



Defining an Australian Business for Commonwealth Procurement

Public Consultation

Introduction

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. Instead, there are a range of Australian business-related definitions that have been adopted for different purposes, including at the federal, and state and territory level.

This paper provides an overview of the Commonwealth procurement framework and the potential use of an Australian business definition in this context. It also provides information on a range of definitions that are currently being used by government entities, and outlines the various factors that could be considered in the development of a definition for use within the procurement framework.

The Department of Finance invites any interested parties to provide comments and suggestions to inform the development of a definition for an Australian Business for Commonwealth procurement.

Context and Scope

Overview of the Commonwealth Procurement Framework

The Commonwealth procurement framework incorporates a range of rules, policies and guidance documents relating to the conduct of procurement activities by government entities. The Commonwealth Procurement Rules (CPRs) are the core of the procurement framework, setting out the rules that must be complied with by relevant officials when undertaking procurement.

The key rules underpinning the CPRs are achieving value for money, encouraging competition, and accountability and transparency. The CPRs also incorporate relevant

procurement obligations from a range of free trade arrangements to which Australia is a party.

The CPRs give effect to Australia's international procurement obligations, as well as Government policy. The CPRs specify that the Australian Government's procurement framework is non-discriminatory and that all potential suppliers to government must, subject to the CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services.¹

There are limited exemptions from the non-discrimination requirements in the CPRs, including when measures are necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value. These exemptions are drawn directly from Australia's international obligations.

Procurement Connected Policies

The Commonwealth procurement framework also includes a range of procurement-connected policies², being policies of the Commonwealth for which procurement has been identified as a means of delivery.

Current procurement-connected policies are:

- Australian Skills Guarantee Procurement Connected Policy
- Environmentally Sustainable Procurement Policy
- Payment Times Procurement Connected Policy
- Shadow Economy Procurement Connected Policy
- Indigenous Procurement Policy
- Workplace Gender Equality Procurement Principles
- Australian Industry Participation (AIP) Procurement Connected Policy

Parliamentary and other Inquiries and Reports

The issue of being able to define an Australian business (and/or a sovereign Australian business) has been raised in various recent inquiries and reviews, including through the Senate Standing Committee on Finance and Public Administration's 'Supporting the development of sovereign capability in the Australian tech sector' report, released in June 2024³, and Australian Small Business and Family Enterprise Ombudsman's December 2023 'Review of the implementation of the 1 July 2022 changes to the Commonwealth Procurement Rules'⁴. Further, a number of submissions from industry included commentary

¹ Refer to paragraphs 5.3 and 5.4 of the CPRs.

² Information and relevant links relating to current procurement connected policies is provided at <https://www.finance.gov.au/government/procurement/buying-australian-government/procurement-connected-policies>

³ Refer to https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Supporting_Aust_tech47/Report

⁴ Refer to <https://www.asbfeo.gov.au/policy-advocacy/policy-insights/review-1-july-changes-commonwealth-procurement-rules-2023>

on this issue in the recent public consultation process reviewing the Consideration of Broader Economic Benefits in Procurement guidance.

Potential use of a definition in the Commonwealth Procurement Framework

The only reference to an Australian business in the CPRs is the definition of a Small and Medium Enterprise (SME), being an Australian or New Zealand⁵ firm with fewer than 200 full-time equivalent employees.⁶

This SME definition is utilised in two key sections of the CPRs. Section 5 sets out expectations regarding the participation of SMEs in procurement processes and includes commitments and targets for contracting with SMEs.⁷ Appendix A sets out exemptions from the open tendering rules in the CPRs that allow for limited tendering from SMEs in following circumstances:

- procurement of goods and services from an SME with at least 50 per cent Indigenous ownership⁸
- procurement of goods and services valued up to \$500,000 from an SME⁹.

Therefore, for the purposes of the CPRs, any definition of an Australian business for the procurement framework would be considered for the 'Australian' portion of the existing SME definition.

Australia's international government procurement obligations include non-discrimination commitments. These commitments are given effect through the CPRs.

In light of these commitments, the definition of an Australian business could be utilised to analyse contract reporting data for Commonwealth procurement to determine the number and value of procurement contracts being awarded to Australian businesses. This data may in turn be utilised to inform relevant government activities, such as those that support businesses to better understand how to engage and compete in Australian Government procurement processes.

