The Association of Consulting Engineers Australia

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Submission to the Regulation Taskforce

Reducing the Regulatory Burden on Business

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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.

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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.

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.

ACEA firms offer a large range of design services for major projects in the fields of building, infrastructure, transport, communications and information technology, project management, environmental management, geotechnical and electrical services, mining, oil and gas.

ACEA firms employ more than 10,000 professionals in Australia alone, and many tens of thousands ancillary staff.

A profile of ACEA and the consulting engineering industry is attached. (**ATTACHMENT A**)

Taskforce for reducing the regulatory burden on business

ACEA welcomes the Taskforce's inquiry into reducing the regulatory burden on business. ACEA believes that this is a well timed and very important exercise given the impact that regulation has on the economic and social wellbeing of Australia.

ACEA believes that there are some unnecessarily burdensome, complex, redundant or duplicate regulations that are impinging on the productivity of the consulting engineering industry. This submission seeks to inform the Taskforce of the areas of regulation that impose unnecessary compliance costs on business and areas of regulation where greater consistency and uniformity across jurisdictions may alleviate burdens on the consulting engineering industry.

REDUCING REGULATORY BURDEN

Common issues in regulation

There are three major issues that arise in the consulting engineering industry that result from regulation, they are:

1. The quantity of regulation
Given the technical nature and associated risks of engineering work, the consulting engineering industry is highly regulated. ACEA believes that there is a need for an appropriate and proportionate level of regulation.

However what has developed over time is a multiplicity of regulation at both Federal and State and local level, which has resulted in a complex and unwieldy system that is hard to understand and costly in terms of both compliance and administration.

2. The quality of regulation
Much of the regulation that impacts the consulting engineering industry has been developed in isolation at State and local levels; this has lead to a 'patchwork' of regulations, which lack consistency and so overlap other jurisdictions.

Due to a lack of effective cost benefit analysis and regulatory impact statements or assessments, the regulations often seek to impose unreasonable and unrealistic duties of care on business. The particular circumstances and impacts on small businesses are typically not taken into account.

3. The changing regulatory environment
New regulation is often given little time to 'bed-in' before amendments are introduced, meaning that business has little time to absorb the impact of the regulation before new changes are introduced. A review of the regulation to determine whether it is working as intended is not undertaken nor as amendments are introduced is there a review of whether the amendment renders other provisions redundant that can then be removed.

It is this continued layering of regulation that leads to the multiplicity and patchwork regulatory environment that exists in so many areas today.

The cost of unnecessarily burdensome regulation on the consulting engineering industry

ACEA has undertaken to identify the cost of compliance incurred by the consulting engineering industry. ACEA took a sample of small, medium and large consulting engineering firms and asked them to identify their estimated costs per annum in complying with unnecessarily burdensome, complex, redundant or duplicate regulations.

The results show the following:

- sole traders and small firms' (firms with a staff of up to 50) incur on average $40,000 per year each in unnecessary compliance costs.

- Medium and large firms (firms with staff of 50 plus) incur on average $180,000 per year each in unnecessary compliance costs.

Across the ACEA membership this is a loss in revenue totalling **$18.5million** per annum caused by unnecessary regulation.

Regulation review of unnecessary, complex, redundant or duplication regulation impacting on the consulting engineering industry

ACEA member firms have identified the following areas in order of priority as the most burdensome, complex, redundant or duplicate regulations which attract the greatest amount of unnecessary compliance cost in the consulting engineering industry. ACEA has also provided a number of potential solutions for the Taskforce to consider.

1 Occupational Health and Safety Regulation

Australia has six State, two Territorial and one Federal set of Occupational Health and Safety Acts and legislation, all with differing compliance requirements.

There is also legislative conflict within jurisdictions eg. NSW OH&S Act 2000 with NSW Building Act, which imposes its own inflexible duties of care on individuals who are accredited certifiers. Differences also exist between various jurisdictional OH&S Acts and Australian Standards on Safety Management.

