

## Submission to the Productivity Commission

# Review of National Competition Policy Reforms: Discussion Draft

**November 2004**

For enquiries, contact Therese Charles Chief Executive or Nicola Grayson Senior Policy Adviser.

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

The Association of Consulting Engineers Australia, 75 Miller Street, North Sydney NSW 2060. Phone (02) 9922 4711, Fax (02) 9957 2484, e-mail [acea@acea.com.au](mailto:acea@acea.com.au). [www.acea.com.au](http://www.acea.com.au)

<b>INDEX</b>
--------------

Page

<b>INTRODUCTION AND EXECUTIVE SUMMARY</b>	<b>3</b>
<b>KEY ISSUES</b>	<b>6</b>
<u><b>1. Application of the TPA to Public Sector Procurement</b></u>	<b>6</b>
<i>Recommendations</i>	20
<u><b>2. The Need for Further Reforms in Infrastructure</b></u>	<b>22</b>
A. Greater Outsourcing of Services to the Private Sector	24
<i>Recommendation</i>	24
B. Land Transport Planning	24
<i>Recommendations</i>	32
<u><b>3. IP and Application of the Copyright Act to Government</b></u>	<b>35</b>
<i>Recommendation</i>	35
<b>FULL LIST OF RECOMMENDATIONS</b>	<b>36</b>
 <b><i>Appendices</i></b>	
<i>Appendix 1: Profile of ACEA</i>	40

## **INTRODUCTION AND EXECUTIVE SUMMARY**

### **The Consulting Engineering Industry in Australia**

The Association of Consulting Engineers Australia (ACEA) represents the interests of nearly 300 engineering and technology businesses providing consulting services to government and private sector clients throughout Australia, both metropolitan and regional, and in more than 40 countries overseas.

Businesses represented range in size from large firms employing over 3000 people, to medium firms employing around 300 people, down to smaller firms and 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.

A profile of ACEA and the consulting engineering industry is attached.

### **The Productivity Commission Discussion Draft**

ACEA welcomes the opportunity to make a submission to the Productivity Commission Discussion Draft on a Review of National Competition Policy Reforms. Competitive behaviour in the market, and the operation of the Trade Practices Act, are major legislative policies governing how its member firms operate in the domestic market.

Competition policy clearly plays a critical role in the services industry, in terms of:

- Productivity and efficiency of service;
- Reduction of prices, particularly amongst business users; and
- Increased consumer choice.

### **ACEA Submission**

ACEA wishes in this submission to highlight and comment on some specific issues raised in the Productivity Commission's Discussion Draft.

They are:

1. Application of the Trade Practices Act and Competition Policy to Public Sector Procurement
2. The Need for Further Reforms in Areas of Infrastructure
3. Intellectual Property and the Application of the Copyright Act to Government Activity

## **1. Application of the Trade Practices Act and Competition Policy to Public Sector Procurement**

ACEA notes the critical role played by public sector agencies in the management, service delivery and operations of these critical infrastructure sectors.

ACEA believes that significantly more can be done to open up the *procurement* processes and services of these agencies to a more competitive environment, with a view to improving efficiency and reducing the kinds of market inequities that can develop with the significant if not monopoly power of such agencies. In particular therefore ACEA supports the recommendation of the Commission that

*“Those provisions of the TPA extending coverage to government businesses should be examined in the light of recent court decisions, to ascertain whether legislative changes are warranted to ensure that particular activities do not inadvertently escape coverage.”*

ACEA members are experiencing detriment as a result of the way in which the Crown exemption is operating, which ACEA believe was not the intention when the TPA was extended to cover the activities of Government. This is causing competitive distortion in the market place and ultimately will damage the Australian economy if not resolved.

ACEA believes that the proposal should not only be examined in the light of the recent court cases, but on the basis of case studies where detriment is occurring as a result (as it is in the consulting engineering market place) and the process by which public benefit is determined.

A number of recommendations are made in the submission.

## **2. The Need for Further Competition Related Reforms in Areas of Infrastructure**

ACEA supports the Productivity Commission's proposed recommendations for continuing reform in infrastructure areas generally, and particularly in areas such as energy and water, freight and passenger transport and communications.

ACEA believes that for maximum efficiency and effectiveness there should be more consistency of outsourcing of infrastructure services from public sector agencies.

ACEA has also done significant work in the area of transport planning, and agrees with the proposals of the Productivity Commission for nationally coordinated reform networks for freight and passenger transport. ACEA promotes a model which moves away from development and investment decision-making based on segmented modes (rail, road, sea and air) and management (three tiers of government) to an integrated nationally consistent multimodal approach based on freight and passenger flows and logistics, and strategic transport corridors incorporating rail, road, air and maritime sectors. ACEA also believes that there must be an efficient mix of transport modes, which allows the free movement of freight along the entire logistics chain, meeting the needs of commuters and business in a cost-effective and sustainable manner.

A number of recommendations are made in the submission.

### **3. Intellectual Property and the Application of the Copyright Act to Government Activity**

Intellectual property rights are a concern for ACEA members. Outright transfer of copyright and intellectual property rights to the Crown raises issues of competitive disadvantage. It is also a disincentive in terms of the development and application of innovative engineering solutions.

A recommendation is made in the submission.

Comments on all these issues are as follows.

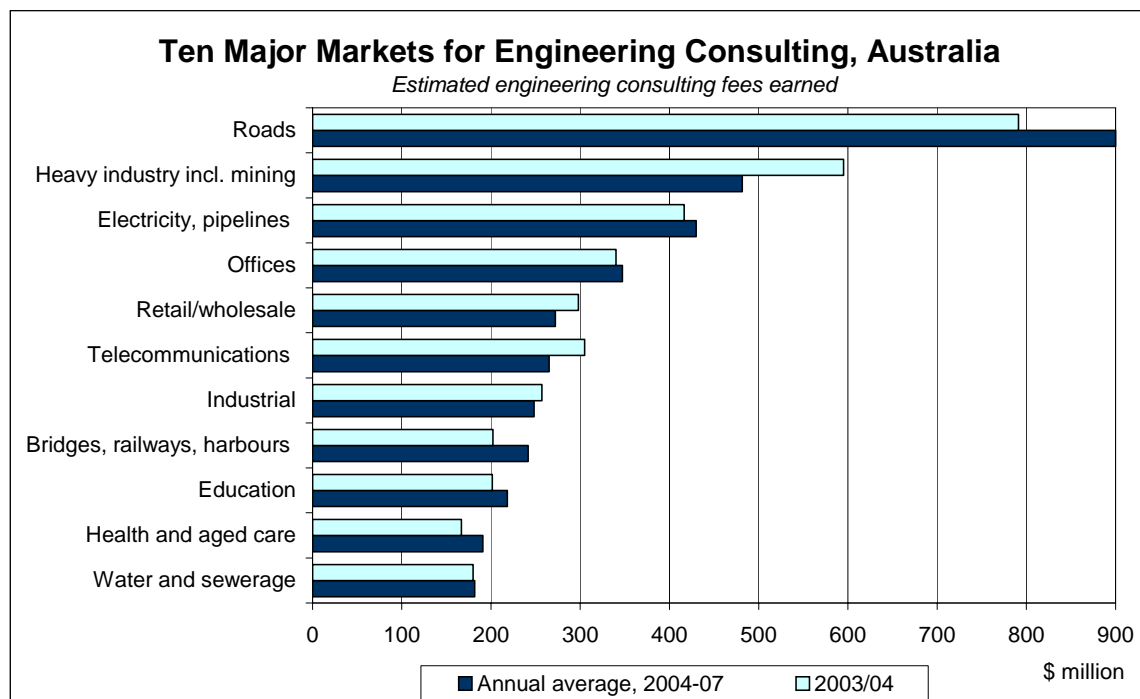
## ISSUE 1 - GREATER APPLICATION OF THE TPA TO GOVERNMENT PROCUREMENT

### 1.1 The Importance of the Public Sector as Client for Consulting Engineering Firms

The public sector is a major client for consulting engineering firms (it comprises approximately 50% of the projects undertaken by the industry, and for some particular firms it constitutes the major part of their service delivery).

The recent “Outlook for Engineering Consulting” (April 2004) predicted the ten major markets for consulting engineers as shown below (Chart 3.7 from the Report):

