Because of the sunsetting of a number of legislative instruments, there have been changes to the legislation governing the EMDG Administrative Guidelines. These changes are:

<table>
<thead>
<tr>
<th>OLD NAME</th>
<th>NEW NAME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Export Market Development Grants Regulations 2008</td>
<td>Export Market Development Grants Regulations 2018</td>
</tr>
<tr>
<td>Description</td>
<td>Guidelines</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Determination (1/1997 AJV) - Guidelines for the approval, variation of approval, and cancellation of approved joint ventures</td>
<td>Ventures) Guidelines 2018</td>
</tr>
</tbody>
</table>

Repealed:

- Export Market Development Grants Act 1974 - Approved Joint Ventures and Consortia
- Export Market Development Grants Act 1997 - Determination (1/1997 ATH) - Guidelines for the approval, variation of approval, and cancellation of approved trading houses
The EMDG Administrative Guidelines explain Austrade’s interpretation of the *Export Market Development Grants Act 1997* and how it is applied by Austrade in administering the Export Market Development Grants (EMDG) scheme.

The Administrative Guidelines draw on:

- the *Export Market Development Grants Act 1997*
- the Regulations made under the Act
- the Chief Executive Officer and Minister-made legislative instruments.

Exporters are welcome to request advice regarding the eligibility of proposed export promotional expenditure by contacting Austrade by phone on 13 28 78 or by email at emdg.help@austrade.gov.au

Austrade updates these guidelines as required. This version of the Guidelines was released in July 2018.

Readers are invited to suggest improvements or to recommend topics for the guidelines. This information can be provided by email to emdg.help@austrade.gov.au. Please mark this email to the attention of the Manager – Policy and Legislation.

Any questions about the EMDG scheme can be directed to Austrade:

**Hotline:** 13 28 78  
**Email:** emdg.help@austrade.gov.au
Note: Most references in this Index are to the Austrade Administrative Guidelines. In some cases this table also includes references to legislation, regulations or Ministerial Determinations. This is indicated in the ‘reference’ column of this table.

