
Submission for defining an Australian Business for Commonwealth Procurement

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22/10/2024

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Context

Government motivation

1. The Australian Government is seeking to develop a definition of an Australian Business for use within the context of Commonwealth procurement. Australian Business is not commonly defined in Australian Government legislation or policy and the Australian Government does not have a standard definition of an Australian business that is applicable to all situations.
2. The Department of Finance invited any interested parties to provide comments and suggestions to inform the development of a definition for an Australian Business for Commonwealth procurement. This submission is in response to that invite.

About the submission author

3. Dr Alan Dyer (the author of this submission) is the director/owner of a micro-business that supports the Commonwealth of Australia by providing above-the-line expertise regarding the definition and development of strategic capability. Within this context, Dr Dyer has interacted with the full gamut of businesses that engage with the Commonwealth, from micro-businesses and research entities to multi-national organisations.
4. The author is not a tax, legal or economics specialist. None of the discussion following should be considered as expert commentary on tax, legal or economic issues.

Current definitions

5. The government's public consultation paper ("Defining an Australian Business for Commonwealth Procurement") provided known definitions that are relevant to the Commonwealth Procurement Rules. Taking from this paper (without the full references or the additional explanations), we have:
 - a. the definition of a Small and Medium Enterprise (SME), being an Australian or New Zealand firm with fewer than 200 full-time equivalent employees.
 - b. those businesses which have an ABN and are actively trading (remitting Goods and Services Tax (GST)) in the market sector of the Australian economy.
 - c. Similarly, a corporate limited partnership will be considered a resident of Australia if either:
 - i. the partnership was formed in Australia, or
 - ii. the partnership either carries on a business, or has its central management and control in Australia.
 - d. Generally, trusts are considered Australian residents for an income year if:
 - i. a trustee of the trust estate was a resident at any time during the income year, or
 - ii. the central management and control of the trust estate was in Australia at any time during the income year.
 - e. an Australian Entity means:
 - i. a company registered under the Corporations Act 2001 (Cth) or a company registered under the Companies Act 1993 (New Zealand);
 - ii. a body corporate, partnership, joint venture or association formed or incorporated in Australia or New Zealand; or

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- iii. a foreign-owned company in Australia or New Zealand, and which has a registered body number (ie. ARBN or NZRBN),
 - iv. carrying on business through a permanent establishment in Australia or New Zealand, including as evidenced through employment and the conduct of business operations in Australia or New Zealand.
- f. “Australian employer”, being an employer that:
- i. is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - ii. is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - iii. is the Commonwealth; or
 - iv. is a Commonwealth authority; or
 - v. is a body corporate incorporated in a Territory; or
 - vi. carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or
 - vii. is prescribed by the regulations.
- g. an entity that has an ABN or an ACN.
- h. a business is Australian if it has an ABN or ACN.

6. The upshot of these definitions is that currently, a company is Australian if it is ‘registered’ in Australia. None of these definitions reflect the behaviours of the company with respect to financial transactions within Australia.

7. A consequence of these definitions is that a non-Australian entity could register an Australian entity, and thus be identified as an Australian business. The revenue from the Australia entity can then be sent offshore. In this example, while technically an Australian business, the behaviour is that as a branch of a non-Australian company.

Counterexamples

8. The author has observed numerous business entities that, under the definitions described early, could call themselves an Australian business. However, these entities do not necessarily meet the intent of an Australian business. Specific company names are deliberately excluded, but the counterexamples cited have been chosen as they have provided services or products to the customer’s satisfaction.

Counterexample 1 – Small shopfront

9. A company that provides printed sports shirts takes the orders through an Australian address, using an Australian ABN. The design for custom shirts or tailoring of catalogue designs is sent to a foreign printing company (in this example the foreign company is in China). Any confirmation of the final design and colours, or changes are passed from the Australian shopfront to the foreign company (including translation from Australian English to the foreign language).