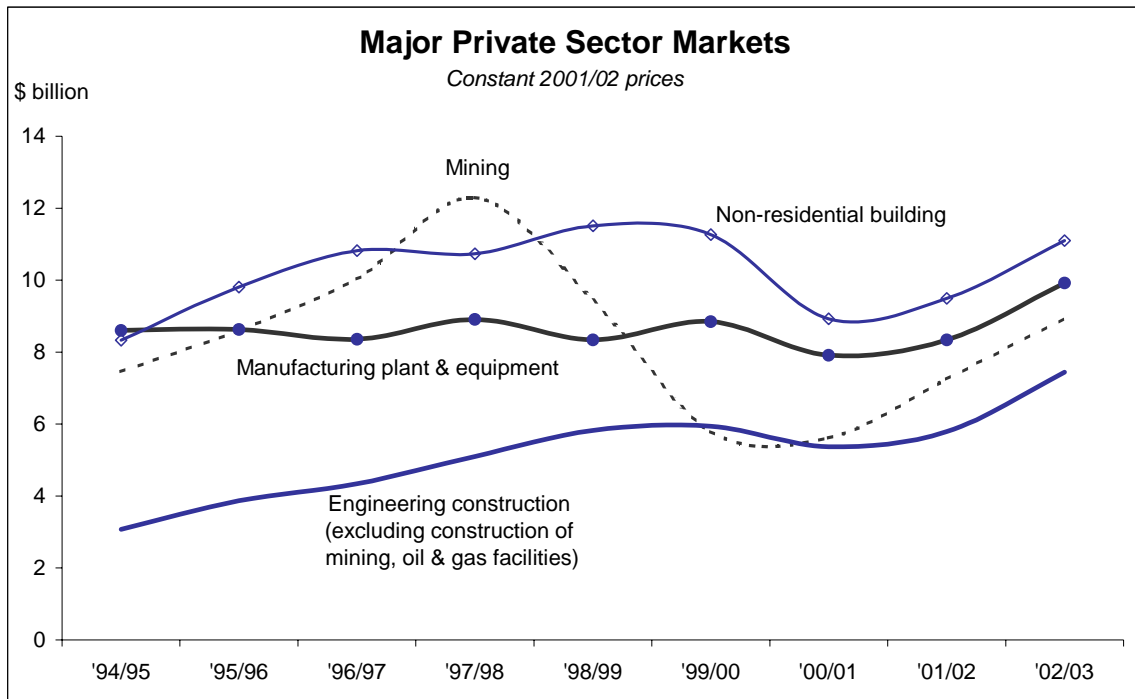
Chart 3.7



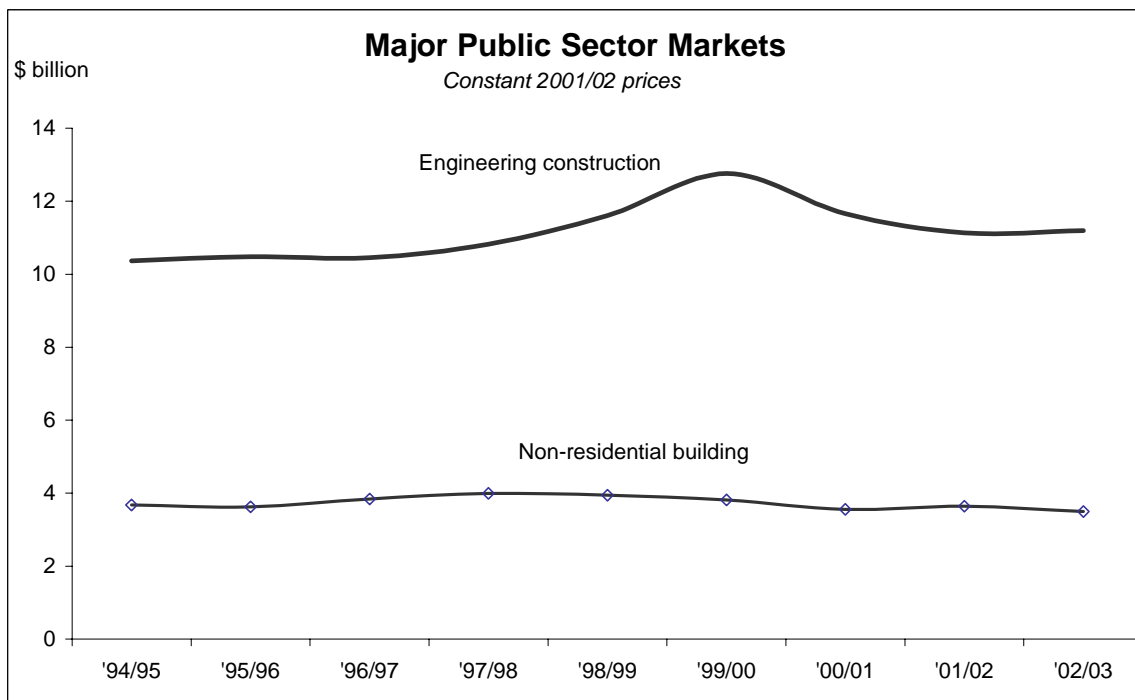
Not all of this work is available to private consulting engineering firms as some is done in-house in both private and public sector organisations.

The relationship between the private and public sectors is demonstrated by comparing Chart 3.1 Major Private Sector Markets and Chart 3.2 Major Public Sector Markets from the Outlook for Engineering Consulting (April 2004) report.

**Chart 3.2**



**Chart 3.2**



The work in the public sector is undertaken by departments and authorities including:

- Public works
- Road authorities
- Transport departments
- Rail authorities
- Water corporations
- Electricity generators
- Electricity transmission and distribution networks
- Electricity retailers
- Planning authorities / departments
- Environmental authorities
- Councils and local government.

ACEA firms' relationships with these authorities are generally very strong. These relationships have developed over decades through sharing of technical knowledge and experience and joint participation in the activities of learned bodies such as Engineers Australia.

The project/service delivery methods used by the authorities vary significantly and include:

- Allowances
- PPPs
- Build Own Operate
- Design Construct & Maintain
- Design & Construct
- Construct Only

The involvement of the authorities / department also varies significantly. Examples include:

- Client or principal contracting out a service
- Alliance partner working in an integrated project team working with the private sector
- Working with in-house teams to design and construct the projects
- Carrying out design only in-house and contracting out the work
- Project managing multiple contracts carried out by the private sector either design only / construct only or design & construct
- Competing with the private sector.

An example can be given to demonstrate the range of public sector clients to which ACEA firms regularly supply consulting engineering and design services.

#### **An example**

ACEA recently reviewed a sample set of client contracts presented to member firms for the supply of technical and professional services in New South Wales.

The larger clients involved in the sample set of contracts included:

- Department of Public Works and Services
- NSW Land and Housing



- Department of Transport
- State Rail Authority
- Sydney Water
- Rail Infrastructure Corporation
- Roads and Traffic Authority
- Transgrid

This list can be expanded through the addition of multifarious other New South Wales State agencies, and a plethora of Local Councils, in Sydney, the provincial cities and the regions, who contract to ACEA member firms for projects ranging from: large projects, such as, road and rail development; the design of bridges, dams and water storage facilities; airport development and upgrading; drainage, flood mitigation; power and water reticulation; urban development and public facilities including schools, hospitals, recreation centres; to smaller projects, such as, environmental impact statements; pre-feasibility studies; and IT and software development (this is not an exhaustive list).

This list can be multiplied by eight to encompass the same or similar agencies in all other State and Territories.

Examples of projects carried out for the various agencies under commercial contracts include:

- Sydney Water – dams, water storage systems, pumping stations, water treatment, hydro-electric development, tunnelling and viaduct design;
- Department of Defence – aircraft maintenance facilities, defence facilities, housing for service personnel and their families;
- State Rail Authority and National Rail Corporation – rail track, signalling, maintenance facilities;
- Department of Main Roads – road development, design and maintenance;
- Energy Australia and Internal Energy – design of sub-stations, power reticulation, lighting services, communication systems;
- Department of Education and Training – schools, education facilities and maintenance of buildings;
- Health Commission – hospitals, community health facilities, biological research facilities
- Department of Communication, Information Technology and the Arts – museums, art galleries.

These services are either delivered by private sector service firms, under commercial contracts, directly with the client or indirectly under sub consultancy agreements between the consultant and contractor.

These client organisations have major market power in the consulting engineering industry (in most cases monopolistic power because no private sector clients exist which require, or are allowed to commission, the same set of services). They can and do dictate their own terms and conditions, and significantly influence market operations. They use tender procedures to demand compliance with their terms and conditions, and on some occasion's confidentiality agreements to prevent discussions of the terms outside the framework of the client–consultant relationship.

In contrast, the consulting engineering industry in Australia is generally characterised by relatively small firms with limited market power and low capital bases. This is illustrated by Table 1.4 from the Outlook for Consulting Engineering Firms Report (April 2004):

**Table 1.4**

**Engineering Consulting Activity, by State and Territory, 2001/02**

	Firms		Employment		Revenue	
	No.	%	No.	%	\$m	%
New South Wales	4,030	37	20,891	32	2,517	27
Victoria	3,089	28	15,021	23	2,170	23
Queensland	1,828	17	13,787	21	2,342	25
South Australia	604	5	3,289	5	388	4
Western Australia	1,454	13	8,305	13	1,450	16
Tasmania	156	1	1,045	2	106	1
Northern Territory	78	1	552	1	157	2
Australia Capital Territory	175	2	1,605	2	212	2
<b>Australia</b>	<b>10,984</b>	<b>100</b>	<b>64,495</b>	<b>100</b>	<b>9,342</b>	<b>100</b>

*Source: ABS Cat. No. 8693.0*

Consulting firms are heavily dependent on clients for work and survival. The impact of withdrawal of business or termination of contract is potentially devastating.

## **1.2 The Crown as a Business**

The most significant competition reform in recent times to impact the consulting engineering industry was the extension of the Trade Practices Act (TPA) to government enterprise through partial removal of the 'shield of the Crown'. The departments and authorities of Commonwealth and State Governments have long been a significant client base of ACEA members. This change, therefore, affected a significant step towards addressing the commercial imbalance between small firms and large government agencies. Engineering industry revenue has risen by 61% since 1992/3 and share of GDP from 0.5% to 0.6%.

The TPA now binds the Crown insofar as it is carrying on a business. This extension of the TPA was introduced to make Government agencies and departments more commercially focused and expose them to competitive pressure. This also enabled consistent and uniform application of the TPA across the economy and improved the scope of the TPA to prevent the reduction of competition in key industries.

An extract from the Second reading speech to the Competition Policy Reform Bill 1995 makes clear (by inference) that the intended application of the Act extends to all bodies insofar as they are engaged in trade and commerce. Hansard records the following (Senate 29 March 1995 pages 2435-6):

*“The Trade Practice Act will be amended so that, with State and Territory application of legislation, the prohibitions against anti-competitive conduct can be applied to all businesses in Australia.*

.....

