

Submission to Public Consultation:

Defining an Australian Business for Commonwealth Procurement

25 October 2024

SOVEREIGN AUSTRALIAN PRIME ALLIANCE



1 About SAPA

1.1 The **Sovereign Australian Prime Alliance** (SAPA) is an informal grouping of large Australian prime contractors comprising:

- AUSTAL (ASX: ASB) – Australia's global shipbuilder;
- DroneShield (ASX: DRO) – Australia's world leader in counter-drone solutions;
- Gilmour Space – Australia's leading venture-capital-backed space technology company;
- Macquarie Technology Group (ASX: MAQ) – Australia's data centre, cloud, cyber security and telecom company; and
- NIOA Group – Australia's largest family-owned global munitions company.

In aggregate, SAPA represents significant human resources (ie. combined workforce approximately 3,000), financial capital (ie. combined valuation over AU\$5 billion), and technical capability developed through years of investment into research and development (eg. registered patents).

Since forming in 2022 SAPA has advocated the important economic and social contributions sovereign Australian prime contractors provide the Australian economy – including to Australian SMEs – and to push for genuine sovereign capability in areas that are critical to Australia's technological, national security and defence interests.

1.2 Our shared goal is to advocate for Federal Government to cultivate and support Australia's sovereign prime contractor companies in the interests of achieving a more prosperous, self-reliant and resilient Australia, supporting policies the Albanese Government took into the 2022 Federal Election – specifically:

- Future Made in Australia (**FMIA**); and
- Buy Australian Plan¹ (**BAP**),

Our people work in the service of Australia's national security, defence and technology sectors, and our investments are overwhelmingly focused on uplifting capability here in Australia. This includes, but is not limited to, dual-use technology design and manufacture at advanced manufacturing facilities in New South Wales and Queensland, naval shipbuilding in Western Australia, and secure data centres (ie. Zone 4 rated by the Australian Security Intelligence Organisation) in New South Wales and the Australian Capital Territory.

2 SAPA Definitions

2.1 '**Australian business**': SAPA defines an Australian business as an Australian registered company that is not a subsidiary of a foreign company, that is based in Australia, controlled by majority Australian shareholders, and governed by a majority Australian Board of Directors.

2.2 '**Australian prime contractor**': SAPA defines an Australian prime contractor as an Australian registered company that is not a subsidiary of a foreign company, that is

¹ <https://www.finance.gov.au/business/buyaustrianplan>

based in Australia, controlled by majority Australian shareholders, and governed by a majority Australian Board of Directors.

- 2.3 **'National resilience'**: "The ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management²."
- 2.4 **'Self-reliance'**: "Reliance on oneself or one's own powers; confidence; independence³."

3 Introduction

- 3.1 According to research cited by the Australian Academy of Technological Sciences and Engineering, "Australia's economic complexity ranks at just 93rd in the world, between Uganda and Pakistan, rather than alongside those we normally see as our peers – Japan (1), Germany (4), the UK (8) and the US (14)."⁴
- 3.2 SAPA believes the definition of an Australian business has played a role in Australia's falling ranking in this key economic indicator. SAPA also submits that the definitions of an Australian company currently in effect across myriad legislative and regulatory regimes—as pointed out in the Consultation Paper this submission is responding to—are leading to multiple negative consequences which work against the national interest.
- 3.3 They include, but are not limited to:
- impacting the partnership and shared sense of endeavour which Government and industry should have, and which is seen in other advanced economies and key trading partners;
 - enabling economic support from successive Australian Governments to local subsidiaries of massive foreign multinational conglomerates, which have little-to-no effective decision-making control in Australia, and are—given their corporate governance structures—necessarily vested in advancing the industrial capabilities of their home nations first and foremost; and
 - stifling innovation, research and development of local Australian companies, notwithstanding their sustained industrial success.
- 3.4 In undertaking its review, The Department of Finance (**Finance**) would benefit from examining the industrial policies of Singapore, Israel, Taiwan and South Korea. Each of these countries have rapidly advanced up the ladder of technological and industrial capability over the past 50 years with far fewer resources to draw from than Australia. In that time, each have also made similar international trade commitments as Australia.
- 3.5 Tightening up the definition of an Australian business is a critical first step towards effectively delivering industrial policies. With clearer more accurate definitions the Australian Government will be able to put in place stronger, measurable incentive programs which could, for instance:

² United Nations Risk Reduction Glossary, the definition currently utilised by the National Institute of Strategic Resilience (Australia).

