



**Small Business
Development Corporation**

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To whom it may concern

PUBLIC CONSULTATION – DEFINING AN AUSTRALIAN BUSINESS FOR COMMONWEALTH PROCUREMENT

Thank you for the opportunity to comment on the Public Consultation on *Defining an Australian Business for Commonwealth Procurement* (the **Consultation**).

The Small Business Development Corporation (**SBDC**) is an independent statutory authority of the Government of Western Australia (**WA**), established to support and facilitate the growth and development of small businesses in the State¹. Under the leadership of the WA Small Business Commissioner, the SBDC provides a range of services to assist and empower small business operators in the State when they are making crucial decisions over the course of their business lifecycle, and when they are faced with uncertainty or unfairness in their business, particularly when dealing with another party.

These services are tiered based on the level of support needed, and include:

- information and guidance through online channels (including the SBDC's website), workshops, business advice and outreach services;
- dispute resolution service, which includes pre-mediation case management and mediation if required; and
- examining behaviour negatively impacting on the commercial interests of small businesses, particularly when there is a power imbalance between parties.

Through these various touchpoints with small businesses, along with regular engagement with small business and industry representatives, the SBDC is able to monitor the WA small business landscape and constructively contribute to government and parliamentary reviews and policy development. To that end, the SBDC's feedback on the Consultation follows.

¹ The views presented here are those of the SBDC and not necessarily those of the WA Government.

Submission focus

The SBDC notes that currently the only reference to an Australian business in the Commonwealth Procurement Rules (**CPRs**) is the definition of a Small and Medium Enterprise (**SME**), being an Australian or New Zealand firm with fewer than 200 full-time equivalent employees. The Public Consultation paper (the **paper**) outlines factors for consideration in the development of a definition of an Australian business within the procurement framework.

The SBDC's submission will respond to two factors laid out in the paper:

Business Location/Operations

- Should the Australian business definition include consideration of:
 - the place of incorporation/establishment of the business?
 - the location of a business' operations?
 - the principal place of business?
 - whether the business is considered to be an Australian employer?

Other considerations

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

Definitions of an Australian business

Across Australia, the definition of an SME is not consistent. The CEO of the Council of Small Business Organisations Australia (**COSBOA**) recently pointed out that there are 25 different definitions for SMEs, and this influences under what legislation a business operates². Indeed, at the time of writing this, there were discussions in the media about changing the definition of a small business from 15 to 25 employees in the *Fair Work Act 2009 (Cth)* in order to reduce the burden of compliance for small business operators while also impacting industrial rights of employees³.

Other national frameworks include the Australian Taxation Office (**ATO**) which defines a small business as a business with annual turnover of \$10 million or less – by this definition as of June 2022, 98 per cent of Australian businesses are small businesses⁴. Additionally, s.23(4)(b) of the *Competition and Consumer Act 2010 (Cth)* outlines the unfair contract term protections for small businesses with small business satisfying either or both of the following conditions:

- The business employs fewer than 100 persons; and/or
- The business turnover is \$10 million or less.

² 'Government's sledgehammer approach to SME privacy reform needs a rethink', Luke Achterstraat, *Smart Company*, 23 September 2024. <https://www.smartcompany.com.au/opinion/opinion-governments-sledgehammer-approach-sme-privacy-reform-rethink/>

³ 'Unbearable burden' of Labor's laws', Ewin Hannan, *The Australian*, 14 October 2024.

⁴ 'Small Business Matters, June 2023', *Australian Small Business and Family Enterprise Ombudsman* https://www.asbfeo.gov.au/sites/default/files/2023-07/Small_per_cent20Business_per_cent20Matters_June_per_cent202023_per_cent20_per_cent281_per_cent29.pdf

In WA, Part 1 of the SBDC's enabling legislation, the *Small Business Development Corporation Act 1983 (WA)*, describes a small business as a business undertaking:

- (a) which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001*⁵ of the Commonwealth and which —
 - (i) has a relatively small share of the market in which it competes; and
 - (ii) is managed personally by the owner or owners or directors, as the case requires; and
 - (iii) is not a subsidiary of, or does not form part of, a larger business or enterprise; or

- (b) which is declared by the Governor by Order in Council pursuant to subsection (2) to be a small business for the purposes of this Act.