*Many public sector organisations have both commercial and non-commercial functions and these reforms are not designed to affect the non-commercial functions undertaken by governments.*

*In sectors such as education, health, welfare, community services and labour market programs where the public sector has, and will continue to have, a dominant role, the relevance of competition policies will be limited to those circumstances where enterprises are engaged in business activity.”*

Clearly the original intention of the drafters of the TPA was not that some departments and authorities of the Commonwealth and State governments engaging in commercial activity would enjoy a degree of immunity from the Act. This is evidenced by the Government’s policy of competitive neutrality (CN) which is:

- that significant Australian Government business activities do not enjoy net competitive advantages over their private sector competitors (or potential competitors) simply by virtue of their public sector ownership;
- that potential resource allocation distortions arising from the public ownership of significant business activities operating in contestable environments be eliminated; and
- that fair and effective competition in the supply of goods and services be encouraged.

The CN policy does not however formally recognize in practice that its principles and the requirements of the TPA should also be applied when the Government is *procuring* the services of the private sector – not only to circumstances where they are directly competing. This point has also been recognized by the National Competition Council, who in their response to the Senate Economics References Committee Inquiry into the effectiveness of the TPA (March 2004) stated that the CN policy,

*“is silent on the manner in which government business (or governments per se) operate as direct purchasers of goods and purchases and governments’ tendering and contracting-out arrangements.”*

The CN and TPA should clearly apply in procurement situations because, in most instances of procurement of services, agencies are in fact engaged in business and commercial matters, and because of the significant market power that the public sector client holds. It is particularly important where such immunity contributes to a distortion in competition frustrating the intention of the NCP reforms.

### **1.2.1 Lack of Clarity of Application of the Act**

The Commission’s Discussion Draft alludes to one of the problems in application of competitive regimes to government agencies, and this is the lack of clarity of application of the Act.

The Australian TPA does not define, "*in so far as it carries on a business*", only the word, "business" which is defined as,

*"includes a business not carried on for profit."*

The New Zealand Fair Trading Act more clearly defines the activities that are subject to that legislation. It *binds the Crown*, "in so far as the Crown engages in trade." *The New Zealand FTA also contains a definition of 'trade' which is,*

*"any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land."*

The New Zealand legislation not only binds agencies where they *substantially* engage in business. It also binds them *whenever* they engage in business.

Sections 2A and 2B of the Australian TPA, subjecting the departments and authorities of Commonwealth and State governments to the Act, is illusory in so far as the departments and authorities do not "carry on a business" according to how the courts have interpreted those words. Case law has been relied upon to provide interpretation of the Crown exemption, in the absence of clear definitions.

### **1.2.2 The Public Benefit Provision Path to Sidestepping the TPA**

This relates to the authorisation of anti-competitive behaviour that is in the public benefit under section 51(1) TPA. The ACCC in their submission to the Productivity Commission Inquiry in June 2004 said,

*"Under the TPA, s.51(1) provides for governments to exempt anti-competitive conduct from the competition law. Reliance on s.51(1) provides an avenue other than through the authorisation process to exempt behaviour from the TPA. A s.51 exemption is not conducted in as public and transparent a manner as the authorisation process and is not subject to review by an independent authority, such as the Australian Competition Tribunal."*

Under s.51 (1), a Government department or agency can sidestep the obligations of the TPA, on the basis that it does so for the benefit of the public, in a non transparent manner and with no opportunity for review or appeal.

While there may be a case for using the exemptions from the Act as a transitional measure where projects are one-off 'specific events' (such as the Olympic Games), it is hard to see the justification where projects or service requirements are multiple and/or routine.

It is also necessary to define what is meant by "a one off project". In the case of the Olympic Games, it is clear that management of the Olympic Games as a project in itself is a 'one-off'. However the delivery of routine services within the framework of the Games (e.g. design of stadia, sports halls, environmental clean up and remediation, development of a mass transport system, lighting (venues and public displays), rail and road development) should not be subject to exemption because such services are common projects for delivery by supplier firms operating in an open market.

### **1.3 The Impacts**

Without the constraining influence of the Act arising from exemption from the TPA that the departments and authorities of the Commonwealth and State Governments enjoy in relation to the kinds of service referred to in this submission, the results have been introduction of contractual terms which have strong anticompetitive effects.

#### **1.3.1 Onerous Clauses in Contracts**

Harsh or oppressive contractual terms in "take it or leave it" standard form contracts in the public sector are now commonplace.

##### **Example**

Major examples of onerous clauses in contracts which feed down to consulting engineering firms either directly, from Government as a client, or indirectly through Government contractors, include;

- requirements for excessive and unreasonable levels of professional indemnity insurance which effectively shift the total liability and risk for projects on to consulting engineering firms, and
- unilateral variations of contract.

##### **Example**

Other specific contractual demands of an onerous nature include:

- Very high standards of care which in some cases are unachievable
- Responsibility for client supplied information
- Liquidated damages in the head contract
- Absolute fitness for purpose warranties (or unqualified)
- Strict compliance with very complex and detailed specifications
- Accurate and detailed estimates of quantities and cost
- Certification of compliance of design
- Certification of compliance of construction
- Liability for consequential loss
- Unqualified indemnities against personal injury, death and property damage
- Unqualified indemnities against third party actions
- Duties of care to multiple parties.

##### **Example**

Government agencies force contractors and consultants into circumstances where *they* will breach the TPA.

Some government contracts require that consultants take on an obligation of certifying work with a prescribed form of certificate, without any provision for deviation in the form of the certificate according to the particular circumstances of the project.

When the consultant is then not able in engineering terms to certify the works exactly as prescribed in the certificate, the consultant may either be in breach of contract if it does not proceed to certify or certifies in a qualified way, or alternatively is placed in a circumstance of being in breach of Section 52 of the TPA if it does certify.

### **Example**

In tendering on government contracts, tenderers may be required to complete a tender form which includes an explicit statement that the tenderer in no way relies on the information provided by the government agency. Such a requirement may be repeated in the contract.

Clearly, the government agency is fully aware that the contractor or consultant has no alternative source of information on which to tender.

Further, the contractor or consultant may have to enter into a confidentiality agreement prior to receiving tender documents and hence have no opportunity to source additional data.

Should the government's information prove to be incorrect, and the consultant make a claim for additional fees on that basis, the government agency may claim that in completing the tender form, the consultant has breached s.52 of the TPA.

If s.52 of the TPA applied to all the parties in a commercial transaction, government agencies would not be in a position to contract out of their reasonable obligations.

In ACEA's view contract clauses like those in the examples infringe the principles set out in s.51 of the TPA concerning unconscionable conduct, where the courts can have regard to the relative strengths of the bargaining positions of the parties, and also the policy favouring small/medium business in the Commonwealth Government's *Procurement Guidelines* (because most SMEs are unable to comply).

However they also have a significant anti-competitive effect.

### **1.3.2 The Anti-Competitive Effect**

The use of market power and the terms and conditions applied by government agencies to PPP's and various forms of design & construct contracts have a flow on effect across the construction industry, and broader impacts that go to lessening of competition.

There is already considerable evidence that the rise in disputation and claims against consultants driven by such clauses has risen dramatically in the 1990's, which in turn has had a dramatic impact on the scope, availability and premiums for insurance, which in turn has forced some firms to discontinue operation in the market in their current form. As a result, there has been consolidation of firms in the industry through merger, and in some cases total exit of firms from the market. This has been particularly prevalent at the small and medium end of the market.

The introduction of harsh or oppressive contractual terms increases the height of barriers to entry to markets. Small consulting engineering firms, who have the skill and capacity to take part, cannot enter the market because:

- Only firms with significant financial resources can afford the Professional Indemnity Insurance cover that is required to meet the onerous demands in the contracts; and

- Only large firms can afford to perform the scope of work which:
  - a) could not have been foreseen when the contract was signed, but is a "back door" variation to the contract for which there is no remuneration to the engineer and;
  - b) is outside the engineer's field of expertise.

As a result of onerous clauses in contracts, market concentration is increased. ACEA members for whom these contracts are not commercially viable are excluded as participants in the market. As a class, their countervailing power to big business parties who acquire consulting engineering services diminishes or vanishes.

**Example: Market power held by a Government client**

A medium-size consulting engineering firm with over 30 years of experience, and a track record of award-winning bridge design, was the initial successful tender to a government client for a \$3 million bridge design project, for which the consultant's fee was \$50,000. The Professional Indemnity Insurance (PI) cover required by the client was \$20M.

The consultant had PI cover of \$15M. However, he was unable to secure the additional \$5M PI insurance cover required by the client at a reasonable commercial rate, or to negotiate a lower cover with the client. On this basis, although the consultant had initially been notified that he was the preferred tenderer, he was forced to withdraw from bidding for the project.

On protest, the client later agreed that for such a project their PI requirements were unreasonably high, and reduced their requirement to \$10M, a level which the consultant could easily have met.

However by this time the tender had been awarded to another consultant who had the \$20M cover (a major firm).

The TPA's objective to apply anti-competitive measures equally across public and private businesses is not achieved under such a regime.

Ultimately this is anomalous in an efficient economy, in that a vigorous consulting engineering service supply sector is inhibited, and in danger of contracting. An industry needs to be maintained which is diverse in terms of the size of firms in it, and competitive across the markets and sub-markets necessary to maintain services to the community, the private sector and local, state and federal government. It is vital to the Australian economy that competition be based on a range of technical and commercial criteria and not on who can meet onerous clauses in contracts, and the insurance requirements associated with them.