<table>
<thead>
<tr>
<th>ITEM</th>
<th>REFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT review of Austrade decisions</td>
<td>8.4, s 99</td>
</tr>
<tr>
<td>ABN: eligibility requirement</td>
<td>7.7.1(d), s 85A</td>
</tr>
<tr>
<td>Accommodation services and principal status</td>
<td>5.10.11</td>
</tr>
<tr>
<td>Accreditation of EMDG consultants</td>
<td>8.5</td>
</tr>
<tr>
<td>Acquittal of expenses</td>
<td>5.6.5, 5.30, 5.13</td>
</tr>
<tr>
<td>Adjustments that may be made by Austrade to eligible expenses, earnings or provisional grant</td>
<td>8.3</td>
</tr>
<tr>
<td>Administration costs</td>
<td>s 105</td>
</tr>
<tr>
<td>Administrative Decisions (Judicial Review) Act 1977</td>
<td>8.4.13</td>
</tr>
<tr>
<td>Advertising in Australia</td>
<td>5.8.11</td>
</tr>
<tr>
<td>Advertising material</td>
<td>5.8.7–18</td>
</tr>
<tr>
<td>Agent</td>
<td>5.3.2, 5.4.2</td>
</tr>
<tr>
<td>Agent – marketing visits</td>
<td>5.5.2</td>
</tr>
<tr>
<td>Air fares</td>
<td>5.5.1–7</td>
</tr>
<tr>
<td>Allowance for working days (Overseas Visit Allowance)</td>
<td>5.5.8–13</td>
</tr>
<tr>
<td>ANBRs (Australian Net Benefit Requirements)</td>
<td>3.7.1</td>
</tr>
<tr>
<td>Appeals against Austrade determinations</td>
<td>8.4, s 97</td>
</tr>
<tr>
<td>Applications: Austrade may ask for further information etc</td>
<td>7.2, s 72</td>
</tr>
<tr>
<td>Applications: closing date for lodgement</td>
<td>7.1.4–5, 70, s 73(2)</td>
</tr>
<tr>
<td>Applications: form and manner</td>
<td>7.3.3</td>
</tr>
<tr>
<td>Applications: grounds on which Austrade may refuse to consider</td>
<td>7.3, s 73</td>
</tr>
<tr>
<td>Applications: how to apply?</td>
<td>7.1</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>------</td>
<td>-----------</td>
</tr>
<tr>
<td>Applications: when received?</td>
<td>7.1</td>
</tr>
<tr>
<td>Applications: where prepared by disqualified individuals</td>
<td>7.4</td>
</tr>
<tr>
<td>Approved activity, project or purpose for joint ventures</td>
<td>5.25, 8.1.4, Min. Det.</td>
</tr>
<tr>
<td>Approved bodies</td>
<td>3.2.3, 5.18.5, 8.1.3, Min. Det. Regs</td>
</tr>
<tr>
<td>Approved entities: principal status</td>
<td>5.10.12</td>
</tr>
<tr>
<td>Approved joint venture</td>
<td>3.1.4 – 5, 3.3, 5.1.2, 5.25, 8.1, Min. Det., Regs 4, 5, 6</td>
</tr>
<tr>
<td>Approved joint venture: limit on a number for a person</td>
<td>8.1.15</td>
</tr>
<tr>
<td>Approved joint venture: nominated contact member</td>
<td>s 84, s107, Min. Det.</td>
</tr>
<tr>
<td>Approved joint venture: disqualifying convictions re: joint venture</td>
<td>3.3.4</td>
</tr>
<tr>
<td>Approved joint venture: limit on number for a person</td>
<td>8.1.15</td>
</tr>
<tr>
<td>Approved promotional purpose</td>
<td>5.3.4, 5.10, s 37 &amp; s 38</td>
</tr>
<tr>
<td>Arts exporters: eligibility of overseas touring expenses</td>
<td>5.18.4, 5.7.25, 5.18.6</td>
</tr>
<tr>
<td>Artworks: promotion of and principal status</td>
<td>5.10.10</td>
</tr>
<tr>
<td>Associate</td>
<td>3.17, s 87, s 107</td>
</tr>
<tr>
<td>Association</td>
<td>3.1.3, s 107</td>
</tr>
<tr>
<td>Austrade fees: eligibility</td>
<td>5.4.6, 5.4.31</td>
</tr>
<tr>
<td>Australian content: goods</td>
<td>4.1</td>
</tr>
<tr>
<td>Australian Net Benefit Requirements</td>
<td>3.7.1</td>
</tr>
<tr>
<td>Australian residency</td>
<td>3.1, 3.2.1–2, 5.15.1, 7.7.1</td>
</tr>
<tr>
<td>“Backpackers”: wholesalers selling to and principal status</td>
<td>5.10.13</td>
</tr>
<tr>
<td>Balance distribution date</td>
<td>6.2.7, 7.6, annual Min Det.</td>
</tr>
<tr>
<td>Branches of foreign companies cannot receive grants: must incorporate in Australia</td>
<td>3.1.7</td>
</tr>
<tr>
<td>Buyers and potential buyers, eligibility of expenses for visits to Australia</td>
<td>5.3, s 33 (item 7), s 34A</td>
</tr>
<tr>
<td>Capital expenses</td>
<td>5.13.1, 5.13.2, s 41</td>
</tr>
<tr>
<td>Capping mechanism – for grants calculation</td>
<td>s 61(3), 6.2</td>
</tr>
<tr>
<td>Carrying on business in Australia</td>
<td>3.2.1, Min. Det.</td>
</tr>
<tr>
<td>Cash payments</td>
<td>5.28.2, 5.30.13–14</td>
</tr>
<tr>
<td>Changes in ownership of a business</td>
<td>8.2, s 94</td>
</tr>
<tr>
<td>Christmas Island</td>
<td>3.1.10</td>
</tr>
<tr>
<td>Closely related persons</td>
<td>5.3.5, Min. Dets., Close Relationships – General &amp; Events Promoters</td>
</tr>
<tr>
<td>Closing date for lodging applications</td>
<td>7.1.4–5, s 70(2) &amp; 73(2)</td>
</tr>
<tr>
<td>Commissions</td>
<td>5.21.1–3, s 49</td>
</tr>
<tr>
<td>Company</td>
<td>3.1.3, s 107</td>
</tr>
<tr>
<td>Computer software</td>
<td>4.5</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Consents to check criminal records</td>
<td>7.2, 7.3</td>
</tr>
<tr>
<td>Consultants</td>
<td>5.4.25–38</td>
</tr>
<tr>
<td>Consultants’ expenses</td>
<td>5.4.25–38</td>
</tr>
<tr>
<td>Continuing business provisions</td>
<td>8.2, s 94</td>
</tr>
<tr>
<td>Contras and offsets – export earnings</td>
<td>6.1.24</td>
</tr>
<tr>
<td>Contras – expenses offset against income</td>
<td>5.30.9</td>
</tr>
<tr>
<td>Convictions</td>
<td>ss 16, 17, 103</td>
</tr>
<tr>
<td>Co-operative</td>
<td>3.1.3, s 107</td>
</tr>
<tr>
<td>Criminal records checks</td>
<td>7.2, 7.4.11–12</td>
</tr>
<tr>
<td>Cultural exporters – Loss-making tours</td>
<td>5.18.6</td>
</tr>
<tr>
<td>Databases – eligibility of expenses associated with</td>
<td>5.8.16</td>
</tr>
<tr>
<td>Definitions used in the Act</td>
<td>s 107 – s 114 inclusive</td>
</tr>
<tr>
<td>Demonstration/display equipment</td>
<td>5.7.7, 5.8.3 &amp; 4</td>
</tr>
<tr>
<td>Departure Tax</td>
<td>5.20.1</td>
</tr>
<tr>
<td>Disguised payments</td>
<td>5.21.3</td>
</tr>
<tr>
<td>Disposal</td>
<td>s 107, s 111</td>
</tr>
<tr>
<td>Disposal of intellectual property etc: promotion of returns</td>
<td>5.11, s 38</td>
</tr>
<tr>
<td>Disposal of eligible intellectual property</td>
<td>4.3.6–7, 5.27, s 107</td>
</tr>
<tr>
<td>Disqualified individuals preparing EMDG applications</td>
<td>7.4</td>
</tr>
<tr>
<td>Disqualifying convictions</td>
<td>3.2.6, 3.3.4, 3.4.2, 3.5.5, 3.17, 7.2.2, 7.7.1</td>
</tr>
<tr>
<td>Educational institutions: eligibility requirement</td>
<td>7.7.1(e)</td>
</tr>
<tr>
<td>Eight grant limit</td>
<td>3.2.3, 3.5.2, 3.6.1</td>
</tr>
<tr>
<td>Eligible expenses: general</td>
<td>5.1</td>
</tr>
<tr>
<td>Eligible products</td>
<td>Part 4</td>
</tr>
<tr>
<td>Eligible goods</td>
<td>4.1</td>
</tr>
<tr>
<td>Eligible intellectual property</td>
<td>4.3, 5.10.1</td>
</tr>
<tr>
<td>Eligible know-how</td>
<td>4.4</td>
</tr>
<tr>
<td>Eligible promotional activities</td>
<td>5.3–5.11</td>
</tr>
<tr>
<td>Eligible services</td>
<td>4.2</td>
</tr>
<tr>
<td>Eligible tourism services</td>
<td>4.2, Regulations</td>
</tr>
<tr>
<td>Eligible tourism service samples</td>
<td>5.7.12–19</td>
</tr>
<tr>
<td>EMDG consultants preparing applications whilst being disqualified</td>
<td>7.4</td>
</tr>
<tr>
<td>EMDG consultants: accreditation of</td>
<td>8.5</td>
</tr>
<tr>
<td>Event holders/owners as applicants</td>
<td>4.2.5</td>
</tr>
<tr>
<td>Event promoters: approved promotional purpose</td>
<td>5.10.18</td>
</tr>
<tr>
<td>Event promoters: eligibility issues</td>
<td>4.2.7–16</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Event promoters: expenses incurred</td>
<td>5.30.17</td>
</tr>
<tr>
<td>Event promoters close relationships</td>
<td>Min. Det – Events Promoters</td>
</tr>
<tr>
<td>Excluded expenses</td>
<td>5.12–5.30</td>
</tr>
<tr>
<td>Expenses for which applicant is paid</td>
<td>5.18</td>
</tr>
<tr>
<td>Expenses: $15,000 minimum</td>
<td>5.1.2</td>
</tr>
<tr>
<td>Expenses: apportionment guidelines</td>
<td>5.3.6, 5.10.2–3</td>
</tr>
<tr>
<td>Expenses: approved promotional purpose</td>
<td>5.10</td>
</tr>
<tr>
<td>Expenses: claimable</td>
<td>5.3–5.9</td>
</tr>
<tr>
<td>Expenses: commissions, discounts etc</td>
<td>5.21</td>
</tr>
<tr>
<td>Expenses: disclosed after submitting application</td>
<td>5.19</td>
</tr>
<tr>
<td>Expenses: excluded</td>
<td>5.12–5.30</td>
</tr>
<tr>
<td>Expenses: first-time applicants</td>
<td>5.1.2</td>
</tr>
<tr>
<td>Expenses: general eligibility</td>
<td>5.1</td>
</tr>
<tr>
<td>Expenses: incurred</td>
<td>5.30</td>
</tr>
<tr>
<td>Expenses: other financial assistance schemes</td>
<td>5.18</td>
</tr>
<tr>
<td>Expenses: pre-payments</td>
<td>5.30.3</td>
</tr>
<tr>
<td>Expenses: reasonableness</td>
<td>5.3.3, 8.3.2</td>
</tr>
<tr>
<td>Expenses: when incurred?</td>
<td>5.30</td>
</tr>
<tr>
<td>Expenses re: samples for testing or clearance by government authority. Expenses limited to cost of sample</td>
<td>5.7.3, 5.7.10</td>
</tr>
<tr>
<td>Export earnings</td>
<td>6.1.13–30</td>
</tr>
<tr>
<td>Export performance requirements</td>
<td>6.1.13–30</td>
</tr>
<tr>
<td>External territories</td>
<td>3.1.10</td>
</tr>
<tr>
<td>Facebook expenses</td>
<td>5.8.19</td>
</tr>
<tr>
<td>Fares</td>
<td>5.5.1–7</td>
</tr>
<tr>
<td>Feasibility studies: ineligibility</td>
<td>5.10.5</td>
</tr>
<tr>
<td>Film industry: eligibility</td>
<td>4.7</td>
</tr>
<tr>
<td>First class airfares</td>
<td>5.5.5, 5.4.24</td>
</tr>
<tr>
<td>Form and manner – EMDG applications</td>
<td>7.3.3–5</td>
</tr>
<tr>
<td>FOCs (tourism sample expenses)</td>
<td>5.7.12–19</td>
</tr>
<tr>
<td>Foreign country definition</td>
<td>5.10.10</td>
</tr>
<tr>
<td>Free samples</td>
<td>5.7</td>
</tr>
<tr>
<td>Free samples (services)</td>
<td>5.7.20–23</td>
</tr>
<tr>
<td>Free samples (intellectual property/know-how)</td>
<td>5.7.24</td>
</tr>
<tr>
<td>Free samples (music and other performance services)</td>
<td>5.7.25</td>
</tr>
<tr>
<td>Free samples (tourism)</td>
<td>5.7.12–23</td>
</tr>
<tr>
<td>Free samples (wine)</td>
<td>5.7.5</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Freedom of Information Act</td>
<td>8.4.14</td>
</tr>
<tr>
<td>Frequent flyer points</td>
<td>5.30.18</td>
</tr>
<tr>
<td>General eligibility rules</td>
<td>3.2–3.5</td>
</tr>
<tr>
<td>Genuinely carrying on business in Australia</td>
<td>3.2.1, Min. Det.</td>
</tr>
<tr>
<td>Gifts</td>
<td>5.4.9, 5.4.20, 5.8.7</td>
</tr>
<tr>
<td>Goods – eligibility of</td>
<td>4.1, s 24</td>
</tr>
<tr>
<td>Goods and services paid for but not received</td>
<td>5.30.16, s 59</td>
</tr>
<tr>
<td>Government departments or agencies cannot receive grants unless they are a body approved under S.89</td>
<td>3.1.8</td>
</tr>
<tr>
<td>Grant calculation: capping mechanism</td>
<td>s 61(3), 6.2</td>
</tr>
<tr>
<td>Grant calculation: general</td>
<td>6.1</td>
</tr>
<tr>
<td>Grant calculation: maximum grant</td>
<td>6.1.3, 6.1.6</td>
</tr>
<tr>
<td>Grant calculation: payout factor</td>
<td>6.2, s 69, s 107, Reg 3</td>
</tr>
<tr>
<td>Grant calculation: provisional grant</td>
<td>6.1–6.2, s 63</td>
</tr>
<tr>
<td>Grant calculation: related company group</td>
<td>6.1.6–12, s 65</td>
</tr>
<tr>
<td>Grants entry requirements</td>
<td>3.2.6, 3.5.8, 3.18, Austrade Det.</td>
</tr>
<tr>
<td>Grants history</td>
<td>3.6.1, s 8</td>
</tr>
<tr>
<td>Grants options A &amp; B</td>
<td>7.3.6</td>
</tr>
<tr>
<td>Grants: Austrade action to recover</td>
<td>8.8</td>
</tr>
<tr>
<td>Grants: not payable</td>
<td>7.7.1</td>
</tr>
<tr>
<td>Grants: obtained or increased as a result of the applicant being a party to any arrangement or transaction</td>
<td>8.3, s 96</td>
</tr>
<tr>
<td>Grants: repayment of</td>
<td>8.8, s 103 &amp; 104</td>
</tr>
<tr>
<td>Grants: when payable?</td>
<td>7.6</td>
</tr>
<tr>
<td>Guidelines, Ministerially approved and Austrade</td>
<td>s 101, Determinations section</td>
</tr>
<tr>
<td>Hotel EMDG applicants</td>
<td>5.4.38, 5.8.18</td>
</tr>
<tr>
<td>Illegal activities</td>
<td>5.28.1, s 56</td>
</tr>
<tr>
<td>Inbound tour operators</td>
<td>s 25(2), 4.2.8, 5.10.13</td>
</tr>
<tr>
<td>Income</td>
<td>3.2.4, 3.5.3, 5.25.1, s 107</td>
</tr>
<tr>
<td>Incurred expenses</td>
<td>5.30</td>
</tr>
<tr>
<td>Incurred expenses: events promoters</td>
<td>5.1.3</td>
</tr>
<tr>
<td>Incurred expenses for goods and services – not actually received</td>
<td>5.1.4, 5.30.16</td>
</tr>
<tr>
<td>Ineligible services based on insignificant Aust input</td>
<td>4.2.2</td>
</tr>
<tr>
<td>Initial payment ceiling amount</td>
<td>s 61(3), 6.2, 7.6.5–7, Min. Det.</td>
</tr>
<tr>
<td>In-store promotion</td>
<td>5.8.2 &amp; 4</td>
</tr>
<tr>
<td>Insolvency administration</td>
<td>7.7.1, 7.7.2, s 87, s 87B &amp; s 87C</td>
</tr>
<tr>
<td>Intellectual property</td>
<td>4.3, 5.11</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
</tr>
<tr>
<td>Intellectual property registration expenses</td>
<td>5.9.4–7</td>
</tr>
<tr>
<td>Internal review of decisions</td>
<td>8.4.1, s 97 &amp; s 98</td>
</tr>
<tr>
<td>Internet expenses</td>
<td>5.6.11, 5.8.15, 5.21.4</td>
</tr>
<tr>
<td>Internet selling of goods – product eligibility</td>
<td>4.2.1</td>
</tr>
<tr>
<td>Interpreters’ expenses</td>
<td>5.4.21, 5.6.1</td>
</tr>
<tr>
<td>Inward visits</td>
<td>5.9</td>
</tr>
<tr>
<td>Iran market trade sanctions</td>
<td>5.16.2</td>
</tr>
<tr>
<td>Iran export earnings</td>
<td>6.1.28</td>
</tr>
<tr>
<td>Joint Ventures</td>
<td>3.3, 3.17.3, 5.1.2, 5.25, 8.1, Min. Det., Regs 4, 5, 6</td>
</tr>
<tr>
<td>June 30 falling on a weekend and date expenses taken to be incurred</td>
<td>5.30.15</td>
</tr>
<tr>
<td>Know-how</td>
<td>4.4, 5.7.24, 5.11</td>
</tr>
<tr>
<td>Loan accounts (expenses incurred)</td>
<td>5.30.8</td>
</tr>
<tr>
<td>Loss making promotional tours: arts exporters</td>
<td>5.18.6</td>
</tr>
<tr>
<td>Losses not eligible expenses</td>
<td>5.18.7</td>
</tr>
<tr>
<td>Magazines</td>
<td>5.7.11, 5.18.3</td>
</tr>
<tr>
<td>Market research/marketing (consultants’ expenses)</td>
<td>5.4.27</td>
</tr>
<tr>
<td>Marketing visit allowance</td>
<td>5.5.8–11</td>
</tr>
<tr>
<td>Marketing visits</td>
<td>5.5, s 33, s 34</td>
</tr>
<tr>
<td>Manufacturer</td>
<td>s.37(b), 5.7.5, 5.10.7</td>
</tr>
<tr>
<td>Maximum grant</td>
<td>6.1.3, 6.1.6</td>
</tr>
<tr>
<td>Merchant</td>
<td>s.37(a), s109</td>
</tr>
<tr>
<td>Merchant promoting goods not made in Australia</td>
<td>4.1.5</td>
</tr>
<tr>
<td>Minimum grant</td>
<td>6.1.4</td>
</tr>
<tr>
<td>Ministerial guidelines</td>
<td>s 101</td>
</tr>
<tr>
<td>Music industry</td>
<td>4.6, 5.7.25, 5.18.6</td>
</tr>
<tr>
<td>New Zealand: Trade with</td>
<td>5.15.1</td>
</tr>
<tr>
<td>Nominated contact member for approved joint ventures</td>
<td>s 84, s 89(4), s 107</td>
</tr>
<tr>
<td>Non-resident: ineligibility for a grant</td>
<td>7.7.1(b), s 85</td>
</tr>
<tr>
<td>Non-tourism services</td>
<td>Regulations, 4.2.6</td>
</tr>
<tr>
<td>Norfolk Island</td>
<td>3.1.10</td>
</tr>
<tr>
<td>Not Fit and Proper persons: – Denial of grants where applicant/associate is</td>
<td>7.7.3</td>
</tr>
<tr>
<td>Not Fit and Proper Person rules for EMDG consultants</td>
<td>7.7.4</td>
</tr>
<tr>
<td>Offences</td>
<td>3.17.3, 7.4.9 &amp; 10, 8.7, 8.8</td>
</tr>
<tr>
<td>Ombudsman, The Commonwealth</td>
<td>8.4.12</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Overseas buyers/potential buyers</td>
<td>5.9, s 33, s 34A</td>
</tr>
<tr>
<td>Overseas representatives</td>
<td>5.4</td>
</tr>
<tr>
<td>Overseas Visit Allowance</td>
<td>5.5.8–13</td>
</tr>
<tr>
<td>“Paid off”</td>
<td>5.30</td>
</tr>
<tr>
<td>Partnership</td>
<td>3.1.3, s 13, s 16(1)(c), s 107</td>
</tr>
<tr>
<td>Patents etc expenses</td>
<td>5.9.4–7</td>
</tr>
<tr>
<td>Payout factor</td>
<td>6.2, s 69, s 107</td>
</tr>
<tr>
<td>Person</td>
<td>s 107</td>
</tr>
<tr>
<td>Postage/courier expenses</td>
<td>5.6.1, 5.8.8</td>
</tr>
<tr>
<td>Pre-payments</td>
<td>5.30.10–12</td>
</tr>
<tr>
<td>Pre-contractual and post-contractual expenses</td>
<td>5.10.2</td>
</tr>
<tr>
<td>Pre-selling expenses: re: feasibility studies, IPR</td>
<td>5.10.5</td>
</tr>
<tr>
<td>Previous grants: Pre 1985/86 grants &lt;$3500</td>
<td>3.6.1</td>
</tr>
<tr>
<td>Principal status (approved entities)</td>
<td>5.10.12</td>
</tr>
<tr>
<td>Principal status (expenses for product promotion)</td>
<td>s 37, 5.10</td>
</tr>
<tr>
<td>Principal status (services exporters)</td>
<td>5.10.9</td>
</tr>
<tr>
<td>Principal status (tourism services exporters)</td>
<td>5.10.13</td>
</tr>
<tr>
<td>Principal status and works of art</td>
<td>5.10.10</td>
</tr>
<tr>
<td>Private exhibition expenses – eligibility of</td>
<td>5.8.2 &amp; 4</td>
</tr>
<tr>
<td>Prizes</td>
<td>5.8.17</td>
</tr>
<tr>
<td>Product accreditation</td>
<td>5.7.3, 5.10.3</td>
</tr>
<tr>
<td>Promotional literature</td>
<td>5.8.7–9</td>
</tr>
<tr>
<td>Prototypes</td>
<td>5.7.3</td>
</tr>
<tr>
<td>Provisional grant calculation</td>
<td>6.1–6.2</td>
</tr>
<tr>
<td>Quality Incentive Program (QIP) for extended lodgement for qualified EMDG consultants</td>
<td>7.7.1</td>
</tr>
<tr>
<td>Reasonable expenses</td>
<td>8.3.2</td>
</tr>
<tr>
<td>Recovery of grants by Austrade</td>
<td>8.8</td>
</tr>
<tr>
<td>Registration</td>
<td>3.2.7, 3.18</td>
</tr>
<tr>
<td>Regulations</td>
<td>s 106, Regs accompanying Act</td>
</tr>
<tr>
<td>Reimbursements</td>
<td>5.18, s 46</td>
</tr>
<tr>
<td>Related companies</td>
<td>3.2.5, 6.1.6–12, 7.2.1, 7.6.9 &amp; 10</td>
</tr>
<tr>
<td>Related entities</td>
<td>5.10.8, 6.1.23</td>
</tr>
<tr>
<td>Relatives travelling together</td>
<td>5.5.14–18</td>
</tr>
<tr>
<td>Repayment of grants</td>
<td>8.8.1–3, s 103 &amp; 104</td>
</tr>
<tr>
<td>Residency requirements</td>
<td>3.2.2, s 114</td>
</tr>
<tr>
<td>Return on disposal of eligible intellectual property etc</td>
<td>5.11, 5.27</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>Review of EMDG Scheme</td>
<td>S 106A</td>
</tr>
<tr>
<td>Reviewable decisions</td>
<td>8.4, s 97–99</td>
</tr>
<tr>
<td>Royalty or licence fee: promotion of return after disposal of intellectual property etc</td>
<td>5.11.4</td>
</tr>
<tr>
<td>Sale of goods</td>
<td>S 37, s 109, s 111</td>
</tr>
<tr>
<td>Sales-related expenses</td>
<td>5.8.18, 5.21, s 49</td>
</tr>
<tr>
<td>Samples</td>
<td>5.7</td>
</tr>
<tr>
<td>Samples of IPR and know-how</td>
<td>5.7.24</td>
</tr>
<tr>
<td>Second hand goods</td>
<td>4.1.3</td>
</tr>
<tr>
<td>Section 94 (continuing business provisions)</td>
<td>8.2</td>
</tr>
<tr>
<td>Section 96</td>
<td>8.3</td>
</tr>
<tr>
<td>Seminars</td>
<td>5.8.2</td>
</tr>
<tr>
<td>Serviced office expenses — eligibility of</td>
<td>5.4.2, 5.6.2, 5.8.3</td>
</tr>
<tr>
<td>Services</td>
<td>4.2, Regulations</td>
</tr>
<tr>
<td>Services exporters and principal status</td>
<td>5.10.9-5.10.11 and 5.10.13</td>
</tr>
<tr>
<td>“Set offs” of expenses against income</td>
<td>5.30.9</td>
</tr>
<tr>
<td>Software</td>
<td>4.5</td>
</tr>
<tr>
<td>Special approvals: approval variations</td>
<td>8.1.12–15</td>
</tr>
<tr>
<td>Special approvals: effect and expiry</td>
<td>8.1.16–18</td>
</tr>
<tr>
<td>Special approvals: renewal of approval</td>
<td>8.1.19</td>
</tr>
<tr>
<td>Special approvals: cancellation of approval</td>
<td>8.1.20–23</td>
</tr>
<tr>
<td>Sponsorship</td>
<td>5.8.7–9, 5.8.13–14</td>
</tr>
<tr>
<td>Spouse travel</td>
<td>5.5.14-18</td>
</tr>
<tr>
<td>Success fees</td>
<td>5.4.18, 5.21.1</td>
</tr>
<tr>
<td>Taxes</td>
<td>5.20.1</td>
</tr>
<tr>
<td>Termination expenses (overseas representation)</td>
<td>5.4.19</td>
</tr>
<tr>
<td>The Commonwealth Ombudsman</td>
<td>8.4.12</td>
</tr>
<tr>
<td>The Commonwealth, States or Territories (Government Departments)</td>
<td>3.1.8</td>
</tr>
<tr>
<td>Tourism applicants: principal status</td>
<td>5.10.13</td>
</tr>
<tr>
<td>Tourism services</td>
<td>4.2.5, Regulations</td>
</tr>
<tr>
<td>Trade fairs</td>
<td>5.8.2–4</td>
</tr>
<tr>
<td>Trade sanctions</td>
<td>5.16.1, 6.1.26</td>
</tr>
<tr>
<td>Translators’ expenses</td>
<td>5.4.21–22, 5.6.1</td>
</tr>
<tr>
<td>Trophies</td>
<td>5.8.9, 5.8.22</td>
</tr>
<tr>
<td>Trust estate beneficiaries</td>
<td>3.5.5–6</td>
</tr>
<tr>
<td>Trustees</td>
<td>3.5, 3.6.1, 5.26.1, 7.7.1</td>
</tr>
<tr>
<td>ITEM</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>------------------------------------------------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>Turnover (Income)</td>
<td>3.2.4, 3.5.3, 5.28.1, s 107</td>
</tr>
<tr>
<td>Under insolvency administration</td>
<td>7.7.1</td>
</tr>
<tr>
<td>Undisclosed expenses</td>
<td>5.19.1</td>
</tr>
<tr>
<td>Unreasonable expenses</td>
<td>8.3.2</td>
</tr>
<tr>
<td>Universities and $50m income limit</td>
<td>3.2.4</td>
</tr>
<tr>
<td>Visits</td>
<td>5.5</td>
</tr>
<tr>
<td>Website development – eligibility of</td>
<td>5.6.11, 5.8.15, 5.13.2, 5.21.4</td>
</tr>
<tr>
<td>Who is eligible for a grant?</td>
<td>3.1</td>
</tr>
<tr>
<td>Withdrawal of applications</td>
<td>7.3.2</td>
</tr>
<tr>
<td>Withholding tax</td>
<td>6.1.22</td>
</tr>
<tr>
<td>Working day for Overseas Visit Allowance calculation purposes</td>
<td>5.5.9</td>
</tr>
<tr>
<td>X-rated Publications, films, services, etc</td>
<td>5.12.1, 5.29, s 57, s 57A &amp; s 57B</td>
</tr>
</tbody>
</table>
SECTION 6 GUIDELINES

