TFIA
COUNCIL OF
TEXTILE & FASHION
INDUSTRIES OF AUSTRALIA LTD.

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Dear Doctor Chadwick,

DRAFT DETERMINATION – Homeworkers Code of Practice

As suggested by you, we respond to the Draft Determination and the ACCC's request for further comment, particularly on the use of the TCFUA as an auditor and other matters.

Before specifically responding to these matters we believe it is important to restate, what may appear obvious, but seems to carry little weight in your draft:

- The TFIA is the peak industry body in the sector; we represent employers from significant employment sites to SME and single operators.
- We have represented the sector to industry and government for more than 70 years.
- The TFIA supports an Australian industry that is sustainable, and we firmly believe that it is in the public interest to support employers who take the risk to invest in a highly competitive and highly regulated industry.
- The TFIA is an original signatory of the Code, and we welcome the intent to ensure Australian TCF workplaces are compliant with expected standards within the Australian market.
- The TFIA and its members support their employees and want to ensure their employees are properly remunerated and have workplace standards that are within the various workplaces legislative Acts that determine such matters.

From these points, it is reasonable to say the TFIA should have a strong, clear and representative view about activities and conditions within the market; so, when the ACCC comments that it accepts much of the evidence provided to it by TFIA, and employers, but then, is not prepared to act to alleviate these concerns, we are troubled. We are concerned there is a theme of compliance to the status quo, as opposed to seeking and recommending improvement. This ACCC response may be limited by government policy or current legislation, if so then the ACCC should identify this to be the case.

We believe there are four stark issues that need resolving;

1. The lack of an alternate auditor.
2. The compliance cost for SME and sole traders is too high.
3. The significant lack of reliable information and statistics within the sector.
4. The mandatory nature of the Code, which is supposed to be a voluntary system.

In particular, we point to a number of issues which the ACCC considers relevant, yet does not recommend significant amendment to improve the market, the public benefit, and reduce the detriments within the market:

1. TFIA has been summarily dismissed from the Code Committee without formal discussion or appeal process. We are unsure of the reasons for such action as they have not been clearly articulated, other than the implication that we are not compliant to the Committee's policy position by 'whistleblowing' the ineffective nature and reach of activity by the Committee and the ECA.
2. At 107 you raise the issue of public benefit and provide a definition. The TFIA would argue strongly that the TCF industry is of value to the Australian community generally and contributes to the aims pursued by society by providing economic goals of efficiency, yet it seems progress can be identified as stymied within the sector from the regulatory burden placed upon many of its enterprises, in particular the SME sector within the industry. Therefore, it is incumbent of any regulator acting for the public benefit to listen and then act upon advice those businesses within the sector, rather than treat their view as lesser to that of observers to the sector, such as the TCFUA. The Union's view is important, but it should not be given more weight than those who take the financial risk and the uncertainty of the global market to provide employment, which is an economic benefit and thus the ultimate public benefit.
3. The ACCC at item 123 considers that the Code is likely to improve efficiency, yet provides little evidence to support such a notion. We would strongly recommend that the ACCC provides evidentiary support that a public benefit is provided by the Code as it claims within this item. There is an acknowledgement from all stakeholders that the local market is diminishing and around 92% of the total Australian market is now imported without regulatory burden. So with the market diminishing, the only efficiency seems to be the exporting of Australian manufacturing. This means no jobs, and a significant reduction in public benefit. So we therefore disagree with the ACCC's enthusiasm with limited supporting evidence.
4. We strongly point to a lack of market penetration of the Code from the work of the ECA since inception which is clear from results articulated in their submission; and we argue the current management of the education programs is neither efficient nor effective enough given the significant public resources provided to the managers of Code compliance. We question if public benefit is attained if significant market penetration is not achieved from the use of significant public funds. Within the draft we do not seem to have an ACCC view of what is measurable efficiency and effectiveness. We suggest such a view may help a responsible regime with measurable outcomes as opposed to the current little responsibility for the expenditure of public funding as now applies.
5. We strongly suggest the implication from the use of the term voluntary is misused; clearly from submissions from employers in the sector, this term voluntary is not the case in the management of the Code and the activities of the Auditor. We also suggest activities under the auspices of the Code borders on debasing the esteemed principles of the ACCC's third line forcing by forcing supply chain companies to mandatory comply to audit requests from the Union.
6. There is a substantial suggestion within submissions there is a misuse of market power by those auditing employees within Code, which, although acknowledged as potentially existing (item 263), there is no significant desire to independently

