair Work Commission has the power to vary awards, make minimum wage orders, approve enterprise agreements, determine unfair dismissal claims and make orders on such things as good faith bargaining and industrial action. The Fair Work Commission is also able to assist employees and employers to resolve disputes at the workplace through mediation.²¹

Fair Work Ombudsman

43. The Fair Work Ombudsman is a statutory office established on 1 January 2010 under the Fair Work Act. The Fair Work Ombudsman's functions include promoting harmonious, productive and cooperative workplace relations and ensuring compliance with Commonwealth workplace laws. In exercising these functions, the Fair Work Ombudsman provides information and education regarding Australia's workplace relation system. It also investigates and litigates complaints and breaches of workplace laws, awards and agreements.²²

The Homeworkers Code of Practice

44. The Code is a tool to enable businesses to manage their own compliance, including exposure to noncompliance in their supply chains, with relevant awards (currently the TCF Award) and workplace laws in the textile, clothing and footwear industry (referred to generally as 'legal obligations'). The proposed terms of the Code are the result of negotiations since 2010 between the TCFUA, Council of Textile and Fashion Industries of Australia Limited (TFIA), Australian Industry Group, the NSW Business Chamber, the Australian Retailers Association and individual businesses which are members of the Code Committee.²³
45. The role of the Code Committee under clause 5 of the Code is to:
- develop the Code;
 - make accreditation decisions under the Code and settle disputes; and
 - oversee Ethical Clothing Australia.
46. Ethical Clothing Australia is a registered business name of the Code Committee and it is used to refer to the staff of the Code Committee who are responsible for its day to day operations. The staff of the Code Committee consist of a national manager, two accreditation advisors, an administrative officer, a finance officer, and a media and communications director.
47. Ethical Clothing Australia's role under clause 7 of the Code is to promote ethical behaviour in the industry, administer the Code and assist applicants and accredited businesses. Ethical Clothing Australia provides some training and marketing regarding the Code to businesses and consumers, runs a telephone line to provide assistance to businesses undergoing accreditation and auditing and has developed detailed guidelines to assist businesses to understand their legal obligations in relation to workers' entitlements.

²¹ Fair Work Commission website: <http://www.fwc.gov.au/index.cfm?pagename=aboutrole>.

²² Fair Work Commission website: <http://www.fairwork.gov.au/about-us/pages/default.aspx>.

²³ The ACCC notes that at this stage, it is unclear whether the Council of Textile and Fashion Industries of Australia Limited will rejoin the Code Committee.

48. The TCFUA's role under clause 6 of the Code is to audit businesses' compliance with their legal obligations. When conducting such audits, if incidences of noncompliance are discovered, the TCFUA's compliance officers are expected to educate businesses as to how to become legally compliant. The TCFUA is also expected to assist Ethical Clothing Australia to promote workers' and consumers' awareness of the Code and workers' legal entitlements.
49. The operations of the Code are subsidised by Australian Government grants provided through the Department of Education, Employment and Workplace Relations.²⁴ This funds the day to day operations and training provided or outsourced by Ethical Clothing Australia and the compliance auditing by the TCFUA. The yearly fees of \$330-\$6600 (depending on size) paid by accredited manufacturers (but not retail signatories) also make a contribution to the operations of the Code.
50. The agreements that comprise the Code and for which reauthorisation is sought are the:
 - Manufacturers' Agreement (Part 1)
 - Retailers' Agreement (Part 2).

Manufacturers' Agreement

51. The Manufacturers' Agreement is a contractual agreement between the TCFUA, the Australian Industry Group and the NSW Business Chamber. This first level agreement governs the relationship between the manufacturing related representatives on the Code Committee. In conjunction with the Retailers' Agreement, it also governs the parameters within which the Code Committee operates.
52. In order to become accredited under the Code, a business enters into a copy of the same agreement with the TCFUA alone. At this level the agreement is directed at governing the relationships between the business and the TCFUA and the Code Committee.
53. The Manufacturers' Agreement establishes a system to accredit individual manufacturers, fashion houses and wholesalers in the textile, clothing and footwear industry (referred to generally as accredited suppliers). In order to become accredited, businesses must commit to ensuring that workers in their supply chain, including outworkers, receive their legal entitlements. Once accredited, a business becomes automatically licensed to display the Ethical Certification Trademark series.²⁵
54. In order to gain and maintain accreditation, a supplier is required to:
 - a) ensure to the best of its ability that all textile, clothing or footwear entities in its supply chain are compliant with their legal obligations.²⁶ This includes ensuring that:
 - i. all of its direct in-house workers and outworkers are receiving, at a minimum, their legal entitlements;

²⁴ The most recent grant was awarded for a four year period from 2011-2015.

²⁵ Clause 10, Part 1 Homeworkers Code of Practice (7 March 2013 version).

²⁶ Clause 9, Part 1 Homeworkers Code of Practice (7 March 2013 version).

- ii. all workers in its supply chain who work on its products are receiving, at a minimum, their legal entitlements;
 - iii. any outworkers in its supply chain receive a standard letter regarding the Code and the role of the TCFUA in the industry;²⁷
 - iv. it, and all suppliers within its supply chain, are registered with the Board of Reference if they give out work; and
 - v. if it gives out work to contractors other than outworkers, it has received a statutory declaration from each of its contractors in the form of Schedule 1, 2 or 5 of the Code as relevant;
- b) provide as relevant signed statutory declarations to Ethical Clothing Australia, attesting to its compliance with Part 1 of the Code;²⁸
 - c) pay the yearly accreditation fee²⁹ and provide the documentation which it is legally required to create under the TCF Award and workplace laws³⁰ to Ethical Clothing Australia; and
 - d) co-operate with the TCFUA regarding compliance checks of itself and all of the entities in its supply chain and advise Ethical Clothing Australia of any changes to its manufacturing circumstances.³¹
55. Each accredited manufacturer commits to investigating within 14 days any notification by the TCFUA that a supplier is in breach of its legal obligations. If the accredited manufacturer confirms the breach, the accredited manufacturer must cease trading with the supplier unless and until the supplier has remedied its breach within 14 days.³²
56. To the extent that the Code contains content as to workers' entitlements, this content is largely for information and replicates existing legal obligations in the TCF Award and the Fair Work Act.
57. The ACCC notes the proposal to include a clause in the Code to the effect that: with the exception of clause 9.4(d) of Part 1 of the Code, the Code is intended to reflect requirements of the Award and relevant workplace laws. A party who complies with an Award or workplace law will also have complied with a provision of the Code that is intended to reflect the relevant requirement of the Award or workplace law as in force from time to time.
58. The ACCC considers that this will ensure that the Code will not extend participating businesses' existing legal obligations to workers, including if those legal obligations change in the future.
59. The exception in clause 9.4(d) of Part 1 of the Code potentially extends the liability of an accredited supplier to cover unpaid remuneration to outworkers within its supply chain.³³ In specific circumstances, this supplements the mechanisms to

²⁷ The standard letter is Schedule 6, Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

²⁸ Clauses 9.2, 9.3 and 9.4, Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

²⁹ Clause 11, Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

³⁰ Work agreements, work records, wages records, superannuation fund and record of payments, workers compensation fund and record of payments.

³¹ Clause 8, Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

³² Clause 9.5, Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

³³ Clause 9.4(d), Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

recover unpaid workers' entitlements in clause F.7 of the TCF Award and Division 3 of the Fair Work Act. This is discussed further under 'Scope' in 'ACCC Evaluation'.

60. The Code provides for the deaccreditation of a manufacturer if it or its supply chain become noncompliant with the Code or if the manufacturer ceases manufacturing in Australia. Prior to deaccrediting a manufacturer, the Code Committee is required to provide notice to the accredited manufacturer stating the grounds of deaccreditation. The manufacturer has 28 days from the notice's delivery date to provide material to satisfy the Code Committee that it has complied with the Code.

Retailers' Agreement

61. Broadly, the Retailers' Agreement is an agreement between the TCFUA, the Australian Industries Group, the NSW Business Chamber and the Australian Retailers Association. This agreement governs the operations of the Code Committee. As with the Manufacturers' Agreement, individual retailers may also sign a copy of Retailers' Agreement and thus become retail signatories under the Code.
62. The Retailers' Agreement establishes a system whereby retailers can ensure that all Australian textile, clothing and footwear businesses in their supply chain are compliant with their legal obligations. By becoming a retail signatory to the Code, each retailer agrees to:
 - a) inform the TCFUA immediately if it becomes aware that a supplier in its supply chain may not be complying with its legal obligations;³⁴
 - b) immediately investigate any claims by the TCFUA that a supplier in its supply chain has breached its legal obligations and advise the TCFUA of the outcome;³⁵
 - c) take all action reasonably required by the TCFUA to encourage any supplier in breach of its legal obligations to remedy the breach within 14 days. This may include termination of the supply contract and boycott of the supplier;³⁶
 - d) provide the necessary documents in order to allow the TCFUA to find and audit the compliance of all suppliers in its supply chain. This information may be provided in the form of a list of the suppliers' contact details and existing documents required to be produced by taxation and corporations law;³⁷
 - e) inform all of its existing and any future suppliers that it is a signatory to the Code and that the TCFUA will be conducting checks of suppliers' compliance with their legal obligations in relation to workers' terms and conditions;³⁸
 - f) require each of its suppliers to provide to it those documents, which it will then make available to the TCFUA, which are required by the TCFUA in order to audit each supplier's compliance with their legal obligations;³⁹
 - g) include in any future supply agreements, and use its best endeavours to amend existing supply agreements to include, obligations on its suppliers to.⁴⁰

³⁴ Clause 4.7, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

³⁵ Clause 6, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

³⁶ Clause 6.3 and 6.4 *Homeworkers Code of Practice* (7 March 2013 version).

³⁷ Clause 3 and 4.1, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

³⁸ Clause 4.2, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

³⁹ Clause 3.1(c), Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

- i. undertake to comply with all legal obligations including registration with the Board of Reference if they give out work;
 - ii. keep appropriate records (as required by law) regarding contracted work;
 - iii. make available to the retailer, within five days of being requested, those records which the supplier is legally obliged to create; and
 - iv. acknowledge that the retailer may terminate any contract with the supplier or refuse to enter into any future contract with the supplier if it is proved that the supplier has not complied with its legal obligations;
- h) appoint a liaison officer for the purpose of handling all enquiries or allegations raised by the TCFUA in relation to the Code;⁴¹ and
 - i) permit its suppliers to use the Ethical Certification Trademark series on labels and swing tags if they are accredited under the Code.
63. The Retailers' Agreement also includes clauses regarding the resolution of any disputes between the parties to the Retailers Agreement via mediation conducted by an independent mediator as agreed by both parties.
64. The Retailers' Agreement may be terminated by each party upon no less than three months written notice, or less in the event that the other party refuses to mediate in good faith or remedy a breach of the Retailers' Agreement.⁴²

Interaction with state mandatory codes

65. New South Wales and South Australia have mandatory codes of practice in relation to textile, clothing and footwear industry outworkers. Both mandatory codes provide an exemption from compliance with the relevant state mandatory codes for retail signatories or manufacturers accredited under the Code.⁴³

Submissions received by the ACCC

66. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC specifically sought submissions from the members of the Code Committee (which includes the TCFUA, industry representative groups and individual businesses), relevant state and Australian Government departments, industry representative groups which are not members of the Code Committee and various non-government stakeholders.
67. The ACCC received 31 submissions from interested parties in relation to the Code Committee's request for interim authorisation. Many of these submissions were also expressed to apply to the ACCC's consideration of the substantive application

⁴⁰ Clauses 4.3 and 4.4, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

⁴¹ Clauses 4.5 and 4.6 Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

⁴² Clause 9, Part 2 *Homeworkers Code of Practice* (7 March 2013 version).

⁴³ The South Australian *Outworker (Clothing Industry) Protection Code* is made by regulation under section 99C of the *Fair Work Act 1994* (SA). The New South Wales *Ethical Clothing Trades Extended Responsibility Scheme* is made by regulation under Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW).

for reauthorisation. After seeking further submissions in relation to the substantive application the ACCC received another 18 submissions.⁴⁴

68. In making this draft determination, the ACCC has taken into account the information provided in all of the submissions received to date.

Submissions supporting the authorisation application

69. The ACCC received submissions (including some submissions received on a confidential basis) from industry associations, individual businesses and the TCFUA that expressed support for the Code. Public submissions were received from the Department of Education, Employment and Workplace Relations, Oxfam, the TCFUA, Fairwear, the NSW Business Chamber, Ted Eftimiadis (a business representative on the Code Committee), New Model Beauty Queen and So Stella.
70. These submissions supported the Code Committee's claims that the Code is likely to reduce the unlawful treatment of workers, provide an efficient means by which businesses can show their compliance with legal obligations and also reduce supply chain risks.