Who is eligible for a grant?

3.1.1 This section details the business or legal entities that are entitled to receive grants, subject to being able to meet the other eligibility requirements of the Export Market Development Grants Act 1997 (EMDG Act).

3.1.2 An individual will only be considered to be an Australian resident if his/her principal place of residence is in Australia and if he/she intends to remain permanently in Australia. (Refer to the definition of resident of Australia at section 114 of the EMDG Act.)

3.1.3 The EMDG Act requires that businesses other than those carried on by individuals must be established, incorporated or regulated by Australian laws. This will apply to:

- Bodies incorporated under the Corporations Law
- Associations or co-operatives incorporated under an Australian law
- Partnerships regulated by an Australian law. Refer to section 112 of the EMDG Act for clarification of the circumstances where a joint venture may be considered to be a partnership
- Body corporates established for a public purpose by or under an Australian law.

3.1.4 In addition, two other types of entities are entitled to receive grants. These are approved joint ventures and approved bodies. Applicants wishing to claim as one of these entities must address selection criteria detailed in the Guidelines, available from the EMDG website.

3.1.5 For detailed guidelines and procedures regarding these “approved” applicant categories, refer to guidelines 8.1.1-8.1.23 as well as to the “Legislative Instruments” section.

Who is not eligible for a grant?

3.1.6 Broadly, any entity which does not fall within the meaning of paragraphs 6(1)(a)-(g) of the EMDG Act is not eligible for a grant.
3.1.7 Branches of foreign companies cannot receive EMDG grants. These entities can only receive grants if they incorporate in Australia.

3.1.8 Government departments or government agencies cannot receive EMDG grants. While they can be members of Approved Joint Ventures, their share of any claimed expenses will not qualify for EMDG assistance.

Body corporates established by government that satisfy the eligibility criteria at paragraph 6(1)(g) of the Act are eligible to receive an EMDG grant. A body corporate of this type claiming an EMDG grant should provide Austrade with a copy of the enabling legislation under which it is established. Austrade requires this information to establish if any legal relationship exists with any level of government.

Unincorporated associations cannot receive grants.

3.1.9 Eligible partnerships

Partnerships regulated by an Australian law are eligible for an EMDG grant.

Partnerships and joint ventures set up solely for tax purposes will not be eligible for EMDG grants under paragraph 6(1)(d) of the EMDG Act. Joint ventures will only be taken to be eligible partnerships for EMDG purposes if they are established under state or territory partnership laws – refer to section 112 of the EMDG Act.

For partnerships of trusts set up solely for tax purposes, the individual trusts (trustees) may be eligible for a grant for their share of the partnership’s eligible expenses.

Partnerships of trusts regulated by state or territory partnership laws can be eligible under paragraph 6(1)(d) of the EMDG Act where the functions of the trust are undertaken by the trustee of each trust and the trustees are the partners in the partnership.

Joint venture businesses set up with one corporate trustee acting on behalf of a series of trusts may be eligible with the corporate trustee claiming under section 6(1)(b) of the EMDG Act.

Applicants who are residents of Australian external territories

3.1.10 Based on definitions in the EMDG Act as well as those found in the Acts Interpretations Act 1901, rules for applicants resident in Norfolk Island and Christmas Island are as follows:

<table>
<thead>
<tr>
<th>s6 applicant type</th>
<th>Norfolk Island</th>
<th>Christmas Island and Cocos (Keeling) Islands</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Eligible</td>
<td>Eligible</td>
</tr>
<tr>
<td>Company incorporated under Australian Corporations Law</td>
<td>Company carrying on a business in Norfolk Island is eligible and considered to be carrying on business in Australia.</td>
<td>Company carrying on a business in Christmas Island or Cocos (Keeling) Islands is eligible and considered to be carrying on business in Australia.</td>
</tr>
<tr>
<td>Body Corporate establish for a public purpose</td>
<td>Company established under Commonwealth, State or internal Territory * legislation and carrying on business in Norfolk Island is eligible and considered to be carrying on a business in Australia. Note: A company incorporated under Norfolk Island law is ineligible</td>
<td>Company incorporated or established under Commonwealth, State or Internal Territory * legislation and carrying on business in Christmas Island or Cocos (Keeling) Islands is eligible and considered to be carrying on business in Australia.</td>
</tr>
<tr>
<td>Association or co-operative</td>
<td>Association or cooperative incorporated under Commonwealth, State or internal Territory *</td>
<td>Association or cooperative incorporated under Commonwealth, State or internal territory * legislation and carrying on</td>
</tr>
</tbody>
</table>
### Persons eligible for a grant

<table>
<thead>
<tr>
<th><strong>Type</strong></th>
<th><strong>Eligibility</strong></th>
<th><strong>Note</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Partnership</strong></td>
<td>Partnership regulated by Commonwealth, State or internal Territory * legislation and carrying on business in Norfolk Island is eligible and considered to be carrying on business in Australia.</td>
<td>Note: A partnership regulated by Norfolk Island law is ineligible.</td>
</tr>
<tr>
<td></td>
<td>Partnership regulated by Commonwealth, State or internal Territory * legislation and carrying on business in Christmas Island or Cocos (Keeling) Islands is eligible and considered to be carrying on business in Australia.</td>
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</tr>
</tbody>
</table>

* Internal Territory means the Australian Capital Territory, the Northern Territory or Jervis Bay Territory.

Any applicant which is a resident of an Australian external territory and is looking to claim under any other category (such as the Austrade approved entities) should contact Austrade for advice about its entitlement to receive an EMDG grant.

### SECTION 7 GUIDELINES

#### General rules for eligibility for applicants (other than approved joint ventures, and trustees)

**3.2.1 Applicants must be genuinely carrying on business in Australia during the grant year**

Paragraph 101(1)(a) of the EMDG Act requires the Minister to determine guidelines to be complied with by Austrade in determining whether applicants meet this test.

A copy of the Guidelines are provided on the Publications page of the EMDG website.

**3.2.2 Residency requirements for those applicants carrying on business as individuals**

Individuals are required to ordinarily reside in Australia. Passports and tax returns will be examined as part of determining the place of residence of an applicant. The onus of proof for residency is with the applicant.

Paragraph 114(a) of the EMDG Act defines a “resident of Australia”.

**3.2.3 Eight grant limitation**

Applicants are entitled to receive up to eight grants. Approved Bodies are not subject to the eight grant limitation. Approved Joint Ventures are subject to a five grant limitation.

**3.2.4 The person’s income for the grant year is not more than $50 million**

The definition of income is at section 107 of the EMDG Act

For most applicants, that is, those subject to the provisions of the *Income Tax Assessment Act 1936 (ITA)*, this is their assessable income. This is considered to be the sum of all income items declared in a return.
For other applicants not subject to the ITA, it is the equivalent amount to the assessable income under that Act. That is, all income types must be included.

The income definition also includes any money that an applicant receives by way of financial assistance from:

(i) the Australian, a state or a territory government; or
(ii) a body established by or under an Australian law.

Universities and other institutions receiving operating funds from government would count these funds as part of their income. For body corporates established for a public purpose under Australian law, any money appropriated by a parliament for the purposes of the body is also included in the measure.

3.2.5 There are no disqualifying convictions outstanding against the applicant when it applies for a grant

Subsection 16(1) of the EMDG Act details which people or bodies corporate are required to be free of outstanding disqualifying convictions. This subsection refers to the term associate which is defined at section 107 of the EMDG Act. Applicants must be free of convictions against the range of offences listed at subsection 16(2) of the EMDG Act. Section 108 of the EMDG Act defines the term ‘conviction’. Section 17 of the EMDG Act specifies the length of time for which any disqualifying conviction remains outstanding.

The disqualifying convictions provisions also apply when, or at any time after, the applicant becomes entitled to a grant or advance. Refer to section 86 of the EMDG Act and guideline 7.7.1 for this rule.

3.2.6 First-time applicants must meet the requirements of grants entry

Section 18 of the EMDG Act specifies which applicants must meet the requirements of grants entry. This is any applicant who is not a grantee or who does not have an un-finalised application for a grant in respect of the immediately preceding grant year.

The grants entry requirements are a relatively low test, in recognition that the scheme seeks to assist aspiring as well as current exporters. The three requirements in the test are that a person:

- has sufficient financial resources to carry on its intended activities;
- has taken reasonable steps to prepare for export; and
- proposes export activities that are not unlawful or impracticable.