investigate or recommend change until further submissions are provided. Is it the recommendation of the ACCC to provide an independent audit process?

7. There remains extremely poor statistics and research within the industry. The questionable use of references associated with some submissions based upon long out of date data, should not add weight to assertions and assumptions by those submissions with a self-interest for the status quo to remain. It seems old data is referenced in reports, then those reports are further referenced, but continue to use the old data; and then those reports are in turn referenced until there is little understanding or relevance to actual statistics submitted. It seems too many current submissions are relying on very old data to support their view. We strongly suggest the ACCC recommend to industry, and indeed the government, to progress proper and substantive relevant research.
8. Just exactly how many alleged outworkers are there in the market? If the ACCC does not know, or have reliable and relevant data, then how can it make decisions about regulating an unknown market?
9. There is evidence which suggests reports and assumptions made to ACCC via various submissions are out of date given the changes in legislation, market conditions and apparent increased activity as reported by the ECA and the TCFUA. Therefore, reports cited at Items 27 – 29 (2007 Brotherhood of St Laurence) 31 – 30 (2008 Green) may have been relevant at the time, but they are now questionable given the assurances of the EFC and TCFUA to having had significant success in the market. Perhaps, there is a need for a more relevant investigation to the current actual state of the market to be made by a body without self-interest in the outcomes of such an Inquiry.
10. The application of the Fair Work Act, the Textile and Clothing and Footwear Award, the reviews of the Fair Work Commission, the access now provided to the TCFUA, and the investigations of the Fair Work Ombudsman surely is enough to regulate the sector. All of these bodies' regulatory instruments have been added to the regulatory regime since the advent of the Homeworkers Code; and thus, it is questionable whether the continued investment of public funds should be engaged in a further level of regulation and compliance on matters that can be addressed by other regulatory bodies. The rationalising of the regulatory regime would reduce public funds providing a significant public benefit without the addition to public detriment.
11. There remain jurisdictional arguments as to where the Code remains relevant in various states. This means we are operating a national regulatory regime by multiple regulatory bodies, yet some states still practice their own regulatory legislation. Surely this is over regulation on a fragile market trying to compete with global competition. Is it not in the best interest of the market and thus a public benefit to reduce the regulatory burden on SME's within the TCF industry?
12. There are significant submissions (items 71 – 75) opposing authorisation of the Code, yet there appears to be little weight added to these submissions, and by implication, greater weight given to observers to the market, such as those that may have an interest such as TCFUA, FairWear and Oxfam. So it seems the enterprisers, the financial risk takers, who are the employers in the industry, have a diminished view before the ACCC as compared to the Union and the ECA.
13. There is a lack of supporting evidence at item 86 that exploitation exists in any systemic practice, causing public detriment. This claim that exploitation exists within

the market needs to be tested with solid evidence rather than assumptions and assertions.