Submissions opposing the authorisation application

71. The ACCC also received a number of confidential and nonconfidential submissions expressing concerns with reauthorisation of the Code in any form. Public submissions opposing the authorisation were received from the Council of Textile and Fashion Industries of Australia Limited (TFIA), the National Retail Association (NRA), Jenny Bannister, M Recht Accessories Pty Ltd, GTG Industries Pty Ltd t/a Skoola, Markit Apparel Online and Wilderness Wear Australia Pty Ltd.
72. A number of interested parties including the TFIA and the NRA queried the claimed public benefits of the Code, given:
- a claimed reduction in the number of homeworkers;
 - a claimed lack of exploitation of homeworkers; and
 - the existence of alternative methods which are available to increase businesses' compliance with their legal obligations.⁴⁵
73. Further, interested parties considered that the Code has given rise to detriments, and is likely to in the future, because:
- compliance with the Code is not voluntary in certain circumstances;
 - there are high compliance costs, in particular the cost of paperwork and seeking many statutory declarations; and
 - the involvement of the TCFUA in the process of accreditation under the Code, including the scope of the audits performed by the TCFUA (which imposes

⁴⁴ Some interested parties have made multiple submissions.

⁴⁵ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission 5* April 2013 Letter pp 3, 7; Jo Kellock, *Council of Textile and Fashion Industries of Australia submission 4* March 2013 Letter pp 5-6.

further costs upon businesses and to which some businesses have an objection).⁴⁶

74. Several of the confidential submissions and the submission from Markit Apparel Online opposing the application were received from small businesses who consider themselves wrongly classified as outworkers under the TCF Award and the Fair Work Act. These small businesses did not consider themselves or other similar small business owners in the industry as subject to exploitation. Further, they considered that their ability (and the ability of similar people) to establish and run a small home based business had been significantly inhibited by measures in the TCF Award and the Fair Work Act which are intended to protect them as outworkers. These businesses considered that the Code would lead to public detriment through the effect of greater compliance cost burden on small businesses such as themselves.
75. The views of interested parties and the responses by the Code Committee are considered further in the ACCC's evaluation of benefits and detriments in this draft determination. Copies of the public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

76. The ACCC's evaluation of the Code is in accordance with the relevant net public benefit tests⁴⁷ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.
77. In order to assess the likely effect of the Code and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future with and without the Code.

Scope of the Code

Coverage of textiles and footwear

78. The ACCC notes that it has received a number of submissions from the TFIA and from businesses that the revisions incorporated within the Code have unjustifiably extended the operation of the Code to include textile and footwear businesses (in addition to clothing businesses) and to cover all workers of those businesses (not just outworkers).
79. The ACCC notes that the range of businesses which may become accredited is limited by the definition, in Part 1 of the Code, of 'Products' which may be supplied by accredited businesses. Similarly, the type of businesses which may become retail signatories is limited by the definition of 'Goods' in Part 2 of the Code. These

⁴⁶ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter pp 2, 3, 6.

⁴⁷ Sections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the Act. The relevant tests are set out in full at Attachment A.

definitions also define the range of businesses which may be audited in a relevant supply chain.

80. Previously, the definitions of 'Products' and 'Goods' in the Homeworkers Code of Practice included a reference to 'wearing apparel' which the Code Committee and the TCFUA have interpreted to extend to footwear. Accordingly, the Code Committee has previously accredited footwear businesses and accepted such businesses as retail signatories.
81. In relation to textiles products, the definition of 'Products' did not explicitly include textiles products. However, the definition did include a statement that: '[i]t is an intention of the parties to expand the definition of product to encompass all items manufactured by parties to this agreement.'⁴⁸ The ACCC also notes that the definition of 'Goods' included many items commonly considered to be textile products including handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain, and ornamentations made of textiles, felts or similar fabrics, or artificial flowers.
82. The Code Committee has revised the definition of 'Products' to explicitly include any article of footwear or any textile product. The definition of 'Goods' remains unchanged and therefore also includes many textile products as well as footwear, given the previous interpretation of 'wearing apparel'.
83. The Code Committee submits that the Code was originally established to reflect and supplement the outworker and contracting out provisions of the Clothing Trades Award 1999, which was replaced by the modern Textile, Clothing and Footwear Award in 2010.⁴⁹ In addition, many relevant laws are expressed to apply to the whole textiles, clothing and footwear industry and are not limited to, for example, the clothing section of the industry. Examples include the Commonwealth Procurement Rules, the Fair Work Act and State occupational health and safety legislation. Therefore, the extension of Part 1 of the Code to explicitly include textiles manufacturers (in particular) reflects changes in the coverage of the underlying Award and laws.
84. The ACCC agrees that the revisions to the definition of 'Products' will extend the operations of the Code to some textiles businesses not previously covered. The ACCC considers that the revisions do not go beyond the definitions of the types of businesses covered by the TCF Award and relevant State and Federal legislation. The ACCC considers that increases in the scope of the Code have the potential to affect the magnitude of the likely public benefits and detriment discussed below but do not necessarily, of themselves, constitute a likely public benefit or public detriment.

Coverage of all workers

85. The ACCC notes the submissions objecting to the Code on the basis that the revisions to the Code mean that the Code explicitly covers all workers of relevant businesses, not just outworkers. These submissions also objected to the fact that,

⁴⁸ Clause 4.10, Part 2 of the *Homeworkers Code of Practice* as authorised on 17 February 2011.

⁴⁹ Homeworker Code Committee Submission 6 March 2013 *HWCC Response to ACCC issues regarding revised HWCP* p. 6.

under previously authorised versions of the Homeworkers Code of Practice, the TCFUA has audited the working conditions of employees and factory workers, not just outworkers.

86. The ACCC refers to Part 1 of previous versions of the Code in which retailers commit to take action in the event of exploitation being identified. For example, clause 4.7 of Part 1 of the Code authorised by the ACCC in 2011 states that:

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

87. The ACCC notes that since 2005, Part 1 of the Code has included a definition of 'exploitation' as:

"Exploitation" occurs where a Supplier breaches the Federal Award or State Award or an award of an industrial tribunal or legislation in respect of the engagement of its employees and/or contractors, and such breach involves either a failure by the Supplier to comply with award obligations binding upon the Supplier to register or provide lists for notification of contracts or keep records or else (in relation to any other type of breach by the Supplier) such breach is, in all the circumstances, detrimental to those employees and contractors.

88. The ACCC notes that Part 2 of previous versions of the Code has been more explicitly focused upon outworkers (referred to as homeworkers). However, the ACCC also notes that "Manufacturer" in these previous versions of the Code clearly contemplates that accredited businesses may conduct production in-house (using in-house workers rather than outworkers). This reflects the intention of the Code Committee (stated in relation to previous authorisations) to ensure that all workers in an accredited business's supply chain receive their Award and legislative entitlements.⁵⁰

89. The ACCC considers that there is some confusion in the industry regarding the scope of the Homeworkers Code of Practice and that the revisions in the Code are likely to provide clarification on this point. However, the ACCC also considers that the coverage for both in-house workers and outworkers has been an attribute of the Homeworkers Code of Practice since the version authorised by the ACCC in 2005 (and reauthorised in 2011). Accordingly, the ACCC does not consider that the revisions in the Code extend its operations beyond previous versions of the Homeworkers Code of Practice in this respect.

Comparison of obligations owed to workers under the Code with existing legal obligations

90. The ACCC has received a number of submissions which express concerns that the Code imposes obligations upon businesses additional to existing legal obligations. The ACCC notes that the intention of the Homeworkers Code of Conduct is to require compliance with existing legal obligations in relevant awards and legislation rather than to extend these obligations. Therefore, to the extent that the Code includes substantive obligations to workers, these have been included in the Homeworkers Code of Conduct for educative purposes.

⁵⁰ For example, in Homeworkers Code Committee *Application for authorisation 2010* p. 8.

91. The one exception is clause 9.4(d) which intentionally extends the liability of some accredited suppliers to cover unpaid remuneration to outworkers within their supply chains.⁵¹ The ACCC notes that this is not a new clause and was present in the version of the Homeworkers Code of Practice which was authorised by the ACCC in 2005 (and reauthorised in 2011).
92. The ACCC also notes that amendments to the Fair Work Act during the life of the Homeworkers Code of Practice have reduced the extent to which the Homeworkers Code of Practice differs from underlying legal obligations. In particular, the amendments contained in the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* gave outworkers the ability to recover unpaid amounts from indirect principals which are subject to the Fair Work Act. The ACCC notes that only defined Commonwealth outworker entities are subject to the outworker provisions of the Fair Work Act discussed in paragraph 42 and 43 of this Draft Determination.⁵²
93. Each of these entities are also subject to the provisions of the TCF Award. The TCF Award gives all workers, including outworkers, the ability to recover unpaid amounts from principals who have directly contracted with their contractor. Due to the referral of State employment powers, except in Western Australia and subject to transitional arrangements, businesses such as sole traders and partnerships are also subject to the TCF Award.
94. Given the above considerations, the ACCC considers that the incremental extension in clause 9.4(d) of Part 1 of the Code is likely to have the greatest effect upon small State based businesses which are unincorporated.
95. The ACCC also considers that there is a risk that the Award or underlying workplace laws may change in the future in a way which is inconsistent with the content of the Code. In particular, the ACCC notes section 9 of Part 1 of the Code includes a number of specific obligations (for example minimum and maximum hours) agreed to by accredited suppliers.
96. However, the ACCC also notes the proposal to include a clause in the Code to the effect that: with the exception of clause 9.4(d) of Part 1 of the Code, the Code is intended to reflect requirements of the Award and relevant workplace laws. A party who complies with an Award or workplace law will also have complied with a provision of the Code that is intended to reflect the relevant requirement of the Award or workplace law as in force from time to time.
97. The ACCC considers that this will ensure that the Code will not extend participating businesses' existing legal obligations to workers, including if those legal obligations change in the future.
98. In conclusion, the ACCC considers clause 9.4(d) is an extension in the obligations that a business may owe workers which is above the existing legal obligations arising under the TCF Award and workplace laws. The effects of this extension on the likely benefits and detriments are considered below.

⁵¹ Clause 9.4(d), Part 1 *Homeworkers Code of Practice* (7 March 2013 version).

⁵² That is: a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a Territory or (broadly) a person who subcontracts work commonly performed by outworkers in a way that is connected with a Territory. Section 12 *Fair Work Act 2009*.

The relevant area of competition

99. The Code Committee submits that the Code applies to businesses in the textile, clothing and footwear industry that manufacture products in Australia. The relevant areas of competition encompass the breadth of the textile, clothing and footwear 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.
100. The ACCC notes that the textile, clothing and footwear supply chain comprises a number of functional levels as described in the Code Committee's submission. 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.

The future with and without test

101. The ACCC considers the '*likely future with-and-without*' the conduct that is the subject of the authorisation (in this case, the Code) to identify and weigh the public benefits and public detriments generated by conduct for which reauthorisation has been sought.⁵³
102. The ACCC considers that in the absence of the conduct for which authorisation is sought, it is unlikely that the Code would operate in its current form. This is because the Code contains conduct which is at significant risk of breaching the Act.
103. The ACCC notes that in the absence of the Code, textile, clothing and footwear businesses would continue to be required to comply with any relevant award, the Fair Work Act, and other applicable legislation. For example, many principal businesses which contract out work may have liabilities under these existing legal obligations if a direct contractor or a sub-contractor fails to fully comply with legal obligations in relation to workers.
104. The ACCC considers that, to the extent that businesses have voluntarily participated in the Code, these businesses would be likely to seek to replicate the effects of the Code to ensure the compliance of their own supply chains. The ACCC considers that any system which would be capable of fulfilling such a role, including understanding a variety of contracting relationships, would impose similar costs in terms of auditing and fees.
105. While it may be possible for the Code Committee to amend the Code to lessen the concerns under the Act this would constitute a significant dilution of the Code. The ACCC notes that the effectiveness of the Code to encourage compliance with legal obligations depends upon those provisions of the Code which potentially raise concerns under the Act. In particular, the potential trading sanctions which retailers and manufacturers agree to impose on non-compliant suppliers further up the production chain is a powerful mechanism to ensure compliance.
106. The ACCC therefore considers that the relevant future without the conduct is the situation in which the proposed Code is not implemented and potentially, a

⁵³ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

significantly diluted version of the Homeworkers Code of Practice is introduced in its place.

Public benefit

107. Public benefit is not defined in the Act. However, the Australian Competition 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.⁵⁴

108. The public benefits claimed by the Code Committee may be summarised as:

- a) efficiencies in businesses' management of their supply chain risks;
- b) efficiencies in the means by which businesses in the industry may signal their ethical status to interested consumers and for consumers to easily gain assurance as to the ethical status of industry products; and
- c) increased compliance by businesses with their legal obligations in relation to textile, clothing and footwear workers.