Some regulation is complex, out-of-date, impractical or uncertain. Poor regulation significantly undermines the objectives of OH&S Acts and efforts by employers to improve safety performance.

For firms working across several jurisdictions, OH&S regulation creates confusion and the need to commit major time, costs and resources in an

attempt to ensure compliance with inconsistent and frequently changing regulation.

Construction site induction processes are an area of significant time and cost burden to consulting engineering firms. Whilst site staff have 'Green Cards' to certify site safety induction training, the same staff are required to undergo several hours of repeat induction on every construction site, adding to the time and costs of staff employment.

Regulation which places absolute duties of care on principals and designers is impractical and unworkable. Engineering design is a complex process in which input and influence is exercised by a range of stakeholders including clients. Regulation needs to recognise this and apportion duty of care in relation to individual influences in the design team. There also needs to be a recognition that some design, particularly in relation to unusual, experimental or innovative design, by its nature, often carries high levels of risk and liability.

There should be no absolute or strict liabilities, deemed guilt, reverse onus of proof or any civil or criminal proceedings, nor any other basis on which persons are treated less favourably than defendants in any prosecutions under any other equivalent law or legislation.

ACEA supports the development of a nationally consistent OH&S regulation throughout Australia. Regulation should be based on a review and use of the best aspects of current regulation and incorporate reasonableness, practicality, balance, mutuality, and independence. It should also include national standards, model regulation, a Code of Practice and guidance/training materials.

2 Taxation Compliance

Major resources and time costs are incurred due to the complexity of Australia's government and cross government taxation system. Complications arise from issues such as Fringe Benefits Tax, Capital Gains Tax, Superannuation Guarantee Charge, Payroll Taxes and a range of other business taxes. The heaviest cost and resources burden falls on small and medium business.

For example, given the nature of consulting engineering service delivery the industry is highly staff intensive. Payroll taxes particularly penalise the larger firms in the consulting engineering industry and inhibit the growth of smaller firms.

Many of our firms seek to be successful exporters of services. Indeed, of the building and construction industry engineering services accounts for the major share of all services related to building and construction. Improvements to the international tax regime are particularly important to exporting firms.

ACEA supports a comprehensive review of the taxation system with a view to simplifying and introducing a less burdensome taxation system in Australia.

3 Australian Standards in Building and Construction

Costs and inefficiencies are caused by major inconsistencies in the requirements for construction work between Local, State and Territory, and Federal government jurisdictions and their differences with Australian Standards. Examples are major inconsistencies between jurisdictions for the design of paving systems for roads and airports.

A further example is the local Government Flood and Drainage Control Regulation: costs and inefficiencies are caused by major inconsistencies in the regulatory requirements for site drainage and flood control across local government jurisdictions. Examples are the differing requirements for the design of culverts and retention structures, and differing minimum grades and slope requirements.

Major costs are also incurred due to inconsistencies in the way in which local government authorities across Australia interpret and apply the Building Code of Australia. For example, different authorities apply different systems for fire rating and environmental controls.

The continual changing of codes for very little extra information is costly to industry in relation to the time required to become familiar with new practices to ensure that documentation delivered to the client is compliant with the latest code versions.

The poor wording of many regulatory documents, including some Australian Standards, is complex and impractical for users' needs. Standards development sometimes reflects pressure from vested interests or overseas stakeholders, but loses the value to Australian users in the process. Errors in spelling and grammar require documents to be amended almost immediately after publication, and indicate that some form of improved quality management needs to be applied to the standards development process.

ACEA supports the development of nationally consistent Australian building and construction standards which incorporate required flexibility for differences in climate, environmental, ground conditions and availability of materials throughout Australia.

2 Building Certification

Confusion is caused by differing laws governing the accredited certification of building work by professional engineers enacted in NSW and Victoria. Local Governments often act inconsistently and unconscionably as certifying authorities, imposing their own set of regulatory requirements in individual certifiers.