For ease of purpose, the SBDC at times employs the same small business definition as that used by the Australian Bureau of Statistics (**ABS**), as a business that has 0-19 employees. Under this definition, there were 238,907 actively trading small businesses in WA as at 30 June 2023⁶, making up 96.9 per cent of all businesses in the State.

Other relevant WA State legislation employ various definitions. For example, among the objects of the *Western Australian Procurement Act 2020 (WA)* is to “to reduce barriers to the participation of small and medium businesses in government procurement by streamlining procurement procedures”, however small and medium business is not defined. The *Western Australian Jobs Act 2017* outlines that a small or medium enterprise means a business or undertaking that has less than 200 full-time equivalent employees.

One of the challenges for small businesses to access Commonwealth Procurement contracts and opportunities is the amount of red tape and complexity involved in the process⁷. A definition of an Australian business could be a useful addition to the Commonwealth procurement framework as this could reduce one of the complexities.

⁵ Section 45A(2) of the *Corporations Law Act 2001 (Cth)*: Small proprietary company

(2) A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

- (a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than \$25 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
- (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
- (c) the company and the entities it controls (if any) have fewer than 50, or any other number prescribed by the regulations for the purposes of this paragraph, employees at the end of the financial year.

⁶ Australian Bureau of Statistics 2024, *Counts of Australian Businesses, including Entries and Exits*, cat. no. 8165.0 ABS.

⁷ 2024 *Small Business Perspectives Report* COSBOA and CommBank

Business Location/Operations

The SBDC believes that where a business is based is entirely relevant, especially regarding the competitiveness of small businesses in the context of Commonwealth Procurement.

Foreign owned companies competing with local companies was raised in the *Supporting the development of sovereign capability in the Australian tech sector* report⁸. Several Australian owned SMEs in the technology sector wrote in their submissions to that Parliamentary inquiry that foreign owned and operating firms with an Australian Business Number could be considered “Australian SMEs” in the previous iteration of the Commonwealth Procurement Rules. By leveraging their economies of scale, foreign owned companies can potentially undercut genuine local businesses’ pricing, creating an unfair competitive advantage.

A definition of Australian business that includes location would help ensure genuine local enterprises can remain competitive in Commonwealth Procurement opportunities. The SBDC therefore proposes that the Australian business definition should include consideration of:

- the place of incorporation/establishment of the business;
- the location of a business’s operations;
- the principal place of business; and
- whether the business is considered to be an Australian employer.

The **place of incorporation** requiring businesses to be established under Australian law would ensure that they are compliant with local regulations, making it easier to verify their commitment to Australia.

The **location of a business’s operations** ensures the economic impact stays local by favouring businesses that actively operate within Australia, benefiting communities where they’re based.

The **principal place of business** could prioritise companies whose primary base is in Australia and reinforce a genuine, ongoing commitment to Australian interests, not just a nominal presence.

Further, preferencing businesses that **employ Australians** is a direct way to support local job creation and ensure that the economic benefits of procurement flow to the domestic workforce.

Other considerations – Additional factors

Submissions to the *Supporting the development of sovereign capability in the Australian tech sector* also suggested the factor of ‘retained economic benefit’ for

⁸ *Supporting the development of sovereign capability in the Australian tech sector*, Commonwealth Finance and Public Administration References Committee, June 2024.
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Supporting_Aust_tech47/Report

procurement⁹. The economic benefit would include consideration of how a tenderer would contribute to job creation, local wealth creation, domestic tax revenue, and technology transfer.

The SBDC notes that CPR 4.7 Broader benefits to the Australian economy states:

In addition to the value for money considerations at paragraphs 4.4–4.6, for procurements above \$1 million (or \$7.5 million for construction services) (except procurements covered by Appendix A and procurements from standing offers), officials are required to consider the economic benefit of the procurement to the Australian economy.

In June-July 2024, the Commonwealth Department of Finance carried out a Public Consultation on the *Consideration of Broader Economic Benefits in Procurement* requesting feedback on practical implementation of assessing economic benefits in procurement activities. It is noted that updated guidance on this has not been released as of late October 2024.