Austrade would consider than an applicant with a significant loss recorded in its P&L, relative to its net asset position in the balance sheet to have insufficient financial resources to carry on its intended activities in the medium term. In this case, the applicant would fail the grants entry test.

Trustee applicants

It should be noted that trustee applicants may lodge claims for:

(i) one trust estate business activity
(ii) multiple trust estate business activities
(iii) their own business separate to any trust estates that they may administer. They may also lodge separate and additional claims on behalf of these trust estates.

Each of these applicants will be treated separately with respect to the grants entry requirements. For example, if company A has received a grant in an earlier grant year in its capacity as trustee of trust estate A, it will be subject to grants entry requirements in the year that it lodges a claim for the promotion of its own non-trust business activities.

The general eligibility requirements for approved joint ventures

(Note: Also refer to the “Legislative Instrument” section of these guidelines for approval rules).
3.3.1 The joint venture must be approved under section 89 of the EMDG Act for a specified activity, project or purpose. Austrade must comply with the Ministerial Guidelines in deciding whether or not to approve any application for joint venture approval.

Having received approval, the joint venture must, for each application for grant, satisfy the general eligibility requirements as follows:

3.3.2 Each approved joint venture is limited to a maximum of five grants

3.3.3 There are no disqualifying convictions against the joint venture when it applies for the grant

This rule applies to an associate of the joint venture – paragraph 16(1)(c) of the EMDG Act refers. Refer to paragraph (e) of the definition of associate at section 107 of the EMDG Act which covers joint ventures.

Joint ventures must be free of disqualifying convictions when they become entitled to a grant or at any time after that determination and up to the time that the grant is paid.

The actual offences covered by this provision are listed at subsection 16(2) of the EMDG Act.

The general eligibility requirements for applicants claiming in the capacity of trustees

3.5.1 Broadly, trustees are subject to the same requirements as other applicants.

Trustees are required to be genuinely carrying on business in Australia during the grant year as trustee of the trust estate.

Paragraph 7(4)(a) of the EMDG Act specifies additional information required to be collected by Austrade in order to administer the trustee provisions.

3.5.2 A trustee of a trust estate cannot receive more than eight grants

This refers to a particular trust business. If a trustee acts for two trust businesses which receive grants, it will have a separate grants history for each business. Likewise, if a trustee acts for one trust business claiming grants and at the same time carries on a business in its own right which claims grants, each of these applicants would have a separate grants history.

3.5.3 A trustee’s income from the trust business during the grant year must not exceed $50 million.

This rule is for individual applicants. There is no provision for grouping the turnover of a trustee’s income where the trustee acts on behalf of more than one trust estate or where it also carries on business in its own right. Austrade will be required to check the relevant trust agreements, accounts and tax returns to verify the assessable income of each trust (see also guideline 3.2.4).

3.5.4 There must be no disqualifying convictions outstanding against either the trustee or any beneficiary of the trust estate when the trustee applies for a grant.

Refer to section 16 of the EMDG Act for details on which persons are subject to this test. For example, a beneficiary of a trust which is a company would be subject to paragraph 16(1)(b) of the EMDG Act.

The trustee and beneficiaries must also be free of disqualifying convictions when, or at any time after, the trustee becomes entitled to any grant or advance on account of a grant - section 86 of the EMDG Act refers.

3.5.5 The trustee must have satisfied the requirements of grants entry.

The trustee must have satisfied the requirements of grants entry in its capacity as trustee of a particular trust estate business.
3.5.6 Eligibility issues associated with trusts claiming EMDG grants

Subsection 7(4) of the EMDG Act provides the general eligibility rules for trust businesses claiming EMDG grants. It will be the trustee that applies for the grant on behalf of a trust estate’s business.

There are many different types of trusts. Most trust arrangements will be formalised between the trustee, the trust estate and the beneficiaries and will state the obligations of the various parties. Austrade will need to examine the trust deed or agreement to be able to resolve any EMDG eligibility issues, including deciding whether or not a claim is being made by a trustee who satisfies the EMDG Act’s requirements in regards to if it is:

- Genuinely carrying on business in Australia on behalf of the trust estate (see guideline 3.5.8)
- Incurring expenses for an “approved promotional purpose” (see guideline 3.5.9)

3.5.7 Sub-paragraphs 7(4)(a)(i)-(v) of the EMDG Act describe the information which may be requested by Austrade. In addition, Austrade will generally require access to the equivalent documentation that non-trust applicants are required to provide such as:

- Bank account statements for the trustee
- Trust accounts
- Trustee reports on the trust’s net assets/liabilities.

3.5.8 Requirement of a trustee to genuinely carry on business in Australia on behalf of the trust estate

The trust deed should show that the trustee has the power to carry on the particular business activity. Put another way, the trust estate must include the business from which the trustee’s potential export earnings are to be derived.

Were the trust estate itself to enter into a management agreement with another business (not the trustee) where that other business carried on an EMDG applicant’s business activity, the trustee would not be assessed to be satisfying the carrying on business in Australia requirement (refer example at guideline 3.5.9).

3.5.9 Requirement of a trustee to incur expenses for an eligible “approved promotional purpose”

Section 37 of the EMDG Act requires the trustee, as with all other applicants, to be subject to the “approved promotional purpose” test. One aspect of this test involves the concept of product ownership or of the applicant being considered to be the intended principal in export transactions. Refer to guideline 5.10.1–3.

For example, a trustee claiming an EMDG grant for the promotion of eligible goods made in Australia is required to either make the goods or to own the goods which it intends to sell for export or to export and sell. Refer to paragraphs 37(1)(a) and (1)(b) of the EMDG Act

Austrade will examine the relevant trust deeds to understand whether trustee applicants are the entities actually incurring expenses.

EXAMPLE

A trustee company lodges a claim on behalf of a wine grape growing project and its various management companies and investors. The trustee company acts as trustee for the individual investors for ensuring the moneys from the project are properly disbursed and to protect investors’ interests.

In addition, the individual investors enter into contracts with management companies where those companies are engaged to run the project and to market the resultant products on behalf of the investor.

The contracts show that the investor is entering into the management company contracts and that the contracts are not entered into by the trustee on behalf of the investor.

Accordingly, the trustee is not the entity which is assessed to be carrying on the business in Australia. Similarly, the trustee would not itself be assessed to be the entity making or owning the project’s grapes. Rather, the individual investor would be assessed to be the legal owner of the grapes.
SECTION 8 GUIDELINES:

Grantees in respect of previous years

3.6.1 Some grants that were paid in earlier grant years are disregarded for all purposes under the EMDG Act. The grants that are disregarded are:

1. Pre 1985-86 grants of $3,500 or less
2. Pre 1985-86 grants to educational institutions as listed in Schedule 7 to the Regulations under the *EMDG Act 1974*. This list is available from Austrade on request
3. Pre 1990-91 grants relating to the provision of tourism services.

The legislation provides for separation between the grants history of a trustee claiming on behalf of a particular trust estate and that same trustee claiming for its own separate business activities. For example, if the trustee had received some grants for the trust estate business activity but had never applied for a grant for its own business activities, it would be regarded as a first-time applicant for the claim for its own business activities.

SECTIONS 9 AND 10 GUIDELINES:

Australian Net Benefit Requirements

3.7.1 Background

Applicants that have received two or more EMDG grants must choose between the Option A and Option B EMDG scheme performance measures in their claims.

Under Option A, applicants will be subject to an *Export Performance Test* which may reduce the grant entitlement. Under this test and subject to the legislated maximum grant amount of $150,000, applicants will receive the lesser of:

a) (50% of total eligible expenses) less $2,500; or
b) The relevant % of export earnings depending on how many grants an applicant has received.

Under Option B, applicants must meet the *Australian Net Benefit Requirements (ANBRs)*. Applicants meeting the ANBRs will be entitled to receive a grant calculated according to its assessed eligible expenses.

The Government amended the *Export Market Development Grants (Information and Document Requirements) Instrument 2018*, with effect from 1 July 2015. Further information on these changes can be found at guideline 3.7.2.

Objective of Australian Net Benefit Requirements

Applicants that choose the ANBRs (Option B) must show that they have achieved or will achieve a satisfactory level of performance from their export activities such that they should continue to receive EMDG grants.

Because the ANBRs test is one element of the overall EMDG scheme performance measure, Austrade will require applicants that choose the ANBRs to demonstrate an actual or an achievable performance level that is no less significant than the export sales performance they would be required to achieve had they chosen the Export Performance Requirements measure.
Applicants that choose the ANBRs must meet the following requirements:

For section 10 of the EMDG Act, an applicant must demonstrate, to the reasonable satisfaction of the CEO of Austrade, that:

(a) a commercial return:
   (i) was received in the grant year; or
   (ii) is receivable in respect of the grant year; or
   (iii) can reasonably be expected to be received in the foreseeable future;

by the applicant as a result of the activities to which the claimed expenses relate and that, having regard to the length of the periods over which those activities have been undertaken, and the amounts expended on them, that commercial return:

(iv) was or would be reasonably commensurate with the quantum of those expenses; and

(v) of sufficient magnitude as to warrant further expenditure of public moneys by way of a further grant; and

(b) the financial position of the applicant’s business, including its reasonable prospects of gaining access to adequate levels of finance, is such that the applicant has reasonable prospects in the foreseeable future of achieving sustainable international business success; and

(c) the applicant’s international business activities do now, or are reasonably likely in the foreseeable future, to generate economic benefits to Australia in 2 or more of the following areas:

   (i) employment in Australia;
   (ii) new capital investment in Australia;
   (iii) introduction of new technologies into Australia;
   (iv) new value-added operations in Australia;

being benefits that are reasonably commensurate with the sum of any eligible expenses previously claimed by the applicant and the amount of the eligible expenses being claimed by the applicant in the application.

Important points to note for applicants applying under the ANBRs:

Applicants choosing to take the ANBRs (Option B) as their EMDG scheme performance measure and who do not meet the requirements will not receive a grant. Having chosen the ANBRs option, an applicant cannot revert or default to the Export Performance Requirements option (Option A).

Austrade is unable to advise on an applicant’s prospects of meeting the ANBRs, other than to detail the documentary requirements, as an informed decision cannot be made without the provision under a statutory requirement of relevant information and documents – see below.

Applicants that do not provide the information and documents required under the Export Market Development Grants (Information and Documents Requirements) Determination 2008 by 30 November following the end of the grant year will be considered to have not lodged a valid claim. If lodging with a Quality Incentive Program consultant, applicants have a further three months to lodge a claim. Austrade is prevented from being able to consider a claim lodged after these dates – section 73(3) of the EMDG Act refers.
• **Requirement (a) - Commercial return**

Austrade cannot provide guidance on any actual required levels of commercial return in the grant year and or in the period following the grant year.

Austrade will assess this requirement taking into account the length of time the applicant has been undertaking export promotional activities and on the amounts spent and claimed on these activities.

In effect, this means that the higher the number and value of EMDG grants received by an applicant and the higher the grant year expenses, the higher the required commercial return.

In deciding whether a commercial return is sufficient to meet this requirement, Austrade will take account of the differing lead times and circumstances between industries. Some industries might require many years of promotion and commercialisation activities before winning export business. The opposite may be true with other industries.

Applicants that have no export sales in the grant year for which they are applying and that rely on future commercial return to show they meet the ANBRs, must show the basis for any predicted earnings they claim to be able to generate. For example, applicants that are not yet in a position to supply their products must be able to show a timeline for being able to achieve future sales.

• **Requirement (b) - Financial position of the applicant’s business**

Austrade will assess this requirement in line with the information in the audited statements supplied as part of (1)(c) and (d) of the Information and Documents Determination – see below.

Applicants must show that they are financially viable, with a sound, long term future and are likely to continue to promote international business.

Applicants will not meet this assessment requirement if there is a reasonable prospect that they could become insolvent in the foreseeable future.

Applicants that are not profitable will be required to substantiate that they have sufficient financial resources to continue as a going concern. This may require the applicant to provide details about their borrowing arrangements, and confirmation from the principal financiers of the applicant about its access to future funding.

• **Requirement (c) - Economic benefits generated as a result of the applicant’s international business activities**

As with demonstrating levels of “commercial return”, grant applicants must demonstrate economic benefits that reflect the level of expenses claimed by an applicant in the grant year and in the years for which EMDG grants were previously paid.

Austrade will take account of the broad range of industries and activities represented and carried on by EMDG applicants and will administer this requirement flexibly.

(n.b. applicants must meet this requirement in respect of two or more of the following areas)

• **Employment in Australia**

Applicants should identify additional employees engaged or to be engaged as a result of its international business activities

• **New capital investment in Australia**

Applicants should identify any capital injection resulting from its international business activities, e.g. equity from Australian or overseas shareholders.

Applicants may also refer to significant investment spending that has resulted from any income generated from their international business activities.
• **Introduction of new technologies in Australia**

Applicants should identify how their international business activities have enabled it to import new technology into Australia, or to develop new technology in Australia via increased spending on research and development in Australia.

• **New value added operations in Australia**

Austrade will interpret the term ‘value added’ broadly so that it refers to any work done or to be done in Australia related to developing or bringing into existence any products.

Applicants should identify how their international business activities have enabled the applicant to set up things like new plant, product development operations or other income earning facilities.