The answer is to constrain the clients from behaving onerously by removing the exemption from the TPA that the departments and authorities of the Commonwealth and State Governments enjoy in procurement of services and in the development of contracts.

Failure to address these issues with the FTA would be inimical to competition within the meaning of section 2 of the Act.

## **1.4 Support for Greater Application of the TPA to the Government as a Business When Procuring Services**

### **1.4.1 The NT Power Case**

The most recent case, which has a significant impact on this issue is *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 (6 October 2004).

Here the Court held

*"PAWA's use of its infrastructure assets was part of its carrying on of a business, whether or not it [PAWA] was in a market for their acquisition, sale or hire".*

Critically the Court confirmed that

*"PAWA's decision to refuse access to infrastructure had the purpose of excluding NT Power from the market, and that purpose could not have been achieved by its refusal of access to infrastructure had it not been for PAWA's market power. "*

This case highlights the fact that if a government authority is found to be conducting a business, a broad range of activities relating to that business are subject to the Act. It also demonstrates the extent of market power that can be held by the Crown and the resulting potential for market abuse.

It must be noted, however, that judgement did not refer to the activities of Government when they are *procuring* the services of the private sector and so while it expands the scope of the TPA to government business, there is no clear definition in the judgement of the phrase, 'carrying on a business'. Without a clear definition that Government procurement activities are caught within the Act, ACEA firms will continue to suffer the impacts and anti-competitive effects that are explained in this submission.

The need for greater constraint of government procurement practice has received attention in other contexts.

### **1.4.2 Senate Economics References Committee Enquiry**

The Senate Economics References Committee undertook an inquiry into the effectiveness of the TPA in protecting small business. The final report was published in March 2004.

The purpose of the inquiry was to look at whether the TPA adequately protects small businesses from anti-competitive or unfair conduct.

The Senate inquiry took into account among others, the view of the Fair Trading Coalition, a grouping of some 22 small business representative organisations, collectively representing some 300,000 small businesses. It was the Coalition's view that the public sector is a significant purchaser of goods and services in the economy, should be subject to the same rules as any other purchaser of goods and services, and should be explicitly covered by the TPA.



The Committee's consideration of this matter is worth noting.

The Senate Committee considered whether the public sector would already be covered by the TPA when procuring the goods and services of the private sector. The Committee recognised that the TPA applies to Government 'in so far as it carries on a business', but noted the judgement of the Federal Court in *Fasold v Roberts* [1997] 439 FCA (2 June 1997), where the following statement was made,

*"I agree with Rolfe J that, generally speaking, the word 'business' as used in the Fair Trading Acts, bears the dictionary meaning of 'trade, commercial transactions or engagement'. However, that will not always carry matters very far. I think that in addition, ordinarily at least, the concept of 'business' imports, as Barwick CJ suggested in Hungier v Grace, a notion of system, repetition and continuity. I appreciate and accept that due regard should be paid to the 'wide and flexible meaning' attributed to the word 'business' in common usage [...] Nonetheless, in general, for an undertaking to constitute a business it will have to be conducted with some degree of system and regularity."*

#### *The Committee's Findings*

The Senate Committee's view was that given Commonwealth Government purchasing involves, 'trade, commercial transactions or engagement' and that it is 'conducted with some degree of system and regularity', it is very likely that purchasing already comes within the meaning of 'business'. However the Committee found that for clarity, the TPA may need amendment to make it explicit that s.51AC applies to the Commonwealth Government.

The Committee agreed, therefore, that Government agencies in all jurisdictions should conduct commercial activities without engaging in unconscionable conduct. Amending the TPA so that Part IVA, including s.51AC, applies to state and territory governments would have this effect. The Senate Committee Report, as a result of this agreement made the following recommendations:

#### Recommendation 8:

*The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in subsection 51AC(3)) or acquirer (in subsection 51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.'*

#### Recommendation 9:

*The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part 1VA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.*

*Witnesses indicated to the Committee that some government authorities, particularly at State and local levels, are not covered by s.51AC of the Act, despite being large scale purchasers of products, often from small businesses. The Committee agrees that such authorities should be subject to the Act.*

## *The Government Response*

The Government responded to the Senate Committee recommendations in June 2004.

In response to Recommendation 8 the Government said the following:

*The Government accepts this recommendation. It accepts that the imposition or utilization of a unilateral right of variation may be an indication that unconscionable conduct has occurred in the bargaining process. The Government also supports the conclusion that unilateral variation clauses do not always indicate that unconscionable conduct has occurred. In some cases these clauses may be indicative of healthy competition.*

*The Government therefore agrees that subsections 51AC(3) and 51AC(4) of the Act should be amended so that courts may have regard to the imposition or utilisation of contract terms that allow for the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and an acquirer of goods or services, in determining if unconscionable conduct has occurred.*

The Government also accepted Recommendation 9. Their response was as follows:

*The Government accepts this recommendation in circumstances where governments are carrying on a business. This recommendation has three parts. First, that subsection 2B(1) be amended to make it clear that the Commonwealth Government is bound by Part IVA of the Act; second, that the Commonwealth Government enter into consultations with the States and Territories to amend subsection 2B(1) to ensure that States and Territories are bound by Part IVA; and third, to amend the Act to ensure that local governments are bound by Part IVA.*

*The Government accepts that it should be clear the Commonwealth is bound by Part IVA (the first part of recommendation 9), but notes that alteration of the Act is unnecessary. Section 2A states that the Commonwealth is bound by all provisions of the Act in circumstances where it is carrying on a business. This includes Part IVA. Amendment of the Act would, therefore, appear unnecessary.*

*The Government accepts the principle expressed in the second part of this recommendation. Binding States and Territories to Part IVA of the Act creates certainty for business in their dealings with that level of government. This will be progressed through negotiations between the Commonwealth and the States and Territories.*

*The Government accepts the principle expressed in the third part of this recommendation. Binding local governments to Part IVA of the Act creates certainty for business in their dealings with local government. The Commonwealth Government proposes to amend section 2D to remove the current exemption that local government bodies have from Part IV of the Act. The Government will give further consideration to ensuring local governments are also subject to Part IVA of the Act.*

*Despite Widespread Agreement with the Principle – The Practices Continue*

ACEA notes that there is widespread agreement that these activities are covered. But reality is that the principle of coverage in these areas is *not* applied within Government agencies who are procuring the services of the private sector.

Large numbers of contracts can be produced to evidence this point.

In addition the guidance which Government agencies apply are often either vague or in disagreement on the point of coverage of the TPA provisions in circumstances of service delivery, as demonstrated in the following example.

### **Example**

The Victorian State and local government agencies Guide to Competition Policy makes no attempt to define the activities that are caught under the phrase, 'so far as they carry on a business'. Section One (Page 15) makes the following comment,

*"'Business' may be given a wide meaning including almost anything which is an occupation as distinguished from a pleasure. 'Business' is expressed to include a business not carried on for profit. In practice, it is unlikely that either the purely regulatory activities of Crown entities or the transactions in which they engage in the course of their delivery of non-commercial (tax-funded) services would constitute 'business' activities for the purposes of Part IV."*

ACEA agrees that regulatory activities should not be covered as a business activity. However ACEA does not agree that "transactions in which they engage in the course of their delivery of non-commercial (tax-funded) services" should not be covered as a business, as this would seem to cover all procurement activity.

The principle that Government is subject to the TPA when procuring the services of the private sector, is clear and generally agreed.

The practice, however, must be changed to affect the intention of the TPA.

Clarification in the TPA itself would be the most effective and efficient way of clarifying the application of the TPA to Government, on a point which has already been agreed upon by Government and stakeholders alike.

## **1.5 Summary**

- The departments and authorities of Commonwealth and State governments are a significant client base of ACEA member firms (approximately 50% of the industry).
- 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 agencies have sidestepped obligations under the TPA on the basis that, under some circumstances, they are not deemed to have been carrying on a business, or by claiming exemption 'in the public benefit'. This has particularly occurred in areas of government procurement.

- Without the constraining influence of the Act arising from exemption from the TPA that the departments and authorities of the Commonwealth and State Governments enjoy in relation to the kinds of service referred to in this submission, contractual terms have been introduced throughout the public sector which has strong anticompetitive effects.
- Market power lies with the client because they are large organisations (most often monopolies), and so they are in a position to distort competition by the introduction of onerous contract terms. The market power of such clients dictates that service suppliers must accept such contracts or go out of business.
- There is widespread agreement on the principle that government agencies when acting in business situations should be subject to the Act eg the NT Power Case, the Senate Inquiry into the Effectiveness of the TPA in protecting small business, and the Government's response in the affirmative.
- However the practices and guidelines at agency level continue to ignore the principles of the TPA in their behaviour, and smaller private sector firms are in no position to sue them under the Act.
- If the detriment to firms continues to occur, there will be shrinkage of suppliers, so reducing competition in supply.
- The Act must be amended so that it clearly applies to all government business activities, including routine procurement.

An ancillary impact of contraction of supply will be detriment to delivery of the Government's infrastructure agenda (an interest of the Discussion Paper), as most infrastructure projects require a wide range of consulting engineering services.

Infrastructure provides the framework within which further economic development can take place.

The Government's policies, including competition policy, must support the key stakeholders that support an efficient infrastructure base, to safeguard the long term efficiency of operation of the economy.