109. Each of the public benefits are considered in more detail below.

Efficiencies in the management of supply chain risks

The Code Committee submissions

110. The Code Committee notes that the TCF Award and the Fair Work Act impose a cascading series of obligations upon each business in a supply chain, in relation to the payment of workers who perform contracted work, particularly outworkers. This creates a risk for retailers and manufacturers who give out work, should a supplier further up in the supply chain fail to pay its workers correctly due to insolvency or for other reasons. This risk and other risks (such as the potential for non-delivery of contracted items or quality control issues) are exacerbated by supply chains that are not transparent.

111. The Code Committee submits that businesses which seek accreditation or become retail signatories to the Code generally believe that they have a complete understanding of their supply chains and that all businesses within it are compliant. However, auditing of these supply chains often reveals sub-contracting by suppliers to other businesses or outworkers, which has occurred without the knowledge or specific consent of the principal business. In addition to risks of non-payment, undisclosed contracting may create issues of quality control and delivery delays. Therefore, the transparency created by the Code's auditing procedures assists businesses to quantify and control several supply chain risks.

112. Once suppliers are identified using the transparency provisions within the Code, the Code Committee undertakes a range of activities to assist these suppliers to

⁵⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

identify and meet their legal obligations. To the extent that a supplier understands and is assisted to meet its legal obligations, this reduces the risks of all principal businesses within the industry that are supplied by that supplier.

113. The Code Committee submits that since 2010 the range of activities it has undertaken to assist businesses to manage their supply chain risks include:⁵⁵
- a) revising the Homeworkers Code of Conduct, its website and its internal practices and procedures to remedy areas of confusion.
 - b) managing program delivery for the compliance services and the outworker outreach program provided by the TCFUA, thus helping principal businesses to identify and quantify the risks posed by sub-contracting.
 - c) managing program delivery for the industry education and training provided by the TFIA.⁵⁶ The TFIA's training related activities have included:
 - i. development of a training program for the industry *Plan for People: HR Strategy and ECA Accreditation* which provides information regarding the TCF Award, the Fair Work Act, occupational health and safety and other workplace laws, and the forms and record keeping obligations to maintain compliance with the above legal obligations;
 - ii. more than 40 training presentations to industry participants conducted by TFIA, including presentations to tertiary students and hosting industry specific events such as *Building Consumer Confidence in Textile & Fashion Sustainability* which was co-hosted by the TFIA and the National Retailers Association; and
 - iii. delivery of TCF Award training through several new platforms (business clusters and the monthly *Plan for People* forums on the Textile & Fashion Hub), which were established as joint initiatives including the TFIA to facilitate networking and dissemination of skills and information amongst industry businesses with common interests.
 - d) providing direct assistance and information to businesses through:
 - i. a telephone advice line and a shopfront, with particular emphasis given to assisting small and emerging businesses;
 - ii. the development and launch of a comprehensive guide to the TCF Award;
 - iii. the development of template record keeping spreadsheets and forms to help businesses register with the Boards of Reference, keep complete work records and written records of outworker arrangements and meet other legal record keeping obligations; and
 - iv. updating industry training slides to incorporate the development of the TCF Award guide and associated business record keeping tools.
114. It has also developed and is soon to launch a new web based education program to respond to industry feedback regarding a preference for flexible self-paced training as opposed to face to face training sessions.

⁵⁵ Homeworker Code Committee *Amendment to Application for Authorisation A91354-A91357 7* March 2013 Appendix 1, p 12.

⁵⁶ The ACCC notes that these activities are provided for under the Code Committee's grant and are likely to continue.

115. The Code Committee notes that clause 9.4(d) of Part 1 of the Code potentially extends a principal's obligations in relation to unpaid work performed by outworkers. This section of the Code applies only to accredited suppliers (not retail signatories). The Code Committee submits that this obligation has been a long standing part of the Homeworkers Code of Practice and reflects the commitment that accredited businesses make to outworkers.⁵⁷

Submissions supporting the application

116. The benefit of efficiencies in the management of supply chain risk claimed by the Code Committee was supported by a number of interested parties' submissions made to the ACCC. For example, Mr Eftimiadis, Pacific Brands' representative on the board of the Homeworker Code Committee provided an individual submission. Mr Eftimiadis stated that: 'it is very important to my employer Pacific Brands to have such accreditation. In simple terms it is a risk management tool.'⁵⁸

Submissions opposing the application

117. The submissions opposing the application did not directly address the effect of the Code upon supply chain risks.

ACCC consideration

118. The ACCC recognises that 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. Around 80% of existing accredited suppliers are incorporated and thus, to the extent that these businesses give out work, they are subject to the full range of obligations under the Fair Work Act and the TCF Award.

119. The ACCC notes that these legal obligations may extend to a contractor's or sub-contractor's in-house workers or to outworkers. As an example, a principal business which is supplied by a firm which becomes insolvent may be jointly or individually required to pay out the firm's employees and/or outworkers. Importantly, this risk is not limited to the 'head' business which originally gave out the work or the business which directly contracted with the subsequently insolvent firm. Each of the sub-contractors in the supply chain between the head business and the insolvent business are also regarded as principals and have the potential to also be jointly and individually liable.

120. In addition to the supply chain risk resulting from existing legal obligations, the ACCC accepts that businesses in this industry are also vulnerable to other supply chain risks as a result of non-transparent supply chains. In particular, businesses may suffer from quality control issues and delivery delays.

121. The ACCC considers that the transparency and auditing obligations in the Code are likely to assist many participating businesses to manage their supply chain risks. The ACCC also considers that in the absence of the Code, bigger businesses at least, are likely to have the capacity to implement their own individual supply chain risk management measures. However, the ACCC considers that the Code is likely

⁵⁷ Homeworker Code Committee Submission 17 May 2013 *HWCC Response to ACCC issues regarding revised HWCP* pp. 1-2.

⁵⁸ Ted Eftimiadis *Submission 2* April 2013.

to provide greater efficiencies in the management of supply chain risks than a piecemeal approach by individual businesses. For, example, there are likely to be auditing efficiencies to the extent that supply chains are shared by accredited businesses and retail signatories.

122. As discussed under 'Scope', the ACCC considers that clause 9.4(d) of Part 1 of the Code provides for an incremental extension in some businesses' obligations to outworkers over existing legal obligations. The extension is likely to have most effect upon small unincorporated State based businesses. For these businesses, this extension in obligations is likely to reduce the total benefit arising from any decrease in supply chain risks noted above. Whether these businesses are likely to experience a net benefit due to the efficiencies in management of supply chain risk is likely to depend on the specific circumstances of the businesses (approximately 20% of currently accredited businesses are unincorporated).

Conclusion

123. The ACCC considers that the Code is likely to improve business efficiency in managing supply chain risks, particularly in relation to the risk that a sub-contractor is not compliant with its legal obligations to workers. The ACCC also considers that the identification of sub-contracting practices will incidentally help businesses to more efficiently manage supply chain risks arising from quality control and delayed delivery. The ACCC considers that the Code is likely to improve businesses' efficiency in managing supply chain risks and that this constitutes a likely public benefit.

Efficiencies in signalling compliance with legal obligations

The Code Committee submissions

124. The Code Committee submits that the Code, in conjunction with the Ethical Certification Trademark series, provides an efficient means for businesses in the industry to provide positive assurance to customers that they have met their legal obligations in relation to workers' entitlements. In this case, 'customers' include both consumers and bulk end purchasers of textile, clothing and footwear products such as government procurement areas and the uniform departments of some businesses. For example, the Australian Government's procurement guidelines require all suppliers of Australian manufactured textiles, clothing or footwear products to be accredited or seeking accreditation to qualify for tenders.⁵⁹
125. The Code and the Ethical Certification Trademark series provide an efficient means for customers to assure themselves that particular textile, clothing or footwear goods have been produced by workers who have received their correct entitlements. The Code Committee submits that the credibility of the Code in this regard is enhanced by its comprehensive nature and representation by both industry groups and the TCFUA on the accreditation body (the Code Committee).

⁵⁹ Homeworker Code Committee *Amendment to Application for Authorisation A91354-A91357* March 2013 Appendix 1, p 14.

126. Since 2010 and in particular since the Homeworkers Code of Practice was last authorised by the ACCC, in order to enhance knowledge of the Code and reinforce the above efficiencies, the Code Committee has undertaken the following activities:

- a) obtained a second round of program funding from the Department of Education, Employment and Workplace Relations (DEEWR) for a four year period (2011-2015);
- b) to increase the marketing appeal of accreditation (and improve the business case for certification), it:
 - i. registered the Ethical Certification Trademark series, to replace the old 'No Sweat Shop' label;
 - ii. launched the consumer campaign 'Meet Your Maker'; and
 - iii. refreshed the marketing appeal of its website.
- c) in order to raise business's awareness of the advantages of accreditation it:
 - i. made large numbers of presentations to existing businesses and tertiary level students who
 - ii. were about to enter the industry; and
 - iii. participated in major fashion and 'fair trade' oriented events;
- d) in order to support government purchasing decisions (in the context of the Commonwealth Procurement Rules which mandate that all Australian textile, clothing and footwear suppliers seek accreditation)⁶⁰:
 - i. gave presentations to businesses participating in the Defence Materials Organisation Clothing Forum and provided tender training workshops to industry; and
 - ii. worked with government purchasing officers and established a secure web portal to facilitate the process of checking tenderers accreditation status.⁶¹

127. In addition to the promotion of the Code, Ethical Clothing Australia also engaged in promotion of accredited manufacturers at fashion and industry events and in its publications.

Submissions supporting the application

128. A number of accredited businesses submitted that they considered that they had benefited from the use of the Ethical Certification Trademark series in order to promote their business's ethical status. For example, So Stella noted that the labels are used as a talking point with customers and to help educate its customers regarding the reasons why So Stella charges more for its products. So Stella's website has received significant traffic from its link to the accredited manufacturers

⁶⁰ The Australian Government Procurement Statement (issued in July 2009) and Fair Work Principles (issued in January 2010) include a specific statement to this effect and are used to interpret the Commonwealth Procurement Rules issued in July 2012 (previously the Commonwealth Procurement Guidelines).

⁶¹ Homeworker Code Committee *Amendment to Application for Authorisation A91354-A91357* 7 March 2013 Appendix 1, p 23.

page on the Ethical Clothing Australia website. Ethical Clothing Australia also promoted So Stella's products at the Sustainable Living festival in Melbourne.⁶²

Submissions opposing the application

129. Several Code participants submitted that their businesses had not benefitted from increased demand for their products following accreditation and in some cases demand had decreased. Accordingly, these businesses questioned whether the Code had achieved its aim of promoting the benefits of goods sold by businesses audited under the Code.⁶³
130. Businesses which had become accredited mainly in order to be able to tender for Australian Government contracts noted that the accreditation was not accepted for state government contracts. Therefore, those businesses which specialise in fulfilling government contracts must undertake a number of different processes in order to meet different government requirements. Other businesses submitted that their existing accreditation under various international ethical standards should be accepted by the Australian Government as equivalent to accreditation under the Code. These businesses did not consider that the availability of Code accreditation provided an efficient signal due to the limited cross-recognition between the various accreditation and certification schemes.

ACCC consideration

131. The ACCC notes that the Code provides a method by which businesses can effectively signal to customers that Australian manufactured textile, clothing and footwear products have been produced in compliance with the TCF Award and workplace laws. The ACCC considers that the Code provides a benefit in this respect to businesses that would be compliant with their legal obligations even without the Code. It is likely that this signalling provides more information to customers and enables them to make better informed purchasing decisions, resulting in the public benefit of more informed markets.
132. The ACCC also notes that the Commonwealth Procurement Rules require all suppliers in the textile, clothing and footwear industry which participate in tenders to be accredited under the Code.
133. The ACCC notes that many of the businesses which are on the Code Committee's list of accredited businesses use the Ethical Clothing Australia certification trademark on their website. Many of these businesses also made explicit claims regarding the ethical nature of their products, using their accreditation to substantiate this claim.
134. The ACCC notes the submissions from some businesses that they have not experienced an increase in sales following accreditation. The ACCC notes that the public benefit arising from more informed markets does not necessarily translate into greater sales for any individual accredited business or accredited businesses as a whole. This is because information about compliance with legal obligations is

⁶² Michelle Kent, *So Stella submission* 3 April 2013.

⁶³ E.g. Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 4 March 2013 Letter p 6.

likely to be one of a number of factors that customers take into account when making purchase decisions.

135. The ACCC notes that there are a variety of alternative methods of signalling and ascertaining a business's ethical status in relation to labour standards. These include:

- certification under international standards such as ISO 26000;
- certification by a relevant non-government agency such as Fairtrade;
- Australian state government worker and outworker codes of practice;
- direct investigations by consumers and consumer representative groups; and
- representations made by individual businesses (which may or may not be independently audited).