Looking at the procurement framework more broadly, the definition of an Australian business may be relevant to procurement-connected policies that refer to Australian businesses, such as the Australian Industry Participation policy which currently specifies a business is Australian if it has an Australian Business Number (ABN) or an Australian Company Number (ACN)¹⁰.

In considering the development of a definition, and how it may be used by both government entities and industry/businesses within the context of Commonwealth procurement, we seek to ensure that a definition:

⁵ New Zealand firms are included in the SME definition due to commitments made in the Australia and New Zealand Government Procurement Agreement.

⁶ The SME definition specifies that when assessing the number of employees a firm has, employees of any associated entities (as defined in s 50AAA of the Corporations Act 2001) to the firm are included. Associated entities to a firm include a firm's parent company, a firm's subsidiaries, and any related bodies corporate to the firm.

⁷ Refer to paragraphs 5.5 to 5.8 of the CPRs.

⁸ Refer to Exemption 16 in CPRs Appendix A

⁹ Refer to Exemption 17 in CPRs Appendix A. The requirements under the Indigenous Procurement Policy must first be satisfied before this exemption is applied.

¹⁰ Refer to Section 5 of the *Australian Job Acts 2013*.

- 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.

Current business-related definitions

There are a range of business-related definitions that are currently being used by government entities. In reviewing these definitions, it was noted that they are generally utilised for different purposes and the definitions appear to have been determined based on the intended use and the relevant context.

Below are some of the definitions currently being utilised by government entities, as well as related policies, that may be useful to inform the development of a definition of Australian businesses for the procurement framework.

This section seeks to provide background and context to support more detailed consideration of the specific factors that may be relevant for inclusion in the definition, which are outlined in the next section of the paper.

Australian Bureau of Statistics (ABS)

The ABS produces a quarterly release, [Counts of Australian Businesses, including Entries and Exits \(CABEE\)](#), which defines Australian businesses as those businesses which have an ABN and are actively trading (remitting Goods and Services Tax (GST)) in the market sector of the Australian economy. The CABEE is focussed on actively trading businesses and the definition is therefore focussed on whether the business is actively operating in the Australian economy.

Australian Taxation Office (ATO)

There is no definition of an 'Australian business' in Australian tax law. However, tax law contains various criteria to determine whether an entity is an Australian resident for tax purposes.

For businesses operated as a sole trader or an ordinary partnership, Australian income tax obligations are based on the individual's residency.

For other entity types (e.g. companies, corporate limited partnerships, and trusts), the residency criteria is different however there are some common elements. For example, a company is a resident of Australia if:

- it is incorporated in Australia, or
- although not incorporated in Australia, it carries on business in Australia and has either:

- its central management and control in Australia, or
- its voting power controlled by shareholders who are residents of Australia.

Similarly, a corporate limited partnership will be considered a resident of Australia if either:

- the partnership was formed in Australia, or
- the partnership either carries on a business, or has its central management and control in Australia.

Generally, trusts are considered Australian residents for an income year if:

- a trustee of the trust estate was a resident at any time during the income year, or
- the central management and control of the trust estate was in Australia at any time during the income year.

Department of Defence

The Department of Defence undertakes procurement within the context of the Commonwealth procurement framework. However, security considerations reflected in the CPRs (and Australia's international agreements) provide flexibility for Defence to consider factors such as local industrial capability during procurement activities.

The Defence Industry Development Strategy establishes the framework and principles for Australia's defence industry policy. It specifies that Australia's sovereign defence industrial base is comprised of businesses with an Australian-based industrial capability and an ABN, and are providing products or services used in, or which can be adapted to be used in, the Australian Department of Defence supply chain and/or an international defence force supply chain.

For the purposes of the Australian Standard for Defence Contracting (ASDEFCON) template suite and in the context of measuring Australian Contract Expenditure under the Australian Industry Capability framework, an Australian Entity means:

- a. a company registered under the *Corporations Act 2001* (Cth) or a company registered under the *Companies Act 1993* (New Zealand);
- b. a body corporate, partnership, joint venture or association formed or incorporated in Australia or New Zealand; or
- c. a foreign-owned company in Australia or New Zealand, and which has a registered body number (ie. ARBN or NZRBN),

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.

Department of Employment and Workplace Relations (DEWR)

The *Fair Work Act 2009* includes a definition for an “Australian employer”¹¹, being an employer that:

- a. is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- b. is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- c. is the Commonwealth; or
- d. is a Commonwealth authority; or
- e. is a body corporate incorporated in a Territory; or
- f. 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
- g. is prescribed by the regulations.