<b>Recommendations On Application Of The TPA To Government Procurement</b>
--

1. ACEA supports the Productivity Commission draft proposal that the provisions of the TPA extending coverage to government businesses should be examined to ascertain whether legislative changes are warranted to ensure that particular activities do not inadvertently escape coverage.
2. However, ACEA recommends that the proposal should not only be examined in the light of the recent court cases, but on the basis of:
  - (a) The recommendations of the Senate Inquiry into the effectiveness of the TPA in protecting small business March 2004 and the resulting Government response.
  - (b) Case studies where detriment is occurring as a result (as it is in the consulting

engineering market place) and;  
(c) The process by which public benefit is determined.

3. ACEA recommends that the Trade Practices Act be amended to ensure that all government agencies are effectively covered by the Act when they are operating in the commercial environment:

(a) 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.

(b) An amendment to the Act should also 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.

(c) Definitions under the TPA and the Section 51(1) exemptions process should be clarified to not only protect industry from anti-competitive behaviour but also to provide some certainty to authorities when determining whether or not Crown exemption is appropriate.

## **ISSUE 2 - The Need for Further Competition Related Reforms in Areas of Infrastructure**

ACEA members work not only in Australia but all round the world on infrastructure development. ACEA members have the skills and experience in design and planning, improvements in the efficiencies of power, water, gas, and transport systems, the use of more energy efficient construction materials and techniques, and the use of alternative energy and water sources.

ACEA is pleased to see the emphasis on infrastructure in the Discussion Paper, as it is such a critical issue for Australia.

The link between infrastructure and economic growth is well researched and reported. There has been significant research by the engineering sector which supports the concept that infrastructure development and investment as a critical factor in the establishment of a stable economy.

This work has included the development of the Infrastructure Report Cards produced by Engineers Australia each year since 2000.

The Australian Infrastructure *Report Card* Alliance is comprised of the major infrastructure users, owners, operators, investors, industry groups and other stakeholders within Australia. The Alliance was formed to oversee an independent review of the state of Australia's infrastructure from economic, social and environmental perspectives. The report card highlights,

*"Infrastructure is vital to the Australian economy. It underpins the delivery of essential services and drives economic growth. Given that Australia's infrastructure affects every Australian every day, it is of paramount importance that it meets today's needs and through careful planning, maintenance and construction, it meets the needs of tomorrow."*

Other independent reports have also re-enforced the link between infrastructure and a thriving economic environment. Some only include:

- The National Institute of Economic and Industry Research Transport infrastructure: A Perspective and Prospective Analysis of its Role in Australia's Economic Growth (December 2002);
- The Local Government Association's State of the Regions Report (November 2004).
- The Department of Treasury and Finance's report into the Structure of the Western Australian Economy (February 2002).

ACEA supports the Productivity Commission's proposed recommendations for continuing reform in infrastructure areas generally, and particularly in areas such as energy and water, freight and passenger transport and communications. ACEA members can and do make a strong contribution in these areas in terms of innovation and design for improving the efficiency and long-term sustainability of these key resources.

As outlined, the engineering industry has done substantial research into infrastructure in Australia, incorporating roads, rail, water, bridges and sewerage. In its significant work on these issues, Engineers Australia note the following pre-eminent problems:

- Overall reduction in capital and recurrent spending on infrastructure with implications for proper maintenance of existing assets, for example, a decline in public sector capital expenditure from around 8% GDP to around 2% GDP over 40 years.
- Lack of planning and co-ordination of infrastructure provision.
- Lack of consolidated, consistent, comparative and up to date information on infrastructure assets.
- The massive shift in the engineering workforce from the public to the private sector with implications for corporate knowledge loss in utilities.

The Productivity Commission's proposals are agreed, which set out the following actions for CoAG:

- Sponsor the development of a longer-term strategy for achieving a national freight system that is neutral across transport modes.
- Sponsor the development of a national reform agenda for the rail sector that integrates current work in this area and establishes clear timelines for the implementation of reform.
- Commission an independent national review of the passenger transport sector to assess the impacts of recent reforms and determine what is now required to deliver further performance improvements in both urban and regional areas.

ACEA believes that the Productivity Commission's proposals that the Government must complete the outstanding infrastructure matters under the NCP legislation review programme (which includes energy, water, freight and passenger transport) is essential.

ACEA also agrees that periodic reviews are essential to ensure that competition measures are being applied effectively and proportionately and remain relevant in relation to public interest.

The Legislative Review Program and Gate-Keeping for new regulation that could have anti-competitive effects is welcomed by ACEA. Legislative reviews should be targeted, focusing on areas where there is evidence of providing significant benefit. ACEA looks to specific methods for achieving progress in terms of making the review processes more transparent and independent.

ACEA also welcomes more effective monitoring and strengthening of gate-keeping measures to ensure that regulation does not have the unintended consequence of being in itself anti-competitive.

ACEA agrees with the Productivity Commission infrastructure must remain a high priority for coordinated reform. Although Australia's infrastructure performance has improved, there is scope for further advancement with further competition related reforms.

Following on from the above comments, ACEA wishes in this submission to highlight and comment particularly on two issues, as follows.

## **2.1 GREATER USE OF OUTSOURCING OF SERVICES TO PRIVATE SECTOR**

The growth in outsourcing of Government services to the private sector has been widespread in terms of some activities, some states / territories and by some agencies. This is particularly the case in infrastructure areas. For example, there has been extensive outsourcing in road projects across Australia using a variety of delivery techniques. However, in other areas such as electricity transmission and distribution, there have been very limited use of outsourcing in some states and in at least one location, a very strong preference (largely at the exclusion of the private sector) to use in-house resources.

ACEA has attempted to gain an understanding of this reluctance to outsource. Anecdotally, it has been suggested that some authorities feel restricted by internal staffing pressures which effectively restricts the use of the private sector in favour of public sector supply of services. In ACEA's view this is anti-competitive.

ACEA believes it is important to use a variety of delivery methods to promote the most efficient, cost effective and value for money service delivery. This approach enables ongoing benchmarking of performance to be undertaken, so as to maintain competitiveness in delivery of public projects and services. There is a distinctly anti-competitive impact on the industry in using a single delivery method.

If a diversity of contracting opportunities was maintained, there would be greater competition in terms of participants and project outcomes, a better appreciation of the value of out placing risk (which has in the past been wholly placed under the contract on the contractor) and of project out-turn cost. It is argued elsewhere in this submission that the excessive transfer of risk using these forms of contract has already resulted in consolidation in the consulting engineering industry.

<b>Recommendation</b>
-----------------------

4. ACEA recommends that the Productivity Commission promote a review of the outsourcing activities of government agencies to ensure the greatest variety of delivery methods for infrastructure service provision as the best way of ensuring the benefits of competition in delivery.

## **2.2 LAND TRANSPORT PLANNING**

Transport infrastructure development is an area which relates to the interests of the Discussion Draft. ACEA agrees with the Productivity Commission's recommendation that additional nationally coordinated reform networks to be developed for freight and passenger transport.

ACEA member firms have been involved in some of Australia's most significant transport projects, both in terms of providing engineering and technology services, and as participants in public private projects (PPPs). Projects include the M2 Motorway in Sydney, Citilink in Melbourne, the Brisbane Innercity Bypass, the Pacific Highway Upgrade, Docklands Transport Infrastructure Project in Victoria, the Scoresby Integrated transport Corridor in Melbourne and the Alice Springs to Darwin Railway.

Transport growth is strongly linked to economic growth. Changes in demand from globalisation, new ways of doing business such as e-commerce, and the opportunities



presented by new technology require a more strategic and flexible response to transport planning than Australia has had in the past.

ACEA agrees with the Productivity Commission that there has been a compartmentalised approach to much of the Australian transport policy.

ACEA believes that Australia must move away from development and investment decision-making based on segmented modes (rail, road, sea and air) and management (three tiers of government) to an integrated nationally consistent multimodal approach based on freight and passenger flows and logistics, and strategic transport corridors incorporating rail, road, air and maritime sectors. ACEA also believes that there must be an efficient mix of transport modes, which allows the free movement of freight along the entire logistics chain, meeting the needs of commuters and business in a cost-effective and sustainable manner.

The Auslink Initiative has moved in the right direction. There needs to significant focus in the delivery of this initiative on integrated planning and development for national objectives, as opposed to piecemeal upgrade at local level.

### **2.2.1 Funding**

ACEA believes that models need to be developed such that there is an overall increase in the level of funding from both the private sector and public sectors to develop the land transport network.

A sufficient level of continuing funds into transport infrastructure is needed to ensure not only development of the transport system but also its long term maintenance. Initial capital funding needs to be accompanied at development stage by earmarked financial support for on-going costs that accrue over a project's life span.

The extra funding from the Auslink initiative is welcome. These funds need to be built on through growth in private funding of what was previously considered to be public infrastructure.

### **Pricing**

Significant pricing differences currently exist between road and rail modes. However, ACEA believes that moving towards more consistent and comparable pricing models for both modes of transport will help to promote a more efficient allocation of resources. Such models should incorporate financial, economic and community returns.

There is a range of options including vehicle registration charges, infrastructure charges, road use and cordon charges, parking charges, location charges and developmental charges.

ACEA believes that road user charging systems which more accurately relate road usage with costs would be acceptable to the public.

ACEA supports the views of the Warren Centre's *Community Values* study, which reveals that transparency and hypothecation are the keys to public acceptance of transport pricing.

The community supports hypothecation of transport pricing funds to transport projects as it not seen as a general taxing mechanism. The perceived value of increased transport pricing will improve if revenue is used to address congestion, environmental, public transport, and transport equity issues.

Education and communications programs can be used to promote public acceptance of 'user pays' transport equity issues.