136. The ACCC considers that there is potential value in a diversity of accreditation schemes in that this gives customers a choice as to the scope and level of assurance to use in purchasing decisions.

137. However, the ACCC does not consider that the alternative certification and signalling schemes suggested in submissions are comparable in scope and intent to the Code. The ACCC also does not consider positive assurance mechanisms such as the Code are equivalent to negative assurance mechanisms (such as the fact that the Fair Work Ombudsman has not taken public action against a business). Accordingly, the ACCC is satisfied that the fact that a businesses is an accredited supplier or retail signatory under the Code conveys information regarding compliance with the TCF Award and workplace laws which is not conveyed by other methods.

Conclusion

138. The ACCC considers that the Code provides efficiencies in signalling reliable information regarding a business's compliance with the TCF Award and workplace laws and that these efficiencies are likely to lead to a public benefit in the form of more informed markets.

Increased compliance with legal obligations in relation to workers

The Code Committee submissions

139. The Code Committee submits there is evidence revealed in the anecdotes attached to its authorisation application and the findings of various government enquiries and academic studies that some textile, clothing and footwear businesses do not comply with their legal obligations.⁶⁴ The Code Committee submits that this non-compliance not only affects workers within the industry but also their families.

⁶⁴ Productivity Commission (2003) *Report of TCF Assistance, August 2003*; Senate Economic Reference Committee (1996) *Outworkers in the Garment Industry*; Diviney, E & Lillywhite S, (2007) *Ethical Threads – Corporate social responsibility in the Australian garment industry*, Brotherhood of St Laurence.

140. The Code Committee submits that the Code increases businesses' compliance with their legal obligations through:

- a) measures to educate relevant businesses regarding their legal obligations including through outreach programs and during TCFUA compliance audits;
- b) measures to ensure the transparency of the supply chains of accredited suppliers and retail signatories, allowing every business in the supply chain to be found and contacted;
- c) yearly audits by the TCFUA and statutory declarations that provide a check upon a business's compliance and the compliance of all suppliers in that business's supply chain. The ACCC notes that the provision of compliance visits and outworker contact has met or exceeded the key performance indicators set by DEEWR;
- d) the potential for boycotts of suppliers who are not compliant with their underlying legal obligations; and
- e) education of workers and consumers regarding the Code and the industry's legal obligations, which enhances incentives for businesses to comply with their legal obligations.

141. Since 2010 and in particular since the Homeworkers Code of Practice was last authorised by the ACCC on 17 February 2011, the Code Committee submits it has undertaken a range of activities in accordance with its obligations under the Code to encourage increased compliance with the TCF Award and workplace laws.⁶⁵ These include the following activities:

- a) developed a compliance checklist for use by TCFUA compliance officers and businesses undergoing the accreditation process;
- b) developed and launched an industry supply chain database and supply chain mapping tool;
- c) produced education materials and resources in various languages to assist outworkers to understand their entitlements. The TCFUA assisted in producing the Vietnamese version and Asian Women at Work the Chinese version; and
- d) updated the Guidelines for Accreditation.

142. The Code Committee submits that as at 7 March 2013, 80 suppliers were accredited and 141 businesses were retail signatories under the Homeworkers Code of Practice. As a result, the Code Committee submits that approximately 500 entities which are in these businesses' supply chains have been audited as compliant with their legal obligations in relation to the TCF Award and workplace laws.⁶⁶ The ACCC notes that this may be compared to the number of Australian textile, clothing and footwear manufacturing businesses which, as illustrated by **Table 1**, was over 7,500 in 2011.⁶⁷ Although, the TFIA's submission that the number of businesses in the industry have since decreased substantially.

⁶⁵ Homeworker Code Committee *Amendment to Application for Authorisation A91354-A91357* 7 March 2013 Appendix 1, p 12.

⁶⁶ Homeworker Code Committee *Amendment to Application for Authorisation A91354-A91357* 7 March 2013 Appendix 1, p 12.

⁶⁷ 8165.0 - Counts of Australian Businesses, including Entries and Exits , Jun 2007 to Jun 2011.

Submissions supporting the application

143. The ACCC received a number of submissions supporting the effectiveness of the Code in increasing businesses' compliance with their legal obligations, within supply chains audited under the Code. In particular, the TCFUA, Fairwear and Oxfam provided public submissions which support the arguments and anecdotes provided by the Code Committee.
144. Oxfam's submission noted that Oxfam promotes the Homeworkers Code of Practice overseas as one of the few examples of a code which works to successfully [increase the transparency of] garment supply chains and allows the [investigation of] the treatment of outworkers in those supply chains.⁶⁸
145. The ACCC notes that the TFIA's submission supports the Code Committee's assessment that the Code has been effective in increasing compliance with legal obligations, however the submission opposes the application on other grounds.⁶⁹

Submissions opposing the application

146. Many of the submissions which oppose the Code Committee's application, including those from the TFIA, claim that the Code is unnecessary and therefore unlikely to result in any public benefit. In particular, these submissions claim that the number of outworkers in the industry has reduced dramatically, for a variety of reasons including reductions in the size of the industry as a whole and the inflexibility of using outworkers under current legal requirements. These submissions question the figures provided by the TCFUA and the Code Committee as to the number and proportion of outworkers in the industry.⁷⁰
147. Many of the submissions also claim that, based on experience, the remaining outworkers in the industry are not exploited. In some cases these submissions have been made by businesses which use outworkers (directly or indirectly). These submissions included anecdotes indicating that the business was aware of outworkers who were satisfied with flexible working conditions which may not be compliant with the TCF Award or the Fair Work Act. The submissions indicated that outworkers preferred the flexibility to set their own minimum and maximum hours according to their family commitments rather than as required by law.⁷¹ In addition, it was submitted that the children of outworkers appreciated the opportunity to earn substantial amounts of money by working in the family business and this practice is facilitated by more flexible working conditions.
148. In other cases, the submissions have been made by individuals who have sought to start small businesses from home and are legally classified as outworkers but do not see themselves or other small business owners in the industry as subject to

⁶⁸ Daisy Gardener, *Oxfam submission* 26 March 2013.

⁶⁹ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter pp 4-5.

⁷⁰ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 4 March 2013 Letter p 3-5. The TCFUA has submitted that the ratio of factory based workers to outworkers within the industry varies between 1:4 and 1:10 depending on the supply chain. (Vivienne Wiles, *TCFUA submission* 8 April 2013 p. 20). In its submissions to the various reviews and inquiries listed in the 'Industry Background', the TCFUA has commonly proposed an estimated figure of around 300,000 outworkers.

⁷¹ E.g. Gloria Gavranic *Skola submission* 3 March 2013 p. 1.

exploitation. To the contrary, these small business owners submit that the measures intended to prevent their exploitation as outworkers have significantly inhibited their ability to establish their businesses. An example of such a submission is the public submission from Markit Apparel Online.

149. Finally, some submissions noted the existence of a variety of alternative mechanisms which are available to reduce any exploitation which might otherwise occur. At a federal level these include the Fair Work Ombudsman, the Fair Work Commission and the TCFUA using its powers under the TCF Award and the Fair Work Act. Given the number of alternative compliance mechanisms, these submissions questioned the need for the Code.

ACCC consideration

150. The ACCC acknowledges the submissions from some industry participants that they have not witnessed exploitation of outworkers and/or workers either recently or in some cases at all.

151. However, the ACCC considers that the information provided in submissions, academic studies and government reviews (including those discussed in the Industry Background section of this paper) indicates that there is greater potential for businesses to fail to comply with their legal obligations in relation to outworkers than in relation to workers in traditional employment arrangements. For example, a recent Fair Work Ombudsman's report into its review of clothing manufacturers in Queensland found that although only 11 of 171 businesses reviewed were found to employ outworkers, seven of those businesses had contravened the outworker specific provisions of the TCF Award. The report noted that in several other cases it was impossible to assess whether outworkers had been correctly paid or not due to the lack of records kept.⁷²

152. The ACCC also notes that the 2007 Brotherhood of St Laurence study (summarised in 'Industry Background') indicated that the fragmented nature of the industry and the non-transparent nature of the supply chains meant that most businesses in the industry had little awareness of the working conditions of the workers in their supply chain. In particular, although 16 of 19 company representatives had visited a workplace where their garments had been made, few companies had a systematic process to evaluate factory conditions and only five large companies gathered information about outworker's employment conditions.⁷³ This study also found that none of the small company representatives were aware of the need to be Award compliant.

153. The ACCC also considers that lack of compliance with relevant Awards including the TCF Award and workplace laws is a continuing issue for all parts of the industry. As an example, in the recent Fair Work Ombudsman's report discussed above, of the 171 businesses audited, 29% were in contravention of workplace laws. Of these, 33 businesses (19%) had contravened laws by underpaying workers.⁷⁴ Therefore, the scope of non-compliance found was significantly wider

⁷² Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* pp 7, 12.

⁷³ Diviney, E and Lillywhite, S (2007) *Ethical Threads: Corporate social responsibility in the Australian garment industry* Brotherhood of St Laurence p. 5.

⁷⁴ Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* pp 11-12.

than the seven businesses found to have contravened outworker specific provisions of the TCF Award.

154. While noting the submissions of the TFIA, the ACCC considers that, partly for definitional reasons, the size and proportion of the outworker population and whether it has increased or decreased is unclear. However, the ACCC notes that the Code applies to all workers (and has done since the 2005 authorisation). Further, the ACCC considers that the potential for benefits to arise from greater compliance with legal obligations does not depend upon demonstrating the size and composition of the relevant work force.
155. The ACCC acknowledges that a consequence of the broad protections to outworkers provided by the TCF Award and workplace laws is that these legal obligations may not suit particular businesses in particular circumstances. However, the ACCC notes that these issues arise as a consequence of the existing laws underlying the Code and considers that the consequences are not attributable to the Code.
156. The ACCC considers that the Code contains a number of compliance and enforcement strategies which are likely to encourage compliance with legal obligations. These include the provision of education regarding legal obligations, auditing of supply chains by the TCFUA and the potential for boycotts by retail signatories and accredited manufacturers of suppliers who are not compliant with their legal obligations.
157. Illustrating the importance of education, the Fair Work Ombudsman's report discussed above noted that lack of up to date knowledge by businesses regarding their legal obligations significantly contributed to the level of noncompliance found.⁷⁵ The Code also contains long-term education measures aimed at consumers and workers which are intended to increase incentives to increase compliance in the industry overall.
158. The ACCC notes that many of the activities undertaken by the Code Committee since January 2010 and described in its submission are likely to remedy some of the concerns described by the Brotherhood of St Laurence in its 2007 report (summarised in the 'Industry Background').
159. The ACCC notes that, as submitted by the TFIA, there are a variety of government and non-government entities which also have an interest or responsibility in workers' entitlements generally. However, the ACCC considers that the comprehensive nature of the Code, which audits whole supply chains, facilitates the development of current industry specific knowledge by the Code Committee and the TCFUA.
160. By contrast, in conducting its review of Queensland clothing manufacturers the Fair Work Ombudsman used the Australian Business Register to select 730 businesses for auditing. However, only 171 were audited with the majority having ceased trading (28%), unable to be found (20%) or no longer employing any workers (13%).⁷⁶ The Fair Work Ombudsman also stated that it strongly suspected that it

⁷⁵ Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* pp 12-13.

⁷⁶ Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* p 11.

was likely that it had been unable to find all of the outworkers used by the businesses it had audited.⁷⁷

Conclusion

161. The Code Committee, in accordance with its obligations under the Code, has undertaken a variety of enforcement and compliance activities designed to increase businesses' compliance with their legal obligations to workers. The ACCC considers that there is evidence that some businesses in the industry do not comply with their legal obligations in relation to workers and that the Code Committee's activities are likely to lead to a public benefit in the form of increased compliance. The costs imposed on businesses by the Code in order to gain the benefit of increased compliance are discussed further under 'Public Detriments'.

Conclusion on public benefits

162. The ACCC considers that the Code is likely to lead to public benefits from increased business efficiency due to more efficient management of supply chain risks. This includes risks imposed by the existing legal obligations underlying the Code and risks regarding quality control and delivery delays associated with lack of transparency in businesses' supply chains.

163. The ACCC also considers that the Code is likely to assist businesses to efficiently signal their compliance with their legal obligations to customers. In turn, this is likely to assist customers who have a preference for purchasing products made by businesses which are compliant with their legal obligations to workers, to find such products. The ACCC considers that this is likely to lead to a public benefit in the form of better informed markets.

164. Finally the ACCC considers that the Code is likely to lead to public benefits from increased compliance with the TCF Award and workplace laws by businesses in the textile, clothing and footwear industry. The costs imposed on businesses by the Code in order to gain the benefit of increased compliance are discussed further under 'Public Detriments'.

