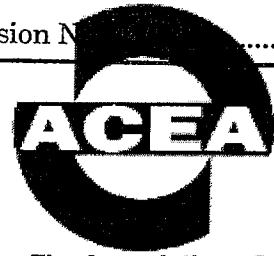


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Lyndean Gould

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The Association of
Consulting Engineers
Australia

June 2004

**ACEA Submission to the
House of Representatives Standing Committee
on Legal and Constitutional Affairs**

**Bankruptcy Legislation Amendment
(Anti-avoidance and Other Measures) Bill 2004**

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

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ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA (ACEA)

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

On the

Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill 2004

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ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA (ACEA)

INTRODUCTION

The Association of Consulting Engineers Australia (ACEA) is the major industry association in the consulting engineering industry. ACEA represents some 300 firms offering consulting engineering and technology services.

ACEA's membership includes most of the industry's large firms (who account for a third of industry employment, 43 per cent of industry revenue and 36 per cent of industry profit). ACEA also represents many of the medium firms, and a large number small firms and sole traders. Some 30,000 individual professionals work in the consulting engineering industry.

A description of ACEA and the consulting engineering sector which it represents is attached (**ATTACHMENT A**).

CONCERNS WITH MAJOR ASPECTS OF THE BILL

Significant Adverse Impacts on the Consulting Engineering Industry

Following circulation to our member firms of details of the amendments, as contained in the exposure draft explanatory memorandum, major concerns have been raised by firms in relation to the proposed amendments to the Bankruptcy Legislation.

Impacts will be felt in both large firms and small, but the impact will be particularly onerous on the small firms and sole traders who comprise approximately 80 per cent of our membership and over 90 per cent of the consulting engineering businesses across Australia. Many of these are professional engineers who operate home based businesses in suburban practices, or provide key engineering services to country communities.

ACEA supports the need to strengthen the asset recovery powers of bankruptcy trustees in cases of deliberate defraud of creditors. However, ACEA believes that the Bill, as currently drafted, will cast a wider and non-discriminatory net over all of the business practices of professionals across Australia.

Coming on top of major market failure of professional indemnity insurance, this will further increase the exposure of the personal assets of individual consultants, their families and their estates to attack from litigious clients.

In an industry which is a major contributor to the Australian economy, this will conceivably result in business closures, major disincentives for innovation and risk, loss of key engineering skills and experience and reduced competition for project work.

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Adverse effects of the proposed amendments on the industry include:

- The creation of uncertainty in consulting engineering business practices;
- Challenging asset protection strategies that have been lawfully entered into by all parties to them;
- Increasing the cost of providing services to the professional services providers and ultimately the market;
- Discouraging innovation, creativity and risk in the engineering profession;
- Discouraging individuals from establishing new consulting engineering businesses which potentially create employment and economic benefits.

ACEA comments upon a number of aspects of the Bill as follows:

1 Need for Qualification of 'High Income Professional'

Item 11 of the Bill Exposure Draft states that *'the Taskforce identified the problem of a small but significant number of high-income debtors, typically high earning fee-for-service professionals, who use bankruptcy to avoid paying their taxation and other debts'*, and it is this part of the reform that is of greatest challenge to widely accepted methods of shielding family and private assets from business related personal liability.

However, the Bill lacks any means to define 'high income' and 'professional', raising concerns in relation to the wide and virtually unlimited reach of the legislation.

Data from Practice Performance Surveys undertaken by ACEA suggests that many of the small consulting engineering firms, who may be caught up in the undefined legislation, have average household incomes. They may, for example, earn relatively modest to high fees for individual projects, but when averaged out over the income year, their total income may be no more than 'average'.

ACEA believes therefore, that the proposed amendments should include a means for qualifying 'high income professional' as being truly representative of the class of persons who the Taskforce identified as the primary 'high income debtors' and whose avoidance actions are the primary reasons for the legislative changes.

2 Fundamental Shift Away from Legitimacy of Asset Protection

Item 15 of the Bill Exposure Draft refers to the fact that the Bill represents a *'fundamental shift away from the perceived legitimacy of arranging business affairs to protect personal wealth from claims which arise as a result of professional activities'*.

Many of our firms practice in their own name, and are not permitted by law to incorporate. Some of these firms have viewed the establishment of family trusts, and similar vehicles for vesting property for the benefit of others, to be a prudent, legitimate and only way of arranging their affairs to protect their personal wealth in a manner similar to that of corporate limited liability.

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For our firms, asset protection is not motivated by avoidance of taxation or valid claims of creditors but, as with incorporation, is viewed as good commercial conduct and practice.

This becomes all the more important for those consulting firms who work in the highly litigious building and construction industry – an industry in which some current contracting conditions tend to promote frequent and often frivolous disputation, which is often directed towards litigation as an outcome. The high costs of claims thus pursued which are legitimate or otherwise and not covered either wholly or partly by professional indemnity insurance, can lead to bankruptcy proceedings against the consultant.

ACEA believes that the removal of the asset protection option greatly facilitates access to a consultant's assets by plaintiffs seeking damages settlements and may tend to encourage increased levels of litigation in an already highly litigious industry. The Bill may also be challenged on the basis that it widens the difference in treatment of insolvency between incorporated companies on the one hand and unincorporated companies and individuals on the other.

3 Market Failure of Professional Indemnity Insurance

Section 8 of the Readers' Guide in the Exposure Draft states *'The amendments proposed by this Bill will have no significant financial impact'*

ACEA disagrees with this presumption. Regular surveys of member firms conducted by ACEA have shown that the consulting engineering industry has, and continues to be, greatly impacted upon by the market failure of professional indemnity (PI) insurance.

The costs of PI policies have risen by an average 300% over the last three years, with similar increases in policy deductibles. As recently as May of this year, premiums were continuing to increase by an average 46 per cent. Insurers continue to impose an increasing number of services exclusions in policies, which means that some firms are unable to obtain any PI cover and have either closed their doors or are being forced to work uninsured. Some other firms have up to 60 per cent of their services excluded from PI cover.

Given the high cost of PI policies, some firms have traded off increases in policy deductibles for more affordable premiums with their insurers. While this greatly increases their liability exposure and the cost of settling claims, firms have relied on the legitimacy of asset protection measures in the event of a claim.

Why, then, would you want to run a consulting engineering business in a highly litigious environment if your only 'last ditch' option of personal asset protection is about to disappear under new bankruptcy laws?

Furthermore, firms will need to obtain increased PI insurance cover to reduce their deductibles, leading to major market pressures and difficulties of availability on already restricted PI insurance resources.

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The overall effects of the changes to the Act, particularly for small firms, may be that the effectiveness of major liability reform initiatives of national professional standards legislation and proportionate liability, as agreed between the Federal Government, and State and Territory Governments, may be reduced. This may happen if the changes to the Act result in increased costs and reduced availability which are unable to be sustained in an already limited Australian PI insurance market.

In its discrimination against small business, the Bill also disregards the importance of this business sector to the Australian economy, and the need to maintain its financial strength and international competitiveness.

4 Presumption of Guilt of the Bankrupt and Reversal of the Onus of Proof

A major aspect of the Bill focuses on the notions of *'tainted money'*, *'tainted property'* and *'tainted purpose'*.

The latter of these is based on a presumption of a bankrupt's main purpose; *'to prevent, hinder or delay the claims of creditors, as determined by the bankrupt's trustee.'*

The Bill also contains extensive powers, enabling trustees to review and disaggregate or reverse the effect of transactions, including asset protection measures, arising out of the supply of personal services.

This heavy weighing and swing towards wide ranging and increased powers for the trustee has no regard for the reason for bankruptcy or legitimacy of the debt, be it due to unfortunate, reckless, greedy or fraudulent behaviour.

The effects of this on the large number of unincorporated consulting engineering firms will be to replace legitimacy of asset protection measures with uncertainty, trigger a range of complex taxation consequences dating back over a number of years and generate uncertainty and dispute over conflicting or competing property claims.

ACEA believes that the Bill should contain mechanisms to restore a reasonable balance of power between bankrupt and trustee and to define or limit the scope of the anti-avoidance procedures to make them less invasive on consulting engineering practices routinely engaged in the delivery of professional services.

5 Retrospectivity Powers of Trustees

Item 2 of the Draft Legislation proposes to repeal the definition of *'examinable time'* and replace it with an unrestricted time period to allow the trustee to apply for orders in relation to property or money transferred or paid *'some time'* before the bankruptcy.

ACEA believes that the retrospective nature of the proposed additional powers of the trustee is contrary to reasonable expectations by firms of certainty, particularly when the practice has been viewed as legitimate and is not motivated by fraudulent or dishonest purposes.

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It may be therefore be argued that the Bill's substantive provisions should have an effect from a particular point of time, or be constrained by stronger reference, drawn from evidence, of the bankrupt's awareness of impending insolvency when the asset protection arrangements were entered into.

SUMMARY

ACEA supports the need to strengthen the asset recovery powers of bankruptcy trustees in cases of deliberate defraud of creditors. However, ACEA believes that the Bill, as currently drafted, will cast a wider and non-discriminatory net over all of the business practices of professionals across Australia.

Coming on top of major market failure of professional indemnity insurance, this will further increase the exposure of the personal assets of individual consultants, their families and their estates to attack from litigious clients.

Adverse effects of the proposed amendments include:

- The creation of uncertainty in consulting engineering business practices;
- Challenging asset protection strategies that have been lawfully entered into by all parties to them;
- Increasing the cost of providing services to the professional services providers and ultimately the market;
- Discouraging innovation, creativity and risk in the engineering profession;
- Discouraging individuals from establishing new consulting engineering businesses which potentially create employment and economic benefits.

ACEA recommends that the following issues be addressed:

- 1 There is need for qualification of 'High Income Professional' to ensure that the amendments specifically target the class of persons identified by the taskforce, and not all business professionals
- 2 The fundamental shift away from legitimacy of asset protection must be removed, to provide business professionals with certainty and protection similarly afforded incorporated entities.
- 3 The market failure of Professional Indemnity Insurance must be recognised, and the potentially significant financial impacts of this as a result of the need for wider insurance cover resulting from the amendments to the Bill.
- 4 The presumption of guilt of the bankrupt and reversal of the onus of proof must be removed to limit the scope of the anti-avoidance procedures and make them less invasive to small businesses.
- 5 The Retrospectivity Powers of Trustees must be removed to restore expectations of certainty to a practice that has been seen as legitimate asset protection.

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ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA



The 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.

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