3.7.2 **Applicants that choose the ANBRs must address each of the requirements by supplying information and documents as follows:**

(a) the applicant’s business plan, including the applicant's international marketing strategy;

(b) the applicant’s audited statement of income for the grant year, including:
   (i) the income received by the applicant from all sources including international sources; and
   (ii) the income receivable by the applicant from all sources including international sources;

(ba) an opinion of the applicant’s export potential, based on:
   (i) the applicant’s sales and revenue budgets for the year following the grant year; and
   (ii) an examination of any correspondence that supports the projected export income; and
   (iii) a comparison of the applicant’s previous sales and revenue projections with actual results in those periods;

(c) the applicant’s audited profit and loss statement for the grant year and the year preceding the grant year;

(d) the applicant’s audited balance sheet for the grant year and the year preceding the grant year;

(e) a statement that details the economic benefits generated, or that will be generated, from the applicant’s international business activities in two or more of the following areas:
   (i) employment in Australia;
   (ii) new capital investment in Australia;
   (iii) introduction of new technologies in Australia;
   (iv) new value-added operations in Australia.

(2) For subsection (1), a reference to:

(a) an audited statement of income; or

(b) an audited profit and loss statement; or

(c) an audited balance sheet;

is a reference to a document that has been audited by a person who is a registered company auditor for the *Corporations Act 2001*. 

EMDG Administrative Guidelines – July 2018
(2A) For subsection (1), a reference to an opinion of the applicant’s export potential is a reference to a document that has been prepared by a person who is a registered company auditor for the Corporations Act 2001.

(Please note that supplying the required ANBRs information and documents by 30 November – or if lodging with a QIP consultant, three months later – is a legal requirement – no exemptions apply)

3.7.3 Important points to note re ANBRs Information and Documents requirements

Once a claim from an applicant that has chosen Option B has been accepted as having satisfied the Information and Documents requirements, Austrade has the power to request additional material from an applicant to resolve any issues arising during the audit process. Applicants are entitled at any time to provide additional material in support of their ANBRs claim.

The ‘income receivable’ amount is confined to receivable (i.e. invoiced or charged) amounts for the year following the grant year.

Applicants promoting goods under paragraph 24(b) of the EMDG Act who also choose the Australian Net Benefit Requirements as their EMDG scheme performance measure

3.7.4 Applicants promoting goods made outside Australia must meet the requirements of the EMDG (Significant Net Benefit) Guidelines 2006 in order for their goods to be considered eligible for EMDG support – refer to administrative guideline 4.1.4.

Some of the assessment criteria for paragraph 24(b) purposes are similar to those in the EMDG ANBRs in that they both measure the economic benefits for Australia generated by the applicant’s business activities. However, the ANBRs contains a broader range of assessment criteria than the paragraph 24(b) factors. Therefore, it cannot be assumed that applicants that pass the paragraph 24(b) requirements will also be taken to meet the ANBRs.

3.7.5 Austrade is unable to give advice on an applicant’s prospects of meeting the ANBRs, other than to detail the documentary requirements, as an informed decision cannot be made without the provision all the required statutory information/documentation.

3.7.6 Applicants choosing to take the ANBRs as their EMDG scheme performance measure and who do not meet the requirements will not receive a grant. Having chosen the ANBRs option, they cannot revert or default to the Export Performance Requirements option – see guideline 7.3.6.

Note: Guidelines 3.8 – 3.16 have been deleted due to the repeal of some parts of the EMDG legislation over recent years.

SECTIONS 16 AND 17 GUIDELINES

Outstanding disqualifying convictions

At what stages of the EMDG claim and assessment process does a person have to be free of outstanding disqualifying convictions?

3.17.1 The general eligibility rules at section 7 of the EMDG Act state that persons applying for a grant, together with their ‘associates’, must have no outstanding disqualifying convictions. Section 86 of the EMDG Act states that no grant, or an advance on account of a grant, is payable when, or at any time after the person becomes entitled to the grant or advance, that person has any outstanding disqualifying convictions.

In effect, the applicant must be free of convictions firstly, at the time of claim lodgement, secondly, at the time of becoming entitled to an advance or grant if the provisional grant is less than the initial payment ceiling amount, thirdly, at the time the final grant payment (including any appeals) is payable (if applicable).
A person who has outstanding convictions during the grant year when expenses are incurred may receive a grant if those convictions become ‘spent’ prior to the claim being lodged.

**EXAMPLE**

An applicant’s director was subject to the EMDG Act’s disqualifying conviction provisions. The convictions become ‘spent’ on 1 June 2014. The applicant would be entitled to claim a grant for the 2013-14 grant year because at the time of applying for its EMDG grant it is not subject to disqualifying conviction provisions.

Who is subject to the disqualifying convictions provisions?

3.17.2 Subsection 16(1) of the EMDG Act lists those who are subject to this provision. It is essentially the applicants or their associates. Section 107 of the EMDG Act describes who is considered to be an associate of the various applicant categories.

Which offences are considered to be relevant offences for this test?

3.17.3 Subsection 16(2) of the EMDG Act lists these offences.

The Corporations Act 2001, Crimes Act 1914 and Criminal Code offences are essentially those relating to fraud and dishonesty and to where a person directly, or by aiding or abetting another person, causes any Commonwealth, State or Territory law to be broken.

Section 39 of the repealed EMDG Act 1974 relates to offences under that Act where false or misleading statements were made or documents presented to obtain or attempt to obtain a grant.

Also refer to section 108 of the EMDG Act which defines the term ‘conviction’.

When is a disqualifying conviction outstanding?

3.17.4 Section 17 defines the duration for which a conviction remains outstanding as follows:

Starting on the day on which the conviction was recorded and ending:

(a) if the conviction was for a term of imprisonment - five years after the individual convicted was released from prison; or

(b) in any other case - five years after the day on which the conviction was recorded.

How does Austrade check on whether a person has outstanding disqualifying convictions?

3.17.5 Subsection 72(2) of the EMDG Act authorises Austrade to write to applicants seeking written consent to enable criminal records to be checked for the purposes of sections 16, 17 and 86 of the EMDG Act. In doing so, Austrade must provide applicants with documentation explaining the effect of these requirements and non-compliance with them – subsection 72(3) of the EMDG Act refers.

(Note: Provisions for EMDG consultants who have disqualifying convictions against themselves (disqualified individuals who assist in preparing applications) are outlined at sections 74–79 of the EMDG (guidelines 7.3.1–12 refer).)
Registration

Guidelines 3.18.1 to 3.18.3 deleted.

Requirements of grants entry

(Note: Section 21 of the EMDG Act provides for CEO of Austrade to determine grants entry requirements. Please refer to the Export Market Development Grants (Grants Entry Requirements) Determination 2002 for further information.

The following is an extract from the Export Market Development Grants (Grants Entry Requirements) Determination 2002:

4 (1) The grants entry requirements for a person that applies for a grant in respect of a grant year are that the person:

(a) has sufficient financial resources to carry on its intended activities; and

(b) has taken reasonable steps to prepare for export, as demonstrated by having carried out activities such as export market research, export market planning or export product development; and

(c) proposes export activities that are not, on the face of it, unlawful or impracticable (for example: export of alcohol to a country where the sale of alcohol is prohibited; export of goods for which consent needed for their export is unlikely to be given; export of a product for which raw material is unavailable).

(2) The person must, if asked by Austrade, give to Austrade any documents that it relies on to demonstrate that it meets the requirements mentioned in subsection (1).

3.18.4 First-time applicants must meet the requirements of grants entry to be eligible for a grant. Meeting the requirements of grants entry does not by itself mean that an application for a grant will be successful. A claim will still need to meet the eligibility requirements of the EMDG scheme.

3.18.5 Purpose

The grants entry requirements complement the eligibility requirements set out in the EMDG Act. They:

- highlight the need for emerging exporters to consider how to prepare for and resource their export drive;
- provide an opportunity for Austrade to review the preparedness and resourcing of intending applicants; and
- allow for applicants who do not meet minimum standards to be excluded from the scheme.

3.18.6 Key assessment principles

- Applicants must meet each of the three requirements of grants entry
- Austrade must be reasonably satisfied that the requirements are met at the time of assessment
- Applicants must submit their most recent financial statements and other documents in order for Austrade to decide whether or not the grants entry requirements are satisfied. Those that do not will be asked to supply additional information. This information should be sought as soon as possible after an application is lodged.
3.18.7 How will Austrade decide whether applicants satisfy requirements?

1. **Applicants must have sufficient financial resources to carry out their intended activities**

Applicants must submit their most recent financial statements to enable Austrade to form an opinion as to the financial position of its business and its ability to fund its intended activities. “Sufficient financial resources” may be demonstrated by the existence of net profit levels or positive net assets.

Where consideration of the financial statements does not clearly establish that an applicant meets this requirement, applicants may be asked to demonstrate how they intend to finance their intended activities. This could involve consideration of things such as sources of finance, projected sales levels, and/or profit margins on sales.

If necessary, applicants may also be asked to provide letters of financial support from either directors or financiers to show that they can fund intended activities.

If an applicant has no demonstrable way to fund its intended activities then it would be unlikely to pass this requirement.

2. **Applicants must have taken reasonable steps to prepare for export**

Applicants should show that they have taken reasonable steps to prepare for export. The determination has three examples of possible steps towards export preparation. These are examples only. Applicants that have not carried out export market research, export market planning, export product development or sought expert advice or training on export may be able to demonstrate that they have prepared for export in some other way. Applicants should demonstrate that they have carried out an adequate level of preparatory effort.

A key issue here is that the preparatory steps taken are “reasonable” in relation to the firm’s size and activities, and that it is clear that the firm is genuine about export. As well, for an activity to be considered a “reasonable step to prepare for export”, it should be possible to see a clear causal link between the carrying out of that activity, and some potential increase in the prospects of success of the applicant’s export enterprise.

Possible examples of “reasonable steps to prepare for export” include:

- **Having sought expert advice or training on export procedures and strategy**: To evidence this, applicants should be able to show that they have received advisory services from an export professional, have participated in a recognised exporter development programme such as Austrade’s services for new exporters and/or that they have made a measurable effort to train its staff in export matters.

- **Export market research**: This relates to activities that the applicant may have undertaken to gain some knowledge of the market for its products, say bycommissioning market research from a research firm. The level of market research needed to meet this requirement needs to be appropriate to the scale of their intended export business and to the stage of their export development. It may range from: for a small applicant – having carried out simple market research through to; for a larger applicant – having commissioned a formal, comprehensive market research report.

- **Export market planning**: To show evidence of export market planning, applicants should be able to produce a written plan that covers issues such as selection of target markets, market entry strategies and so on. (Please note however that there is no requirement for applicants to submit a formal export market plan. The submission of a plan is merely one way in which applicants may meet this part of the Grants Entry Requirements. Austrade encourages exporters to develop export market plans where this is of value to their business, but does not require plans to be developed merely for the purposes of Grants Entry).

- **Export product development**: To show evidence of export product development, applicants must have done something more than simply have a product available for export. They should show that they have made modifications to a product or its packaging in order to tailor it to the export requirements of foreign markets.

Applicants do not need to show that they have carried out all of these activities in order to meet this export preparedness requirement. It may be sufficient for them to have carried out only one, if they have done so in
adequate depth; or conversely it may be that they have carried out several of these activities, but at a lesser level of depth.

Applicants that have not carried out any of these activities may meet this eligibility requirement by showing that they have prepared in other ways. Some applicants may cite elements of their grant year promotional activities, the cost of which is claimed in their EMDG claim, as representing sufficient evidence of export preparation. These applicants should explain in their application how this expenditure (or part thereof) relates to preparation for export – as required by criterion 2 – rather than only to promotion. In general, export preparation is a separate stage which precedes export promotion, and therefore the mere fact that money has been spend on export promotion will not generally satisfy the “preparation” criterion.

3. **Applicants must not be carrying out unlawful or impracticable export activities**

Refer to the examples in the *Export Market Development Grants (Grants Entry Requirements) Determination 2012.*

3.18.8 Other issues:

- **Timing of grants entry assessment:** Applicants will need to be in a position to meet the requirements of grants entry at a time immediately before Austrade determines whether or not the applicant is entitled to a grant. In the event of an appeal against a decision by Austrade that an applicant does not meet grants entry requirements, Austrade will assess the appeal according to the facts prevailing at the time of assessing the appeal.
- **Applicant’s business has been sold or transferred since its grant application was made:** An applicant will need to show that its business is being carried on by another person. It is likely that it will be assessed to have met the grants entry requirements if the other business is ongoing.
- **Applicant’s export business has ceased:** The grants entry assessment will be based on the facts prevailing at the time of assessment. As with the cases where a business is sold or transferred, an applicant would need to demonstrate that something tangible such as intellectual property has been sold to another person who is in turn carrying on a business.

**Example - Resources companies and grants entry requirements**

In view of the complexity of the commercialisation process, resources companies will often start to market their end product a number of years in advance of the product being exploited, and nearly always well in advance of the approval for financing of the venture. Austrade must be reasonably certain that any financial support provided to applicants is on the basis that those applicants can readily identify the eligible product, provide a continuous supply of that product, and have the financial capacity to commence the necessary infrastructure aspects of the project and exploit the available resource.

Austrade would consider that a company is likely to meet its grants entry requirements when it has completed a ‘definitive feasibility study’ which has been reviewed and formally ratified by its board of directors. Austrade considers that this would be the primary technical document that would be used for continued marketing, banking and finance purposes.