Public detriment

165. Public detriment is also not defined in the Act but the Australian Competition Tribunal has given the concept a wide ambit, including:

...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.⁷⁸

166. The ACCC received a number of submissions from the TFIA and from businesses which assert that compliance with the Code is perceived as compulsory for many textile, clothing and footwear suppliers. In particular:

⁷⁷ Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* p 13.

⁷⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- a) accreditation is a condition of Australian Government industry grants and participation in procurement tenders, to the extent that the products supplied are to be manufactured in Australia. There is no corresponding requirement imposed on overseas suppliers; and
- b) if a business becomes accredited or is a retail signatory, every supplier in its supply chain must undergo compliance auditing if the suppliers wish to continue supplying in that supply chain. Completion of such compliance auditing does not, by itself, mean that the business qualifies for accreditation.

167. Suppliers who oppose the Code have submitted that in the context of a contracting industry, it is difficult to find alternative markets should a supplier not wish to undergo compliance auditing or gain accreditation to participate in a tender.⁷⁹ The suppliers noted in this regard the costs of compliance imposed by the Code and the involvement of the TCFUA in the audit and accreditation process.

168. While the Code is voluntary except in certain circumstances, the ACCC acknowledges that the operation of the Code has the effect of reaching beyond the businesses which choose to become accredited or retail signatories, to other businesses within their supply chain. The ACCC also notes the requirement in the Commonwealth Procurement Rules for textile, clothing and footwear suppliers to seek accreditation under the Code to participate in tenders. While this measure was introduced by the Commonwealth Government in its role as a model purchaser,⁸⁰ it also reduces the extent to which the Code can be regarded as completely voluntary for all businesses in practice.

169. Therefore, the ACCC has considered the following potential public detriments resulting from the Code:

- a) restriction on competition between suppliers;
- b) increased business costs imposed by the Code, to the extent that these increased business costs are over and above those due to underlying legal obligations and are not incurred on a completely voluntary basis; and
- c) role of the TCFUA as auditor under the Code, in particular to the extent to which a business must undergo more TCFUA compliance activity than it otherwise would and that this does not occur on a completely voluntary basis.

Restriction on competition between suppliers

The Code Committee submissions

170. The Code Committee submits that '[w]hilst the [Code] may have the potential to constrain suppliers, the arrangements under the Code do not substantially affect participating parties' ability to compete.'⁸¹ The Code Committee submits that there is no evidence that previous versions of the Homeworkers Code of Practice have

⁷⁹ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter p 2.

⁸⁰ Department of Finance and Deregulation *Australian Government Procurement Statement Textile, Clothing and Footwear Provisions, Post Implementation Review* September 2012 p. 7.

⁸¹ Homeworke Code Committee *Application for Authorisation A91354-A91357* 21 February 2013 p. 11.

had any adverse effect on competition and that the Code is unlikely to have any adverse effect on competition in any market in the future.

171. The Code Committee advises that to date, instances of a breach of the Retailers' Agreement have been resolved without recourse taken to cancel contracts. The Code Committee submits that enforcement generally takes the form of persuasion directed towards the retailer who is in turn required to attempt to persuade the supplier to remedy instances of noncompliance. In addition, the Code Committee submits that the Code is voluntary for all participants and that accredited suppliers and retail signatories who no longer wish to participate may easily end their association with the Code.
172. The Code Committee also notes the dispute resolution procedures within the Retailers' Agreement. However, it stated that it did not consider that a dispute resolution mechanism was required in relation to accredited businesses (suppliers) due to the nature of the accreditation process. In particular, the Code Committee advised that the accreditation process is voluntary and there is considerable interaction between Accreditation Advisors (Ethical Clothing Australia staff) and the business seeking accreditation. This interaction is separate from and supplemental to any interactions between the business and Compliance Officers from the TCFUA.
173. In relation to de-accreditation decisions, the Code Committee submits that the Code clearly establishes timelines, notice periods and processes. There is an opportunity for the business subject to de-accreditation to provide material to the Code Committee which will satisfy the Code Committee that the business is in fact compliant with the Code.⁸²

Submissions supporting the application

174. The submissions supporting the Code did not directly address the restrictions on competition between suppliers or whether the structure of the Code and the Commonwealth Procurement Rules reduces the extent to which the Code can be considered to be voluntary in all circumstances.

Submissions opposing the application

175. Businesses' submissions opposing the Code stated that the businesses did not consider that compliance with the Code was voluntary in all circumstances. The implications of these submissions have been reviewed above in the introduction to 'Public Detriments'. In many cases these submissions stated that compliance with the TCF Award or particular aspects of workplace laws had inhibited their ability to operate their business. Therefore, these businesses objected to the Code on the basis that it would remove their ability to compete in audited supply chains while also operating in ways which do not comply with the TCF Award or workplace laws. The submissions indicated that the constraints imposed by these existing legal obligations had particular impact upon small suppliers.

⁸² The ACCC notes that businesses may also be deaccredited if they change their manufacturing operations such that they no longer qualify as a type of business which may be accredited (e.g. if all production of textiles, clothing or footwear products is outsourced overseas).

176. Small suppliers submit that they are often characterised as outworkers by existing laws, particularly to the extent that the business is run from home and employs only family members. However, if these small suppliers wish to provide specialised contracted services to a number of principal businesses on an occasional basis it is likely that this business model would make the principal businesses non-compliant with existing outworker protection laws. The submissions from these suppliers state that principals are increasingly reluctant to breach existing legal obligations, particularly if they are participants in the Code. Therefore, these small suppliers consider that the Code is at least partly to blame for their inability or significant difficulties in operating this form of specialised small business.
177. The submissions from small suppliers also state that the outworker provisions inhibit their ability to give out work. Therefore, these small suppliers submitted that they have no option but to operate in breach of their existing legal obligations when giving out work. The suppliers submitted that working around their existing legal obligations in this way was increasingly difficult if they operate in supply chains which participate in the Code (including if this is due to the Commonwealth Procurement Rules),
178. For example, a small designer may wish to give out work to a garment maker with specialised sewing skills. However, as a small business operating in an often highly seasonal industry, the small designer may not have the scale to contract a maker on a permanent part-time basis or to employ the maker as an in-house worker. Some small suppliers acknowledged that it was possible in this situation to satisfy existing legal obligations by giving out work to an intermediary business with in-house workers or contracted outworkers.⁸³ However, these small suppliers submitted that the addition of an intermediary unacceptably raised the costs of their final product.

ACCC consideration

179. A number of clauses in the Code potentially restrict competition between market participants. In particular, restrictions are likely to arise from clauses that require businesses to:
- reflect the provisions outlined in the Code in agreements with suppliers;⁸⁴ and
 - where legally possible, to terminate and not enter into future contracts with suppliers who have been found to be exploiting workers.⁸⁵
180. The ACCC notes the Code Committee's submission that to date, instances of a breach of the Retailers' Agreement have been resolved without recourse taken to cancel contracts. However, the ACCC considers that the potential for boycotts by accredited suppliers or retail signatories would give significant weight to the Code Committee's interactions with suppliers.

⁸³ Outworker intermediaries can aggregate work from a number of small principals and thus can operate at a scale which allows them to employ outworkers permanently on a permanent part-time or full-time basis as required by existing legal obligations.

⁸⁴ Clause 4.3, Part 2 and the terms of the statutory declarations attached to Part 1 of the *Homeworkers Code of Practice* (7 March 2013 version).

⁸⁵ Clause 9.5, Part 1 and clause 6.3, Part 2 of the *Homeworkers Code of Practice* (7 March 2013 version).

181. The ACCC notes that these restraints upon business conduct are key to the Code's compliance and enforcement mechanisms. However, the ACCC has also considered whether the restrictions raise competition concerns. For example, the ACCC would have competition concerns if accreditation decisions, use of the Ethical Certification Trademark series or acceptance of retail signatories could be unfairly denied to any party or if the ability to boycott was used inappropriately.
182. In general, a commitment by businesses to only deal with those suppliers who agree to certain conditions is likely to generate significant concerns about effects on competition. For example, such an agreement between retailers has the potential to restrict the number of suppliers who may access retail channels. Further, any constraint on suppliers may affect their demand for inputs which may impact on third parties which supply goods or services to the 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. Finally, any boycott is likely to harm the boycotted business and its workers.
183. The ACCC acknowledges the submissions, particularly from small suppliers, concerned about the costs imposed on their businesses by existing legal obligations. In particular, the ACCC considers that existing legal obligations make illegal certain forms of business model and operations which have been historically common in the industry. The ACCC considers that as a consequence, these businesses have been inhibited in their previous modes of operation and have incurred higher costs. To some extent this may have contributed to the failure of some businesses which were unable to adapt (although other factors are also likely to have contributed such as the global financial problems in 2008).
184. Nonetheless, the ACCC considers that these are issues which arise from existing legal obligations. The ACCC does not consider that these issues are properly attributed to the Code. Therefore, as with previous versions of the Homeworkers Code of Practice, the ACCC considers that the potential anticompetitive impact is limited by the following attributes of the Code:
- a) retail signatories and accredited manufacturers are only able to agree to boycott suppliers who are not compliant with their legal obligations. That is, the Code does not provide for boycotts of suppliers for commercial reasons;
 - b) the Code contains specific clauses which provide a method to ensure that businesses have the opportunity to present their case and mediate disputes regarding unfavourable decisions under the Code including decisions regarding boycotts. These include:
 - i. the TCFUA is required to provide notice of its concerns to the relevant retail signatory or accredited supplier;
 - ii. the retail signatories and accredited suppliers have an opportunity (and are required) to investigate any concerns raised by the TCFUA in relation to a supplier in their supply chain,⁸⁶ and
 - iii. if there is disagreement between the TCFUA and a retailer regarding whether any business in the retailer's supply chain is engaging in

⁸⁶ Clause 9.5, Part 1 and clause 6.1, Part 2 of the *Homeworkers Code of Practice* (7 March 2013 version).

exploitation, there is provision for meetings to discuss the issue followed by independent mediation if necessary;⁸⁷ and

- c) the structure of the Code Committee (with representatives of workers, industry bodies and individual businesses) provides some assurance that decisions made under the Code will be objective.

185. However, the ACCC notes that unlike retail signatories, accredited businesses have no access to mediation to resolve disputes. In addition, the Code does not make any explicit provision for other stakeholders in the Code such as audited businesses and consumers to present complaints to the Code Committee. Further, the ACCC accepts that stakeholders who have complaints regarding the operation of the Code may perceive a conflict of interest if their complaints are decided or heard by the Code Committee which includes representatives of the organisation being complained about.

186. The Code Committee submits that the nature of the accreditation process involves intensive interaction between Ethical Clothing Australia staff and businesses even during good faith efforts to bring each business into compliance with the TCF Award and workplace laws. The Code Committee submits that it provides oversight to Ethical Clothing Australia staff. In addition, incorporating formal mediation into the accreditation process would significantly delay the accreditation process and cause a disproportionate drain on the time and financial resources of Ethical Clothing Australia.

187. The Code Committee also submits that it understands the desirability of a complaints handling process which applies to all stakeholders and the issue of potential conflicts of interest by the members of the Code Committee. However, the Code Committee notes its small size and the practical difficulties that are likely to result.

188. The Code Committee submits as an example: if a business undergoing auditing had a complaint about the TCFUA, the individual business representatives on the Code Committee may be required to recuse themselves to maintain the confidentiality of commercially sensitive information. If the TCFUA representatives also recused themselves, then only the three business organisation representatives would remain⁸⁸ and this may cause other issues for Code Committee decision making.

189. The ACCC notes the Code Committee's submissions which oppose widening the Code's dispute resolution mechanisms and concerns about a practical means of doing so. However, the ACCC considers that an effective dispute resolution mechanism is important. Accordingly the ACCC seeks further submissions regarding whether further amendments to the Code are appropriate.

Conclusion

190. The ACCC acknowledges that the Code imposes restrictions on accredited suppliers' and retail signatories' dealings with other businesses in order to provide an effective mechanism for businesses to ensure they (and their supply chains) are

⁸⁷ Clause 7, Part 2 of the *Homeworkers Code of Practice* (7 March 2013 version).

⁸⁸ That is, the three representatives from the NSW Business Chamber, the Australian Retailers Association and the AiG.

compliant with legal obligations. However, the ACCC considers that any anticompetitive detriment is likely to be limited by the fact that the Code is voluntary in most circumstances, only businesses which are noncompliant with their legal obligations are potentially subject to boycott and there are some safeguards against misuse of the Code.

191. To the extent that any additional costs imposed by the Code are not incurred voluntarily, the ACCC considers that it is appropriate to consider whether these costs are likely to constitute a public detriment. This issue is considered further below. The ACCC also invites further submissions from the Code Committee and other interested parties regarding the feasibility of widening the Code's dispute resolution mechanisms and practical means of doing so.