**Example: USA**

Hypothecation in the USA has allowed that country, which has traditionally had difficulty in raising taxes, to build a high quality interstate road network.

(The Institution of Engineers Australia, Public Investment in Infrastructure: Justified and Effective, p.22)

## **Tollways**

For example, tollways on new infrastructure is a positive way to control demand and increase the use of public transport. ACEA believes that fast, efficient tollway systems, such as Citilink in Melbourne, are a far preferable alternative to users than congested city streets, and help to pay for the road systems.

Similarly, ACEA supports heavy vehicle charges which more effectively relate damage to user costs, and supports recent government moves in this regard.

**Example: Germany**

*German transport policy is heavily influenced by demanding greenhouse gas reduction targets and by a national commitment to sustainable development. Both these interrelated concerns have produced a large investment program in rail transport and a weight-distance tax on trucks. The truck tax generates significant revenues, which are used to offset transport investment costs across all modes. As in the case of Germany, Austria has also introduced a truck tax to assist in funding the very high investments on rail projects.*

*(Whitelegg, J., Investing in Transport: an international perspective on methods, priorities and models, p. 7)*

## **Tax System**

Taxation arrangements also have a significant impact on investment in infrastructure.

ACEA supports the move by the Federal Government to amend Section 51AD of the *Income Tax Assessment Act 1977*. The leasing sections of 51AD and Division 16D of the *Income Tax Assessment Act 1936*, in many circumstances, deny the owner of an asset certain tax deductions in relation to that asset. The new arrangements will provide some incentives for private investors.

Other tax related initiatives to support increased funding for the transport system might be to increase the proportion of the budget devoted to capital expenditure, or to earmark part of the GST collected on transport services for the development of the transport system, for a defined period (eg five years).

## Grants Scheme

ACEA also notes an initiative in the UK to address the differential costs and usage of the road and rail systems - a grants scheme to encourage both road and rail transport to attract their optimal proportion of use.

### **Example: UK Grants Scheme**

*In the UK, the Department of Environment, Transport and the Regions has two grants schemes available to companies to equalise the cost of rail and road freight as an incentive to encourage companies to use rail instead of road freight.*

- *The Freight Facilities Grant offsets the capital costs of providing rail freight handling facilities. Grants may be obtained for rail sidings, wagons or other equipment, provided it is to be used exclusively for rail freight purposes.*
- *The Track Access Grant helps rail freight operators meet track access charges set by Railtrack, the privatised UK track owner*

*(The Australasian Railway Association, Infrastructure Investment p.5)*

ACEA encourages consideration of this concept.

## Reciprocal Responsibility and Shared Risk

ACEA believes that there are significant opportunities for greater private sector involvement in road and rail infrastructure development in Australia.

ACEA believes that there is a significant advantage in pursuing greater private sector financing of transport infrastructure, and welcomes the development of Public Private Partnerships (PPPs).

PPPs are a means of attracting private sector funding for public infrastructure projects, and are an increasing means of infrastructure development in Australia, with PPP policies adopted by the Federal Government and all States except NT and the ACT. Local Government development projects and services are also potential candidates for PPPs. Private sector funding has been most successful with PPP style projects where there is a defined income stream such as toll roads.

However, there are many inconsistencies between governments in the way in which PPPs operate throughout Australia which need to be ironed out.

In addition, public sector funding models need to be rethought.

In general, the high level of investment required for infrastructure projects, and the public benefit of most projects, means that joint funding from both the private sector and public sector is both desirable and appropriate to support the feasibility of many projects.

Too often there is an emphasis on evaluating projects on the basis of **no cost** to Government. ACEA believes that it is important to evaluate projects on the basis of **least cost** to Government.

**Example: Sydney Light Rail**

*The Sydney Light Rail Project demonstrates how the right balance of government funding and private sector funding can lead to sustainable transportation. The cost of the project was approximately \$100M with a 30 – 40% contribution from both the State and Federal Government. The Sydney Light Rail is now running efficiently carrying close to 4 million passengers per year. This example emphasises the successful outcomes of projects that poses least cost to Government rather than no cost to Government. Private sector participation is unlikely to increase if Government does not contribute funding.*

**Example: Sydney – Canberra Speed Rail Link**

A private sector proposal was made to the Commonwealth, NSW and ACT Government in early 1999 to develop a speed rail link between Sydney and Canberra on the premise that there would be no costs to the Government. The project was to be designed, financed, built and operated by a privately owned consortium, the Speedrail Group, a partnership between Alstom and Leighton Holdings. However, the project was abandoned in December 2000 when an analysis of the proposal depicted significant net costings to the Government. Although the initial agreement was for the private sector to cover all costs for this project to even be considered, the high levels of costs associated with infrastructure investments, and the public benefit that would have accrued from such a project exemplifies the importance of reciprocal responsibility and joint public/private sector funding if significant transport infrastructure is to be developed.

**Risk Allocation**

ACEA believes that risk allocation is a major issue in PPPs.

Equitable and sustainable risk allocation models need to be developed for each project.

Government policy in implementing PPP projects generally is to require most or all risk to be carried by the private sector. This includes Professional Liability, Public Liability, OH&S, force majeure and all forms of commercial risk associated with the operations of an asset, including the potential risk from future competition.

Risk assessment and evaluation and long-term strategic investment returns and viability are therefore critical elements in both the short-term development phase and long-term equity investment phase. There are major implications in this for PI and PL insurance of all parties.

Experience to date suggests that many contractors involved in PPP projects have had unreasonable levels of risk allocated to them and that some of the risks have been impossible to manage.

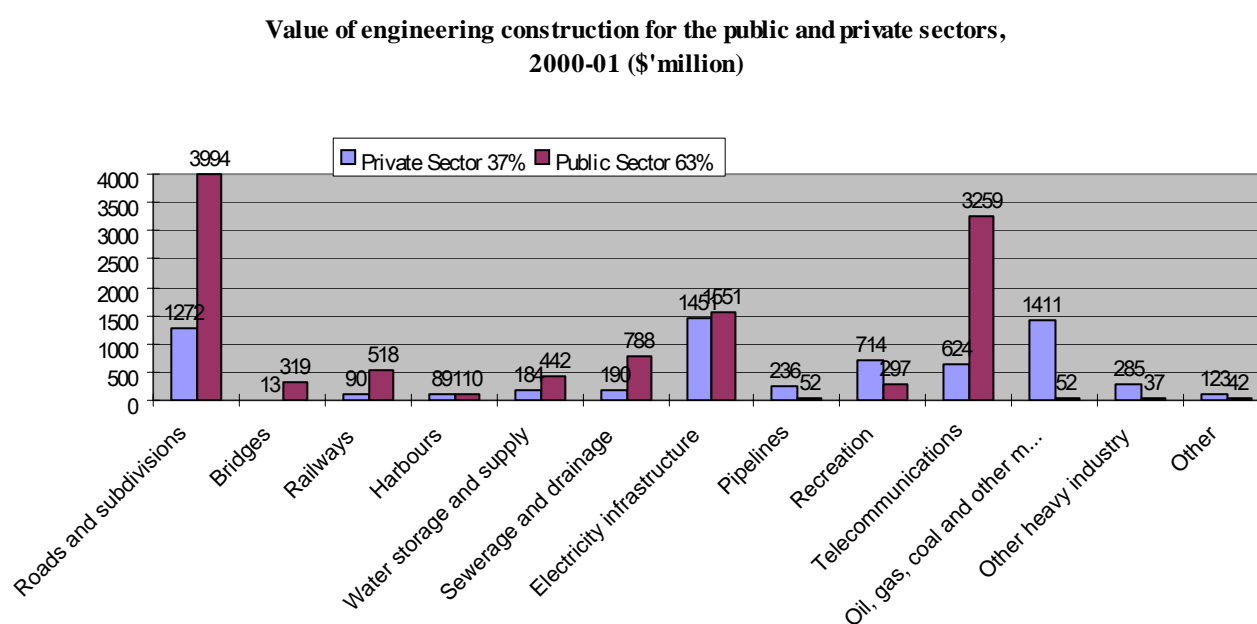
Material Adverse Effect (MAE) regimes have been developed in some cases for those risks which are difficult or impossible to identify in advance. MAE regimes

provide forms of compensation for unforeseeable adverse conditions, such as changes in legislation, which occur during the term of the contract.

## More Equitable Funds for Rail and Road

There is a significant differential in allocation of funds in recent years to road over rail transport.

The following graph illustrates significantly higher level of activities in roads (\$5,266 million) by both the private sector and public sector in comparison to railways (\$608 million).



Royal Commission into the Building and Construction Industry May 2002  
Discussion Paper two

An efficient and flexible system would be promoted by a more equitable allocation of funds.

ACEA believes that greater involvement by the States and private sector in rail infrastructure investment is needed, but will only occur on the basis of a stronger financial commitment by the Commonwealth to invest in public use rail infrastructure (*Tracking Australia, Executive Summary, p.6*). The increase contribution which Auslink will make to rail infrastructure is welcome here.

ACEA supports initiatives to promote all tiers of government working closer together in transport funding to promote more equity in funding between road and rail.

The *Community Values Research Report* by the Warren Centre shows that Sydney residents feel strongly about the need to develop public transport infrastructure and are prepared to pay for this at the expense of road funding.

ACEA supports the concept of consolidating revenue from road and rail, and to allocating it in a rational way across both modes of transport, as part of a strategic plan of transport development. The objective would be however to increase the total

funding of transport development through greater contributions from public and private sector services, and also from a higher prioritisation to capital spending in the Budget, rather than to reduce funding on roads.