Austrade may also assess other factors in determining eligibility which could include various registrations and the requirement to obtain mining licences, Native Title clearances, heritage issues, water licences, environmental protection approval and any relevant state/territory or Commonwealth agreements.

3.18.9 An applicant who is dissatisfied with an Austrade decision in respect of grants entry requirements may appeal this decision.

3.18.10 Approved bodies and approved joint ventures and consortia are not required to meet the requirements of grants entry as they already require prior approval from Austrade before they can submit a claim. This approval serves a similar purpose to Austrade’s assessment of whether or not applicants meet the requirements of grants entry.
Note: All Austrade information requests, including ones relating to grants entry matters, are made in terms of subsection 72(1) of the Act. Accordingly, the time granted by Austrade for meeting these requests will be determined in consultation with the applicant taking into account the applicant’s circumstances and in accord with the normal rules of administrative and procedural fairness.
SECTION 24 GUIDELINES

Eligible goods

Section 24 of the EMDG Act states that:

Goods are eligible goods if:

   a) they are made in Australia; or

   b) the CEO of Austrade is satisfied, in accordance with guidelines determined under paragraph 101(1)(baa), that Australia will derive a significant net benefit from the sale of the goods outside Australia.

Note: Decisions under this section are subject to guidelines determined by the Minister under section 101 of the EMDG Act.

4.1.1 To determine if their goods are likely to be eligible, applicants should:

1. check to see if the goods qualify as ‘made in Australia’ by referring to the ministerial guidelines
   - if the goods qualify as made in Australia, they are eligible.

2. if the goods do not qualify as made in Australia, check to see if they are likely to qualify by referring to the ‘significant net benefit’ ministerial guidelines:
   - the applicant will need to attach extra information to the application to enable Austrade to make a determination on this issue.

4.1.2 Goods that have not yet been made and/or are not available for sale are not eligible under section 24 of the EMDG Act.

4.1.3 Goods ‘made in Australia’

The Export Market Development Grants (Made in Australia) Guidelines 2006 made by the Minister state that:
(2) Austrade must determine that the following goods are made in Australia:

(a) Australian primary products, including products that are mined, harvested, raised or fished within Australia

(b) Goods that are made primarily from Australian primary products, including products mined, harvested, raised or fished within Australia

(c) Goods that are manufactured or assembled in Australia, partially or wholly from imported materials or components, if those materials or components undergo or are included in a process or operation which:

(i) results in the manufacture of a new product; or

(ii) substantially transforms the nature of the materials or components; or

(iii) represents an important stage of manufacture in an ultimate product which is produced from the exported product.

(3) Austrade must not determine that goods are made in Australia if the goods are manufactured or assembled in Australia, partially or wholly from imported materials or components, if those materials or components undergo, or are included in, a process or operation which is:

(a) designed to circumvent the correct origin or origins of the product; or

(b) only grading, packing or sorting of imported components.

To qualify as goods that are ‘made in Australia’, goods must fall into one or more of the following categories:

(a) **Goods made in Australia – Australian primary products**

Examples of eligible products in this category include Australian seafood, meat, fruit, vegetables and livestock.

(b) **Goods made in Australia – Goods made primarily from Australian primary products**

Goods made primarily from Australian primary products will qualify as ‘made in Australia’, irrespective of whether they come into their final form inside or outside Australia.

Examples of products that may be eligible in this category include:

- wine bottled in Australia made from Australian grapes
- wine bottled overseas using Australian bulk wine exports
- packages of Australian dried fruit packed in Australia
- packages of Australian dried fruit packed overseas
- orange juice made overseas from Australian orange juice concentrate
- meat patties made overseas from exported Australian beef.

Products which contain some Australian primary products but which are not made primarily from Australian primary products will not qualify as ‘made in Australia’ under this category.

(c) **Goods made in Australia – Goods that are manufactured or assembled in Australia**

For goods to meet this criterion the Australian processes or operations used to make the goods must be real and significant. However, the inputs to the manufacturing process need not be Australian.

Goods qualifying as ‘manufactured or assembled in Australia’ may include those that are largely made or assembled in Australia but sent overseas for minor operations such as testing or packaging.

Goods which are refurbished in Australia may be taken to be made in Australia if the refurbishment adds significant value to the goods in question, irrespective of the origin of the goods.
Similarly, applicants promoting second-hand goods that have been refurbished in Australia or that have been processed in a significant way in Australia will be eligible.

‘Goods’ for the purpose of paragraph 24(a) of the EMDG Act may include component parts of final goods, if the applicant is promoting the sale of the components.

Final goods that are made overseas primarily from one or more components that are manufactured or assembled in Australia may also be assessed as ‘made in Australia’ under paragraph 24(a) of the EMDG Act.

EXAMPLE – COMPONENTS

The applicant manufactures medical testing goods in Australia. The manufactured goods are not able to be operated in a hospital until some peripheral equipment and a computer is added to them. These goods have a value of approximately A$100,000 per unit and are supplied to a US medical supplies company that adds the other peripheral equipment and computer to the Australian-made unit. The other components have a cost of approximately US$5,000. The applicant contributes to the expenses of promoting the final unit.

*Example* – *Components*

Austrade would assess the final units to be made in Australia because they are primarily made from the components made in Australia.

Goods made overseas that are sent to Australia for minor operations such as quality control, labelling and packaging will not be assessed to be made in Australia.

Goods which do not qualify as ‘made in Australia’ under paragraph 24(a) of the EMDG Act may be considered for eligibility under paragraph 24(b) of the EMDG Act and the *EMDG (Significant Net Benefit) Guidelines 2006*.

4.1.4 Goods not ‘made in Australia’ but where a ‘significant net benefit’ is derived by Australia from the sale of the goods outside Australia

Paragraph 24(b) of the EMDG Act and its guidelines apply to goods that are not ‘made in Australia’ under the *Export Market Development Grants (Made in Australia) Guidelines 2006* discussed above.

Paragraph 24(b) of the EMDG Act and the *Export Market Development Grants (Significant Net Benefit) Guidelines 2006* effectively recognise that many Australian manufacturers increasingly have their final manufacturing and assembly stages carried out overseas while carrying out their design, research and development and other ‘knowledge’ activities in Australia.

The *Export Market Development Grants (Significant Net Benefit) Guidelines 2006* state:

> In determining, for paragraph 24(b) of the Export Market Development Grants Act 1997, whether Australia will derive a significant net benefit, Austrade must comply with the following guidelines.

> Austrade must consider whether:

> a) the business assets which are used in making the goods ready for sale (other than assets used in manufacture) are primarily or substantially based in Australia; and

> b) the activities (other than manufacture) which result in the goods being made ready for sale are primarily or substantially carried on in Australia; and

> c) a significant proportion of the value of the goods is added within Australia; and
any sale of the goods generates, or is reasonably likely in the foreseeable future to generate, economic benefits for Australia, including in the area of employment, that are substantial relative to the amount of the grant claimed by the applicant.

To be eligible, goods not ‘made in Australia’ are not required to meet all of the four assessment criteria to be eligible under paragraph 24(b) of the EMDG Act. Where an applicant fails at least one of the assessment criteria but meets the other criteria in a convincing manner, Austrade may assess the goods to be eligible under paragraph 24(b) of the EMDG Act.

Applicants wishing to have their goods assessed for eligibility under paragraph 24(b) of the EMDG Act must provide a detailed factual submission with their grant application. If required, applicants must also be able to provide relevant documents which substantiate any claims made in their submission.

**EXAMPLE 1 – GOODS ELIGIBLE UNDER PARAGRAPH 24(b)**

An Australian book publisher promotes exports of books printed in Hong Kong. The applicant believes that Australia derives a significant net benefit from the sales of its books outside Australia. The book publisher pays its Australian staff and other Australian suppliers for the following business activities:

- Australian author’s royalties
- editorial expenses
- book design and layout work
- illustrations, art and photography
- typesetting and proof reading
- colour separation.

The applicant uses the Austrade template to provide a detailed and factual submission to Austrade. This shows that the applicant:

a) primarily uses Australian-based business assets – rents office and warehouse in Australia, computer publishing equipment, owns a brand of significant value  

b) primarily carries out activities in Australia which result in the goods being made ready for sale – all activities except printing

c) adds a significant proportion of the value of the goods in Australia – all value added takes place in Australia except printing

d) generates substantial economic benefits for Australia, including employment from its sales – employs staff including editors and designers, engages authors, photographers, artists and provides the opportunity for showing Australian creativity in foreign markets

Austrade assesses that this applicant’s overseas-made goods are eligible under paragraph 24(b) of the EMDG Act.
Each of the four assessment criteria in the Export Market Development Grants (Significant Net Benefit) Guidelines 2006 will now be looked at in turn:

1. **The business assets which are used in making the goods ready for sale (other than assets used in manufacture) are primarily or substantially based in Australia**

Austrade will consider the assets used in all stages of making the goods ready for sale (apart from the actual manufacturing) from the product development stage to the post-sales stage. Applicants should describe how and where the various stages are carried out and where the business assets used in carrying out these stages are located.

Business assets might include:

- real property – land, buildings owned or leased to carry out the non-manufacturing activities
- intellectual property, know-how, or brands
- plant and equipment to make components, or moulds or machinery used to make the goods
- plant and equipment to design components or goods
- equipment used to carry out post-sales and administrative work
- equipment used to transport components and goods.

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**EXAMPLE 2 – GOODS ELIGIBLE UNDER PARAGRAPH 24(b)**

The applicant promotes fashion garments made in China. These garments are sold at the upper price range in retail outlets in Japan and the USA. All its products are made to designs developed in Australia by the applicant’s employees.

All work associated with design, sourcing raw materials, product promotion, warehousing and freight is carried out by the applicant’s eight staff and four contractors in Australia.

The applicant owns an office and valuable business equipment in Sydney and rents retail outlets in Sydney and Melbourne.

The brand is well established and has ‘cult status’ in the younger age group, enabling its profit margin to be three times the cost of manufacture;

Sales income was $1.5 million in the grant year and has been increasing by about 20 per cent per annum over recent years. The applicant was profitable for the first time in the grant year.

The applicant uses the Austrade template to provide a detailed and factual submission to Austrade. This shows that the applicant:

- primarily uses Australian-based business assets – applicant’s brand, office, business equipment, retail outlet;
- primarily carries out activities in Australia which result in the goods being made ready for sale – all activities except final manufacture are carried out in Australia;
- adds a significant proportion of the value of the goods in Australia – all value in the goods is added in Australia except for the final manufacture;
- generates substantial economic benefits for Australia, including employment from its sales – employees, contractors, sales income.

Austrade assesses that this applicant’s overseas-made goods are eligible under paragraph 24(b) of the EMDG Act.
2. The activities (other than manufacture) which result in the goods being made ready for sale are primarily or substantially carried on in Australia

These activities might include:

- design
- research and development
- sourcing components
- design and manufacture of machinery to make goods, moulds, tools etc
- marketing
- administration, legal and accounting
- distribution and logistics
- recycling
- management of any of the above activities and of the overseas manufacture and assembly.

EXAMPLE – BUSINESS ASSETS CRITERION

The Applicant promotes novelty toy products made overseas. The company’s Australian employees devise broad concepts for novelty toy products. The applicant then seeks out foreign manufacturers to design and produce these products competitively for the Australian and USA markets.

The only Australian business assets used are the applicant’s office, office equipment and cars for staff. The applicant’s brand has no real worth according to its financial statements. The applicant would not meet this ‘assets’ assessment requirement because the business assets used in making the goods ready for sale are not primarily and substantially located in Australia.

EXAMPLE – ACTIVITIES CRITERION

The applicant promotes high value fashion scarves that are designed by its own employees and by contract designers. Its head office is in Australia and its staff provide all administration, marketing, quality control and management services. It has a manufacturing branch in China that manufactures to Australian head office instructions using raw materials acquired by head office. The head office conducts marketing activities.

This applicant would meet this ‘activities’ assessment requirement.

3. A significant proportion of the value of the goods is added within Australia

Applicants should be able to cost and describe the types of Australian value added work. This may include the factors listed at (2) above.
4. **The sale of the goods generates, or is reasonably likely in the foreseeable future to generate, economic benefits for Australia, including in the area of employment, that are substantial relative to the amount of the grant claimed by the applicant**

Economic benefits might include income creation, introduction of new technologies and value-added operations, creation of new and higher value jobs, profits or increased productivity and firm competitiveness.

Applicants should be able to show that these or other economic benefits accrue to Australia.

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**EXAMPLE (A) – VALUE ADDED CRITERION**

The applicant is an Australian-owned t-shirt and casual fashion gear manufacturer set up in 2010. It pays fees to a contract manufacturer in India for the sourcing of materials, manufacture and in some cases design.

The applicant spends little time or money on design in Australia. The designs have mainly been made by the applicant’s two owners who have drawn no salary since the applicant company commenced operations. Other designs have been sourced from the Indian manufacturer and its associates. The applicant plans to recruit some design staff in the near future.

The applicant carries out some administrative, marketing and management work associated with sourcing and selling the goods. Its sales margin is 60 per cent.

This applicant would **not** meet this ‘value added’ assessment requirement. The Australian value added work is not a significant proportion of the value of the goods. Rather, a significant proportion of the value of the goods is added in India by way of designing goods and the machinery used to manufacture them, sourcing raw materials, administration and shipping.

