



31<sup>st</sup> July 2009

**The Secretary**

Senate Economics Legislation Committee  
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Dear Secretary

**Re: Trade Practices Amendment (Australian Consumer Law) Bill 2009**

Please accept this short submission to the Senate Economics Committee inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 on behalf of the Association of Consulting Engineers Australia (the ACEA).

The ACEA is an industry body representing the business interests of firms providing engineering, technology and management consultancy services. There are over 270 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by the ACEA with a total of some 45,000 employees.

The ACEA presents a unified voice for the industry and supports the profession by upholding a professional code of ethics and enhancing the commercial environment in which firms operate through strong representation and influential lobbying activities. The ACEA also supports members in all aspects of their business including risk management, contractual issues, professional indemnity insurance, occupational health and safety, procurement practices, workplace/industrial relations, client relations, marketing, education, sustainability and business development.

The membership of the ACEA is made up of corporations (small, medium and large) that provide consulting and engineering services to a broad customer base in Australia, which includes building and construction clients in the private sector and all levels of government (including local, state, territory and the Australian Government).

Whilst it is the norm in most service industries for the supplier to provide its terms and conditions to its client this is not the norm in the building and construction industry.

The ACEA has been campaigning for some time against the use of unfair contract terms in Australia. Evidence exists of the widespread use of onerous standard contractual terms in the building and construction industry, which are imposed not by the supplier of consulting engineering services, but by the client (i.e. the purchaser of consulting engineering services). This is because the client has most, if not all, of the bargaining power relating to the transaction.

Few government agencies or private sector contractors are prepared to negotiate their standard contract terms in a meaningful way. Typically if the consulting engineering business does not agree with the contract contained in the tender documentation they are barred from further consideration in the tender process. The ACEA membership regularly reports being told to, 'take it or leave it' if they attempt to negotiate.



It is with some disappointment therefore, that the ACEA notes that the scope of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 ("the Bill"), no longer applies to business to business transactions.

The ACEA believes that it would have been beneficial for the Bill to apply to business to business transactions but only if the following rules apply:

1. The Bill applies to all business to business transactions and;
2. The Bill applies to all levels of government (Australian, state, territory and local) when purchasing the services of the private sector.

### **Application of the Bill to government procurement**

Prior to the 2007 Federal Election the Prime Minister (then Leader of the Opposition), in a speech to the Council of Small Business Organisations of Australia, National Small Business Summit, July 2007 made the following statement,

*"Small businesses have been telling me that the terms and conditions of Commonwealth Tender contracts are more onerous than a similar contract between two businesses with similar bargaining power.*

*Public sector departments and agencies are large and have significant bargaining power. They are often inflexible in their dealings with business.*

*This reduces the ability of small businesses to win a larger share of the \$26 billion dollar Australian government contract market.*

*The hurdles for small business are numerous."*

.....

The Prime Minister cited the following examples of onerous contract clauses:

*"Clauses that impose liquidated damages.*

*Clauses that don't allow businesses to limit their liability.*

*Clauses that allow government to sue for consequential loss.*

*And 'best endeavours' requirements that often force businesses to be liable for third party actions.*

*These clauses and requirements raise the risk on businesses performing these contracts.*

*Many small businesses are unable to contract with governments because of the proliferation of onerous contract terms that seek to shift unmanageable levels of risk to the private sector.*

*Furthermore, professional indemnity and product liability insurance are often higher than an industry standard and very expensive for small businesses to obtain.*

*As a result, public contracts are often more expensive for businesses to fulfill than if they had a similar contract with a private sector client."*

The points highlighted by the Prime Minister, and the examples given, remain evident in both private sector and public sector contracts today (Australian, state, territory and local government agencies). Furthermore they are not only evident in contracts with small business but also large consulting engineering businesses who are provided with little or no opportunity to negotiate these terms with their clients. This is why the ACEA believes that the Bill should apply to all business to business transactions.

The Bill provides a vehicle to extinguish unfair contract terms in the building and construction industry if it applies to all levels of government when they contract with the private sector.

Governments drive contracting behaviour throughout industry and should set the standard. Although all levels of government have guidelines on procurement and tendering procedures, these do not include guidance to public sector agencies on good contracting behaviour.

The ACEA is concerned that many clients are unaware of the adverse impact onerous contract terms have, not only on consultants but also themselves, including:

- increased risk of project failure; the likelihood of cost blow-outs; and the likelihood of litigation;
- economic and commercial inefficiency, with no incentive to drive efficiency gains;
- reduced industry competition because adversarial contract conditions foster an environment in which competition is driven by risk appetite rather than quality of service;
- compromised independent judgement of the consultant because of the use of unfair terms and complex contracts, which again increases the risk of project failure and litigation;
- reduced ability of the consultant to introduce innovative solutions;
- promulgation of the "deep pocket syndrome", which the tort and liability reforms, introduced in Australia after the insurance market collapse in 2001/02, sought to stop;
- encouragement to recover losses that occur from others in the design and construct team, including consultants, which has a disproportionate impact on the risk profile of consultants; and
- continued skills shortages in the industry because of a commercial environment that exposes consultants to repeated use of unfair contract terms rather than one which encourages fair and proportionate contracting.

The ACEA notes that the Hon Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, stated (Media Release dated 24<sup>th</sup> June 2009) that,

*"In relation to business-to-business contracts the Government is currently reviewing both the unconscionable conduct provisions of the Trade Practices Act and also the Franchising Code of Conduct. Since these reviews relate to business-to-business contracts, the Government will consider the issue of business-to-business standard form contracts when these reviews are complete."*

However, the ACEA believes that recommendations from the Senate Economics Legislation Committee, regarding business to business transactions, are needed.



## **Recommendations**

The ACEA asks that the Senate Standing Committee reinstate the Bill's application to business to business contracts and include the following recommendations in its Report:

1. The Government amend the Trade Practices Act 1974 to make it clear that it applies to all levels of government (Australian, state, territory and local) when procuring the services of the private sector.
2. The Government amend the Trade Practices Act 1974 to include a provision requiring all levels of government (Australian, state, territory and local) to allow their suppliers to negotiate the terms and conditions of contract, particularly any terms that might be considered unfair under the provisions of the Bill.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Megan Motto', is positioned below the closing text.

Megan Motto  
Chief Executive