The level of personal responsibility carried by individual employees as accredited certifiers imposes difficulties with warranties and indemnities required under the various Acts.

ACEA supports the concept of accredited certifiers being qualified professional engineers. ACEA supports the proposition that the accreditation process could be made part of the Building Code of Australia, thereby achieving nationally consistent and realistic and achievable compliance requirements.

3 Public Sector Procurement Regulation

Considerable industry costs are incurred in providing professional services to Federal, State and Local government entities due to major inconsistencies in the wording and regulatory requirements in contracts.

These major inconsistencies occur not only throughout jurisdictions but across public sector procurement agencies within the same jurisdiction, and even within the same agency.

Consulting engineering firms are forced to spend considerable resources in reviewing varying contract conditions and seeking legal advice on the way in which these conditions can impact on their business operations.

The most common of these variations are warranty, indemnity and fit for purpose clauses, which, in an industry environment in which considerable risk is transferred to the consulting firm, can have a major influence on the insurability of the consulting firm's work.

Many inconsistencies arise from the ways in which Government agencies act as a purchaser of professional services. Some contracts are cooperatively designed to ensure that the consultant is a valued member of the project development team.

Others contain punitive and unconscionable clauses which give rise to adversarial contracting relationships in which the consulting firm may need to focus as much on protecting the business as on delivering quality engineering outcomes. This increases the liability of the consulting firm and restricts the ability of firms to tender for projects, reducing competitive pricing, with smaller firms often being unable to obtain the levels of professional indemnity insurance required.

The basis on which public sector agencies procure consulting engineering services does not fit a pattern of consistency, with consultant selection often based on price on the one hand, or quality of service delivery on the other.

ACEA recommends that a co-operative group should be established made up of industry (including the consulting engineering industry) and government procurement organisations, with the aim of developing standard industry forms of cooperative service agreements for use by all public sector procurement agencies, and to develop mutually agreeable forms of consultant selection processes.

4 Business Registration /Regulation

Costs are incurred by firms operating across national boundaries due to the different business registration requirements of various States and Territories.

5 Environmental/Sustainability Regulation

Major inconsistencies in the way in which Federal, State and Local Government authorities apply environmental regulations and controls in construction and environmental monitoring projects results in unnecessary costs and inefficiencies. For example, particulate emissions in the discharge of gases differ across various Clean Air Acts, and water discharges across Clean Water Acts.

There is a number of building sustainability determination systems in use throughout Australia, with no clear direction from government on a nationally consistent process for determining the sustainability of domestic and commercial building projects.

Within governments at all levels there are ad hoc environmental and sustainability groups which are trying to establish themselves as certification groups or experts.

For consulting engineering firms delivering environmental services across various jurisdictions, the plethora of environmental regulation adds to the burden of registration fees and the need for complying and keeping up to date on constantly changing environmental regulations.

ACEA supports the development of a system of national environmental registration, regulation and reporting.

6 Energy Use and Regulation

Costs and confusion result from major inconsistencies in the way in which energy ratings are calculated and applied by the multiplicity of authorities in Federal, State and Local Governments. For example, the way in which the thermal efficiency of building materials is determined differs throughout Australia.

7 Trade Practices Act and State Consumer Acts

Uncertainties arise due to the way in which various State-based consumer laws and procedures are inconsistent with the Trade Practices Act.

8 Professional Standards Legislation: Inconsistencies Across Jurisdictions

Following an agreement between the Federal Government and State and Territory Finance Ministers, industry had hoped for the implementation of nationally consistent Professional Standards Legislation (PSL) to enable PS Schemes to be developed for groups of business professionals.

Whilst PSL has now been legislated in all Australian jurisdictions, and a national Professional Standards Council is about to be developed, confusion and 'forum shopping' result from inconsistencies in Professional Standards Legislation across States and Territories.

NSW is currently the only State in which PS legislation permits the development of multidisciplinary schemes. Tasmania has included 'opt out' provisions in its legislation which permits Scheme members to accept liability beyond their elected liability cap on a 'one off' basis.