The SBDC notes that in its report on the impact of the implementation of the 1 July 2022 changes to the Commonwealth Procurement Rules on small and family businesses – which were updated to target 20 per cent of procurements by value to be sourced from small and medium enterprises among other initiatives – the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) recommended an economic benefit framework for procurement¹⁰.

Specifically, Recommendation 10 of the *Procurement Inquiry Final Report* is to 'Decode rules and guidance' and includes the suggestion to:

- use a 'retained economic benefit' framework to capture, but not prescribe, the contributions of procurements, which can be quantified as:
 - value of goods and services supplied by domestic enterprises, including SMEs, First Nations businesses, start-ups, or suppliers of innovative goods or services
 - value of labour/services provided by Australian residents and First Nations Australians
 - amount of expenditure on capital goods and social infrastructure in Australia.

In line with this, the SBDC suggests that an additional factor when considering the definition of an Australian business is in the context of economic benefit. As per the ASBFEO's recommendation above, SMEs, First Nations businesses, start-ups, or suppliers of innovative goods or services tend to be Australian businesses.

Including economic benefit requirements in Commonwealth Procurement tenders could encourage both SMEs to bid directly and prime contractors to engage SME

⁹ Ibid.

¹⁰ *Australian Small Business and Family Enterprise Ombudsman: Procurement Inquiry Final Report* <https://www.asbfeo.gov.au/policy-advocacy/policy-insights/review-1-july-changes-commonwealth-procurement-rules-2023>

subcontractors. This approach would help SMEs gain greater economic benefits from government procurement opportunities.

Balancing benefits and risks

The SBDC notes there is potential for both benefits and risks that could stem from Commonwealth Procurement prioritising businesses genuinely rooted in Australia.

Local labour, transparency and innovation would all likely benefit from the proposed reform. Firstly, defining an Australian business by its contribution to the domestic labour market and supply chain could encourage local economic impact and ensure resilience against global supply chain disruptions (as starkly highlighted during the COVID-19 pandemic).

Secondly, given the emerging reforms around beneficial ownership and transparency in Australia, a definition that includes transparency in ownership would align well with these international trends. The SBDC understands that regions like the United Kingdom have implemented transparency requirements that help prevent foreign influence and ensure that benefits from procurement flow back to the local and national economy.

Thirdly, including considerations for innovation can help prioritise businesses that contribute proprietary solutions. This approach would be aligned with similar European Union initiatives¹¹ that aim to protect intellectual property created within national boundaries and support technological advancement domestically.

The SBDC is also mindful that there are risks attached to the proposal in relation to free trade agreement limitations, implementation complexity and the potential of inadvertent exclusion.

There is a risk that defining "Australian business" too strictly might conflict with free trade arrangements. As pointed out in the Public Consultation paper, the CPRs specify that the Australian Government's procurement framework is non-discriminatory and that all potential suppliers must be treated equitably and not discriminated against due to their degree of foreign affiliation or ownership, location, or origin of their goods and services.

Secondly, there could be an additional administration burden for both SMEs to provide evidence (i.e. red tape) as well as on government staff to enforce the new criteria. And finally, a rigid definition might exclude some globally integrated Australian companies that may operate partially from overseas but still generate local economic benefits. Excluding these genuinely Australian operating businesses may potentially reduce competition in tenders and impact the value for money in procurement.

¹¹ Enforcement and Protection: Protecting EU creations, inventions and designs, European Commission, https://policy.trade.ec.europa.eu/enforcement-and-protection/protecting-eu-creations-inventions-and-designs_en

However, the SBDC believes that the benefits could outweigh the risks if there is an overall potential outcome that government spending supports businesses that actively contribute to the local economy, create jobs, and have a stake in Australia's prosperity.

Concluding remarks

In summary, the inclusion of location and economic benefit in the consideration of an Australian business would increase opportunities for small businesses to engage with Commonwealth Procurement. Increasing small business capacity and making Commonwealth Procurement more accessible to small businesses is an outcome that the SBDC strongly supports.

Thank you for the opportunity to provide comments to this consultation. If you would like to discuss this submission in more detail, please contact [REDACTED], on (08) 6552 3300 or at [REDACTED]

Yours sincerely

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1 November 2024