### **2.2.2 Technology**

New transport technologies will encompass equipment, freight and transfer systems, and also management systems. New developments in engineering, IT&C, and material handling will all contribute to building a more innovative and integrated transport system.

Intelligent Transport Systems (ITS) use a range of innovative technology to make better use of new and existing transport infrastructure, as well as more efficient, safer and sustainable in terms of technology, society and the environment. (*Booz, Allan and Hamilton 1998*)

ACEA recommends that funding be separately earmarked to foster research and development for future technological solutions, including investigation and integration of ITS more effectively into the land transport system, and related issues such as interoperability.

The R&D Tax Concession could also be an effective incentive for developing innovative transport systems. The definitions in the guidelines for application of the Concession need to be reviewed to ensure that they apply to the kind of innovative process and management solutions developed in private sector transport specialist firms such as engineering firms.

### **2.2.3 Link Transport Planning and Land Use Planning**

ACEA supports the concept of developing a national planning framework supported by clear national transport policies, which combines transport and land use planning in an integrated transport network. A new framework or models need to be introduced to identify developing regions and create a link between transport planning, land use planning and population strategies. The new Auslink National Network is a step in the right direction here.

ACEA supports the Federal, State and Local Governments working together on linking transport planning and land use planning in an integrated way to overcome the issue of poor transportation to new developing areas, such as the new housing developments north west of Sydney.

ACEA believes that long term strategic planning is crucial for land use planning. It takes 20 – 30 years to receive benefits from land use planning. A 50-year horizon outlook should be considered when planning for transport and land use, rather than the average 20-year or less horizon which tends to apply now.

### **2.2.4 Intermodal Connections**

ACEA supports the development of efficient intermodal terminals to improve rail's competitiveness with road, which will help to reduce long-distance truck trips, reduce

road damage, as well as saving fuel and reducing greenhouse gas emissions. The focus in the Auslink initiative on a more coordinated approach is recognised.

### 2.2.5 Development of Data Collections

A limiting factor on cross modal studies, and other areas of transport planning, includes the lack of reliable and valid information available on freight movement and utilisation.

ACEA supports the development of an information framework to extract meaningful and reliable data on freight. This would promote more accurate transport projections and management and provide valuable information for future investment decisions in intermodal terminals and transport planning more generally.

### 2.2.6 International Models

International models can be used to develop efficient transport networks in Australia.

Some insights from overseas research include:

#### **Example: USA**

*In 1998, the US President reauthorised the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), which builds on the initiative established in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). ISTEA recycles tax dollars from fuel taxation and makes substantial sums available for major rail and transport projects. Fundamentally ISTEA is about the preparation of transport plans for metropolitan areas based on cooperation between states and municipalities and giving access to federal funds.*

*(Whitelegg, J., Investing in Transport: an international perspective on methods, priorities and models, p.9)*

*One of the key elements of the new TEA-21 Act includes the development and implementation of management systems including intermodal management systems, congestion management systems, public transit facilities management systems, and safety management systems.*

ACEA recommends that similar models to ISTEA be considered for Australia as a transparent and fair system of comparing the claims and outturn performance of road, rail and intermodal transport solutions.

ACEA also notes the US Government Performance and Results Act (1993) which requires government departments to reveal the actual results of policy. Results are monitored and audited and provide a very clear indicator of which type of transport policy and investment is actually working and why. Australia should also consider introducing such a model. (Whitelegg, J., Investing in Transport: an international perspective on methods, priorities and models, p.11)

### 2.2.7 Project Evaluation

At present, financial analysis is generally performed on project evaluation for the rail sector, which tends to encompass only costs and benefits to investors. On the other

hand, *cost-benefit analysis* (CBA) is generally performed on road infrastructure, which encompass costs and benefits to the community and also measures economic efficiency.

Although CBA is most widely used and is endorsed by the Roads and Traffic Authority (RTA) and the Bureau of Transport & Regional Economics (BTRE), it expresses all the gains and losses in monetary value and fails to measure the social costs involved in financing public projects. Environmental and social impacts are unquantified and valued at zero in a CBA project appraisal, creating bias results.

ACEA believes that it is important to develop a consistent, transparent and common project evaluation framework across all modes of transport and supports the concept of the triple bottom line (TBL) approach.

A TBL approach to project evaluation focuses not only on financial performance, but also economic, social and environmental performance. The core characteristics of the triple bottom line approach include accepting accountability and being transparent.

According to the Department of Infrastructure (DOI) report, *Estimation and Valuation of Environmental and Social Externalities for the Transport Sector*, a proposal to operationalise the TBL is to establish a common base of default externality values. That is, rather than applying zero to environmental and social external impacts in a project, these common base of default “externality values” can be applied through CBA with the support of a range of models that the DOI is currently developing.

Externalities can be defined as “the effects of economic activities which are experienced by third parties, but which are not reflected in the prices of the activities. Since producers and consumers make their decision on the basis of prices, the external effects are not taken into account.” (Austroads 2000)

TBL is a relatively new phenomenon. ACEA supports the development of a project appraisal guide, drawn with similar concepts from the DOI model, that would set out the methodology, assumptions and detail on how priorities will be evaluated, how funds will be allocated, and how performance will be monitored to make sure funds are used effectively. A proper feedback loop is also necessary to monitor performance.

## **Recommendations On Land Transport Reform**

ACEA recommends that the following should be taken into consideration in the Productivity Commission’s proposals for freight and passenger transport, for implementation within the framework of the Auslink initiative:

5. ACEA recommends that models be developed to promote a continuing increase in the level of funding from both the private sector and public sectors to develop the land transport network.
6. ACEA recommends more consistent and comparable pricing models for both road and rail transport to promote a more efficient allocation of resources. Such models should incorporate financial, economic and community returns.



7. ACEA recommends road user charging systems which more accurately relate road usage with costs would be acceptable to the public.
8. ACEA recommends heavy vehicle charges which more effectively relate road damage to user costs.
9. ACEA recommends taxation incentives for private investors in infrastructure, including transport infrastructure.
10. ACEA recommends increasing funding for the transport system by greater priority in the budget to capital expenditure, and/or by earmarking part of the GST collected on transport services for the development of the transport system for a defined period (eg five years).
11. ACEA recommends consideration of the UK Grants Scheme to equalise the cost of road and rail freight.
12. ACEA recommends greater private sector financing of transport infrastructure, and welcomes the development of Public Private Partnerships.
13. ACEA recommends evaluation of projects on the basis of *least* cost to Government. Too often there is an emphasis on evaluating projects on the basis of *no* cost to Government.
14. ACEA recommends recognition of risk allocation as a major issue in PPPs. Experience to date suggests that many contractors involved in PPP projects have had unreasonable levels of risk allocated to them and that some of the risks have been impossible to manage.
15. ACEA recommends initiatives to promote all tiers of government working closer together in transport funding to promote more equity in funding between road and rail.
16. ACEA recommends greater involvement by the States and private sector in rail infrastructure investment, with strong financial commitment by the Commonwealth to invest in public use rail infrastructure.
17. ACEA recommends the concept of consolidating revenue from road and rail, and to allocating it in a rational way across both modes of transport, as part of a strategic plan of transport development. The objective would be to increase the total funding of transport development through greater contributions from public and private sectors, rather than to reduce funding on roads.
18. ACEA recommends funding to be separately earmarked to foster research and development for future technological solutions, including investigation and integration of ITS more effectively into the land transport system, and related issues such as interoperability.

19. ACEA recommends consideration of the R&D Tax Concession as an effective incentive for developing innovative transport systems. The definitions in the guidelines for application of the Concession need to be reviewed to ensure that they apply to the kind of innovative process and management solutions developed in private sector transport specialist firms such as engineering firms.
20. ACEA recommends a national planning framework supported by clear national transport policies, which combine transport and land use planning in an integrated transport network. A new framework or models need to be introduced to identify developing regions and create a link between transport planning, land use planning and population strategies. The new Auslink National Network is a step in the right direction.
21. ACEA recommends long term strategic planning as crucial for land use planning. It takes 20 – 30 years to receive benefits from land use planning. A 50-year horizon outlook should be considered when planning for transport and land use, rather than the average 20-year or less horizon which tends to apply now.
22. ACEA recommends the development of efficient intermodal terminals to improve rail's competitiveness with road, which will help to reduce long-distance truck trips, reduce road damage, as well as saving fuel and reducing greenhouse gas emissions.
23. ACEA recommends the development of an information framework to extract meaningful and reliable data on freight. This would promote more accurate transport projections and management and provide valuable information for future investment decisions in intermodal terminals and transport planning more generally.
24. ACEA recommends that consideration be given to similar models to the US ISTEA (Intermodal Surface Transportation Efficiency Act of 1991) program as a transparent and fair system of comparing the claims and outturn performance of road, rail and intermodal transport solutions.
25. ACEA recommends consideration of the US Government Performance and Results Act (1993) which requires government departments to reveal the actual results of policy. Results are monitored and audited and provide a very clear indicator of which type of transport policy and investment is actually working and why. Australia should also consider introducing such a model.
26. ACEA recommends development of a consistent, transparent and common project evaluation framework across all modes of transport and supports the concept of the triple bottom line (TBL) approach. A TBL approach to project evaluation focuses not only on financial performance, but also economic, social and environmental performance. The core characteristics of the triple bottom line approach include accepting accountability and being transparent.

### **ISSUE 3 - INTELLECTUAL PROPERTY AND THE APPLICATION OF THE COPYRIGHT ACT TO GOVERNMENT ACTIVITY**

Copyright of the intellectual property of a consulting engineer is usually retained by the consulting engineer unless the agreement contains a specific provision to the contrary.