These legislative differences make difficult the task of developing a scheme for consulting engineering firms who work in several jurisdictions and are therefore subject to differing regulations and requirements for each jurisdiction.

ACEA supports nationally consistent PS legislation and which should be a priority in relation to developing PS Schemes with national coverage.

9 Professional Standards Legislation: Difficulties in Developing Schemes

ACEA has been a strong supporter of the introduction of Professional Standards Legislation (PSL) in all Australian jurisdictions to address major PI insurance problems in our industry. However, attempts to develop a PSL Scheme for Australia's consulting engineering industry have met with major difficulties. Many of the larger consulting engineering firms provide multidisciplinary services, employ thousands of professional staff including engineers, and undertake projects with widely differing risk and liability levels and profiles. A PS Scheme, to be practical and workable, needs to incorporate the following:

- Multidisciplinary coverage of all services (not just engineering) in a single scheme;
- Scheme membership by firm, with individual professional staff and their compliance being managed by their firm;
- Flexibility to vary the caps on liability to reflect significant differences in the size and nature of projects undertaken in the industry.

The outline of an ACEA Scheme for consulting engineering firms incorporating the above features, was initially discussed with the Professional Standards Council in 2004. The Council advised ACEA that the elements of the proposed scheme were deemed by them to be outside their guidelines for acceptance of PS schemes and were unacceptable.

Subsequent legal advice received by ACEA suggested that the legislation itself incorporated sufficient flexibility to allow for the development of an ACEA type scheme, but the way in which the former PS Council regulated and administered schemes was inflexible.

Following additional work on elements of the ACEA Scheme, this was discussed with the new Chief Executive of the Professional Standards Council in October 2005 and received a more sympathetic response. There is also widespread industry support for schemes to cover multidisciplinary service delivery and for firms (rather than individuals) as members of schemes. ACEA is continuing to liaise with the Professional Standards Council on these issues.

ACEA supports a review of Professional Standards Legislation in line with ACEA's proposed scheme.

10 Proportionate Liability

Following agreement between the Federal Government and State and Territory Finance Ministers, industry had hoped for the implementation of nationally consistent Proportionate Liability (Civil Liability Acts) throughout Australian jurisdictions to address the spiralling cost and restricted availability of professional indemnity (PI) insurance.

However, inconsistencies in Proportionate Liability legislation across States and Territories have led to confusion and complications for firms working in a number of different jurisdictions. These inconsistencies also have the potential to impact on the cost and availability of PI insurance for firms working in jurisdictions with less certainty of PL outcomes.

Examples of inconsistencies include the introduction of a half million dollar threshold in Queensland before proportionate liability applies, which means that the majority of claims against consulting engineering firms in Queensland will fall under the 'deep pocket syndrome' with judgements being based on capacity to pay rather than fault. Some jurisdictions have also introduced provisions to opt out of PL legislation and this is being pursued in contracts by some public sector agencies. Insurers have indicated that the signing of contracts in which PL is excluded may lead to the consultant being partially or fully uninsured.

The consulting engineering industry needs action on these issues to ensure that PL legislation follows the spirit and intent of governments to achieve an improved environment for PI insurance in Australia.

ACEA supports a review of the level of national legislative consistency of Proportionate Liability Legislation, which includes the abolition of means by which PL legislation can be circumvented.

11 Industrial Relations

There are differing State regulations in relation to industrial relations legislation, including, long service leave, workers compensation and a variety of state based industrial awards. This impacts on ACEA members because it makes the movement of workforce between States complex and costly. Given the project based nature of consulting engineering service delivery and the skills shortages being experienced it is important that the industrial relation laws do not impinge on the efficiency of firms operating on projects across Australia.

ACEA supports, in principal, the move to a single Federal system of workplace relations.

-ENDS-

This concludes ACEA's submission to the Regulatory Taskforce. For further information please contact Nicola Grayson, Senior Policy Officer.