10. An example of an Australian company in the same industry has all the printing machines and shirt assembly on Australian soil.

11. The counterexample removes money from the Australian economy, while the Australian example provides employment and monetary benefits. The ‘shopfront’ provides wages for the limited number of Australian-based staff with any infrastructure and main staff effort within the foreign economy. The Australian company has full staff and infrastructure spend in Australia.

Counterexample 2 – Australian subsidiary

12. A major international company has created an Australian subsidiary for the purposes of doing business in Australia. For this counterexample, the services are provided by Australian experts on Australian soil with infrastructure that is predominantly in Australia. However, the company structures and governance is based on the foreign parent entity.

13. In this counterexample, the Australian entity transfers significant portions of profits to the parent foreign entity. Wages and PAYG tax remain within Australia. The author assumes in this counterexample that GST is also paid, as well as the residual tax on profits.

14. The ‘Australian-ness’ of this Australian business is tempered by the subordination to the parent. However, the parent company is interested in keeping a successful presence in Australia.

Counterexample 3 – Foreign buyout

15. A complex system manufacturer starts off as an Australian company, but is later bought by a major foreign entity. Profits are drawn offshore, and the parent reduces (or removes completely removes) investment in sustaining manufacturing onshore.

16. In this counterexample, the Australian Government provides a subsidy to bolster onshore manufacturing for the benefit of Australian employment. However, the parent entity runs the Australian entity at a loss, again offshoring profits, including a significant portion of the subsidy that was intended to be for Australia’s benefit.

17. In this counterexample, the parent has no concerns regarding the Australian needs or economy and is simply interested in the parent’s profits. When the subsidies are revoked, the parent closes the Australian-based manufacturing.

This counterexample is based on understanding of public information at the time. It is intended to serve as a counterexample, not a full or accurate case study.
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Counterexample 4 – ‘Obviously’ foreign

18. A number of entities are recognised by the general public as being foreign companies, despite having significant representation (including ABN and GST registration of subsidiaries or licenced entities) in Australia. Some key examples include (certainly not an exclusive list) Microsoft, Facebook (Meta), and Toyota.

Considerations

Business location

19. The location of business is an emergent characteristic of an Australian business, not a factor in definition.

20. The place of establishment or incorporation of the business is a factor, but not a principal factor. This is counter-intuitive, but reflects that an Australian business will be incorporated in Australia, but being incorporated in Australia does not necessarily mean it is an Australian business.

21. The location of business operations is also not necessarily an indicator. An Australian business may be predominantly successful overseas. By definition, the principal place of business will be within Australian territories, but this may not be their centre of excellence.

22. The proportion of Australian staff is a key indicator; but not the only key factor. The Australian entity's overseas branches may depend on local staff, management and governance could still be the purview of Australian staff. Other combinations could make it an overseas subsidiary of an Australian company, which may or may not be a desired outcome from this definitional consultation.

Taxation

23. The level of 'Australian-ness' of a business could be determined by how much income is taxable in Australia, and how much is taxable overseas. This also uses the location of tax residency of the entity and its parents (if it has any).

24. Tax is only part of the picture, and by itself is unlikely to determine whether a business should be considered Australian.

Carrying on an enterprise – ABN and GST registration

25. In the broad, an entity that wants to carry on an enterprise within Australia is entitled to an ABN and be registered for GST (noting legislated thresholds). As such, ABN and GST registered cannot be used as an indicator for the 'Australian-ness' of a business.

26. Enterprises are established and sustained for a variety of reasons. Some are initiated for altruistic or beneficial reasons; others are established because an entrepreneur has identified a way to 'make money'. Successful businesses recognise that some value must be provided to the community they serve otherwise that community would take their business elsewhere. The other aspect is that enterprises must make a net gain. These are true regardless if the enterprise is a not-for-profit (or 'for-purpose') or a for-profit entity.