³ Macquarie Dictionary definition of 'self-reliance'

⁴ <https://www.afr.com/policy/health-and-education/how-to-fix-australia-s-dire-state-of-economic-complexity-20240202-p5f1vs>

- facilitate genuine technology transfer to Australian companies;
 - enable uplift to our national manufacturing and broader industrial output;
 - ensure a greater share of the economic benefits that result from government industry policy are retained in Australia for Australian workers, shareholders; et al.
- 3.6 In a globalised economy, where procurement decisions can significantly impact national industries and economic resilience, defining an “Australian Business” cannot rely on superficial markers such as an ABN or ACN. Instead, it should incorporate substantial criteria—local ownership and local control, governance, location of headquarters and place of business registration. This will ensure that Commonwealth procurement recognises the contributions different businesses make to Australia's economic and industrial sovereignty, and protects against supply chain vulnerabilities, particularly in critical sectors such as technology, defence, and telecommunications.
- 3.7 This consultation document acknowledges the importance of clear definitions that give confidence to government and industry, are easy to apply, and properly identify businesses which genuinely Australian and those which are not. Our proposed definition (see paragraph 2.1) addresses these needs, setting clear parameters to ensure that Australian businesses can be accurately identified by Australian Government departments.

4 International Comparisons and Support

- 4.1 International examples highlight that defining a domestic business for procurement commonly focuses on local ownership, control, and management. Several major economies, including the European Union, India, and the United States, have implemented definitions that reflect key elements of our preferred design.

European Union (EU)

- 4.2 The EU provides a strong example of a region that uses ownership and control as significant criteria for defining domestic economic actors in procurement contexts. For example, the EU's International Procurement Instrument considers the location of substantive business operations and ownership influence when determining whether a business is “of” a member state. This focus on ownership and control reflects our emphasis on majority Australian shareholder and board control as essential to qualifying as an Australian business.
- 4.3 Furthermore, the EU's defence procurement policies reinforce the importance of local industrial capacity, requiring entities receiving support under the European Defence Industry Programme (EDIP) to be established within the EU and not controlled by third-country entities. Such provisions safeguard national security interests by prioritising businesses with local (ie. EU member state) control. Australia, particularly in sectors related to national security, should adopt similar measures.

India

- 4.4 India's Defence Acquisition Procedure (DAP) provides another instructive model. The DAP defines an “Indian vendor” based on ownership and control by Indian citizens, with restrictions on foreign direct investment to ensure local control is maintained. This policy prioritises indigenization, emphasising the need for procurement to benefit locally-owned businesses. Australia's Future Made in Australia and Buy Australian Plan policies similarly aim to foster local industrial capabilities. India's procurement policies

provide a strong precedent for adopting ownership and control criteria when defining Australian businesses.

United States

- 4.5 The United States' approach to foreign investment and procurement, particularly in sensitive sectors, further supports SAPA's definition. The Committee on Foreign Investment in the United States (CFIUS) scrutinises ownership and control when determining the eligibility of businesses for certain transactions and procurements. This reflects a recognition that ownership and control are critical in safeguarding national interests.
- 4.6 Furthermore, U.S. measures such as Executive Order 14017 on America's supply chains, reinforce the need for domestic production capacity and local control over critical industries, aligning with our definition. The United States' focus on mitigating foreign ownership risks, especially in sensitive sectors like technology and defence, echoes our call for a definition prioritising Australian-controlled businesses in Commonwealth procurement.