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**EXAMPLE (B) – VALUE ADDED CRITERION**

The applicant promotes scientific testing equipment made in USA but based on its Australian-developed intellectual property and design work.

The applicant pays the USA manufacturer $20 per unit and sells the finished product for $100 per unit. It can show that its $80 margin is based on:

- payment for salaries of design staff and research scientists
- payments for office and research laboratory premises, computers, communications equipment etc
- production of die in Australia designed by applicant’s staff and supplied to the USA manufacturer
- payment for salaries of applicant’s marketing and administrative staff and contractors.

The applicant is able to cost its value-added work and to demonstrate that a significant proportion of the value of its goods is added in Australia, with the value of its Australian value-added work exceeding the value added to the goods outside Australia.

The applicant **would** meet this ‘value added’ assessment requirement.
4.1.5 Applicants promoting goods made outside Australia that are based on research and development or design work carried out by other businesses

Applicants that are wholesalers or merchants promoting goods made outside Australia will also need to be able to demonstrate that Australia would derive a significant net benefit from the sale of the goods outside Australia by providing the same type of detailed factual submission. In practice, this will require these applicants to obtain relevant information from their product suppliers.

Similarly, applicants that promote and sell overseas made goods as a result of their knowledge and overseas contacts, e.g. they make product sales by marketing their ability to source particular goods for clients, must also provide the same type of detailed factual submission to Austrade.

SECTION 25 GUIDELINES

Eligible services

4.2.1 Under EMDG rules, services will be eligible (subject to general eligibility requirements of section 25 of the EMDG Act) as follows:

- tourism services – all services that fall within the meaning of Schedule 1 of Export Market Development Grants Regulations 2018 (EMDG Regulations)
- all non-tourism services except those listed in Schedule 2 of the EMDG Regulations.

Internet selling of goods

Applicants promoting products via the internet will be assessed to be selling goods where the price that is paid is tied to the value of the goods received. Although some applicants might tailor their product offering with advice and creativity, where the applicant’s key deliverable to their customers is the goods, any tailoring type services will be assessed as incidental to goods delivery.
Applicants promoting goods via the internet will be subject to the goods eligibility rules at 4.1.1 – 5 of these guidelines.

Services – Australian inputs must be sufficient to ensure that Australia will derive a significant net benefit from the supply of the services (section 25(4) of EMDG Act refers).

4.2.2 In assessing the eligibility of services, Austrade will take into account:

- the value of the project
- the value of the Australian inputs compared with overseas inputs
- the nature of the inputs, such as professional staff compared to labourers
- the underlying intellectual property or know how involved
- employment generated in Australia
- net foreign exchange earnings
- any other notable factors.

Tourism services and non-tourism services

4.2.3 Applicants promoting tourism services are subject to specific scheme rules, i.e. for principal status requirements (see paragraph 37(1)(da) of the EMDG Act) and export earnings rules measurement (see items 5, 6 and 7 of the section 2.1 (2) table in the Export Market Development Grants (Export Performance Requirements) Instrument 2018 (Export Performance Determination).

Some applicants may promote some services that are tourism services and others that are eligible under the non-tourism services category. It is expected that in a small number of cases, these applicants will be required to claim expenses and export earnings under different scheme rules.

**EXAMPLE**

The applicant promotes accommodation to foreign residents who variously holiday, study and work in Australia.

- When sold to foreign residents who holiday in Australia, accommodation will be eligible as a tourism service product – applicant will be subject to specific tourism principal status and export earnings measurement rules.
- When sold to foreign residents who work in but are not studying in Australia, accommodation is eligible as a non-tourism service – applicant will be subject to general EMDG principal status and claims export earnings as per Item 3 of the 2.1 (2) table in the Export Performance Determination.
- When sold to foreign resident students studying or working in Australia, accommodation will not be eligible for EMDG support.

Tourism services

4.2.4 Refer to specified tourism services at Schedule 1 of the EMDG Regulations.

Applicants promoting services to foreign resident tourists in Australia may only receive EMDG support for the promotion of tourism services – refer 1(j) in Schedule 2 of the EMDG Regulations ‘Services that are not non-tourism services’.

Some applicants including wholesalers selling to ‘backpacker’ tourists may also promote services that are not listed in the Tourism Services Schedule of the EMDG Regulations as part of their packages. These services might include things like insurance services, visa services, mail forwarding services, luggage holding services, internet access. These services be not be eligible for EMDG support under the general service rules.
EXAMPLE
The applicant promotes wedding services to foreign resident couples. A marriage celebrant and
church hire service in themselves will not be eligible tourism services.

EXAMPLE
Applicant promotes its night club and restaurant amenities to foreign resident tourists in Australia. The
restaurant amenity is an eligible tourism service. The night club is not an eligible tourism service. The
applicant can only receive EMDG support for the promotion of its restaurant.

Applicants providing training and education courses (such as language and diving courses) to foreign residents
visiting Australia may be eligible for EMDG support even where the students are visiting Australia on a tourist visa.
Austrade will consider these course attendees to be students and not tourists for the purposes of the EMDG
Regulations 2008. These courses may also be assessable as eligible ‘tours’ where the students receive a complete
tour package.

Tourism Services – Key Eligibility Rules

4.2.5 Section 25 of the EMDG Act provides that tourism services will be eligible if the service:

- is supplied in Australia (whether or not through a resident of Australia)
- contains sufficient Australian input to ensure that Australia will derive a significant net benefit from the
  supply of the service
- is listed in Schedule 1 of the EMDG Regulations.

Key types of tourism services eligible for EMDG support:

a) transport services by land, water or air will be eligible. However, applicants promoting a land transfer
service will not be eligible for EMDG support.

A transfer service is a transport service between the tourist’s point of arrival and a place of accommodation;
or one between a place of accommodation and the person’s point of departure from Australia.

b) accommodation – must be for supply to foreign resident tourists in Australia.

Accommodation supplied to foreign residents looking to work in Australia is not eligible as a tourism service
but is a service eligible for EMDG support under the non-tourism service eligibility rules.

Accommodation for supply to foreign resident students studying or working in Australia is not eligible for
EMDG support.

Applicants promoting an accommodation amenity as a tourism service are required to supply the amenity in
Australia (whether or not through an Australian resident inbound tour operator) to a foreign resident.
Applicants promoting accommodation amenities are not technically required to own the accommodation that
is being promoted. Some applicants such as hotels can be eligible for EMDG support where there is an
agreement in place that provides for owners to grant them a licence to supply accommodation as principal.
Management companies, however, cannot receive grants if they promote accommodation on behalf of
owners in an agency capacity – refer to guideline 5.10.11. Austrade will closely examine relevant
agreements between owners and applicants to determine principal status.

C) tours – see guideline 4.2.4.
d) admission for a fee to tourist attractions as follows:
   - a place that has one or more outstanding natural features or is of historical interest
   - a park, nature reserve or botanical garden
   - a wildlife sanctuary or zoological garden
   - a museum, art gallery or craft centre
   - a place that is, or provides, an amenity appropriate to tourists.

e) admission for a fee to an event, unless there is an event promoter engaged to promote the event.

Event holders or owners can qualify for EMDG support where they promote attendance at their events held in Australia unless they have engaged an event promoter to promote the event.

There are specific EMDG rules enabling event promoters to qualify for EMDG support – refer to guidelines 4.2.7 – 16.

To prevent double-dipping, Austrade will require applicants promoting events held in Australia as event holder or owner to declare that they have not engaged an event promoter for the event.

EXAMPLE

A trade show organisation plans and organises regular trade shows in Australia. It promotes a 2014 automotive trade show to potential automotive industry exhibitors from around the world. Once it secures exhibitors for the planned show, it intends to promote the event to potential attendees. As long as the business does not engage or intend to engage an events promoter to promote the show, its services of seeking both exhibitors as well as attendees will be eligible under this tourism services category.

f) rental of space at a convention or exhibition centre

g) restaurant

h) casinos licensed under Australian law.

Other services eligible for EMDG support (non-tourism services)

4.2.6 Under section 25 of the EMDG Act, non-tourism services must:
   - be supplied (whether in or outside Australia) to a person who is not a resident of Australia
   - contain sufficient Australian input to ensure that Australia will derive a significant net benefit from the supply of the service.

Subject to these requirements, all services apart from those listed in the tourism services schedule are eligible unless they are listed in Schedule 2 of the EMDG Regulations (services that are not non-tourism services).

Schedule 2 of the Regulations lists those non-tourism services that are ineligible for EMDG support. The rationale for these service suppliers being ineligible is that they generally compete with other Australian service providers for export business rather than with foreign suppliers.

Key service types ineligible for EMDG support:

(a) services relating to migration to Australia
Ineligible services will be those that are supplied to foreign residents who consume them as part of the process of migrating to Australia permanently or temporarily or as part of deciding whether to migrate to Australia. These services will commonly be supplied or promoted by the following types of service providers to migrants:

- migration and visa permits and arrangements, including legal services
- financial advice
- freight forwarding
- careers advice.

**EXAMPLE**

*Applicant supplies advisory service in respect of careers opportunities, visa arrangements and financial rules e.g. taxation rates to potential employees in a particular industry. The focus of the advisory services is on encouraging the potential foreign resident clients to migrate to Australia for extended periods. Austrade will assess these services to be related to migration and therefore ineligible.*

N.B. Legal services in relation to migration to Australia will also be excluded by e) below.

(b) services relating to family law matters

(c) services relating to the identification, procurement, lease, sale or purchase of assets in Australia (whether tangible or intangible), including cash, real estate, stocks, options or shares

This exclusion means that services provided to foreign residents relating to a range of transactions involved with assets held in Australia will not be eligible for EMDG support. Assets for the purpose of this exclusion will include but not be limited to real estate, cash, stocks, shares, related financial products and collectable items.

The word “held” limits the exclusion to assets held in Australia on an ongoing basis rather than to assets brought to Australia for one-off or short term reasons, e.g. this exclusion will not apply to collectables brought to Australia to be auctioned.

This exclusion applies to service providers who promote sales related to transacting in assets held or to be held in Australia. It does not prevent grants being paid to exporters of physical assets that incur expenses of promoting goods assessed as eligible under section 24 of the EMDG Act and who meet the Act’s principal status requirements.

**EXAMPLES OF EXCLUSIONS**

- *stockbroking and real estate agency services related to transactions involving Australian assets*
- *services including auctioneering services related to selling Australian assets*
- *advisory services related to selling Australian assets to foreign residents.*

(d) services relating to protecting, operating or maintaining assets held in Australia

This exclusion applies to services supplied to foreign resident clients for providing any services in relation to any assets held in Australia.
EXAMPLES OF EXCLUSIONS

- services supplied to foreign resident owner of an Australian mine
- property management and insurance management services for foreign resident owners of property in Australia
- financial services relating to managing Australian investment funds with portfolios of cash, stocks and shares
- training thoroughbred horses owned by foreign residents for racing in Australia.

The word “held” limits the exclusion to assets held in Australia on an ongoing basis rather than to assets brought to Australia for one-off or short term reasons, e.g. this exclusion will not apply to:

- foreign-owned assets brought to Australia just for repair
- management and insurance arrangements for works of art that are sent to Australia for exhibition.

e) services relating to compliance with the laws of Australia (includes state and territory laws)

This exclusion applies to services supplied to foreign resident clients that relate to the clients’ Australian reporting obligations or any other compliance with Australian laws.

EXAMPLES OF EXCLUSIONS

- accounting services supplied to foreign resident clients for the clients’ Australian businesses that enable these businesses to comply with Australian laws
- legal services supplied to foreign residents e.g. advice about business laws for prospective or existing Australian business activities.

f) a service relating to prostitution

g) a service relating to pornographic material, including pornographic material in publications, films, computer games or accessible on the Internet

This exclusion complements sections 57, 57A, 57B and 57C of the EMDG Act

h) a service relating to illegal activities or illegal products

This exclusion complements section 56 of the EMDG Act that provides for excluding expenses incurred in respect of an eligible promotional activity. This exclusion makes it explicit that applicants promoting services that are illegal in the market in which they are offered for sale or that claim expenses that relate to illegal activities or products in that market will not be supported.

i) a gambling service provided by a service provider not licensed under an Australian law

j) a service not mentioned in Schedule 1 (tourism services) that is provided to a foreign resident tourist in Australia

Applicants promoting services to foreign resident tourists in Australia may only receive EMDG support for the promotion of tourism services – refer 1(j) in Schedule 2 ‘Services that are not non-tourism services’.
k) services provided to foreign students in Australia that are related to:
   - providing accommodation
   - selecting or recruiting these students to work in Australia.

n.b. Some school or college EMDG applicants have accommodation for boarders. Where these applicants claim expenses for promoting their education services, the provision of accommodation to their students will be taken to be an ancillary service. Generally, apportionment of claimed expenses between eligible education and ineligible accommodation services will not be required.

SECTION 25A GUIDELINES

Eligible events – event promoters

4.2.7 Section 25A of the EMDG Act states:

(1) Subject to subsection (2), an event is an **eligible event** if:
   a) the event is held in Australia; and
   b) there is an events promoter for the event; and
   c) the events promoter is not, in Austrade’s opinion, closely related to the event holder; and
   d) the event is not an event of a kind prescribed by the regulations for the purposes of this paragraph.