Under the Copyright Act (S 106) the Commonwealth and Territories and State Governments are an exception. Copyright is owned by the Crown, unless specifically stated to the contrary in the agreement document. Outright transfer of copyright and intellectual property rights to the Crown raises issues of competitive disadvantage. It is also a disincentive in terms of the development and application of innovative engineering solutions.

ACEA recommend to firms that they negotiate for the retention of these rights in agreements. Otherwise, the firm may have to decline to bid for or accept a project if the transfer of copyright or intellectual property rights poses unacceptable commercial disadvantage or business risks.

#### **Recommendation**

ACEA recommends that the Productivity Commission include a proposal in its final report for a review of the Copyright Act, looking at:

- whether the automatic right for intellectual property rights to vest in the Crown is still appropriate,
- whether the rights should be subject to limitation, and
- clearly defining its more limited application.

## **LIST OF ALL RECOMMENDATIONS**

### **RECOMMENDATIONS ON GREATER APPLICATION OF THE TPA TO GOVERNMENT PROCUREMENT**

1. ACEA supports the Productivity Commission draft proposal that the provisions of the TPA extending coverage to government businesses should be examined to ascertain whether legislative changes are warranted to ensure that particular activities do not inadvertently escape coverage.
2. However, ACEA recommends that the proposal should not only be examined in the light of the recent court cases, but on the basis of:
  - (a) The recommendations of the Senate Inquiry into the effectiveness of the TPA in protecting small business March 2004 and the resulting Government response.
  - (b) Case studies where detriment is occurring as a result (as it is in the consulting engineering market place) and;
  - (c) The process by which public benefit is determined.
3. ACEA recommends that the Trade Practices Act be amended to ensure that all government agencies are effectively covered by the Act when they are operating in the commercial environment:
  - (a) 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.
  - (b) An amendment to the Act should also 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.
  - (c) Definitions under the TPA and the Section 51(1) exemptions process should be clarified to not only protect industry from anti-competitive behaviour but also to provide some certainty to authorities when determining whether or not Crown exemption is appropriate.

### **RECOMMENDATIONS ON INFRASTRUCTURE REFORM**

#### **Outsourcing**

4. ACEA recommends that the Productivity Commission promote a review of the outsourcing activities of government agencies to ensure the greatest variety of

delivery methods for infrastructure service provision as the best way of ensuring the benefits of competition in delivery.

## **Land Transport Reform**

ACEA recommends that the following should be taken into consideration in the Productivity Commission's proposals for freight and passenger transport, for implementation within the framework of the Auslink initiative:

5. ACEA recommends that models be developed to promote a continuing increase in the level of funding from both the private sector and public sectors to develop the land transport network.
6. ACEA recommends more consistent and comparable pricing models for both road and rail transport to promote a more efficient allocation of resources. Such models should incorporate financial, economic and community returns.
7. ACEA recommends road user charging systems which more accurately relate road usage with costs would be acceptable to the public.
8. ACEA recommends heavy vehicle charges which more effectively relate road damage to user costs.
9. ACEA recommends taxation incentives for private investors in infrastructure, including transport infrastructure.
10. ACEA recommends increasing funding for the transport system by greater priority in the budget to capital expenditure, and/or by earmarking part of the GST collected on transport services for the development of the transport system for a defined period (eg five years).
11. ACEA recommends consideration of the UK Grants Scheme to equalise the cost of road and rail freight.
12. ACEA recommends greater private sector financing of transport infrastructure, and welcomes the development of Public Private Partnerships.
13. ACEA recommends evaluation of projects on the basis of *least* cost to Government. Too often there is an emphasis on evaluating projects on the basis of *no* cost to Government.
14. ACEA recommends recognition of risk allocation as a major issue in PPPs. Experience to date suggests that many contractors involved in PPP projects have had unreasonable levels of risk allocated to them and that some of the risks have been impossible to manage.

15. ACEA recommends initiatives to promote all tiers of government working closer together in transport funding to promote more equity in funding between road and rail.
16. ACEA recommends greater involvement by the States and private sector in rail infrastructure investment, with strong financial commitment by the Commonwealth to invest in public use rail infrastructure.
17. ACEA recommends the concept of consolidating revenue from road and rail, and to allocating it in a rational way across both modes of transport, as part of a strategic plan of transport development. The objective would be to increase the total funding of transport development through greater contributions from public and private sectors, rather than to reduce funding on roads.
18. ACEA recommends funding to be separately earmarked to foster research and development for future technological solutions, including investigation and integration of ITS more effectively into the land transport system, and related issues such as interoperability.
19. ACEA recommends consideration of the R&D Tax Concession as an effective incentive for developing innovative transport systems. The definitions in the guidelines for application of the Concession need to be reviewed to ensure that they apply to the kind of innovative process and management solutions developed in private sector transport specialist firms such as engineering firms.
20. ACEA recommends a national planning framework supported by clear national transport policies, which combine transport and land use planning in an integrated transport network. A new framework or models need to be introduced to identify developing regions and create a link between transport planning, land use planning and population strategies. The new Auslink National Network is a step in the right direction.
21. ACEA recommends long term strategic planning as crucial for land use planning. It takes 20 – 30 years to receive benefits from land use planning. A 50-year horizon outlook should be considered when planning for transport and land use, rather than the average 20-year or less horizon which tends to apply now.
22. ACEA recommends the development of efficient intermodal terminals to improve rail's competitiveness with road, which will help to reduce long-distance truck trips, reduce road damage, as well as saving fuel and reducing greenhouse gas emissions.
23. ACEA recommends the development of an information framework to extract meaningful and reliable data on freight. This would promote more accurate transport projections and management and provide valuable information for future investment decisions in intermodal terminals and transport planning more generally.
24. ACEA recommends that consideration be given to similar models to the US ISTEA (Intermodal Surface Transportation Efficiency Act of 1991) program as a

transparent and fair system of comparing the claims and outturn performance of road, rail and intermodal transport solutions.

25. ACEA recommends consideration of the US Government Performance and Results Act (1993) which requires government departments to reveal the actual results of policy. Results are monitored and audited and provide a very clear indicator of which type of transport policy and investment is actually working and why. Australia should also consider introducing such a model.
26. ACEA recommends development of a consistent, transparent and common project evaluation framework across all modes of transport and supports the concept of the triple bottom line (TBL) approach. A TBL approach to project evaluation focuses not only on financial performance, but also economic, social and environmental performance. The core characteristics of the triple bottom line approach include accepting accountability and being transparent.

#### **RECOMMENDATION ON INTELLECTUAL PROPERTY AND THE APPLICATION OF THE COPYRIGHT ACT TO GOVERNMENT ACTIVITY**

27. ACEA recommends that the Productivity Commission include a proposal in its final report for a review of the Copyright Act, looking at:
  - (a) whether the automatic right for intellectual property rights to vest in the Crown is still appropriate,
  - (b) whether the rights should be subject to limitation, and
  - (c) clearly defining its more limited application.

**ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA**  
**The voice of the Consulting Engineering Industry**

- The Association of Consulting Engineers Australia (ACEA) represents Australian consulting engineering firms which provide technology-based consulting services to government and private sector clients in Australia and 40 countries worldwide. Services are provided in the fields of building, infrastructure, transport, communications and information technology, project management, environmental management, geotechnical, electrical, mining, oil and gas.
- The ACEA is the sole voice of engineering firms in Australia. ACEA members number nearly 300 firms in all states and territories. These members constitute some three-quarters of the consulting engineering firms employing ten or more people in Australia. Most large and medium-sized firms in the industry are ACEA members, along with a substantial number of the smaller firms.
- Engineering consulting revenues of \$3.8 billion in 1999/00 were equal to 0.6 per cent of Australia's GDP of \$629 billion. Industry revenue has risen by 61 per cent since 1992/93 and share of GDP from 0.5 per cent to 0.6 per cent.
- Engineering consulting firms employed 42,000 people in 1999/00, including approximately 30,000 engineering and technical professionals. Employment in the industry has risen by 31 per cent since 1992/93. The increase has been much more rapid than the 17 per cent rise in national employment.
- The total value of projects designed by ACEA firms in 1999/00 was \$11 billion.
- Engineering services accounted for the major share of all service exports related to building and construction – 53 per cent of total building and construction services exports in 1999/00. Engineering consulting exports accounted for 1.3 per cent of Australia's total service exports of \$28.2 billion in 1999/00. Exports of engineering services have grown strongly and fairly steadily from \$141 million in 1992/93 to \$370 million in 1999/00, an average growth rate of nearly 15 per cent a year.
- ACEA is represented on all of the major government and private-sector industry bodies concerned with consulting engineering and building and construction. It is also a member of a number of bodies concerned with more general business and industry issues.
- There are ACEA offices in all capital cities in Australia.
- ACEA is one of the largest members of FIDIC, the international association of engineering, technology and management firms related to the built and natural environment. FIDIC includes some 67 member associations worldwide.
- ACEA firms designed all of the major facilities and infrastructure for the 2000 Olympic Games, including Stadium Australia, the Superdome, the Olympic Village, and the Olympic Flame Lighting Event and Aerial Effects. Large national projects designed by ACEA firms include the Sydney Opera House, Darling Harbour, Star City Casino, Colonial Stadium Melbourne, St Mary's Cathedral Spires Sydney, Sydney Domestic Terminals, the M1 Motorway in Sydney and Citilink in Melbourne. Major international projects designed by ACEA firms include the Hong Kong Airport, the Singapore Exhibition and Convention Centre, the My Thuan Bridge linking Vietnam and Laos, and Wembley Stadium.