

Australian Information Industry Association

Submission on

Defining an Australian Business for Commonwealth Procurement

25 October 2024

Introduction

The Australian Information Industry Association (AIIA) thanks the Department of Finance for this public consultation on the important matter of “Defining an Australian Business for Commonwealth Procurement.” We are the leading industry body representing ICT businesses in Australia, a forward-thinking partner that supports both competition and the growth of digital industries. For this reason, the AIIA is in alignment with the Department of Finance in its overview and potential use of an Australian Business definition in the context of Commonwealth procurement, with the aims of encouraging competition, accountability and transparency.

Context

It is important to distinguish between an Australian business and business that offer Retained Economic Benefits (REB) to the Australian economy. The AIIA acknowledges that both Australian and non-Australian businesses offer REB by playing a significant role in the Australian economy through local operations, employment opportunities, and tax contributions.

The objective of establishing a definition of Australian business should be solely concerned with providing consistency and visibility¹ to decision-makers about the nature of businesses engaged in government procurement. The definition should not be used to impose limitations on eligible participants to Commonwealth Procurement.

A clear definition will enable streamlined reporting on relevant procurement and economic metrics as well as support improved industry policy in areas such as future innovation programmes, prioritising government support for Australian innovators/start-ups or scale-ups, and potentially the negotiation of free trade agreements.

We urge the Government to avoid using any definition in a protectionist or discriminatory manner that might restrict market access or creates barriers for businesses to compete fairly as this would be contrary to the Australian Government’s procurement framework.²

Core Attributes for a Suitable Definition

The AIIA recognises the following attributes for a suitable definition:

Definitional Alignment with Existing Frameworks

The definition should support a clear, consistent assessment that aligns with other existing definitions in government, such as the Australian Business Number (ABN) criteria, and ensures businesses actively operating in Australia are recognised. This would include businesses with an ABN or Australian Company Number (ACN), as referenced in multiple sections of the consultation paper and other policy areas.

Operational Presence in Australia

The definition should emphasise the operational presence of a qualifying businesses in Australia. This should include a business having its principal place of operations with the majority of its workforce and strategic decision-making occurring within Australia (e.g. percentage of board or leadership roles).

¹ [Department of Finance, Consultation Paper – Defining an Australian Business for Commonwealth Procurement pages 3-4.](#)

² Department of Finance, Commonwealth Procurement Rules (2024), paras. 5.3-5.4.

Nature of Incorporation and Residency of Decision Makers

Companies incorporated in Australia, or those carrying on business and controlled by Australian management and governing body, should be considered. This would also include businesses where the central management and control or the majority of decision-making occur within Australia, as considered in other frameworks like the Fair Work Act.

Beneficial Ownership

The inclusion of beneficial ownership, focusing on the ultimate owners being Australian residents, could ensure that foreign entities with minimal Australian ownership are not unduly categorised as Australian businesses.

Tax Residency and Obligations

Businesses with income tax residency in Australia and those registered for Goods and Services Tax (GST) should be recognised, where tax contributions are aligned with business activity in Australia. This consideration recognises the benefit of taxation contributions to the Australian economy.

Flexibility to Evolve

The definition should be flexible to adapt to future policy shifts and changes at both federal and state levels, noting the fast-paced evolving nature and the non-traditional operations (e.g. decentralised and remote workforces) of the tech sector. Any rigid, narrow definition may not only exclude key ICT businesses contributing to the Australian economy but also create unnecessary complexity. We suggest periodic post-implementation reviews or adaptable criteria to maintain flexibility without overcomplicating the definition.

Impact on SMEs and Compliance Burdens

We would emphasise that the definition should not introduce significant compliance costs, particularly for SMEs, which form a critical part of the Australian ICT landscape. Simplicity and clarity in any definitional tests will help reduce complexity.

Support for Domestic Capability

Finally, in line with recent discussions on domestic capability and supply chain resilience, especially within the tech sector, the submission could support a definition that recognises Australian-based ownership and onshore operations, developing or ensuring the resilience of Australia's software and data supply chains.

Proposed Definition and Tests of an Australian Business

We believe that a simple and assessable definition for an Australian Business may be addressed via the following straightforward tests.

For the purposes of Commonwealth Procurement, an Australian Business is any legal entity which meets all the following three (3) tests:

1. Regulatory test: The entity is incorporated or registered in Australia under legal structures recognised under Australian Federal or State law, and it is not part of a subsidiary, affiliate, or member of a foreign organisation or state-owned enterprise.