Increased costs imposed by the Code

The Code Committee submissions

192. The Code Committee submits that it has made significant efforts to minimise the costs imposed by the Code, including:

- a) reducing the number of statutory declarations from 6 to 4, with templates of each form of statutory declaration provided as an attachment to the Code. The Code Committee submits that it has investigated alternatives to the statutory declarations but that based on legal advice these are considered necessary to the integrity of the Code;
- b) the audit procedures have been developed so that the vast majority of information required for the audit can be accessed from the records that a business in the industry is required to maintain by law in any case. This limits the amount of new paperwork required by the Code to completion of one or two forms; and
- c) development of checklists and guidelines (in Vietnamese and Chinese as well as English) to assist businesses to identify and rectify any missing records prior to commencement of the audit.

193. The Code Committee submits that as a result of its efforts to minimise costs, the only paperwork which may need to be created afresh by a business which has complied with its legal obligations is:

- a) completion of the yearly payment form if it is an accredited supplier (as retail signatories and audited suppliers are not charged fees);
- b) a list of its suppliers (if it does not have such a list already); and
- c) the relevant statutory declarations by itself and its suppliers.⁸⁹

194. The Code Committee also notes that it is run on a not-for-profit basis and that the level of fees charged for accreditation are subsidised by the Australian Government grant funding. Current fees charged to businesses range between \$330 and \$6600, depending upon business turnover and employee numbers.⁹⁰

⁸⁹ Homeworker Code Committee *Submission* 1 March 2013.

⁹⁰ Eg: \$330 - businesses less than three years old and many sole traders, \$440 - businesses with four employees or less, \$1100 - businesses with 16-40 employees, to a maximum of \$6,600 – businesses which outsource more than \$10 million worth of manufacturing.

195. Finally, Ethical Clothing Australia, the TCFUA and the TFIA have provided extensive training to businesses prior to and during auditing and have developed template documentation in order to assist businesses to efficiently meet their record keeping obligations under the TCF Award and legislation.

Submissions supporting the application

196. The TCFUA has provided supporting submissions regarding its efforts to minimise the costs of compliance with the Code.⁹¹ In addition, a number of businesses which have undergone accreditation have provided submissions supporting the Code including an assessment 'that complying with the [TCF] Award and going through Ethical Clothing's re-accreditation process [was not] a significant administrative burden'.⁹²

Submissions opposing the application

197. The TFIA submits that consideration of the costs of the Code should be holistic rather than considering the impact of the Code in isolation. The TFIA submits that considering only the direct impact of the Code fails to take into account the interactions with and between the TCF Award, the Fair Work Act and other legal obligations. The TFIA submits that these interactions have the effect of substantially amplifying the cost impact of each individual legal obligation and these effects are missed when each legal obligation is considered in isolation.⁹³

198. The TFIA provided the Australian Government procurement guidelines as an example of the compounding effects of legal obligations and the Code. The TFIA notes that accreditation is a condition of participation by Australian suppliers in Australian Government textile, clothing or footwear tenders. The TFIA submits that this requirement can only be imposed because the Code is authorised by the ACCC and that no equivalent requirement is imposed on overseas suppliers.

199. The direct costs of accreditation are subsidised through the Department of Education, Employment and Workplace Relations. However, the TFIA submits that there can be significant indirect costs passed through the supply chain. For example, the TFIA submits that in a long supply chain there can be significant costs imposed by audit visits and provision of statutory declarations by every business in the supply chain.⁹⁴ Therefore, the TFIA submits that, the Code in conjunction with Australian Government procurement guidelines makes Australian manufacturers less competitive with overseas manufacturers in Australian Government tenders.

200. Several businesses cited the results of the Chamber of Commerce and Industry Queensland's (CCIQ) study into the costs of the Queensland Mandatory Code of Practice for Outworkers in the Clothing Industry (since repealed).⁹⁵ The CCIQ used

Homeworker Code Committee Submission 3 March 2013 *HWCP Fees Form & Discounts Explained*.

⁹¹ Vivienne Wiles, *TCFUA submission* 8 April 2013.

⁹² Michelle Kent, *So Stella submission* 3 April 2013.

⁹³ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter p 5.

⁹⁴ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Appendix pp 6-7.

⁹⁵ Chamber of Commerce and Industry Queensland *Submission to the Attorney General and Minister for Industrial Relations regarding mandatory code for outworkers* 15 October 2010.

the Australian Government's Business Cost Calculator⁹⁶ and feedback from its member businesses to calculate that the average cost of compliance for each business was \$43,360 per annum with around 10 hours per week spent filling out the required forms and report writing.

201. The TFIA has provided a similar table (see Table 2 below) to that published by the CCIQ, which it submits demonstrates the average cost to a small business in establishing and maintaining accreditation under the Code. The TFIA notes that the table does not include accreditation fees. In accordance with its submission that any consideration of the effects of the Code must also consider its holistic effect, the TFIA acknowledges that the majority of the tasks in the table are existing legal obligations (rather than additional obligations imposed by the Code).

Table 2 - Cost of compliance activity for accreditation (including the costs of becoming compliant with the TCF Award and workplace laws)⁹⁷

COST OF COMPLIANCE ACTIVITY FOR AN ECA ACCREDITATION (does not include ECA accreditation fee)						
<ul style="list-style-type: none"> Based on SME / Brand contracting work out to 3-5 makers (pa) who engage an average 2-4 outworkers each Includes emails, phone calls, compliance visits and meetings to all stakeholders including time taken in securing Statutory Declarations Maintaining manual records and generating manual reports in compliance with code (outside of existing systems and databases) such as value volume data calculations for each order Monitoring of entire supply chain to ensure records are kept by all parties 						
<i>Task</i>	<i>Cost Category</i>	<i>Frequency</i>	<i>Number of Times Performed</i>	<i>Time Required</i>	<i>Labour cost per hour</i>	<i>COST TO BUSINESS</i>
Set up, meetings and understanding ECA / Regulatory Obligations	BOR Notification	Start-up	1 (involves on average 3-5 staff)	76 hours	\$75	\$5,700
Completing Mandatory Fields & Forms for each new order/agreement including value volume data calculations & Stat Decs	Procedural	Weekly	28 per week (average)	30 mins each (728 hrs p.a.)	\$40	\$29,120
Filing and Storage of Records/ Compliance	Monitoring Supply Chain	Weekly	1	1 hours	\$40	\$2,080
Reporting to ECA, BOR & TCFUA	Reporting	Annual	2	15 hours	\$75	\$2,250
Annual Cost to Business						\$39,150
Annual Hours Spent on Compliance						578 hours
Average hours per week per business						11 hours

202. The TFIA submits that the costs of the Code (including the fees and the government subsidy of auditing) may be compared with the costs of international corporate responsibility programs such as Worldwide Responsible Accredited Production (WRAP). TFIA submits that the cost of applying for WRAP certification for a facility is \$1,195. This certification is audited at a cost of \$US600/day, with most factories of 500-1200 employees requiring two days to audit.⁹⁸

⁹⁶ Available from Department of Finance and Deregulation website: <https://bcc.obpr.gov.au/>.

⁹⁷ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Appendix 1.

⁹⁸ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013.

ACCC consideration

The effect on business costs of the interaction between the Code and existing legal obligations

203. The ACCC acknowledges the submissions from businesses that they incur increased costs due to compliance with their existing legal obligations in relation to workers. The ACCC notes the submissions which state that the effect of participating in the Code, in particular the effect of the auditing under the Code, is that these businesses incur a higher level of costs due to the need to become more rigorous in their observance of their existing legal obligations. The ACCC understands that these increased costs are likely to be a significant concern for many businesses.
204. The ACCC notes the TFIA's submission that this means that the effect of the Code is to compound the costs of other legal obligations and that the total compounded cost should therefore be attributed to the Code. However, the ACCC considers that it is inappropriate to assign to the Code the whole cost of regulatory compliance required by existing legal obligations. The ACCC considers that in the absence of the Code, textile, clothing and footwear businesses would continue to be required to comply with their legal obligations and would incur costs from doing so.
205. In particular, the ACCC notes the Code Committee's proposed inclusion of an additional clause in the Code that: with the exception of clause 9.4(d), to the extent of any inconsistency, the obligations under the relevant Award or workplace laws will prevail over the obligations under the Code (paragraph 5 of this Draft Determination).⁹⁹
206. The ACCC considers that the additional clause would ensure that any unintentional inconsistencies between the Code and a business's legal obligations now or in the future (for example due to legislative changes during the life of the authorisation) would not disadvantage participating businesses.¹⁰⁰
207. The ACCC also notes that one of the aims of the Code Committee is to reduce the costs of complying with existing legal obligations in order to facilitate this compliance. The ACCC notes that the Code Committee has introduced a range of measures which are likely to reduce the costs to businesses in complying with their legal obligations. For example, Ethical Clothing Australia has developed spreadsheets which may be downloaded which are structured so as to record all supplier information which a business is required to collect by the TCF Award and workplace laws.
208. The ACCC also considers that the industry training and guides overseen by the Code Committee, the assistance provided through Ethical Clothing Australia's Accreditation Advisors and the telephone helpline are likely to assist businesses to reduce their compliance costs. In particular, these measures are likely to substantially reduce the amount of time or cost of professional advisors which a business may require in order to be aware of and comply with its legal obligations.

⁹⁹ With the exception of clause 9.4(d) which intentionally extends the obligations of businesses in relation to unpaid outworkers (as discussed under 'Scope').

¹⁰⁰ That is, extensions beyond those already discussed under 'Scope'.

209. The ACCC considers that any decrease in the costs of compliance with legal obligations as a result of the Code must be offset against the costs, identified below, of complying with the Code.

Costs of paperwork required by the Code

210. The ACCC notes that a number of submissions referred to the costs of Code compliance. However, in many cases where extensive paperwork was cited as a specific concern, the paperwork in question is a requirement ultimately imposed under either the TCF Award or workplace laws.

211. For example, a number of submissions opposing the Code raised concerns regarding the complexity and cost of completing a work record in relation to an outsourced piece of work. This involves writing a detailed description of the work and a precise estimate of the length of time that the outsourced work will take to complete, which is impacted by many variables. The Fair Work Ombudsman's report also commented on the difficulties its investigators faced in estimating the length of time a worker would take to complete work. However, the report noted that its investigators were able to complete this task using the instructional materials developed by the Code Committee.¹⁰¹

212. The ACCC acknowledges that the completion of work records imposes a cost on businesses. However, the legal obligation (and therefore any additional costs to business) is ultimately imposed by Schedule F of the TCF Award rather than the Code. Further, Ethical Clothing Australia has attempted to reduce the costs and difficulty of creating the work records required by the TCF Award by publishing a paper explaining the methodology which may be used to create them.¹⁰² To the extent that businesses have complied with Schedule F, the only cost imposed by the Code in relation to work records is the cost of providing a physical copy of the work record to Ethical Clothing Australia and the TCFUA.

213. The ACCC acknowledges the CCIQ report cited in business submissions but considers that the report's cost findings are not appropriately attributed to the Code due to the differing nature of the obligations imposed compared to the former mandatory Queensland outworkers code of practice. For example, the CCIQ report noted that a large proportion of the costs from the mandatory Queensland outworkers code of practice arose from the need to regularly fill in by hand detailed hard copy forms for reporting purposes. By comparison, the Code only requires copying of existing records.

214. The ACCC accepts the TFIA's and other submissions that ensuring the proper creation of witnessed statutory declarations may be an involved process, particularly from people with little or no understanding of written English. It also needs to be done by each business and homeworker in a retail signatory or accredited manufacturer's supply chain. However, the ACCC notes the Code Committee's submission that, contrary to the assertions in many submissions, this needs to be done only once per audit period (which is yearly).

¹⁰¹ Fair Work Ombudsman (2013) *Queensland Clothing Manufacturing Audit Report 2011-2012 Final report April 2013* pp 9-10.

¹⁰² Ethical Clothing Australia *Guide to the Textile, Clothing, Footwear and Associated Industries Award – helping you meet your legal obligations*.

215. The ACCC accepts that under the obligations imposed specifically by the Code, the only paperwork which may need to be created afresh by a business which has complied with its legal obligations is completion of:
- a) the statutory declarations
 - b) the yearly payment form, and
 - c) a list of its suppliers.
216. The ACCC considers that the statutory declarations are likely to be the most costly of these obligations to comply with but accepts that they are important for businesses to gain assurance that they and their supply chains are compliant with the TCF Award and workplace laws.
217. Accordingly, the ACCC considers that the additional paperwork required by the Code, in particular the business time and costs required to gain the required statutory declarations, is likely to increase business costs. The ACCC does not however accept that the increase in business costs as a result of the Code (as distinct from underlying compliance costs arising from the TCF Award and other work place laws) are of the magnitude suggested by the CCIQ study or by the TFIA. Notwithstanding this distinction, to the extent that obligations under the Code are not assumed voluntarily, these costs are likely to constitute a public detriment.

