



**The Association of
Consulting Engineers
Australia**

ABN 25 064 052 615

Submission to the Committee of Inquiry

Review of Competition Provisions of the Trade Practices Act 1974

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The ACEA represents Australian consulting engineering firms which provide technology-based consulting services to government and private sector clients in Australia and in more than 40 countries worldwide. Services are provided in the fields of building, infrastructure, oil and gas, transportation, mining, communications and information technology, agriculture, food processing and manufacturing.

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1 Introduction:

The Consulting Engineering Industry in Australia

The Association of Consulting Engineers Australia (ACEA) welcomes the opportunity to make a submission to the review of the Trade Practices Act, which is the major legislation governing how its member firms operate in the domestic market.

ACEA represents the interests of nearly 300 engineering and technology businesses providing consulting services to government and private sector clients throughout Australia and in more than 40 countries overseas.

Business represented range in size from large firms employing over 3000 people, to medium firms employing less than 300 people, down to sole traders. ACEA has as members some 80% of the large and medium consulting engineering firms in Australia. However, the bulk of its membership consists of small firms.

The value of construction projects designed by ACEA member firms each year is estimated to be \$11 billion. The industry is a significant contributor to the Australian economy in terms of both revenue and employment and provides essential services to clients and the community.

In representing the interests of its member firms therefore, ACEA has a key interest in the review process.

2 Inquiry Terms of Reference:

Review of the Competition Provisions of the Trade Practices Act

- The consulting engineering industry in Australia is generally characterised by relatively small firms with limited market power engaging in commercial relationships for the supply of technical and professional services to clients with large market power and influence.
- The competition provisions of the Trade Practices Act are therefore important in terms of the consideration of whether the Act provides an appropriate balance of power between relatively small consulting engineering firms and large client businesses including government authorities.
- ACEA's submission is based on the concept, under the Terms of Reference, that the administration of the Act should provide sufficient protection to the position of individual businesses.
- ACEA's submission refers to the need for legislation to ensure that:
 - All government agencies carrying on business activities, such as the procurement of technical and professional services, are clearly subject to the provisions of the Act, and;

- There is provision of the right for small business and/or its representative organisations to collectively negotiate.

3 Amendments to the Act

3.1 Government Organisations Deemed to be Carrying On a Business

Provisions Affected

Part 1 Preliminary:

Section 2A: Application of the Act to Commonwealth and Commonwealth authorities

Section 2B: Application of the Act to States and Territories

Section 2C: Activities that are not business

Public Sector Clients

- The departments and authorities of Commonwealth and State governments are a significant client base of ACEA member firms.
- Federal Government policy, through National Competition Policy, has been that the principles of free and open competition should apply across the economy.
- According to how the courts have interpreted the meaning of Section 2 of the Act, some government departments and authorities have enjoyed a degree of immunity from the Act on the basis that, under some circumstances, they are deemed to have not been carrying on a business.
- This effectively means that the objectives of the Act in Section 2 are undermined.

Proposed Amendments

The Trade Practices Act should be amended to ensure that all government agencies are effectively covered by the Act when they are operating in the commercial environment.

Section 2C of the Act (or sections 2A or 2B) should be amended to the effect that there would be a conclusive presumption that the entering into a contract by a Commonwealth, State or Territory authority or department for the acquisition of professional and technical services from consulting engineers, whether on a one-off basis or as part of a series of transactions, would be conduct engaged in during the course of carrying on a business for the purposes of section 2A/2B.

To be more conclusive, the amendment would include words to the effect that, even if the conduct by the authority or department complained of had no relationship to the day-to-day operations of the organisation, the conduct is still presumed to be carrying on a business and subject to the provisions of Act.

3.2 Provide a Right for Small Business to Collectively Negotiate

Provisions Affected

Part 1V Restrictive Trade Practices

The Market for Consulting Engineering Services

- Individual consulting engineering firms have limited bargaining power dealing with much larger corporate business clients (private and public sector) in the broader building and construction industry. Such client organisations have major market power and can easily dictate their own terms and conditions. Consulting firms are heavily dependent on the client for work and survival. The impact of withdrawal of business or termination of contract is potentially devastating.
- Terms and conditions are often onerous. Examples include requirements for excessive and unreasonable levels of professional indemnity insurance which effectively shifts the total liability and risk for projects on to consulting engineers, as well as unilateral variations of contract.
- Within this environment, consulting firms and /or their representatives need to be able to collectively negotiate in order to survive.
- Whilst the Trade Practices Act contains provision for authorisation of conduct that might otherwise be in breach of the anti-competitive provisions of the Act, the process is expensive and uncertain. The ACCC can also now authorise collective conduct and boycotts, but the process is slow, difficult and is rarely successful. Such ACCC authorisations are also subject to appeal by any involved or interested party.

Proposed Amendments

The current Act prevents businesses from engaging in any collective behaviour, either in terms of negotiating with a supplier/customer or engaging in a boycott.

ACEA's proposal is for a legislative provision that provides certain 'safe harbours' in the Trade Practices Act, to permit limited collective negotiation by consulting firms (small businesses) and/or their representatives. A legislative provision would provide smaller firms with certainty and greater protection of their right to collectively negotiate than would the current authorisation process.

For further information or assistance, please contact:

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