Ownership, including nationality of owners/shareholders and relationship to other businesses

27. For the purpose of this discussion, I will generalise and use the terms Australian citizen and a foreign citizen. The nuances of citizenship, nationality and residency do not alter the discussion.

28. The author has previously worked for a company that was considered Australian, but technically owned by a foreign citizen. At a later stage, the company was transferred to a private equity firm (nationality unknown by the author), but this did not change the Australian focus of the company.

29. The counter-position is also possible, and Australian citizen could own (or part-own) a foreign company.

30. For these reasons, the nationality of the beneficial owners cannot be used to definitively decide if a business is Australian. However, the direction of benefit should be a consideration.

Skills and knowledge

31. From the Department of Employment and Workplace Relations's website, "The Australian Skills Guarantee (Skills Guarantee) uses government investment in major projects to help train the next generation of skilled workers."

32. This policy was introduced in 2024 and reflects a different dimension (skills) than the other guidance. The summary, as provided by DEWR is that "[t]he Commonwealth Government has introduced the Australian Skills Guarantee (Skills Guarantee) to leverage its significant purchasing power to help address

skills shortages and gender segregation in the building and construction and maintenance services (construction) and Information and Communication Technology (ICT) sectors.”

33. There is no particular focus on Australian businesses; and assumption of its focus on Australian employees (apprentices, cadets, women etc) is not explicit. In addition, the Skills Guarantee focusses on two industry sectors, not full gamut.

34. Skills and knowledge gained from enterprises operating within the Australian domain could be transferred to a foreign nation, perhaps through the employment of foreign nationals. Likewise, non - Australian enterprises could employ Australians and pass on skills and knowledge. As such, the transfer of skills and knowledge are not simple indicators; and in the examples given here the transfer is a byproduct of conducting the enterprise.

35. Some enterprises, however, have a specific purpose to upskill communities. Other enterprises may have a specific purpose to export Australian skills and knowledge to other countries. Two possible examples are management companies training remote Australian communities to be self-sufficient, and tertiary educational institutions teaching foreign students. The first category is using skills and knowledge as an economic multiplier, while the second category is using skills and knowledge as a product¹.

Compliance

36. All entities operating in Australia should be compliant with Australian laws and regulations. As such, this by itself cannot be a definitive marker. However, the degree of compliance to foreign requirements (laws and regulations) can also be an indicator.

37. An example where this could be significant is a *foreign-nationality* company operating in Australia, through a ‘shopfront’ (Counterexample 1). The *foreign-nationality* arm of the company has obligations to the *foreign-nationality* government that may be antithetical to the broader Australian interests (including the gathering of client information and passing it to the *foreign-nationality* government). An argument can be made that the Australian component is not subject to the foreign government requirements, but the relationship between the shopfront or subsidiary and the parent is an important consideration.

A possible definition

Defining elements

38. The business location, ownership and taxation basis hold hints that the definition of an Australian business is not purely financial, but also include aspects of local employment. The other aspect that is not clearly enunciated is how the enterprise adds value to Australia at the local, regional or national level. The concepts of skills and knowledge do not appear at all in the current definitions. The following are possible elements of a definition:

- a. The degree to which the enterprise disburses revenue to the Australian economy as opposed to a non-Australian economy.
- b. The degree to which the enterprise adds to Australian employment as opposed to non-Australian employment.
- c. The degree to which the enterprise adds to the Australian tax take as opposed to non-Australian tax take.

¹ The discussion of skills and knowledge as a comparative or relative (and thus depreciating) product is outside the scope of this submission.

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- d. The degree to which the revenue can be considered as part of Australian GDP as opposed to non-Australian GDP.
 - e. The degree to which the enterprise provides economic benefits to Australian communities.
 - f. The degree to which the enterprise is beholden to foreign laws and regulations. The types of obligations (e.g. tax compliance, business reporting, minimum workforce, data sharing) have a bearing on this element.
 - g. The degree to which the enterprise improves (or adds to) sustainable skills and knowledge within Australia.
 - h. The degree to which the enterprise invests in systems, employment, export markets or knowledge transfer for the future benefit of Australian communities or the Australian taxpayer.