14. In items 89 and 105 you acknowledge the ACCC can add to the Code; but, by implication, the ACCC cannot revise to exclude from the Code, which seems to be a regulatory detriment to the market. If the market is advising regulatory issues are a detriment to it operating efficiently and effectively, surely this is reason enough to review separately these claims with the view to analyse more fully the claims of detriment.
15. We strongly contend the Homeworkers Code of Conduct should be used as a vehicle to educate and support the market to comply with the multiple regulatory authorities, yet we point to submissions from the market that suggest this is not the case; although, we acknowledge those enterprises (ECA and TCFUA) that receive significant public funding to provide such education claim otherwise … but then, they would, wouldn't they? Yet, the market is clearly advising the ACCC that this claim of providing education is not supported in any significant manner to justify the expense, yet it appears these claims are dismissed.
16. In item 95 the ACCC claims that there is a risk future legislation may be inconsistent with the Code, provides an example how this could be a detriment yet the ACCC does not determine that this could add to the cost and resources needed by enterprises in the market. Clearly any regulatory compliance has a cost, yet this seems to go unrecognised by the ACCC to the extent of recommending a reduction in cost.

    If there is no additional resources needed to comply, as suggested by the ACCC, which is insinuating the compliance requirements are the same, why then have two regulatory bodies inquiring into the same matters? Two regulatory bodies managing the same issues is not a public benefit.

17. In 153 the ACCC show concern for the alleged non-compliance of the FWA, the Award and the Code and points to the recent FWO report on originally 700 listed companies but actually reported 171 companies. The assumption the ACCC makes as systemic issues within the industry is based on a very small sample … but … if the FWO is able to do the job, why then does the industry require a fourth compliance regulator?
18. In item 184 the ACCC states that competition restrictions arise from legal obligations and therefore the Code does not restrict competition per se. That being the case, why then does the need for four regulatory instruments and bodies to manage the industry exist?
19. The ACCC in item 248 states that it would be concerned if misconduct were to be happening within the sector, and although there are submissions from employers suggesting such a thing, it states it has no evidence. We strongly suggest that an independent investigation be held to determine this consideration is correct and if the submissions suggesting otherwise are mischievous as implied by the ACCC's view for no further action.
20. At item 253 the ACCC acknowledges the key public benefit is the efficiencies in the management of supply chain risk. It does not however consider the reducing employment figures, the reducing investment in the sector and the reduction in outworker numbers as a public detriment. We strongly suggest the ACCC also

consider these aspects when coming to their conclusion. We also suggest evidence of management efficiencies be measurable and thus reported at future reviews.

There are a number of matters to address which in the Draft does not concede or acknowledge market response and requires further ACCC consideration. These matters include:

1. The assumption the Code is voluntary

   Whilst the accredited companies that join the Code are indeed doing so voluntarily there are two consequential matters which are not addressed within the Draft:

   a. The imposition of demand by a third party (TCFUA) to an audit on a party who is not a signatory of the Code, yet is a bona fide organisation within the market, meeting its compliance requirements as set out by various legislative instruments is clearly a mandatory requirement and not voluntary. There is no attempt for this third party audit to seek permission (as set out within various submissions) to audit, rather the party uses it market power to insist and demand compliance.

      In other words, a party who chooses not to be accredited and wishes to continue to supply to a Code accredited party is required to compulsorily subject themselves to an audit from a labour representative (TCFUA), with no apparent alternative other than to comply.

      This mandatory compliance to be subjected to an audit with a third party to allow the initial audited party to deal with the accredited party, borders on a breach of the principles of third line forcing, yet the ACCC seems to endorse such a mandatory condition of the Code without significant reference for change in the Draft other than a request for the market to provide further submissions at 263.

      Our response is that supply chain companies and enterprises should not be required to comply with demands for audits without an alternate system, such as the Fair Work Ombudsman compliance review. There is no justification or public benefit for the third party, currently the labour representative TCFUA, to be the exclusive provider of audits.

   b. There is an assumption that the Code is a voluntary instrument; however, there is clear indication within many submissions that to procure government work a company must be accredited. This is not an Australian Standards requirement, rather a preference for government procurement.

      We question whether there has been a direction from government for procurement officers to ensure successful tender bidders have a prerequisite of being an accredited Code supplier. For instance, government can purchase from Australian companies who manufacture offshore and who are not ECA accredited. Therefore, those that manufacture in Australia are disadvantaged by this assumed government requirement.

Our query is this; if there is not a prescribed need for government to ensure within its procurement protocols that an ECA accredited organisation will win the work, then the Code is truly voluntary as organisations will not need to be accredited to win the work. But if, as suggested by the ECA and others in submissions, that they (ECA) advertise a benefit of accreditation as having an exclusive right to government procurement, then the idea that the Code is voluntary is nonsense, if a company wishes to be successful at government procurement.

At your 130 you acknowledge that this requirement to be accredited does not extend to state government procurement schemes. So the question to ask is this … why is there an incorrect market assumption that to gain government procurement then a company must comply and seek accreditation? Surely this assertion would be of interest to the ACCC?

Our response is that there is no public benefit in advertising falsely that government requires accreditation to be successful at government procurement tender. Therefore, there is an assumption that decisions are being made on false and misleading information with respect to accreditation.

c. Costs

For instance in your Draft at 104 and later at 210, you state the cost of audit compliance is the same as the need to comply for other legislative instruments. That assumption is fundamentally wrong and misunderstands the compliance requirements and resources required for all matters of compliance for a business. That being the case, then there is no need for an audit compliance as other instruments will be able to detect if an employer is indeed not compliant.

The point here is this; if you have two systems of compliance each will have a cost, yet you have ignored the substantive submissions identifying this as a problem and that there are additional costs for each regulatory requirement.

In your Draft items 211 and 212 you acknowledge there have been significant submissions regarding the cost and complex nature of compliance and you identify again that this is a requirement under other instruments, and thus ignore those that submit, that tell you there is a problem when they maintain both systems. So is it not reasonable to add weight to those that have to maintain compliance for two regimes and complain about cost? It would seem this detriment is not considered with any weight by ignoring those who have to comply as compared to listening to those that audit the compliance.

If you believe the information required is exactly the same then why have more than one body seeking compliance? The ACCC cannot alter government policy nor legislation and cannot comment upon other regulators, but when they have the ability to reduce costs without a reduction in public benefit then why not provide such recommendation?

What would a small business operator know about their own business, the resources they have to comply with various regimes to provide a service, when there are those who are not at risk of the market telling them what their costs should be? As an arbiter and regulator of competition and consumer protection should there not be weight added to those in the market who actually have to spend the money, as opposed to those that report the market?

RECOMMENDATION

1. Appoint an alternate auditor.

   It seems incongruous to the TFIA that the auditor of the supply chain is also the Union with right of entry powers. Is it just us, or is there a conflict between educating the employer through an audit, whilst at the same time having powers of entry and access to pay records? Surely, it makes ethical sense that the auditor should be independent of the supply chain with the ability to support and educate the employer as opposed to the potential conflict from the Union. It is little wonder employers have submitted implying consternation over this process requirement.

   We submit that an alternative auditor should be available under the following conditions;

   i. The Fair Work Ombudsman is nominated as an alternate auditor.
   ii. A list of approved auditors assembled by the industry if the ECA and FWO are not suitable to the employer.
   iii. Costs should be borne by the company
   iv. Audits be done annually to reduce costs and the management resources allocated to comply … just like annual accounting audits for the annual returns.

2. The significant lack of reliable information and statistics within the sector is a major detriment and we recommend to the ACCC that is takes note and refers the issue to industry and government.

Doctor Chadwick, as always we remain keen to support your investigations to ensure the TCF industry is sustainable. We continue to maintain, to what appears 'deaf ears' from all regulatory submissions, that the industry is overburdened with regulation and is driving Australian jobs off shore through the obligation to meet rigid compliance requirements from three legislative and regulatory instruments and four regulatory bodies.

We just want to get on with it; and to do that will require some help to ease the burden.

We look forward to further discussion.

Yours sincerely,

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Chief Executive Officer