5 The Case for SAPA's Preferred Definition

- 5.1 Our preferred definition of an Australian business is not only supported by international practices but is essential for safeguarding Australia's economic sovereignty and advancing government policy objectives (ie. BAP, FMIA). By focusing on majority local ownership and control, our definition ensures that procurement spending—when required—can be directed to support businesses that are fully invested in Australia's future, rather than foreign subsidiaries that also have offshore interests which they must prioritise.
- 5.2 The FMIA policy explicitly seeks to secure Australian supply chains and build local capabilities in areas such as clean energy, defence, and critical technologies. A narrow definition of an Australian business based on formalities such as holding an ABN/ACN fails to capture the economic value of businesses contributing to Australia's long-term prosperity. SAPA's proposed definition ensures genuinely Australian businesses can benefit from government procurement and aligns with key national objectives.

6 Recommendations

- 6.1 Adopting our preferred definition of an Australian business—requiring majority local ownership, control, and governance—is crucial for ensuring that Commonwealth procurement drives long-term benefits for Australia's economy and national security. By aligning with international best practices and reflecting the government's strategic priorities, our definition offers a clear, robust framework for distinguishing genuinely Australian businesses in the procurement process.
- 6.2 We urge Finance to consider these international examples and the policy drivers behind them as it develops a definition that will shape the future of Australian industry. Only by adopting stringent criteria that prioritize majority Australian control and ownership can the government ensure that Commonwealth procurement supports Australia's national interests.

7 Response

- 7.1 SAPA's position on the definition of an Australian Business has been articulated in response to various Australian Government public consultations since 2022. We therefore welcome this opportunity to respond to the public consultation: *Defining an Australian Business for Commonwealth Procurement (the **consultation**)*, and we applaud the effort Finance has put into the consultation paper which notes current inconsistencies across Australian Government departments and legislation, where defining Australian businesses is concerned. We hope this submission can provide clarity and guidance to achieve a consistent and accurate 'standard definition' of genuinely Australian businesses.
- 7.2 Central to the debate about defining an Australian business is the need for Australian Federal and State governments to gain certainty as to the industrial capability that exists within Australia's jurisdictional boundaries. The extent to which our jurisdictional boundaries can reach has a direct impact on the design and delivery of policies affecting Australia's industrial output. This, in turn, has consequences for many national interests, including—in no particular order—Australia's national security, national resilience, self-reliance, economic prosperity, technology security and development.
- 7.3 Achieving a standard definition of an Australian business will enable Australian governments to direct current and future policies with accuracy, irrespective whether the targets of those policies are Australian or non-Australian businesses, small-to-medium (**SME**) businesses or major primes. The current confusion makes this near impossible, and leads to perverse policy outcomes articulated in detail in recent Senate inquiries such as:
- Supporting the development of sovereign capability in the Australian tech sector;
 - Performance of the Department of Defence in supporting the capability and capacity of Australia's defence industry; and
 - Influence of International Digital Platforms, among others.

8 Business Location/ Operations questions

- 8.1 *Should the Australian business definition include consideration of the place of incorporation/establishment of the business?*

Section 119A of the Corporations Act notes the jurisdiction of incorporation and registration for Australian businesses down to the State/ Territory level. This makes possible the application of specific State/ Territory legislation which may affect entities that are registered under the Act.

If the Act under which all companies registered for business in Australia recognises there are differences—even across Australia's different jurisdictions—where corporations law is concerned, we would argue this to be manifestly the case where international jurisdictions are concerned.

Since the place of incorporation has a specific meaning under the Corporations Act because it has consequences under Law, incorporation in Australia should be a necessary pre-requisite for being defined as an Australian business.

Therefore, SAPA supports a definition of an 'Australian business' that includes a consideration of the *place of incorporation* of the business (ie. an Australian business must be incorporated in Australia).

