



ASSOCIATION OF CONSULTING
ENGINEERS AUSTRALIA

SUBMISSION TO THE PRODUCTIVITY COMMISSION

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PERFORMANCE BENCHMARKING OF AUSTRALIAN BUSINESS REGULATION OHS

ACEA SUBMISSION

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The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services.

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INTRODUCTION

ABOUT THE ACEA

The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services.

There are over 260 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by the ACEA with a total of some 46,000 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.

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EXECUTIVE SUMMARY

The ACEA welcomes this opportunity to provide a written submission to the Productivity Commission on Performance Benchmarking of Australian Business Regulation-Occupational Health and Safety.

The business community has long been citing OHS reform as one of the keys drivers in reducing the regulatory burden that business operators face. For consulting firms, especially those who operate in multiple jurisdictions, business is hindered by an inconsistent commercial environment due to inconsistent OHS laws, especially specific designer duties of care.

The ACEA believes that the role and responsibility of a designer of buildings or structures has increased beyond the design process. This has meant designers in some jurisdictions now have to ensure persons who construct the design project are not unduly exposed to hazards or risks. This regulation is burdensome as a designer has no effective or sustained control over the construction site and will generally never design the construction site layout and access of the design project as this is usually undertaken by the constructor or one of its agents.

The ACEA is in full support of the development of nationally consistent OHS laws. A model OHS Act will reduce the regulatory burden faced by consulting firms, especially those that operate in multiple jurisdictions, by eliminating the differences in OHS regulations between the States and Territories.

In addition, standardising and bringing all OHS regimes into a single model OHS Act will help workplace productivity, participation and efficiency, and the provision of greater shared protections for all stakeholders through a national consistent approach. Most importantly, the ACEA believes it will result in better safety outcomes and performance.

A model OHS Act will also:

- improve the capabilities of consulting firms and their employees to manage their OHS specific duties and responsibilities;
- standardise designer's specific duties of care;
- increases competition and equality between all consulting firms by creating a level OHS playing field; and
- help foster a culture that places a significant value on workplace safety for all stakeholders consistently across all jurisdictions in Australia and reduce workplace injury, disease and fatalities.

For this submission the ACEA has only made comment at this time on issues to which it has readily available information. Attached along with this submission are additional comments made by the ACEA on the National Review Panel's recommendations for the optimal structure for model OHS Laws for your interest and reference.

If at a later date the ACEA believes it can make comment or has the opportunity to comment on Performance Benchmarking of Australian Business Regulation OHS then it will respond accordingly.

PRODUCTIVITY COMMISSION- PERFORMANCE BENCHMARKING OF AUSTRALIAN BUSINESS REGULATION OHS

WHAT OHS REGULATIONS IMPOSE THE MOST SIGNIFICANT BURDEN ON CONSULTING FIRMS?

1.1 Designers of buildings and structures specific duties of care

The ACEA believes consulting engineering firms, especially those that operate in multiple jurisdictions, are unnecessarily burdened by inconsistent designer specific duties of care that are in effect in each jurisdiction.

This is because the role and responsibility of a designer of buildings or structures has started to increase beyond the design process in the last decade. In some jurisdictions a designer now has a duty of care to ensure persons who construct the design project are not unduly exposed to hazards or risks, whereas others jurisdictions don't (e.g. NSW OHS Act 2000).

The increased role and responsibility of a designer in some OHS laws (e.g. WA OSH Act 1984 place additional duties on designers to ensure those affected by the construction work of the design project are not exposed unduly to hazards or risks) has placed additional burdens on designers. These additional duties are outside their qualification, expertise and control which can include:

- supervising and directing construction;
- responsibility for and having control over construction methods and sequences as well as coordination of construction work
- evaluating and determining construction site safety and the methods, sequences and coordination used in the construction of the design project;
- determining whether that any work methods, sequences, or coordination is unsafe and therefore unsafe to proceed; and
- responsibility that if construction work methods, techniques and coordination proceeds when deemed unsafe, that they are solely responsible for any resulting injury, loss or damage etc.

1.2 Control over the construction phase of a design project

The ACEA believes it is an unbalanced and unreasonable to expect designers of buildings and structures to ensure those constructing the design project and not unduly exposed to hazards or risks.

This is because a designer has no control over the construction site unless a contract is in place which states otherwise. The designer will almost never design the construction site layout and access of the design project as this is usually undertaken by the constructor or one of its agents.