Accreditation fees

218. The yearly accreditation fees paid by accredited manufacturers are \$330-\$6600, depending on the size (in terms of employees and turn over) of the manufacturer. New businesses and small businesses with less than 5 employees which perform the core manufacturing processes in-house would pay \$440 or less. Businesses which are more than 3 years old and outsource up to \$200,000 dollars of work including core manufacturing processes may pay up to \$1,000. There is a 10% discount for such businesses if the business was accredited and used the Ethical Clothing certification trademark labels in the previous 12 months and a 20% discount if the business uses accredited suppliers.¹⁰³
219. The ACCC notes the TFIA's and other submissions that the Code provides poor value for money as a way of assuring compliance with workplace laws, particularly as compared to other certification schemes.¹⁰⁴ For example, the TFIA has submitted that WRAP certification for a facility is \$1,195, which is audited at a cost of \$US600/day, with most factories of 500-1200 employees requiring two days to audit.
220. The ACCC considers that the scope and methods of the other certification schemes cited are not comparable with those of the Code. For example, the cost of the WRAP certification discussed by the TFIA applies only to the certification of a single facility and does not attempt to find and assess the working conditions of any outworkers associated with that facility. The Code, by contrast, accredits entire supply chains. In most cases this requires assessment of smaller facilities and businesses (including outworkers) in many disparate locations. Taking the example of the WRAP certification scheme, in order for a retailer or manufacturer to replicate

¹⁰³ The ACCC notes that the Code requires suppliers to be audited but does not require that they are accredited. Auditing, alone, does not qualify a supplier for accreditation.

¹⁰⁴ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter p. 3, 7.

the effect of the Code on its entire supply chain using the WRAP process, it would need to require every business facility and outworker location in its supply chain to pay for individual WRAP certification and auditing. The ACCC considers that in many cases this would impose a substantially larger total cost on the supply chain than certification under the Code.

221. The ACCC notes that the costs of the Code are heavily subsidised by the grant funding from the Department of Education, Employment and Workplace Relations (DEEWR) and in kind contributions from entities with representatives on the Code Committee. Accordingly, the question of the value for money of the Code must incorporate these subsidies as noted by the TFIA.
222. While accreditation costs and the costs of the Code more generally are relevant to the assessment of likely public detriments, the ACCC considers that it is a matter for DEEWR and the committee members whether they consider that they are receiving value for money in terms of the subsidy provided. The ACCC notes in this regard that DEEWR has renewed the Code Committee's grant funding and supported the Code Committee's application for authorisation. In particular further funding was provided to ECA for the period between 2011 and 2014 because:

[Ethical Clothing Australia] demonstrated that it is effective in meeting program objectives, assessed by reference to education activities or compliance visits per quarter, the level of contact with homeworkers and accreditation rates including new applications for accreditation.

Some 3000 workers currently in accredited supply chains would be put at risk if the funding was discontinued and fewer Australian businesses in the [textile, clothing and footwear] industry would be informed of their legal and award obligations and assisted to meet those obligations.

Since the existing funding has been provided to [Ethical Clothing Australia] (i.e. since 2007/08), [Ethical Clothing Australia] has worked with over 100 brands and accredited 68 businesses and has received more than 100 applications for accreditation.¹⁰⁵

223. The ACCC accepts that the Code requires a contribution from accredited businesses in the form of fees towards the costs of the accreditation process, although this contribution is a small proportion of the overall costs of the Code. However, the ACCC accepts that accreditation fees may contribute to an overall increase in business costs as a result of the Code. The ACCC considers that businesses undertaking accreditation are likely to consider the increased business costs from fees when assessing the costs and benefits to the business of seeking accreditation. To the extent that accreditation is not undertaken voluntarily, these fees are likely to constitute a public detriment.

The costs of compliance auditing

224. The ACCC accepts that businesses undergoing an audit incur some compliance costs. These costs include the cost of management time interacting with the auditor and disruption to workers' ordinary work practices. Provision of physical copies of existing records to the TCFUA for auditing purposes may also impose some cost,

¹⁰⁵ Department of Finance *Australian Government Procurement Statement Post-implementation Review* 12 April 2013 p. 6.

although in most cases the audit requirements can be satisfied by a small sample of different types of documents.¹⁰⁶

225. The ACCC notes that the Code relies on the TCFUA's existing powers under existing legal obligations to enter premises, interview workers and inspect and copy records to conduct the required auditing. In particular, these existing legal obligations avoid the need for accredited businesses and retail signatories to renegotiate contracts with their suppliers to allow access by an auditor. As such, the form of the audit under the Code is the same as what would be likely to occur during a normal TCFUA inspection of a workplace. Since participation in the Code makes such an inspection a certainty as opposed to a possibility, the ACCC recognises that the Code imposes an additional cost on businesses arising from more frequent auditing.
226. However, the ACCC considers that some of this additional cost of more frequent compliance auditing would also be imposed were a business to utilise any other form of certification or method to ensure that its supply chain complies with the TCF Award and workplace laws. That is, any alternative compliance audit is likely to require access to premises, interviews with workers and inspection and copying of records to ensure its integrity. Therefore, the ACCC considers that it is only to the extent that the costs of increased compliance auditing are not voluntarily incurred that the increased costs are likely to constitute a public detriment.

Conclusion

227. The ACCC recognises the Code imposes a number of different costs upon businesses from increased paperwork, compliance auditing and fees. It is incumbent upon the Code Committee to ensure that these costs are minimised and to maximise the offsetting cost savings from measures to facilitate compliance with businesses' underlying legal obligations. To the extent that the Code is voluntary in nature, the ACCC considers that it is a matter for each business to decide whether to incur these costs by assessing the costs and benefits of becoming accredited or a retail signatory or supplying such a business.
228. However, the ACCC accepts that the requirements of the Code are such that some businesses will view their involvement as involuntary in some circumstances, either because they plan to participate in Australian Government tenders or because another business or businesses in their supply chain has decided to seek accreditation or to become a retail signatory. To the extent that compliance with the Code is involuntary in some circumstances, the ACCC considers that the Code imposes a cost on businesses which would not be incurred if authorisation is not granted. The ACCC considers that this constitutes a likely public detriment.

The role of the TCFUA as auditor under the Code

The Code Committee submissions

229. The Code Committee submits that the choice of the TCFUA as the auditor under the Code is due to the Code's reliance upon the existing powers and operations of

¹⁰⁶ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission* 5 April 2013 Letter p. 6-9.

the TCFUA under workplace laws. In particular, the Fair Work Act and the TCF Award grant the TCFUA wide powers to enter workplaces and inspect and copy documents. Further, the TCFUA has the industry experience and contacts required to efficiently conduct audits, including the ability to find and contact outworkers. Finally the Code Committee submits that, contrary to the submissions of some businesses, the TCFUA does not make a profit from the compliance auditing that it undertakes under the Code.

Submissions supporting the application

230. The TCFUA submitted that it has a critical and legitimate role in ensuring that the textile, clothing and footwear industry operates on an ethical and sustainable basis. This includes ensuring that appropriate labour standards are observed and that unfair advantage is not gained by businesses who seek to undercut their reputable competitors by exploiting the workers within their supply chains who make their products.¹⁰⁷
231. The TCFUA notes that, when auditing a business under the Code, its practice is to notify the business of its intention to conduct an audit and send the business the checklists that its Compliance Officers will use to assess the business. Businesses also have access to extensive guidelines regarding their legal obligations prepared by the Code Committee and assistance from Ethical Clothing Committee staff. If businesses become aware that they are not compliant with their legal obligations upon receiving this information, the businesses also have some opportunity prior to the audit to utilise the tools developed by the Code Committee to commence remedying this non-compliance.
232. The TCFUA advises that its practice in conducting the audit is to arrange the audit for a time that suits the business and that it accommodates cancellations. In conducting the audit, its Compliance Officers seek to work with the business to remedy non-compliance with legal obligations. This may require a number of visits to a business, although it is also common in the case of businesses with relatively short and simple supply chains that the audit process takes relatively little time.
233. Oxfam stated in its submission that key features that have led to the success of the Homeworkers Code of Practice are the supply chain transparency and the ability of the union to access workplaces to assess working conditions.¹⁰⁸

Submissions opposing the application

234. As well as the costs of compliance with the Code, a number of suppliers have expressed concerns that the TCFUA is the only choice of auditor under the Code.
235. In addition to general objections to a union presence on their premises, some submissions expressed the concern that the TCFUA had a conflict of interest in undertaking the role of auditor. Some businesses that had undergone auditing expressed concerns that the TCFUA appeared to treat the audit visit as a recruiting opportunity (by engaging in discussions with workers and providing a letter regarding union membership) and had spent little time checking records. Other

¹⁰⁷ Vivienne Wiles, *TCFUA submission* 8 April 2013 p. 23.

¹⁰⁸ Daisy Gardener, *Oxfam submission* 26 March 2013 p. 1.

businesses expressed concerns that the TCFUA required unreasonable access to records and required an excessive amount of documentation.

236. Many submissions, such as the TFIA's submissions, expressed overall concerns that the lack of competition for the role of auditor contributed to the high cost of auditing and a heavy handed approach.¹⁰⁹ Other submissions expressed doubts as to whether auditing actually occurred at all or if the Code Committee just depended upon the statutory declarations from businesses.

ACCC consideration

237. 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 TCFUA 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 any auditing fees. The cost of engaging the auditor in this instance is effectively paid by government grants, through the Code Committee.
238. Weighed against the removal of potential competitive pressure, the ACCC considers that there are advantages to the use of the TCFUA as the sole auditor. In particular, the Code draws upon the TCFUA's extensive industry experience and existing powers to enter industry workplaces and examine industry documents. The use of a single auditor facilitates the pooling and cross-checking of information, as for example the development of supplier mapping across the whole industry.
239. In response to the submission that the TCFUA does not actually conduct any auditing, the ACCC is satisfied on the evidence before it that the TCFUA does in fact audit the businesses in the supply chain of a retail signatory or accredited business and does not simply rely solely on the presentation of statutory declarations. In relation to the concerns raised in submissions regarding the TCFUA's potentially mixed motives as auditor, the ACCC would be concerned if the TCFUA were to use its auditing role as a means of recruiting new members.
240. The ACCC notes the concerns expressed regarding the TCFUA's use of interviews with workers rather than extensive examination of records. In contrast, other businesses have complained of the excessive paperwork required and intensity of the TCFUA's auditing.
241. The ACCC notes that for efficiency reasons, it is a common auditing technique to use interviews with key personnel to identify likely areas of concern and to sample only a small proportion of records relating to other areas. In addition, some breaches of workplace laws (for example failure to properly extract dust) may not be readily apparent from documentation but may be discovered through discussions with workers. The ACCC notes that the issue was extensively discussed in the 2007 study conducted by Harpur (noted in the 'Industry Background' section).¹¹⁰ Finally, the ACCC notes that the audit has an educative as

¹⁰⁹ Jo Kellock, *Council of Textile and Fashion Industries of Australia submission 5 April 2013* Letter p 3; Jo Kellock, *Council of Textile and Fashion Industries of Australia submission 4 March 2013* Letter p 5.

¹¹⁰ Harpur, Paul D. (2007) *Occupational health and safety duties to protect outworkers: the failure of regulatory intervention and calls for reform* Deakin Law Review, 12(2) pp. 74-75.

well as compliance focus. Therefore, to the extent that a business's managers are able to verbally demonstrate knowledge of the business's legal obligations, the auditing is likely to require considerably less time to complete.

242. Therefore, the ACCC also considers that it is not inappropriate for the TCFUA to assess a business's compliance with its legal obligations via verbal interviews with its workers and samples of documents rather than by extensively reviewing written records. The ACCC also notes that complaints regarding the auditing process may be submitted to the Code Committee and/or to DEEWR which both provide oversight. In particular, it is the role of the Code Committee to determine the priority to be given to factors such as: risk management as opposed to risk minimisation, the relative weight given to verbal as opposed to written evidence, an educative or enforcement approach, and the overall cost effectiveness of the audit program.
243. While noting the advantages of the TCFUA as the auditor under the Code, the ACCC considers that there may be some value in making some provision in the Code for an alternative auditor (at the expense of the business invoking the provision). For example, should a business have an objection to undergoing more frequent compliance auditing by the TCFUA than it would otherwise, it may elect to appoint its own auditor, subject to the terms described below.
244. The ACCC notes that the TCFUA's ability to enter a workplace means that retail signatories and accredited suppliers do not need to renegotiate their supply contracts to incorporate specific terms to allow compliance auditing of their supply chains. Therefore, the use of an alternative auditor would need to occur on the understanding that otherwise the auditing would be conducted by the TCFUA. The auditor would also need to be approved and overseen by the Code Committee and would provide all documentation and coordination with Ethical Clothing Australia as is done by the TCFUA.
245. The ACCC notes the objections of the Code Committee that it would be very difficult to find an auditor with the industry experience and contacts to identify hidden contracting relationships and gain the trust of workers, particularly outworkers. In addition the Code Committee has submitted that the costs of an alternative auditor are likely to be high for the business involved (since it would not be subsidised by the government grant) and that it would also incur substantial costs in overseeing any alternative auditor.
246. The ACCC would have significant concerns were it to receive evidence that the TCFUA has engaged in misconduct in the course of its auditing as this would call in doubt the claimed public benefits likely to arise under the Code and would be likely to increase the public detriments. The ACCC is seeking further submissions from the Code Committee and other interested parties regarding the feasibility and utility of including provision for an alternative auditor under the Code.