2. Control test: The entity carries on a business with its central management and control by a governing body that resides principally within Australia, and the entity is not subject to foreign management or decision-making, either directly or indirectly, through global or multinational governance structures.
3. Ownership test: For privately held entities, at least 51% of the entity is owned by Australian resident(s), and no foreign individuals or entities hold significant ownership stakes in the business, either through direct ownership, partnership agreements, or affiliations. For public entities, its shares are primarily listed on the ASX or a similar Australian bourse, and the entity is not part of a non-Australian or cross-border governance or financial controls.

Whilst we believe it is necessary to keep the definitional tests simple, we would highlight that a qualifying entity should be contributing to the Australian economy as appropriate to its size. Special consideration should be given to companies developing Intellectual Property and companies that are registered with the Australian Taxation Office (ATO), which would benefit the nation in an ongoing manner. Thus, we see synergies in aligning the definition to the policy outcomes of the current consultation on REB.

As such, we suggest that post-implementation reviews are conducted to ensure the definition is being fairly applied. For example, that business models such as “front office only” businesses (i.e. a business that only resells non-Australian goods/services) are not reported as Australian Businesses in the context of Commonwealth Procurement.

Use of Alternative Clauses for non-Australian businesses to compete for procurement opportunities

In light of these tests, current business-related definitions should be updated to provide alternative clauses that enable non-Australian businesses to compete fairly for procurement opportunities without the need to be artificially classified as Australian businesses. For example, in the Australian Industry Capability framework, the definition of an Australian Entity should now exclude "foreign-owned companies in Australia... which have a registered body number (e.g., ARBN or NZRBN)." However, an additional clause should be included to allow such foreign-owned companies in Australia, with a registered body number, to compete for business, particularly if they are supplying critical, niche or domestically unavailable services in the defence sector.

Addressing Questions in Public Consultation

Do you consider that a definition of an Australian business will be a useful addition to the Commonwealth procurement framework, noting the scope and context set out in this paper?

Yes, a clear and consistent definition of an Australian business is necessary for the Commonwealth procurement framework. It will:

- Create certainty as to what businesses are Australian for Commonwealth procurement.
- Prevent situations where foreign entities may appear to be Australian whilst in fact having limited local decision-making capacity or economic contributions.
- Recognise when Commonwealth government contracts are awarded to businesses that contribute directly to broader benefits in the Australian economy, either through local ownership, control, or operations.
- Provide clarity for all parties engaging in procurement processes, ensuring that those suppliers growing Australian domestic capability are recognised.

Should the definition be applied to any of the procurement connected policies?

Yes, the definition should be applied to procurement-connected policies, where a procurement connected policy identifies or distinguishes Australian business from other businesses and especially policies aimed at recognising domestic capability and supporting Australian industry participation, such as:

- The Indigenous Procurement Policy (IPP): Ensuring that Indigenous Australian businesses genuinely meet the criteria for local ownership and control.
- The Australian Industry Participation Policy: Ensuring that the policy applies to businesses that have a real stake in the Australian economy, especially for those industries critical to national infrastructure, technology, and security.

Are there any elements of a potential definition that may create a compliance cost to business? If so, are there options for mitigating that cost?

Yes, certain elements in the definition could create compliance burdens, especially for startups, small-to-medium enterprises (SMEs), and multinational firms:

- Ownership verification: Determining whether a private business is 51% Australian-owned or predominantly controlled locally could require detailed reporting and legal verification, particularly for complex or global ownership structures. This is because a definition that provides for elements that are measured by scale rather than absolute characteristics will result in compliance cost for those businesses claiming to be an Australian. This is because those entities would need to prove their compliance with a threshold. This could add costs in terms of legal and compliance resources.
- Control and management disclosure: Proving that central management and decision-making reside in Australia could also require significant documentation, especially for multinationals where strategic decisions may be shared between global and local headquarters.

To address these challenges, several mitigation strategies could be considered, including:

- Simplified reporting thresholds: SMEs could be exempt from some of the more onerous requirements, such as providing detailed ownership and control disclosures, for example by simply supplying their statement of Australian taxation record (as already required under some Commonwealth panels).
- Reliance on existing regulatory filings: Rather than creating entirely new reporting mechanisms, businesses could rely on existing legal documents (e.g., ASIC filings) to prove their status.
- Proportional audits: Only businesses tendering for high-value contracts could be required to meet fuller compliance obligations (as per the existing economic benefit assessment threshold), reducing the reporting burden on smaller suppliers.