Department of Industry, Science and Resources (DISR)

The *Australian Jobs Act 2013* defines an Australian entity as an entity that has an ABN or an ACN. Similarly, the Commonwealth AIP policy, which includes the AIP Procurement Connected Policy, states a business is Australian if it has an ABN or ACN.

Treasury

The *Corporations Act 2001* (Cth) includes a definition of when a body corporate is taken to carry on a business in Australia¹². The definition is relevant, amongst other things, for determining when a foreign company must register with the Australian Securities and Investments Commission (ASIC)¹³. It references a number of relevant activities including whether the body corporate has a place of business in Australia, establishes or uses a share transfer or registration office or administers, manages or otherwise deals with property situated in Australia (subject to certain exceptions).

Other concepts included in the Act that may be useful in considering how to define an Australian business, include Section 9, which provides the following definitions for a “foreign company”, and for “incorporated in Australia”:

foreign company means:

- a. a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not:

¹¹ Refer to Section 35(1) of the *Fair Work Act 2009*.

¹² Refer to Section 21 of the *Corporations Act 2001*.

¹³ Refer to Section 601CD of the *Corporations Act 2001*.

- i. a corporation sole; or
- ii. an exempt public authority; or
- b. an unincorporated body that:
 - i. is formed in an external Territory or outside Australia and the external Territories; and
 - ii. under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
 - iii. does not have its head office or principal place of business in Australia.

incorporated in Australia, in relation to a body corporate, includes incorporated by or under a law of:

- a. the Commonwealth; or
- b. a State; or
- c. an internal Territory.

Country of tax residency disclosures are currently required as part of the Commonwealth procurement framework. Specifically, from 1 July 2023, the Government introduced requirements for tenderers for Australian Government contracts worth more than \$200,000 to disclose their country of tax residency (including their ultimate parent entity's country of tax residence) as part of the general business identifier information required in the Commonwealth Government procurement tender application process.

Further, as outlined in the section below, Treasury is also undertaking work in relation to beneficial ownership disclosures for certain types of entity structures operating in Australia.

Factors for potential consideration in the definition

There are a range of factors relating to businesses that could be considered in the development of a definition for Australian business for use within the procurement framework. Information is provided below on a range of these factors and your feedback is sought on which factors should be considered as part of the definition of an Australian business for the procurement framework.

In reviewing the below information and responding to the question, please be mindful of the context and potential use of the definition within the procurement framework, as outlined in scope section of this paper.

Questions have been included throughout this section to assist you with preparing feedback and comments. However, the questions are not intended to limit feedback and any additional comments you wish to provide relating to the topic of developing a definition of an Australian business for the procurement framework are welcome.

Business Location / Operations

While not relevant to all business structures, the Corporations Act includes definitions for ‘incorporated in Australia’ as outlined in the previous section. When registering a company under the Act (Part 1.5, 3.7), the company must have a registered office in Australia, and a post office box cannot be the registered office of the company.

The Corporations Act also includes the concept of principal place of business, being the location from which a company operates its business. The principal place of business for a company may be different from its registered office.

Separately, the Fair Work Act sets out a definition for determining whether an employer is Australian, and includes consideration of whether an employer carries on an activity in Australia and has its central management and control in Australia.

Questions:

- 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?
- Where businesses have operations in multiple locations, should all the locations be considered, or just the principal place of business?
- What are the advantages or disadvantages of including the above considerations in the definition?

Taxation, including registering for an ABN and GST

Income tax

An entity that is a resident of Australia is generally assessable on income derived from all sources whether in or out of Australia. In contrast, a non-resident is generally only assessable on income with an Australian source.

As mentioned in the Treasury section above, tenderers for Australian Government contracts worth more than \$200,000 are required to disclose their (and their ultimate parent entity’s) country of tax residency as part of the general business identifier information required in the Commonwealth Government procurement tender application process.

Questions:

- Should the Australian business definition take into consideration a business’ liability to pay income tax in Australia?
- Should the Australian business definition include consideration of whether a business is an Australian resident for taxation purposes?
- Should the Australian business definition take into consideration a business’ disclosure as to their country of tax residency?

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

Carrying on an enterprise – ABN and GST registration

Carrying on an enterprise is a requirement to be entitled to an Australian Business Number (ABN). Under section 8 of *A New Tax System (Australian Business Number) Act 1999* (ABN Act) entities are entitled to an ABN if:

- they are carrying on an enterprise in Australia ('enterprise' defined per section 9-20 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)),
- in the course or furtherance of carrying on an enterprise, they make supplies that are connected with the indirect tax zone, or
- they are a Corporations Act company.¹⁴

The criteria to be entitled to obtain an ABN mean that a foreign business that is located outside of Australia may also be entitled to an ABN if they are carrying on an enterprise in Australia, or in the course or furtherance of carrying on an enterprise, make supplies connected with the Indirect Tax Zone.

The *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) does not define 'Australian business' but contains similar, but distinctive, provisions concerning 'enterprise', 'carrying on an enterprise', and 'carrying on an enterprise in the indirect tax zone' (essentially Australia).¹⁵

The meaning of 'enterprise' is broader than the meaning of 'business' and is not limited to enterprises carried on in Australia.

An entity is eligible (or may be required) to be registered for GST if it is carrying on an enterprise. This includes a non-resident (foreign business) who is carrying on an enterprise.

Under Division 23 of the GST Act, a business or enterprise *must* register for GST if they meet certain criteria, including:

- when the business or enterprise has a GST turnover of \$75,000 or more,
- when the non-profit organisation has a GST turnover of \$150,000 or more.

A business or enterprise *may* register for GST if they are carrying on an enterprise with a GST turnover below the relevant threshold, or if they intend to carry on an enterprise from a particular date.

Questions:

- Should the Australian business definition include a requirement for businesses to be registered for an ABN?
- Should the Australian business definition include consideration of whether a business is registered for GST?

¹⁴ *A New Tax System (Australian Business Number) Act 1999* section 41 Dictionary, definition: **Corporations Act company** means a body registered as a company under the Corporations Act 2001.

¹⁵ Definitions can be found in sections 9-20 and 9-27 of the GST Act.

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

Ownership, including Nationality of owners/shareholders and Relationship to other businesses

There is currently a requirement for directors of Australian companies to lodge with ASIC a notice containing their personal details, including their address and place of birth; however, information about the nationality of shareholders of companies is generally not required to be provided to ASIC.

There are proposed government reforms that are likely to affect how the ownership of Australian businesses is recorded, including around beneficial ownership. Generally, beneficial owners are natural persons who ultimately own or control an entity, legal vehicle, or asset¹⁶. Australia does not currently have a comprehensive framework for collecting information about the owners and controllers of unlisted companies. As part of its multinational tax integrity package, the Government committed to implement a public register of beneficial ownership. The register will include information showing who ultimately owns, controls, or benefits from Australian companies. The Government released a consultation paper in November 2022¹⁷ which proposed that the information a company is required to collect and store on the proposed beneficial ownership register includes the nationality of its beneficial owners.

Questions:

- Should the Australian business definition include consideration of:
 - the nationality of the owners/shareholders (including the beneficial owners)?
 - related businesses, such as parent companies?
- What are the advantages or disadvantages of including the above considerations in the definition?
- Does the percentage of the ownership/shareholding need to be taken into account?

Other considerations, including compliance

Any definition for Australian business is intended to be clear and simple to use for both businesses and government, while not introducing significant hurdles or costs to business in relation to compliance.

Questions:

- Do you consider that a definition of an Australian business will be a useful addition to the Commonwealth procurement framework, noting the scope and context set out in this paper?
 - Should the definition be applied to any of the procurement connected policies?
- 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?

¹⁶ Refer to [Multinational tax integrity: Public Beneficial Ownership Register Consultation paper November 2022](#)

¹⁷ Refer to <https://treasury.gov.au/consultation/c2022-322265>

- Are there additional factors, not listed above, that you consider should be included in the definition of an Australian business?
- Is there a combination of factors that you consider should be included in the definition?
 - What is your reasoning for the combination of factors?
- 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?

The above questions are intended as prompters. We invite feedback and comments on any aspect regarding developing a definition of an Australian business, including those not covered above.

Timeframe

The Department of Finance requests that submissions be submitted via the webform on the [Finance website](#) by **5pm, Friday 25 October 2024**. Enquiries can be submitted to ProcurementConsultation@finance.gov.au.

To ensure submissions are accessible, please submit responses in Word or PDF format.

All information (including name details) contained in submissions may be made publicly available on the Department of Finance website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

If your submission is published on the Department of Finance website, the information in it, including your name can be searched for on the internet.

Please see the Submission Guidelines for further information on the consultation process and how your information may be used.

Relevant Links

[Commonwealth Procurement Rules](#)