Conclusion

247. The ACCC considers that there are a number of potential advantages arising from the use of the TCFUA as the sole auditor under the Code. These include efficient use of existing contacts and efficiencies in the development and cross-checking of industry information. The TCFUA also has existing powers under legislation which facilitates its auditing role.

248. The ACCC would be concerned if it were to receive evidence of misconduct by the TCFUA in the course of auditing undertaken in relation to the Code. In particular, misconduct in relation to the Code's compliance auditing mechanisms would be likely to undermine the public benefits discussed above and increase the likely public detriments. However, the ACCC has no evidence that such misconduct has occurred.

249. The ACCC invites further submissions from the Code Committee and other interested parties as to whether provision for an alternative auditor could be incorporated into the Code for businesses which have an objection to being audited by the TCFUA more frequently than would otherwise occur given the TCFUA's existing right of entry.

Conclusion on public detriments

250. The ACCC considers that that the Code is likely to result in some public detriment in the form of greater costs to businesses, to the extent that these costs are not incurred on a completely voluntary basis in some circumstances. As noted above, in the context of the fact that the Code is not voluntary in all circumstances, the ACCC would also have concerns were evidence of misconduct in the course of compliance auditing to emerge.

Balance of public benefit and detriment

251. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

252. In the context of applying the net public benefit test in section 90(8)¹¹¹ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹¹²

253. The ACCC considers that the key benefits likely to arise from the Code are efficiencies in the management of supply chain risks and the signalling of compliance with the TCF Award and workplace laws. The ACCC considers that public benefits are also likely to arise from increased compliance by businesses in the industry with their legal obligations to workers. The ACCC considers that, to the extent that businesses do not participate voluntarily in the Code, some public detriments are likely to arise from the Code in the form of an increase in business costs and businesses being required to undergo more frequent visits by the TCFUA than would be the case absent participation in the Code.

254. On balance, for the reasons outlined in this draft determination in relation to the Code, the ACCC is satisfied that these likely benefits to the public would outweigh this detriment to the public including the detriment constituted by any lessening of

¹¹¹ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹¹² *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

competition that would be likely to result. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met in relation to the Code.

Length of authorisation

255. The Act allows the ACCC to grant authorisation for a limited period of time.¹¹³ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
256. The ACCC proposes to grant authorisation to the Code for five years, as requested. The ACCC notes submissions from businesses which oppose the length requested of the Code authorisation requested.
257. However, the proposed grant of a five year authorisation period follows the ACCC's previous approach in relation to previous versions of the Homeworkers' Code of Practice, with the exception of the most recent reauthorisation. The most recent reauthorisation was granted for two years as requested by the Code Committee to reflect the expected length of its review process.

Draft determination

Conduct for which the ACCC proposes to grant Authorisation

258. The Code was initially authorised under sections 88(1), 88(7) and 88(7A) of the Act.¹¹⁴ The current application for reauthorisation has been assessed as if it were a new application for authorisation under sections 88(1A), 88(1), 88(7) and 88(7A) of the Act.¹¹⁵
259. On balance, for the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the Code is likely to result in a public benefit that would outweigh the detriment to the public (including the detriment constituted by any lessening of competition) arising from the conduct.
260. The ACCC therefore **proposes to grant authorisation** A91252-A91255 to the Code for five years. The ACCC proposes to extend this authorisation to future signatories to the Manufacturer's Agreement and the Retailer's Agreement.¹¹⁶
261. Further, the proposed authorisation is in respect of the Code as it stands at the time authorisation is granted (including the amendments proposed by the Code Committee noted at paragraph 5). Any changes to the Code during the term of the proposed authorisation would not be covered by the proposed authorisation.
262. This draft determination is made on 5 June 2013.

¹¹³ Section 91(1) of the Act.

¹¹⁴ Pursuant to section 177(2) of the Act, which came into force on 24 July 2009, authorisation was also deemed to have been granted on the basis that it was applied for under section 88(1A) of the Act.

¹¹⁵ See section 91C(7) of the Act.

¹¹⁶ Under sections 88(10), 88(13) and 88(14) of the Act.

Further submissions

263. The ACCC will now seek further submissions from interested parties. In particular, the ACCC invites further submissions from the Code Committee and other interested parties regarding:

- a) whether the Code's dispute resolution mechanisms should be broadened to include all potential stakeholders in the Code and whether there is a practical means of doing so; and
- b) the feasibility and utility of including provision under the Code for an alternative auditor to the TCFUA, with the cost of the auditor to be met by the audited business.

264. In addition, the Code Committee or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Sections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(5A), would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) 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.

Sections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(6), would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

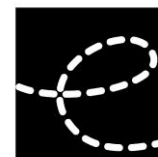
unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or

the proposed conduct should be allowed to take place, as the case may be;
or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

Section 91C(7) requires the Commission, in making a determination to revoke an authorisation and substitute another authorisation, to apply the tests in section 90(5A), (5B), (6), (7) (8), (8A), (8B), or (9) (as applicable) as if the authorisation were a new authorisation sought under section 88.

Attachment B – Accredited businesses and retail signatories



ethical
clothing
AUSTRALIA

APPENDIX B

Accredited Businesses to Part 1 of the Code as at 7/03/2013

1. A Plus Schoolwear
2. Acline
3. ADA
4. Akubra Hats
5. Alma Fudge
6. Ambassador Clothing
7. Ampersander
8. Art Kabanyana
9. Aussie Mills Embroidery
10. Australian Contract Clothing
11. Babylon Industries
12. Baxter Boots
13. Blue Gum Clothing
14. Buxwear
15. Cameron James Dixon Design
16. Candy & Lace
17. Carla Zampatti
18. Cash's
19. Christie's
20. Collette Dinnigan
21. Cue
22. Dayoub Clothing
23. Dina Corporate
24. DNA Manufacturing
25. Drummond & Kindred
26. Elegant Knitting Co
27. Elliott Australia
28. Fixed Race
29. Fraser & Hughes
30. Gideon Shoes
31. Ginger & Smart
32. Harmony Fashions
33. Humphrey Law
34. J Robins Manufacturing
35. Jets Swimwear
36. Kitbag
37. Lisa Ho
38. LMB Knitwear
39. Lydra
40. Mattt
41. Melbourne Made
42. Merino Country Australia
43. Metalicus
44. Mont Adventure
45. Mountcastle Hats
46. Mr Charles
47. Mr K
48. NathanPaul
49. New Model Beauty Queen
50. Nico Underwear
51. Nobody
52. Novatek International
53. Novo Socks
54. Oliver Footwear
55. Pacific Brands Workwear Group
56. Perry Cutten
57. Platypus Outdoors
58. Protop Australia
59. Puma Australia
60. Qualitops
61. Queensland Swimwear Company
62. Redback Boot Company
63. Review Australia
64. Rossi Boots
65. Snugglerite Industries
66. So Stella
67. Spunky Bruiser
68. Stockpile
69. Tate & Lawson
70. Tatyana Ariyan Design & Co
71. The Ark
72. The Social Studio
73. Totally Corporate
74. Tote Systems Australia
75. Tuffa Workwear
76. Tuffys & Tuffetts
77. Urbanearthwear
78. Valour Apparel
79. Wildnerness Wear
80. Woolerina

Signatory Business to Part 2 of the Code as at 7/03/2013

1. Abbey Bridal
2. Adam Larissa Fashions
3. Airdd
4. Alexander Michaels Clothing for Men
5. Anita Holland's Boutique
6. Anthea Crawford Australia
7. Apricot
8. Armondilloxtreme
9. Australian School of Mountaineering
10. Australian Surfing Headquarters
11. Barrakets Fashion Centre
12. Batalin Boutique
13. Bay Collection Boutique
14. Berrima Natural Australia
15. Best & Less Retail Stores
16. Big W Discount Department Stores
17. Billingham's Menswear
18. Bonza Brats
19. Born in the Blue Mountains
20. Boutique Capri
21. Bowral Country Sports
22. Butterfly xx
23. BW Benson Fashion
24. Carla Zampatti
25. Cascade Butterfly
26. Catherine Smith t/a Duck Creek Clothing
27. Christine Coon t/a Country Chique Boutique
28. Cinnamon Boutique
29. City Classics
30. Clare Ellen Fashions
31. Clothing Haven Menswear, Ladieswear & Surfwear
32. Corfu Blue
33. Country Road
34. Cue & Co
35. CW & AE Bird t/as Ultimate Underwear
36. David Jones
37. Dotti
38. D'Vine D'Zine
39. Eda Michelle Designs
40. Emma James
41. Esprit
42. Events Fashion
43. Eve's of Mittagong
44. Fandango
45. Fetts
46. Final Touches
47. Flanagans Menswear
48. Fuller Figure with Style
49. G Retail
50. Galleria Boutique
51. General Pants Group
52. Gloucester Town and Country
53. Have to Shop (Zena Sutton)
54. Herro International (Mens Avenue)
55. Hunter Gatherer
56. Infinite Abundance t/as Visage Mens Boutique
57. J.H. Barsby & Sons
58. Jeans West
59. Jim Mills/John Douglas Menswear
60. Jiva
61. Jodi of Umina
62. John Grahams Mens Wear
63. John Santalucia t/as Taaney Boutique
64. Jory Family Trust t/as Enhance U
65. Joseph's Menstore
66. Jourdan Fashions
67. K Mart
68. Kennedy's
69. Kerry's Klothes
70. La Boutique Fantasque
71. Langcru PL t/as Amazon Fashions
72. Leura Mall Outback Clothing
73. Looking Class
74. Lowes
75. Man to Man
76. Marves Shoppe
77. Matilda Janes C & G Enterprises
78. Mays Ladies Fashion
79. Mr Sports
80. My Style Boutique
81. Myer
82. Nick Brown Menswear

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| 83. Noaron / XS Surf t/as Woopi Bizare | 112. Shoppe Two Ten |
| 84. Noni B | 113. Simona |
| 85. Nunee Boutique | 114. Simone Louise |
| 86. Oliver NSW | 115. Smyths Specialty Store |
| 87. Orientique Byron Bay | 116. Snellings Clothing Store |
| 88. Paleface | 117. Specialty Fashion Group |
| 89. Pat Kearins' Mensland | 118. Sportsgirl |
| 90. Peg Hargreaves Fashion | 119. Stewart's Menswear |
| 91. Peter Pan Baby & Childrens Wear | 120. Sussan Corp |
| 92. Petl & Co | 121. Suzanne Grae Corp |
| 93. Pink Pomegranate t/a Treehouse Childrens Décor | 122. Swans of Tumut |
| 94. Pizazz Boutiques | 123. Sweethearts Bridal |
| 95. PJ's Warehouse | 124. Syndicate |
| 96. Plumage for Clothes | 125. Synergie Fashion Co. |
| 97. Posh & Chic | 126. Target |
| 98. Pretty Girl Fashion Group | 127. The Avenue Bridal Boutique |
| 99. Pretty Things | 128. The Discovery Group |
| 100. Reilly's Quirindi | 129. The Just Group |
| 101. Review Australia | 130. Totalook Clothing |
| 102. Rifoba t/as Heppy's | 131. Trachelle Boutique |
| 103. RM Williams | 132. Trumps Boutique Leura |
| 104. Robinson's Department Store | 133. V & M Wear t/as Monza Mens |
| 105. Robyn Hunter | 134. Vince Maloney & Co. |
| 106. Robyn's Lets Dance | 135. Vivian Chan Shaw |
| 107. Roger David | 136. Von Troska |
| 108. S M Brands | 137. Wahney Boutique |
| 109. Shebu Contemporary Fashion | 138. Webster Holdings (Jigsaw, David Lawrence) |
| 110. Sheike & Co. | 139. Who Knows Where |
| 111. Sheppards of Albury | 140. Witchery Fashions |
| | 141. Zig Zag Boutique at Yamba |