Are there additional factors, not listed above, that you consider should be included in the definition of an Australian business?

We do not believe that additional factors are necessary to be included within the definition itself. However, selection criteria in this space could certainly include factors of broader REB including:

- Local employment criteria: Consider including the proportion of Australian employees as a factor. For example, a company should employ a majority of its workforce in Australia to be considered an Australian business.
- Research and development: For technology or innovation-driven businesses, whether they conduct R&D in Australia could also be a useful criterion to ensure the benefits of government procurement flow back into the local economy.

Noting the scope and context set out in this paper, are there other instances where the data collected through any such definition could be used to inform other Australian Government activities?

The AIIA notes that the intended purpose of this definition is to permit more accurate identification of procurement spend across the Commonwealth in respect of SMEs. The AIIA cautions against expanding the use of this data for additional purposes.

Notwithstanding the above, the data collected through the definition of an Australian Business for the purposes of Commonwealth Procurement could be valuable in the following areas of government:

Industry and Economic Policy Development:

The data could help shape policies aimed at fostering domestic industry growth and innovation by identifying Australian businesses. This can support decisions on where to channel resources for business development, R&D, or grants. As an example, the Industry Growth Program provides expert advice to startups and innovative small and medium enterprises (SMEs) with high growth potential who want to transform and significantly scale their business, and help build Australia's manufacturing capability for the future within government priority areas. A clear definition will help to identify these companies, making them eligible or prioritised for government-funded sectoral advice and expertise.

Monitoring Domestic Capability:

In sectors like technology, health, and defence, ensuring that Australian capabilities in critical infrastructure and services is vital for national security and societal stability. Data on ownership, management, and economic activity would help assess Australian capability in key industries and inform decisions on government investment or public procurement to build critical domestic capabilities.

Tax and Regulatory Compliance:

Information on Australian ownership, management, and tax residency can support the Australian Tax Office (ATO) and other regulatory bodies in ensuring that businesses pay their fair share of taxes and comply with local regulations. This would help ensure that businesses receiving procurement contracts are making direct contributions to the Australian economy.

Trade and Investment Policy:

The data could also help balance trade agreements, ensuring that Australian businesses benefit from international deals, especially when negotiating reciprocal treatment for Australian companies in foreign procurement markets.

SME Engagement:

Identifying which businesses are Australian can help inform SME support programs, ensuring that

Australian businesses have the opportunity to grow and compete for government contracts, particularly in regional areas where economic growth is vital.

Conclusion

The AIIA supports the development of a clear definition of an Australian business for use within the context of Commonwealth procurement. This approach will support greater transparency and inform policy makers on the level of Australian Government procurement from Australian businesses.

By aligning the definition with existing frameworks, focusing on operational presence, beneficial ownership, and tax residency, the proposed definition strikes the right balance between encouraging local business participation and avoiding unnecessary compliance burdens. It also provides flexibility to adapt to future economic conditions and policy adjustments, making it a practical tool for supporting the growth and development of Australian businesses, including SMEs.

This definition will not only support the effective governance of the Commonwealth procurement framework but will also contribute valuable insights to broader policy areas such as industry development, foreign investment, taxation, and employment. The data gathered through this definition will contribute to a range of initiatives aimed at strengthening Australia's critical capabilities and economic landscape.

Finally, the AIIA encourages the Department to monitor and adjust any definition of Australian businesses (and SMEs) included in the CPRs to ensure the Government's intentions and obligations are appropriately reflected and aligned to the policy objectives of the Government.

Should you require further information, please contact [REDACTED]
[REDACTED], at [REDACTED] or [REDACTED], or [REDACTED], at [REDACTED]

Thank you for considering our submission.

Yours sincerely

[REDACTED]
[REDACTED]

About the AIIA

The AIIA is Australia's peak representative body and advocacy group for those in the digital ecosystem. Since 1978, the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity. We are a not-for-profit organisation to benefit members, which represents around 90% of the over one million employed in the technology sector in Australia. We are unique in that we represent the diversity of the technology ecosystem from small and medium businesses, start-ups, universities, and digital incubators through to large Australian companies, multinational software and hardware companies, data centres, telecommunications companies and technology consulting companies.

