

AUSTRALIAN OWNED CONTRACTORS LTD

Response to public consultation – defining an Australian Business for Commonwealth Procurement

“A good industrial strategy should have ‘edges’ around it, delineating where the free play of markets is good enough from where strategic intervention is needed.”

UK Institute for Government

Introduction:

On behalf of Australian Owned Contractor (AOC), thank-you for both the announcement and release of the public consultation (paper) on this vitally important piece of public policy reform, and the opportunity to respond to it.

AOC maintains the view that the simplest and most accepted form of assessment of what constitutes an “**Australian business**” is needed to reflect community sentiment and expectations; and also reflect common sense.

In fact, the opportunity at arriving at an understood and generally accepted definition of an Australian business will greatly benefit other (State and Territory) jurisdictions as they seek to maximise the strength of their procurement/purchasing power to deliver local industry development and sovereign capabilities and other tangible economic and social policy outcomes. In noting the limitations of this definition to Commonwealth procurement, we urge the Federal Department of Finance to be most mindful of its leadership in policy co-ordination and consistency across jurisdictions (for example through the National Cabinet and various Ministerial committees including the [Transport and Infrastructure Ministers’ Meeting](#)).

From the outset, AOC declares our specific interest and focus on the definition of an Australian business for the purposes of levelling the playing field (market access) to head contracts for Australia’s major infrastructure projects delivered by **civil constructors**. Whilst we will make general references to policy best-practice in this response, our advocacy is intended to be specific to Australia’s civil construction sector.

AOC is aligned with the policy commitments and implementation of the Albanese Government’s ***Buy Australia Plan***, which we notes was regrettably not referenced in this discussion paper. A simple and acceptable definition of an Australia Business is needed to deliver the specific commitment number two: ***Infrastructure projects that support Australian business and grow jobs***

- Labor will commit to work with states, territories and local governments to, where possible, break up larger contracts in a way that **allows smaller, Australian owned companies to bid for tender** (*our emphasis*)

This is mostly due to the fact that the market dominant, Tier 1 constructors are Australian-based but owned by foreign interests - with one major contractor being a State-Owned Enterprise of the People's Republic of China. Policy approaches to discerning between Australian businesses (to allow smaller Australian owned companies to bid for tender) is therefore essential to achieving these outcomes.

In this context, the outcomes of a definition arrived at from this process must acknowledge the heightened global and domestic security environment for understanding what is a sovereign (Australian) entity and conversely, what is not. Where a threshold decision must be made in determining the definition, erring on the side of robustness is encouraged as it will better take into account the level of commitment a business has to Australia's interests; rather than those of international interests.

Defining an Australian Business (for Commonwealth Procurement)

1. AOC's experience in campaigning and advocating for Australian owned businesses demonstrates that Australian residents do not distinguish between the currently (ill-defined) definitions across agencies that the consultation paper highlights (ie. the Australian Tax Office, Australian Bureau of Statistics and the Department of Industry, Science and Resources' Australian Industry Plans [AIPs]). A simple, acceptable definition must be arrived at across the whole-of-(Australian) government to overcome this complexity.
2. AOC therefore submits that a simple and accepted definition of an Australian Business is one that satisfies all of the following criteria:
 - i. A natural company that is based in Australia, as evidenced by the business headquarters and has obligations through Australian Corporations and Tax Law, for example through holding a valid ABN or ACN;
 - ii. That is majority owned by Australian citizens, where no single controlling shareholder (an owner of >50% of shares) should be domiciled outside Australia, and for a listed company a majority of shares owned by Australian citizens.
 - iii. Majority of board directors must be domiciled in Australia;
3. AOC maintains that the Australian Government needn't be concerned with offending the Free Trade Agreements (FTAs) by virtue of determining a robust, simple and acceptable definition of an Australian Business. In other words, FTAs should not be used as a barrier or blocker to achieving a definition and any

considerations of FTA applications can be considered after this definition has been arrived at.