SAPA further submits that the country where the business is headquartered—where the Board of Management meets—should match the country where the business is incorporated. This is an important clarification since the location of a business' Board of Management is a central element of SAPA's definition of an Australian business (ie. paragraph 2.1).

The *place of 'establishment'* is of less value in this context as it could be confused with meaning the place where a business was founded. This would lead to organisations such as News Corporation being defined and counted as 'Australian' despite its reincorporation in the US state of Delaware since 2004.

8.2 *Should the Australian business definition include the location of a business' operations?*

If the intent is to include *any* physical location associated with a business, SAPA recommends inclusion of 'location of a business operations' within the definition of an Australian business so long as the country of incorporation and location of corporate headquarters are also within Australia.

8.3 *Should the Australian business definition include the principal place of business?*

SAPA understands 'principal place of business' to mean the physical main, headquarter address where business is conducted. For reasons stated earlier, SAPA supports this inclusion in the definition of an Australian business.

8.4 *Should the Australian business definition include whether the business is considered to be an Australian employer?*

This is less relevant since, if a business is incorporated in Australia, has its operational location(s) within Australia, including its principal place of business, it will in all likelihood employ Australians.

In the reverse scenario, a foreign company which has operations here in Australia and necessarily employs Australian residents, should not qualify—solely due to these bonafides—for being defined as an Australian business. The intent of the Australian definition is to clearly categorise companies which have majority local ownership and control versus which those have majority offshore (ie. non-Australian) ownership and control.

8.5 *Where businesses have operations in multiple locations, should all the locations be considered, or just the principal place of business?*

For the incorporated entity to be defined as Australian it should be an Australian registered company that is not a subsidiary of a foreign company, that is based in Australia, controlled by majority Australian shareholders, and governed by a majority Australian Board of Directors.

8.6 *What are the advantages or disadvantages of including the above considerations in the definition?*

The most obvious advantage to the definition SAPA advocates is noted in paragraph 7.3. Where government seeks to direct policies towards Australian (or non-Australian)

businesses it can only do this when proper definitions are in place. Current—and likely future—government policies require a definition of an Australian business which meets the threshold of majority Australian ownership + control + location.

For example, the Finance website, explains the BAP as follows:

“The Buy Australian Plan will... maximise opportunities for Aussie businesses in major infrastructure projects...”; and “... make National Partnerships work to maximise the use of local workers and businesses.”⁵

Although not explicitly stated in the above, SAPA believes the intent of this policy is to support genuinely Australian businesses as SAPA defines them. The current definition of Australian businesses allows government procurement to direct BAP policy effects towards ‘maximising opportunities’ for businesses including the likes of ACCIONA (headquartered in Spain but operating subsidiaries in Australia), John Holland Group (an Australian subsidiary of China Communications Construction Company), Lockheed Martin Australia (a subsidiary of Lockheed Martin Corporation), et al.

We would also argue that where the BAP refers to ‘national partnerships’ to support ‘local workers and businesses’, the intent is not to support—through government procurement contracts—international companies or staff of headquarter offices scattered throughout world, but genuinely Australian businesses (as SAPA defines them).

Arguably the most vital advantage the SAPA definition of Australian business offers concerns black swan or war time scenarios, when the Australian Government may need to nationalise an industry sector in the interests of national security or emergency management.

Further, SAPA contends that it must surely be the policy intent that any government policy designed to deliver positive benefits to Australian companies target genuine Australian businesses, rather than the international examples of “Australian businesses” given above, not discounting numerous other examples.

During the COVID-19 pandemic when Government sought to secure food supplies from major grocery chains, it was the Australian majority owned + controlled + located companies, not their international competitors, with which it negotiated and secured supply guarantees.

In a war time scenario, where industrial capability might need to be nationalised to ensure defence materiel and related supplies are secured, it will be Australian majority owned + controlled + located businesses which the government can nationalise in the national security interest. Whilst there may be options for the Australian Government to nationalise Australian workforces and/or *facilities* within Australia, operated by international defence industry primes, government will not be able to seize the intellectual property (IP) necessary to build and sustain defence platforms provided us by those international defence primes.

9 Questions related to taxation, including registering for an ABN and GST

Income tax questions

⁵ <https://www.finance.gov.au/business/buyaustrianplan>

- 9.1 *Should the Australian business definition take into consideration a business' liability to pay income tax in Australia?*

Yes, it should. However, whilst this should be important to Government procurement assessments⁶, it is of less concern to the definition of an Australian business. If an entity is registered for business in Australia, that registration includes obligations to tax liabilities whether the business is a genuinely Australian business or not.

- 9.2 *Should the Australian business definition include consideration of whether a business is an Australian resident for taxation purposes?*

As at paragraph 9.1 above.

- 9.3 *Should the Australian business definition take into consideration a business' disclosure as to their country of tax residency?*

Yes, it should. This disclosure would advise Government the country of incorporation of the business operating in Australia (and/or the parent business of the local Australian subsidiary) and provide clarity as to whether or not the business is genuinely Australian.

- 9.4 *What are the advantages or disadvantages of including either of these considerations in the definition?*

As noted in paragraph 9.3, country of tax residency declarations will aid identification of Australia or non-Australian businesses. Further, such clarification would support efforts to increase Government taxation revenues from multinational companies.

Again, SAPA contends that it must surely be the policy intent that any government policy designed to deliver positive benefits to Australian companies consider broader economic benefits such as tax residency, sovereign wealth creation, development of industrial capabilities and intellectual property creation and transfer.

Carrying on an enterprise – ABN and GST registration

- 9.5 *Should the Australian business definition include a requirement for businesses to be registered for an ABN?*

Yes, it should. SAPA understands 'business' to mean an entity that is registered to conduct business in Australia. If an entity does not hold an ABN it will not be relevant to the intent of this discussion – ie. to better define Australian businesses for the purposes of government policy making and implementation.

However, this cannot be used as a determinative factor. For instance, HUAWEI PTY. LIMITED (ABN 98 166 902 763) could be used as a potential example of how solely using an ABN definition could work against the interests of Australian companies, national security concerns notwithstanding.

Review of the Implementation of the *Australian Jobs Act 2013* (which applies such an ABN definition to defining an Australian business) by Quantum Consulting Australia dated 26 November 2018 states: "Further issues were that "International businesses [were] counted as local business". Solutions were

⁶ SAPA has advocated businesses be excluded from government procurement contracts when they do not meet their tax obligations to the Commonwealth. In advice provided to the Department of Science, Industry and Resources⁶, SAPA suggested Commonwealth procurement officers utilise the Australian Tax Office's Tax Assurance Program as guidance for the tax obligations of suppliers to government.

offered that included expanding the definition of Australian business to include "more than an ABN".⁷

9.6 *Should the Australian business definition include consideration of whether a business is registered for GST?*

No, this is not necessary. Not-for-profit organisations (**NFPs**) need only register for GST if their turnover is greater than \$150,000. It would be a negative impact if small (ie. by annual turnover) Australian NFPs were not defined as 'Australian' under a revised definition simply because they were not registered for GST.

9.7 *What are the advantages or disadvantages of including these considerations in the definition?*

As detailed above.

10 Questions concerning ownership, including Nationality of owners/ shareholders and Relationship to other businesses

10.1 *Should the Australian business definition include consideration of the nationality of the owners/shareholders (including the beneficial owners)?*

SAPA supports the consideration of nationality of ownership/ shareholding where this has material impact to the management and/or control of the business. SAPA has maintained its view that majority Australian ownership and management control should be central to the definition of an Australian business. We believe this is an important consideration in the national security interest, notwithstanding the interests of policy effects highlighted earlier in this submission.

10.2 *Should the Australian business definition include consideration of related businesses, such as parent companies?*

SAPA submits that, when an entity is owned by an international parent company, it is otherwise known as a local (or Australian) subsidiary of a foreign company. It is therefore not an Australian company under SAPA's definition.