A designer's responsibility to design a building or structure does not extend to construction methods and organisation of building sites including supervision of workers. A designer has no formal training in construction processes needed to ensure the safety of those constructing a project.

The ACEA deems that designers should only owe a duty to those persons using it as a workplace for the purpose for which it was designed. This workplace should not include the temporary workplace (i.e. construction site) of the design project. The 'construction site' is not designed by the engineer. It is designed predominately by the builder or principle contractor.

The principal contractor, possessing the appropriate skills and expertise, is the best person/organisation to supervise and direct construction work. The principal contractor is also in the best position to evaluate and determine construction site safety and whether work is too unsafe to continue.

Therefore, they are best placed and in control to ensure, so far as is reasonably practicable, that persons constructing the design project are not unduly exposed to hazards or risks.

The ACEA has previously raised concerns in governmental reviews (notably the ACEA 2008 Submission to National Review into Model OHS Laws) that some OHS Acts (e.g. WA OSH Act 1984 & Qld WHS Act 1995) impose burdensome duties on designers to ensure those affected by the construction work of the design project are not unduly exposed to hazards or risks.

A designer should not have specific duties of care for all phases of a design project because:

- a designer does not normally work on a construction site and therefore is unable to direct work or control construction staff (unless a different contract arrangement exists between or with other construction participants);
- a designer does not ordinarily have a contract to have control for the whole lifecycle of the design project (e.g. operation, maintenance and demolition phase of a building or structure); and
- the client or end-user of the building or structure is the best person/organisation to ensure and control those persons maintaining or disposing of the building or structure is not unduly exposed to hazards or risks.

1.3 Conclusion

A designer's main design consideration, expertise and responsibility are for the safety of the design project for its intended purpose and use once constructed. A designer of a building or structure does not typically specify how a design project will be constructed unless there is in place a contract (i.e. with the client or builder) to do otherwise. This is rarely the case. The regulatory creep that has already taken place in some jurisdictions has imposed regulations on designers that are beyond their qualification, expertise and control.

The ACEA believe the duties of care designers should have in a model OHS Act ought to be specific. These duties should be largely as they are expressed in Victoria¹:

"A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed."

¹ S.28(1) Occupational Health and Safety Act 2004 (Vic)

ARE THERE ADDITIONAL REGULATORY BURDENS BECAUSE OF DIFFERENCES IN REGULATIONS BETWEEN THE STATES AND TERRITORIES?

1.4 Application to designers of buildings and structures

The ACEA believes there are additional regulatory burdens that consulting firms face because of differences in regulations between jurisdictions.

This is because the different number of complex and over-lapping sets of OHS laws also impact on consulting firms through the reduction in workplace efficiency and productivity, especially labour productivity. This is because firms who mobilise employees to work in various jurisdictions to meet project demands are burdened with need to re-train and re-educate employees on the new OHS designer duties they may face.

As a result of these factors, consulting firms have to use a number of extra resources to mobilise employees across jurisdictions. This raises business costs, as well being time-consuming and a needless financial burden for employers. The use of these additional resources and processes needed to mobilise workers also reduces consulting business efficiency through lost productivity, increased business expenses and reduction in profit capability.

Additional regulatory burdens faced by consulting firms due to differences in OHS regulations may also include:

- the reduction in competition and equality between consulting firms due to the existence of a unlevel OHS playing field;
- the reduction in the capabilities of consulting firms and their employees to manage their OHS duties and responsibilities;
- the increase in administration and operational costs including paperwork costs, OHS training, OHS education and OHS legal advice needed to meet different regulatory requirements;
- having to deal with each regulators inconsistent application of OHS laws which may require a number of changes in the operation of the business in order to achieve OHS compliance, despite many of regulatory requirements in many jurisdictions being the same; and
- a partial enforcement, or non-enforcement, of designer duties which disadvantages compliant businesses compared with non-compliant.

1.5 Conclusion

Consulting firms experience a number of additional regulatory burdens because of differences in regulations between the States and Territories. These regulatory burdens include a reduction in workplace efficiency and productivity, additional administration and operational costs, a reduction in national competitiveness, inefficient management of OHS duties and an unnecessary need to deal with numerous regulators.

1.6 The lack of a specific duty to consult with key construction project participants

The ACEA supports the duty imposed on clients and principal contractors to consult with designers in the Qld Workplace Health and Safety Act 1995. It is essential that coordination, cooperation and agreement through consultation between key construction project participants (client, principal contractor and designer) is promoted, supported and adopted in all OHS Laws, especially in a model OHS Act.