39. The elements are not binary, and the idea that a business could be Australian or non-Australian (as I have framed it in the earlier discussion) is simplistic. Some enterprises may not be willing to share information across all the elements, particularly investment strategies; meaning that measuring the 'Australian-ness' of a business could be incomplete or inconsistent.

40. This submission recognises that an Australian business has, at its heart, a focus on benefits for Australia writ large through a focus on revenue and tax retention, employment, upskilling and improvements to the wellbeing or welfare of the (or an) Australian community.

A proposed definition

41. A possible definition of an Australian business is one that is **registered in Australia (through an ABN)** and **has the intent of retaining value** (earned, economic and non-economic – present and future) **within the Australian community or environment**.

42. The proposed definition depends on what an enterprise does, rather than any singular characteristic which is only a part of what it is. In other words, the proposed definition is behaviour-based rather than attribute-based.

Entities that may not fit the proposed definition

43. Any business that has the intent to take the value of any work done off-shore for the benefit of foreign enterprises and perhaps the foreign nation cannot be considered an Australian business.

44. This definition can be applied to the counterexamples.

- a. Counterexample 1 – Small shopfront. The main work is done in a foreign country, and any revenue is expended overseas on delivery of the product. As such, the earned value is not retained within the Australian environment.
- b. Counterexample 2 – Australian subsidiary. Some subsidiaries act wholly within the Australian environment with some minimal 'licence fees' or dues being sent to the parent foreign entity. These could be considered Australian businesses under the proposed definition. However, some subsidiaries either use excessive 'licence fees', dues or other tax mechanisms to move profits offshore. Under the proposed definition, these subsidiaries will not be considered as Australian businesses.
- c. Counterexample 3 – Foreign buyout. While the enterprise was originally considered an Australian business, it would no longer be considered an Australian business under the proposed definition.

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- d. Counterexample 4 – ‘Obviously’ foreign. The Australian arm of these foreign entities should be afforded the same treatment as the Australian subsidiaries described in counterexample 2. In some cases, these ‘obviously’ foreign entities could be considered an Australian business under the proposed definition.

Benefits from the proposed definition

45. The use of a behaviour-based approach makes it harder for entities to ‘game the system’. They can no longer ‘tick the boxes’ to appear Australian, and only their actions will determine the outcome.
46. The definition could also encourage greater transparency in reporting. To be classified as an Australian business, entities must ensure the relevant metrics are available (see **Possible defining elements**).
47. The definition encourages entities to consider how they add value to various stakeholders, not just to the entity, owners, directors and shareholders. This encourages considerations aligned with modern directorship principles such as environmental social governance (ESG) or unintended benefits from simply carrying on the enterprise.
48. The current definitions do not encourage any of these behaviours.
49. The proposed definition, by taking a broader view of ‘value’ outside of tax, also makes it easier for a non-profit organisation to be recognised as an Australian business. While companies limited by guarantee (under the Corporations Act) are easy to consider, the proposed definitions also allow non-profits (including member-based non-profits) incorporated under state/territory rules to be considered as Australian businesses.

Closing remarks

50. This submission takes a business perspective on the current identification of entities as Australian businesses. This perspective is based on experience and observation and deliberately avoids any in-depth academic or legal study. The proposed definition is behaviour-based, which is harder to ‘game’ and should give the Australian public greater confidence that Commonwealth procurement is using bona-fide Australian businesses, subject to value-for-money considerations.
51. The proposed definition of an Australian business is: **a business, enterprise or entity that is (a) registered in Australia (through an ABN) and (b) has the intent of retaining value (earned, economic and non-economic – present and future) within the Australian community or environment.**