The simplest way of navigating this element is to define such businesses as 'Australian (or local) subsidiary (of a foreign company)'. In this context, SAPA suggests Finance consider not one definition of Australian business, but multiple definitions of businesses operating in Australia, such that each model is accurately defined and categorised.

For example, Australian businesses would be defined as per SAPA's suggestion; 'Australian/ local subsidiary' could be another definition applicable to a different cohort of companies; other definitions could be created to relate to other categories as needed.

10.3 *What are the advantages or disadvantages of including the above considerations in the definition?*

As detailed above.

10.4 *Does the percentage of the ownership/shareholding need to be taken into account?*

Yes. SAPA submits that percentage ownership/ shareholding is central to the national interest test. Government has the power to direct, or seize control over the resources,

⁷ Review of the Implementation of the Australian Jobs Act 2013: Report prepared for the Department of Industry, Innovation and Science, Quantum Consulting 26 November 2018

materiel, operations, and intellectual property of majority Australian companies. This makes genuinely Australian companies unique in this regard.

Powers available to Government to achieve similar controls over international companies which operate in Australia are substantially limited, particularly where seizure of IP is concerned.

Government also has the power to stop foreign takeover or acquisition (ie. majority stake) of Australian companies because every Australian entity and business is subject to the Foreign Investment Review Board Regime (**FIRB**)⁸.

Conversely, the Government has no real power to influence acquisition of foreign companies that operate in Australia. For the reasons detailed in paragraphs 8.6 et al , SAPA believes the percentage ownership/ shareholding does need to be taken into account when defining an Australian business.

11 Other considerations, including compliance questions

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

Yes, it should. However, SAPA is not suggesting its' genuine definition of an Australian business be designed and then implemented to enable preferential procurement decisions by APS procurement officials. It will be for the government of the day to determine where (ie. which country) and which organisation a capability should be procured from, and this will be determined based on a variety of factors and considerations.

The central relevant point is that, without a proper definition of an Australian (or a non-Australian) business, government cannot make accurate assessments in order to direct policy and/or procurement decisions accurately where the corporate nationality considerations are concerned.

11.2 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?

SAPA is not aware of any compliance costs to business its' proposed changes to definitions may create.

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

Amending the definition of an Australian business may create administrative costs to government.

11.4 Is there a combination of factors that you consider should be included in the definition? What is your reasoning for the combination of factors?

The combination of factors SAPA believes should be included in the definition of an Australian business are detailed in paragraph 2.1. Reasons for the inclusion of these factors are detailed throughout this submission.

⁸ The detailed legislation is governed by the FIRB Board and ultimate responsibility rests with the Treasurer. A Foreign Person (including foreign Government, Corporation or Trustee) cannot take ownership of an Australian entity of a substantial interest when the trigger threshold is met (the threshold being as low as 20%) without FIRB approval. Relevantly, if the target of the acquisition operates a national security business any direct interest by a Foreign Person that meets the monetary threshold (which is nil, in the case where the target operates a national security business) requires FIRB approval.

11.5 *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?*

National security strategic planning is one obvious area which will benefit from more precise definitions of Australian and non-Australian companies. As detailed in paragraphs 4.6 et al, there is a national security imperative for the Australian Government to have clear and precise intelligence on the Australian/ non-Australian industrial capacities which support Australian Defence Forces and our broader national security interests.

Strategic planning with respect to critical supply lines, emerging technologies, national resilience and self-reliance are other areas—albeit also relating to national security interests—which will benefit from clearer more precise definitions.

Relatedly, the Security of Critical Infrastructure Act (2018) will also benefit such that it has the effect of safeguarding the continuing operation of eleven critical industry sectors during black swan events (including pandemic, major cyber or kinetic attack). In this context Government will benefit from clear and precise information about the organisations which are responsible for Australia's Systems of National Security (SONS) so defined under the Act.

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