

Response to Consultation on a Business Definition for Procurement

September 2024

Introduction

TechnologyOne welcomes the opportunity to contribute to the Consultation process into defining an Australian Business for Commonwealth Procurement purposes.

TechnologyOne is an ASX100 business inventing, developing, delivering and supporting core business software applications. The business was founded in Brisbane in 1987 where it remains headquartered and supports its main R&D facility. TechnologyOne reinvests about 20 percent of revenue in R&D every year and today operates throughout ANZ, the Pacific and the UK.

The business focuses on selected markets only, the largest being government, local government and higher education. It has been serving Federal Government customers since 1990 and today has 85 departments and agencies as customers, ranging from less than 30 FTE to around 7000.

In the context of this experience over 35 years, TechnologyOne has been pleased to contribute to numerous recent processes that have considered Federal procurement policy and practice, including the Senate Standing Committee on Finance and Public Administration report into "Supporting the Development of Sovereign Capability in the Tech Sector", the Australian Small Business and Family Enterprise Ombudsman "Review of the Implementation of the 1 July 2022 changes to the Commonwealth Procurement Rules", and the consultation on Consideration of Broader Economic Benefit in Procurement Guidance.

The Definition Question

The absence of a single, clear definition of an Australian business across all of Government has arisen in all of the above processes in which TechnologyOne has been a participant. This has often been conflated with other issues of concern raised by industry participants and has at times contributed to some lack of clarity about the underlying source of disquiet with procurement practice and guidance.

For this reason, TechnologyOne is supportive of this process and its objective of developing a single, common definition for procurement purposes. TechnologyOne believes such a definition may be helpful in clarifying the sources of perceived deficiencies or weaknesses in various Government activities and programs, including procurement.

Further, TechnologyOne agrees the use of a common and accepted definition would provide the opportunity for more consistent and widely accepted reporting of the extent and value of Government business conducted with Australian businesses. Better and more consistent information would be welcome and of value. This greater clarity would better inform the consideration of the efficacy of policy intended to increase procurement from Australian businesses both in proportion and volume and improve the design of any new measures. This clarity is important not only to provide an indication of any programs that might be specifically intended to increase procurement from Australian businesses, but would also provide data that might be useful in other analyses. For example, changes in the trends of Australian businesses responding to various commercial tenders could give insights into the development or otherwise of domestic and sovereign capability in a range of industries.

TechnologyOne agrees that a common definition should be:

- Simple
- Understandable
- Not overly complex
- Suitable to support accurate measurement and reporting, and
- Not in conflict with other definitions or criteria in use.

Such a definition would be easiest to administer and lend itself to the widest range of uses.

Proposed Approach

We submit it is of high importance that any definition is widely accepted as "common sense" or consistent with a reasonable person test.

The Department's discussion paper helpfully describes numerous examples where the Commonwealth has identified the features of businesses that can be described as "Australian" in various contexts. Many of these are not procurement contexts, however, and many do not purport to be a definition.

It is important to note that in most of these circumstances the criteria are not strictly presented as defining of "Australian". While this is often an element or implied in the different contexts, the criteria are seeking to capture the scope of business entities intended to be subject to the provisions of a specific program, law or regulation. That is, they describe characteristics of a business subject to or eligible under an instrument.

For example, as the paper makes clear, the provisions in the GST Act related to carrying on an enterprise in Australia have the very specific purpose of capturing enterprises for which tax liability is deemed appropriate. Similarly, the requirement that tenderers for Government contracts valued at more than \$200,000 disclose their country of tax residency is not represented as de facto definition of whether a business is Australian. It is evidently intended simply as a transparency measure.

TechnologyOne submits a helpful approach to deriving a common definition of an Australian business would be take an "Occam's Razor" approach to developing the simplest possible definition which is separate to and potentially supportive of each of those circumstances.

That is, a simple definition of Australian should stand apart from other criteria that define eligibility or coverage of a particular instrument. This approach would mean a definition would not need to be "all things in all circumstances", which would be impossible to achieve. Such an approach should also mean there is no need for disruption or change to most of the examples cited in the paper.

Further, separating the definition from other criteria would allow each criterion to be considered on its merits in the context of the intent of the instrument. The Government might decide tax payable on the income from a Government contract is an economic benefit that should be considered in a procurement. This is a relevant consideration but need not be part of a definition of Australian.

This approach also ensures the procurement non-discrimination principle noted in the Paper is not offended because it makes clear economic benefit opportunities in a procurement do not attach to the definition of Australian.

Where there is a policy intent or a specific reason to define eligibility to a specific program, this should be explicitly described, consistent with the Paper's point that a definition should not create complication or confusion and cost of compliance. In many cases, a simple definition of an Australian business may not be necessary as a criterion at all.

Seeking to create a single definition of "Australian" that incorporates all the particular requirements of various existing programs will create several problems.

Firstly, it would likely result in a definition so unwieldy as to be meaningless.

Further, the definition would be so far removed from the common sense understanding it would invite a backlash from businesses that regarded themselves as "genuinely" Australian

Finally, the opportunity to create transparency around the reasoning for business entities to be subject to a particular instrument would be lost. This would have a number of undesirable impacts, including increasing the risk of legal challenge in processes, and discouraging Australian businesses from seeking to participate in programs and tender opportunities, to the detriment of several of the Government's broader stated policy ambitions, including increasing domestic and sovereign capability.

Recommendation

If the definition of Australian taken apart from the objectives an instrument, the approach to creating a definition is greatly simplified. Among the criteria that have been proposed in some fora and circumstances are:

- Ownership and Control. Majority owned in Australia. For private businesses this means 51% of ownership with Australian citizens or permanent residents. For listed business, this could be satisfied by primary public listing of the ultimate control entity being on an Australian bourse. Control can mean a majority of directors citizens or permanent residents.
- Legal Entity. Incorporated or registered in the Australia under legal structures recognized under Australian Federal or state law.
- Location of Operations. Typically, primarily engaged in business activities in Australia.
- Tax obligations. Complies with Tax laws and has obligations under the ATO.
- Regulatory Compliance. Compliance with Federal regulations and standards, including labor, environmental and industry-specific obligations.

Australia should draw from these principles, but is in a position to create an even simpler definition, if the definition is coupled with instrument-specific requirements on a case by case basis as proposed above.

For example, control may be a crucial consideration where the purpose is for FIRB or security reasons. Tax residency and meeting taxation obligations are central to the ATO's ability to maintain the integrity of the tax system and are factors procurement officers are required to consider in both the procurement process and through the Commonwealth Supplier Code of Conduct. It is worth questioning whether questions such as these add anything to a definition of Australian or if they would be unnecessary duplication and/or complication and should therefore be separate criteria.

With this in mind, we recommend the definition of an Australian business is reduced and simplified to the following:

“Is the organization public and, if so, is its primary listing on the ASX (i.e not a subsidiary of an overseas company)? If the company is private, is it at least 51 percent Australian owned?”

“Is the Legal Entity. Incorporated or registered in the Australia under legal structures recognized under Australian Federal or state law?”

Such criteria go to the heart of what most people would likely agree as the foundation of “Australian” – that the business is owned by Australians and is created under Australian Corporate law.

Contact

TechnologyOne would be pleased to answer any questions in relation to this submission and would welcome an opportunity to participate further in this process is appropriate.

Please contact:

