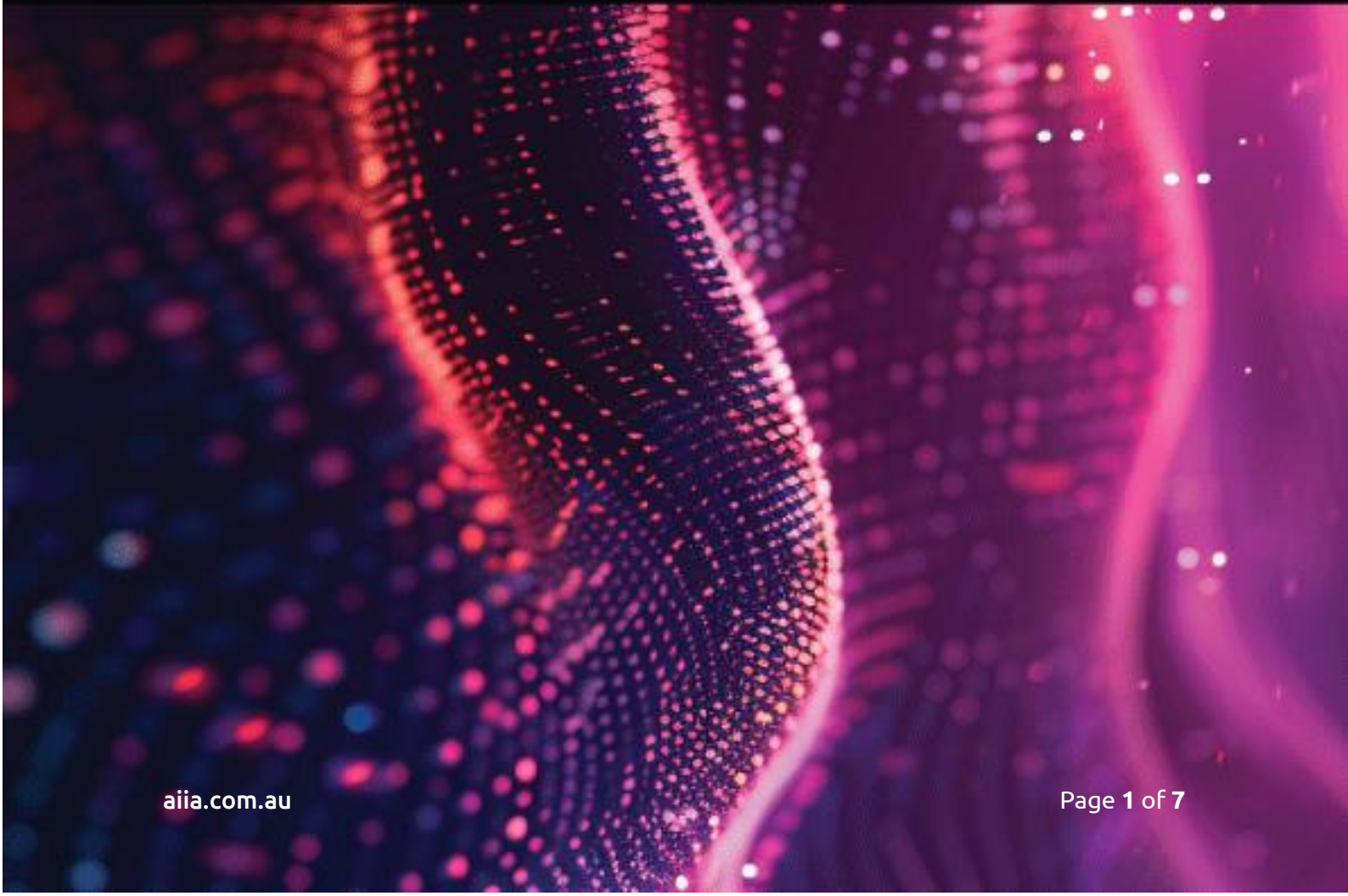




Australian Information Industry Association

Submission on

the Digital Seller Underperformance Policy



About the AIIA

The Australian Information Industry Association (AIIA) is the nation's peak body for those in the digital ecosystem, leading strategic policy and advocacy to shape a thriving digital sector. Through strong engagement with government, industry, and the broader community, the AIIA ensures the voice of its members informs decision-making on technology, innovation, and digital capability.

Membership provides direct access to influential networks, premium events, and opportunities to collaborate on initiatives with the sector's best and brightest to drive industry growth, improve productivity, and secure Australia's place as a global technology leader. AIIA members access real collaboration, real connections, and real outcomes.

Introduction

The AIIA welcomes the opportunity to provide feedback on the Draft Digital Seller Underperformance Policy (DSUP). While we support improving digital delivery outcomes across government, the DSUP, as currently drafted, does not provide an appropriate or effective basis for achieving those objectives.

The proposed policy represents a significant shift in the management of supplier performance, introducing a centralised, whole-of-government underperformance framework with enduring commercial and reputational consequences for sellers. This submission identifies fundamental concerns with the policy's rationale, design, proportionality, and governance. Taken together, these issues are not matters of refinement or implementation detail. They go to the core of whether the policy is necessary, appropriate, and fit for purpose. Unless substantially reconsidered and redesigned, the DSUP risks distorting procurement behaviour and discouraging participation in complex government digital programs.

Lack of Clear Problem Definition

The draft DSUP does not clearly articulate the specific problem it is intended to address, nor does it set out an evidence base demonstrating a systemic failure in existing procurement, contract management, or assurance frameworks. While concerns about accountability and performance in government digital delivery are recognised, the policy does not identify the scale, frequency, or nature of seller underperformance that would justify the introduction of a new, whole-of-government reporting and register mechanism.

The policy appears to respond to broad concerns about transparency and accountability, rather than to a clearly defined and evidenced policy problem. It does not explain which existing mechanisms are failing, how often they are failing, or why they are insufficient to manage underperformance in practice. Australian Government agencies already have extensive tools available to them, including contractual remedies, performance management frameworks, assurance and gateway processes, dispute resolution

mechanisms, and the Commonwealth Procurement Rules. The draft DSUP does not demonstrate why these mechanisms are inadequate, or why a centralised register is a necessary or proportionate response.

In the absence of a clearly articulated problem statement supported by data, it is difficult to assess whether the policy is appropriately targeted, proportionate to the risk it seeks to address, or likely to deliver improved delivery outcomes.

Recommendation: The policy should clearly define the problem it seeks to address, supported by evidence of systemic underperformance that cannot be effectively managed through existing procurement and contract management mechanisms.

Scope and Definition of Strategic Digital Contracts

While the \$4 million contract value threshold provides a clear trigger, the draft policy also allows any other contract to be designated as a “Strategic Digital Contract” at the discretion of the DTA. The absence of clear criteria for this discretionary designation creates uncertainty for suppliers and undermines predictability in the procurement environment.

Suppliers may be captured by the policy without prior visibility or understanding of the risks involved, particularly where contracts below the threshold are later deemed strategically significant. This discretion also creates a risk of inconsistent application across agencies.

Recommendation: The policy should clearly define the characteristics that would justify discretionary designation, or otherwise limit application to contracts meeting an objective and transparent threshold.

Definition and Threshold for Serious Underperformance

The definition of “serious underperformance” in the draft DSUP relies on concepts such as “significant deficiencies” and failure to meet “substantive requirements”, which draw on language used in the Commonwealth Procurement Rules. Within the CPR framework, these concepts are applied in a procurement specific context, supported by established evaluation processes, probity controls, legal advice, and principles of procedural fairness.

Under the DSUP, the same concepts are applied in a standing, whole of government context through a centralised register with multi-year visibility and enduring commercial and reputational consequences. As drafted, the threshold for serious underperformance is set at a level that is capable of capturing a very broad range of underperformance issues, including matters that commonly arise during the delivery of complex digital projects and would not ordinarily be regarded as genuinely serious.

The inclusion of issues such as failure to meet schedule, budget or performance standards, without clear materiality thresholds, severity criteria or causal analysis, risks conflating routine delivery challenges with conduct warranting inclusion on a serious underperformance register. In large scale digital programs, delivery outcomes are often shaped by evolving requirements, scope changes, interdependencies and external constraints.

Clearer operational guidance would assist in improving consistency of interpretation and application across agencies, particularly in complex delivery environments. However, guidance alone is not sufficient to address the breadth of the current definition. Unless the threshold itself is substantially tightened and more narrowly defined, the policy will continue to capture conduct that falls short of what would ordinarily be understood as serious underperformance.

By contrast, where governments have adopted supplier performance disclosure or sanction mechanisms, these have typically been grounded in objective, quantitative and narrowly defined criteria. For example, in the United Kingdom, the Poor Payment Practices Reporting System publicly identifies large businesses that fail to pay suppliers within mandated timeframes.¹ That regime is based on clear statutory thresholds, measurable compliance indicators and standardised reporting, which reduces ambiguity and mitigates the risk of inconsistent or discretionary application.²

Recommendation: The policy should be amended to both clarify and elevate the threshold for serious underperformance. This should include clearer guidance to support consistent application, alongside substantially narrower and more objective criteria, such that only genuinely serious, sustained or unremediated failures are capable of triggering inclusion on the register.

Lack of Agency Accountability and Shared Responsibility

Digital project outcomes are the product of shared responsibility between buyers and sellers. In large and complex government programs, delivery challenges commonly arise from a combination of factors, including unclear or shifting requirements, scope changes, weak governance, insufficient internal capability, and poor risk and contract management on the agency side. The Australian Public Service Commission's *Learning from Failure* review identified these government-side factors as recurring contributors to major project

¹ *Reporting on Payment Practices and Performance Regulations 2017* (UK) SI 2017/395.

² Department for Business and Trade (UK), *Duty to report: guidance to reporting on payment practices and performance* (Guidance, UK Government)
<https://www.gov.uk/government/publications/business-payment-practices-and-performance-reporting-requirements/duty-to-report-guidance-to-reporting-on-payment-practices-and-performance>.

failure and noted that accountability in such initiatives is often diffuse, making it difficult to attribute outcomes to a single party in isolation.³

The DSUP framework focuses exclusively on seller conduct and does not provide a mechanism for considering whether agency actions or decisions materially contributed to the alleged underperformance. This one-sided approach risks misallocating responsibility and does not incentivise improvement in agency capability or project governance.

In addition, the policy does not address the practical complexity of attributing responsibility in multi-party delivery environments. Modern digital programs frequently involve multiple participants, including software vendors, hardware providers, system integrators and subcontractors, operating under layered contractual and governance arrangements. In such contexts, underperformance is seldom attributable to a single party in isolation. The draft policy does not explain how accountability would be assessed where delivery outcomes are shaped by interdependencies across multiple suppliers, nor how responsibility would be apportioned within consortia or prime and subcontractor models. In the absence of clear guidance, there is a risk that responsibility is assigned to the most visible or contractually exposed party rather than reflecting the underlying causes of underperformance.

Recommendation: Assessments under the DSUP should explicitly consider agency conduct and shared responsibility, including whether agency decisions, governance arrangements or delivery dependencies materially contributed to the alleged underperformance. Cases where responsibility for outcomes is diffuse, contested, or cannot be clearly attributed to a single seller, should not meet the threshold for inclusion on the underperformance register.

Risk of Coercive or Inappropriate Use

The existence of a central register of underperformance creates a risk that the policy could be used as leverage during contract delivery or commercial negotiations. Even where unintended, the threat of reporting may influence supplier behaviour in ways that are inconsistent with fair and collaborative contract management. While the draft policy recognises the role of contractual remedies and remediation, it does not require buyers to evidence that such mechanisms have been fully pursued or exhausted before reporting, nor does it include sufficient safeguards to ensure that reporting is used strictly as a last resort.

Recommendation: The policy should incorporate explicit safeguards to prevent coercive use, including senior accountability for reporting decisions, and a mandatory requirement

³ Peter Shergold AC, *Learning from Failure: Why Large Government Policy Initiatives Have Gone So Badly Wrong in the Past and How the Chances of Success in the Future Can Be Improved* (Australian Public Service Commission, 2015).

for buyers to evidence that contractual remedies and internal escalation processes have been fully pursued before a report is made.

Governance and Independence

Under the draft DSUP, the DTA is responsible for receiving reports, assessing evidence, determining outcomes and maintaining the register. This concentration of roles closely resembles a regulatory function, yet without independent oversight or separation of powers. The absence of independent review mechanisms raises concerns about procedural fairness, particularly given the significant commercial and reputational consequences of being recorded on the register.

Furthermore, the draft DSUP does not address how the framework would apply where the DTA itself is the procuring agency or has played a material role in delivery decisions. In such circumstances, the combination of buyer and assessment functions further heightens the importance of clear safeguards to ensure that shared responsibility is properly considered and that assessments are, and are seen to be, conducted independently.

Recommendation: The introduction of an independent review mechanism, or at minimum, a clearly defined internal reconsideration process separate from the original assessment. The framework should also explicitly address how assessments will be conducted where the DTA is the buyer or has had a material role in delivery, including any alternative assessment or review arrangements that would apply in such cases.

Removal from the Register

While the policy allows sellers to seek removal from the register after a minimum period, it also provides that a seller's underperformance history, including the dates on which confirmed serious underperformance was recorded and subsequently removed, will remain searchable and accessible to agencies for a period of five years.

In practical terms, this means that even where a seller has successfully demonstrated remediation and has been formally removed from confirmed serious underperformance status, the historical record continues to be visible and capable of influencing procurement decisions for a prolonged period. The distinction between being "removed" from the register and remaining searchable on the register for five years is therefore largely semantic rather than substantive.

Recommendation: Where a seller has been formally removed from the underperformance register following demonstrated remediation, no record of the underperformance should remain searchable or accessible to agencies. Removal should be complete and final, such that the seller is no longer subject to ongoing or residual sanction through historical visibility.

Conclusion

The AIIA supports efforts to strengthen performance and delivery outcomes for government digital projects. However, achieving these objectives requires a framework that is clear in its purpose, proportionate in its application, and grounded in principles of fairness, accountability and shared responsibility.

In the AIIA's view, the DSUP should not proceed in its current form. Fundamental reconsideration is required to ensure that any future framework is clearly justified, narrowly targeted, operationally workable, and aligned with principles of proportionality, procedural fairness, and collaborative delivery. Absent such changes, the policy is unlikely to improve delivery outcomes and may instead deter capable suppliers from engaging in complex and high-risk government digital initiatives.

If the underlying concern is recurring time and cost pressures in government digital programs, these would be more effectively addressed through bolstering existing assurance and performance provisions in contracts, or implementing stronger oversight and reporting requirements from agencies to the DTA to surface emerging issues before they escalate into major project failures.

The AIIA remains willing to engage constructively with the DTA on alternative approaches that strengthen delivery performance while maintaining confidence in the procurement system and supporting a competitive, innovative digital supplier market.

Should you require further information, please contact Mr David Makaryan, Advisor, Policy and Media, at david@aiaa.com.au.

Thank you for considering our submission.

Yours sincerely
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