4. Furthermore, the need to arrive at a simple and acceptable definition is a prerequisite to enhancing existing industry policy by properly defining “local” as necessarily Australian owned rather than purely geographically-based. AOC notes here that the fact there are exemptions (or “carve outs”) to FTAs to develop sovereign defence capabilities and support the development of local industries, through AIPs and for example through the *Future Made in Australia Bill* and Buy Australia Plan, which are examples of legitimate grounds for strategic government (market) intervention. AOC concludes here that the act of defining an Australian Business is just as important as *how* it is defined, and urges the Commonwealth Government to think carefully about enhancing existing policy goals including local/content. Some current examples of policy which support this point include:

- [Queensland Charter for Local Content - Best Practice Guidelines for Agencies June 2023](#) that highlights Queensland *“Government agencies are encouraged to work in partnership with regional communities to develop industry capability and capacity, and secure broader societal benefits, as appropriate. Using government procurement processes to ‘pull’ innovative and competitive solutions from local suppliers has the potential to achieve more cost-effective procurements and increase growth in the local industry base, for which the public sector is a particularly important market. The involvement of regional suppliers can have proportionately higher economic benefits to a region in the form of jobs growth/retention, population growth, new investment and additional economic activity. Government agencies should consider strategies to increase input from Queensland regional suppliers, where appropriate. To better enable regional industries to gain every opportunity to achieve maximum benefit from a major procurement opportunity, government agencies may wish to consider:*

- giving consideration to local joint ventures who bid on tender packages
- encouraging contractors to maximise the use of local business as sub-contractors when contracts are awarded outside the region
- identifying opportunities for local industry innovation
- working with contractors and sub-contractors to identify all opportunities for local value-add”.

- The New South Wales (NSW) Government’s [Supporting local jobs, boosting local businesses with Jobs First Commission and ‘If not, why not’ government spending rules](#)
 - [Australian Industry Plans](#) that have a “key objective of the plan must be to ensure that Australian entities have full, fair and reasonable opportunity to bid for the supply of goods or services for the project.”
5. For the avoidance of all doubt, AOC supports the policy of the AIPs that do dis/advantage based on State or Territory base; rather we acknowledge significant money granted federally for major civil construction projects that benefit directly or indirectly all Australian citizens. AOC agrees with the Department’s wish to have arrive at a definition that:
- Gives confidence to both government and industry.
 - Is clear, understandable and simple enough to easily apply.
 - Robust enough to exclude businesses that are not genuinely Australian, while not being overly complex or difficult for businesses to meet.
 - Suitable for procurement reporting (including procurement-connected policies, where relevant).
 - Flexible to allow alignment (or at least not be in conflict) with existing definitions used at federal and states and territories levels and with future government priorities
6. The Australian Government must also seek to defend Australia’s national interests in developing sovereign industrial capacity through mirroring, as much as possible, foreign jurisdictions’ policy to support their own domestic industries. This avoids the potential of offending FTAs - only after a definition of an Australian Business is arrived at. In a straightforward way, it also levels the playing field for many domestic industries in accessing government contracts and does not put Australian businesses, or our industry, at a disadvantage. Examples of international (domestic policy) that the Commonwealth could consider mirroring include the European Union’s International Procurement Instrument and [Regulation No 2022/1031 of the European Parliament and of the Council of 23 June 2022](#) that defines an “economic operator” as
- (a) hold the majority of the legal person’s subscribed capital;
 - (b) control the majority of the votes attaching to shares issued by the legal person; or

- (a) can appoint more than half of the legal person's administrative, management or supervisory body.¹

A further example of the Government of India's approach to Defence procurement warrants attention through their [Defence Acquisition Procedure \(DAP\)](#) that provides a definition of an "Indian Vendor" for assessment against the relative importance towards indigenization. These are ownership by Resident Indian Citizen(s) and control by Resident Indian Citizens.

7. AOC references other examples of countries of procurement approaches for civil construction in international jurisdictions that a simple, accepted definition of an Australian business would help to level the playing field within Australia. We do not however reference these as models we support or seek the Government to mirror. The [European Commission's European Construction Sector Observatory Analytical 2017 Report - Fostering the international competitiveness of EU construction enterprises](#) notes that *"For instance, in India, procurement practices are considered non-transparent and discriminatory against foreigners. In Japan, too, there is a lack of transparency. In addition, procurement by the local administration is not open to foreign competition and there are a series of administrative barriers and hurdles that make procurement markets very difficult to access. Ukraine public procurement policy clearly favours domestic suppliers, while Russia has complicated procedures for issuing work permits and restrictive procurement legislation. Algeria requests that tenders set up investment partnership with Algerian companies to access procurement opportunities."*

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