However, at present there is a failure to consistently impose a specific duty of care on all key construction participants (i.e. client, principal contractor and designer) to consult over the design and construction phase of a building or structure. This only adds further to the inconsistent OHS legislative environment and the imbalance of roles and responsibilities for designers.

While there remains a failure to impose a specific duty of care for all key construction project participants in most jurisdictions, consulting firms based in Qld will have different specific designer duties to consult than firms in other jurisdictions. This means a Qld consulting firm may have to change the operation of their business in order to achieve compliance under another OHS Law- if they were to operate in a different jurisdiction. This would burden Qld firms by creating an unlevel OHS playing field with other firms operating in other jurisdictions.

1.7 Conclusion

The failure to impose consistent specific duties of care in relation to consultation with key construction project participants in OHS laws (with the exception to the Qld WHS Act 1995) means that an inconsistent OHS legislative environment continues to exist. This reduces competition and equality between consulting firms and produces an unlevel OHS playing field that unnecessarily burdens designers with different and inconsistent specific duties of care.

1.8 Reverse onus of proof

The ACEA believes the reverse onus of proof provisions imposed in OHS laws in NSW and Qld inflict an additional regulatory burden on consulting firms that operate in those jurisdictions.

This is because reverse onus of proof provisions mean an employer in NSW and Qld has an absolute duty of care to provide a safe working environment for its employees, and that when an accident occurs in the workplace the onus is then upon the employer to prove that it was not 'reasonably practicable' for them to eliminate or reduce the hazard and risk. This strict liability approach is onerous for consulting engineering firms to control and manage.

Furthermore, the application of the reverse onus of proof or absolute strict liability means that the self funded duty holder must bear the expense and difficulty of establishing a defence, if a breach has occurred. This is a difficult proposition particularly for small and medium firms who often lack the significant resources required to mount such a defence. The ACEA believes that the regulatory authority backed by the resources of the state is the most appropriate party to bear the onus of establishing the elements of the prosecution.

In other jurisdictions employers ensure health and safety in the workplace by eliminating risks to health and safety as far as is "reasonably practicable", and if it is not reasonably practicable to eliminate, to reduce the risks to the lowest level that is "reasonably practicable". In other words, an employer must provide a safe workplace provided it's 'reasonably practicable' to do so. The ACEA believes this approach to OHS is less burdensome for consulting engineering firms to control or manage.

1.9 Conclusion

NSW and Qld remain the only jurisdictions which apply reverse onus of proof or strict liability obligations. The other seven jurisdictions which regulate OHS do not apply such obligations. According to the Comparative Monitoring Report 2006², the operation of strict liability duties has not

² Australian Safety and Compensation Council, Comparative Performance Monitoring-Report 2006.

resulted in less workplace injuries in either QLD or NSW. In fact both have experienced workplace injury frequency rates which exceed the Australian average.

The ACEA believes the reverse onus of proof provisions impose an additional regulatory burden on NSW and Qld consulting engineering firms that are onerous to control and manage. These provisions also reduce competition and equality between consulting firms, especially those that operate in NSW and Qld, by producing an unlevel OHS playing field. This is because it imposes different and inconsistent qualifiers on designers in NSW and Qld to meet an OHS duty of care compared with firms that operate in other jurisdictions.

WHAT IS THE COST OF UNNECESSARY BURDENSOME REGULATION?

1.10 Application to designers of buildings and structures

The ACEA believes consulting firms, especially those that operate in multiple jurisdictions, are unnecessarily burdened by the increasing role and responsibility of designers, the number of inconsistent OHS laws and the inconsistent specific duties of care imposed on designers in all jurisdictions.

The ACEA feels that the cost of this unnecessary regulation faced by designers is hard to completely evaluate and put a cost upon. However, in 2005 the ACEA undertook a member survey to identify the cost of compliance incurred by the consulting engineering industry. The 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, which were put in a November 2005 submission to the Regulatory Taskforce (Reducing the Regulatory Burden on Business), showed 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 estimated as a loss in revenue totalling \$18.5 million per annum caused by unnecessary regulation.
- ACEA member firms identified OHS regulation as the most burdensome, complex, redundant or duplicate regulations which attract the greatest amount of unnecessary compliance cost in the consulting engineering industry.

1.11 Conclusion

The results indicate that ACEA member firms have incurred significant compliance costs associated with unnecessary regulation, such as OHS. The ACEA believes these unnecessary costs reduce consulting business efficiency through lost productivity, increased business expenses and reduce profit capability.