(2) Despite subsection (1), a particular event that, apart from this subsection, would be an eligible event, is not such an event if Austrade determines, in writing, having regard to all the facts available to it, that the Australian input in the event is not sufficient to ensure that Australia will derive a significant net benefit from the holding of the event.

Relevant definitions found at section 107 of the EMDG Act:

- **event** includes a conference, a meeting, a convention, an exhibition and a sporting, cultural or entertainment event.
- **event holder**, in relation to an event, means the person holding the event.
- **events promoter**, for an event, means a person that markets the event, under a written contract between the person and the event holder, to persons outside Australia.

(Note: Austrade’s decisions on whether events promoters are not closely related to events holders are subject to guidelines determined by the Minister under section 101 of the EMDG Act.)

4.2.8 **What type of events can be promoted by events promoters?**

The EMDG Act defines the term **event** as including a conference, a meeting, a convention, exhibition, sporting cultural or entertainment event.

This means that all events are eligible as long as they are held in Australia unless:

- they are illegal
- there is inadequate Australian input so that Australia derives insufficient net benefit as a result of the event being held in Australia
- a regulation has been made to exclude them (there are no such regulations currently in existence).

4.2.9 **Can an event be eligible even if it is free?**
There is no requirement that there be an admission price charged for an event to be eligible for EMDG support.

The aim of the EMDG events promoters’ provisions is to maximise foreign residents’ attendance at Australian events together with their consequential spending on accommodation, tours etc. However, the event should be the drawcard that provides the main reason for the foreign resident to visit Australia.

The claim may be assessed under the general EMDG tourism rules if an applicant is mainly promoting general tourism services under the heading of promoting an event.

4.2.10  **What happens if an event is cancelled after an events promoter has spent money promoting it?**

Grants will be paid as long as the event in question:

- is expected to proceed at a future date
- was expected to proceed at the time the expenditure was incurred, but was subsequently cancelled.

4.2.11  **What arrangements should be in place between events promoters and their clients, the event holders?**

The event holder must operate at arms-length from the events promoter applying for EMDG.

There must be a written contract between the event holder and the events promoter requiring the events promoter to market the event to persons outside Australia.

4.2.12  **Can there be more than one events promoter for any one event?**

There may be occasions when more than one events promoter is appointed for the one event.

This should not generally be an issue for EMDG purposes. Each promoter should be able to claim their expenses in their own right.

4.2.13  **Does the event holder need to be resident in Australia?**

The event holder is not required to be an Australian resident. For example, an overseas association may decide to hold an event in Australia and the association may appoint an Australian events promoter to maximise attendances by people other than Australians.

4.2.14  **Can there be more than one event holder for an event?**

Austrade would expect that in most cases there would be only one event holder for each event. This would normally be the organisation that has decided to stage an event and that has the authority to engage an events promoter, hire a venue, organise dates, arrange for speakers etc.

However, there may be occasions where there is some overlap between an organisation holding an event and, say, a committee set up to arrange for putting on the event. Similarly, there may be a foreign organisation with an Australian affiliate where both bodies have authority to enter into contractual arrangements relating to the event.

Austrade would handle such cases on a case-by-case basis.

(Note: Refer also to guideline 5.10.14 for details on expense eligibility rules for events promoters.)

4.2.15  **Are activities related to attracting foreign exhibitors to an event eligible?**

Some events may include exhibition opportunities for attendees, but in most cases the exhibition component would merely be an adjunct to the event. In such cases, as long as expenses claimed are primarily incurred for the purposes of boosting the number of foreign attendees, they will as a general rule be eligible. Where the expenses claimed are mainly about attracting exhibitors (i.e. filling the space) rather than attracting foreign attendees, they will not be eligible.
4.2.16 From 1 July 2008 (2008–09 grant year) applicants promoting events that they hold or own will be eligible under the EMDG Regulations 2008 as long as they do not engage an events promoter to promote the particular event. Refer also to guideline 4.2.5.

SECTION 26 GUIDELINES

Eligible intellectual property

4.3.1 Intellectual property is referred to at section 107 of the EMDG Act and is defined to be things other than rights relating to know-how.

4.3.2 Eligible intellectual property is defined at section 26 of the EMDG Act. It is divided into two broad categories:

- Where the rights relate to a trade mark, that trade mark must have been first used in Australia or it must have increased in significance or value because of its use in Australia.
- Where the rights relate to any other thing, that thing resulted to a substantial extent from research or work done in Australia.

Eligible expenses and intellectual property

4.3.3 The EMDG Act requires that applicants must own and must intend to dispose of their eligible intellectual property. Applicants holding intellectual property on exclusive licence are taken to meet this ownership requirement. However, Paragraph 37(1)(f) of the EMDG Act states that approved bodies can claim expenses in relation to eligible intellectual property owned by another person and which the other person intends to dispose of to a foreign resident. In addition applicants that are companies can also receive EMDG support where their related entities own the eligible intellectual property and intend to dispose of it to a foreign resident – refer to guideline 5.10.8.

4.3.4 Guideline deleted.

4.3.5 Guideline deleted.

What is meant by disposal of eligible intellectual property?

4.3.6 Disposal is defined at section 107 of the EMDG Act. Disposal, in relation to intellectual property or know-how, includes sale, grant, assignment or supply.

4.3.7 Disposal of eligible intellectual property or eligible know-how is defined at section 111 of the EMDG Act. It states that 'a person is taken to dispose of eligible intellectual property or eligible know-how only if Austrade is satisfied that the property or know-how (as the case may be) is disposed of for reward to a person that is not a resident of Australia, for use or enjoyment outside Australia.'

Australian content and eligible intellectual property

4.3.8 Eligible intellectual property must have a satisfactory level of Australian input. In the case of trade marks a satisfactory level of input can be established by first use in Australia or by an increase in significance or value through use in Australia. In the case of things other than trademarks, eligibility will be established by considering the extent of creative research or work done in Australia.

Ownership of intellectual property

4.3.9 Paragraph 37(1)(e) of the EMDG Act states that eligible intellectual property must be owned by the applicant. An applicant is entitled to receive EMDG support where it or its specified related entities own the eligible intellectual property – refer guideline 5.10.8.
SECTION 27 GUIDELINES

Eligible know-how

4.4.1 Know-how is defined at subsection 27(2) of the EMDG Act as private knowledge, information or expertise relating to commercial or industrial operations that: (a) is of commercial value; and (b) is imparted for the purpose of enabling the recipient to carry out a particular activity.

4.4.2 Subsection 27(1) of the EMDG Act provides that know-how is eligible know-how if Austrade is satisfied that it resulted to a substantial extent from research or work done in Australia in terms of subsection 27(1).

4.4.3 Know-how should involve the provision of something in written, tangible or material form such as a manual or computer software. Austrade will closely check the eligibility of know-how where it includes a services component. Eligible know-how can include some element of service in its one-off delivery to overseas users but it will primarily be the passing on of knowledge to allow the recipient itself to deliver the service in question. Know-how will not be considered eligible where it is primarily the provision of on-going management services to an overseas client.

4.4.4 In determining the eligibility of know-how, it should be noted that it is the knowledge or information disposed of which must have the requisite Australian content rather than the method of disposing of the know-how.

Eligible expenses and eligible know-how

4.4.5 The EMDG Act requires that applicants must own and must intend to dispose of their eligible know-how. However, Paragraph 37(1)(f) of the EMDG Act states that Approved Bodies can claim expenses in relation to eligible know-how owned by another person and which the other person intends to dispose of to a foreign resident. In addition, applicants that are companies can also receive EMDG support where their related entities own the eligible know-how and intend to dispose of it to a foreign resident (refer guideline 5.10.8).

4.4.6 Paragraph 37(1)(f) states that Approved Bodies can claim expenses in relation to eligible know-how owned by another person and that the other person intends to dispose of.

What is disposal of eligible know-how?

4.4.8 Disposal is defined at section 107 of the EMDG Act. Disposal, in relation to intellectual property or know-how, includes sale, grant, assignment or supply.

4.4.9 Disposal of eligible intellectual property or eligible know-how is defined at section 111 of the EMDG Act. It states that a person is taken to dispose of eligible intellectual property or eligible know-how only if Austrade is satisfied that the property or know-how (as the case may be) is disposed of for reward to a person that is not a resident of Australia, for use or enjoyment outside Australia.

Distinction between eligible know-how and other product categories

4.4.10 (1) eligible know-how and goods

The distinction will be in the method of disposal. If the know-how is embodied in a good which (even though covered by copyright) is sold to the end user without any formal contract relating to retention of the claimant’s rights in this know-how, it is likely to be a sale of a good. Examples would be the treatment of film and music CDs sold to the general public.

(2) eligible know-how and services
For something to be considered as know-how, it should impart knowledge to enable the recipient to undertake its own work. This is different to services where the actual work is undertaken by the provider of the services.

**Product eligibility guidelines for particular industries**

**Computer software**

4.5.1 Computer software will be assessed as one of, or a combination of, goods, intellectual property (IP) and/or know-how.

4.5.2 The basic eligibility requirements for each of these three categories are stated at 4.1, 4.3 and 4.4 of these Guidelines.

4.5.3 It should be noted that although software is covered by copyright, this alone is insufficient to categorise it as either a good or an intellectual property right. What is needed is evidence of the ‘thing’ that is being promoted and purchased in overseas markets.

4.5.4 The method of determining which category the software fits into will be largely based on what, if any, rights the buyer acquires when purchasing the software. This distinction will often not be clear-cut because of the nature of software. However, as an indication, sales of discs for retail and similar distribution would generally be regarded as the sale of a good whilst the sale of rights to a licensee (on a worldwide, country or territory basis) and similar activities would constitute a disposal of IP or know-how.

4.5.5 The distinction between goods and know-how may be seen in the method of disposal. If the know-how is embodied in a good which (even though covered by copyright) is sold to the end user without any formal contract relating to the retention of the applicant’s rights in this know-how, it is likely that the subject of the sale is the good, not the know-how. Such goods will then be assessed to ensure they meet the Australian content requirements. An example of such a treatment would be video and music CDs sold to the general public.

4.5.6 Guideline deleted.

4.5.7 Where rights are involved, it will generally not be necessary to categorically determine whether the software is either an IP or know-how as the same basic eligibility criteria apply to both types of activity.

4.5.8 Software exporters granting distribution licences to overseas territories may continue to incur promotional expenses in that territory as a means of increasing royalty or licence fee income. Such expenses may be claimable as promotional expenses in terms of section 38 of the Act.

However, where an applicant has licensed eligible rights to an overseas resident and the contract between the parties requires that the applicant/licensor continues to undertake promotional activities in the licensed territories, such expenses would be regarded as a cost of sale and not as eligible promotional expenses.

4.5.9 Computer software and programming services would generally be claimable as eligible external services subject to satisfying the requirements of guideline 4.2.16.

**Music industry applicants**

4.6.1 Applicants will generally be promoting the following products:

- goods (such as CDs)
- intellectual property rights (copyright in songs, music or recordings)
- to increase royalty income
- services (concert performances).
Goods

4.6.2 These must satisfy general Australian content requirements as outlined at guideline 4.1.1

An applicant owning the rights to a master tape may incur expenses in promoting products made overseas from this tape. These promotional activities may be eligible in terms of section 38 of the EMDG Act but only where such activities are not a condition of any licensing agreement with an overseas resident.

Intellectual property

4.6.3 Copyright (and associated rights) in music are eligible intellectual property rights only where the recordings, songs etc have resulted wholly or substantially from work performed in Australia. All stages in the production of music are taken into account when determining its Australian content.

4.6.4 In respect of music rights, applicants (and in some cases their related entities – see guideline 5.10.8) must also hold the exclusive rights to do one or more of the following acts (as specified in sections 85, 87 and 88 of the Copyright Act 1968):

- make a copy of the sound recording
- cause the recording to be heard in public
- broadcast the recording
- in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds, to make a recording of the broadcast, or a copy of such a sound recording.
- in the case of a television broadcast or of a sound broadcast, to re-broadcast it
- in relation to a published edition of a musical work, the exclusive right to make, by means that includes a photographic process, a reproduction of the edition.

4.6.5 The exclusive rights to these things can be held as owner, assignee or licensee, but not as agent.

4.6.6 Applicants who are granted an exclusive licence to a particular market territory in respect of a particular medium or media (e.g. radio, television) will be regarded as having satisfied the requirements detailed above and can claim expenses of promoting the music rights to that market territory for that medium or media.

4.6.7 Music industry applicants promoting royalty income by performing and showcasing in overseas markets may be subject to the provisions of section 46 of the EMDG Act which deals with "reimbursements" of expenses. Please refer to the guidelines at 5.18.

Services

4.6.8 Applicants performing overseas will generally be regarded as providing eligible external services. Refer also to guidelines at 5.18 for assessment rules applying where applicants receive income in relation to their promotional activities.

Film industry guidelines

Background

4.7.1 Film rights, for the purposes of the EMDG scheme, are regarded as intellectual property.

4.7.2 Grants are payable only in respect of the disposal, or intended disposal, of eligible intellectual property, for reward.

4.7.3 Copyright (and associated rights) in a film are eligible intellectual property only where the film has resulted wholly or substantially from work performed in Australia.

All stages in the production of a film are taken into account when determining its Australian content.
4.7.4 For promotional expenditure to qualify for grant entitlement, it must be of an allowable type and be incurred for the purpose of creating or increasing demand for the disposal of copyright (and associated rights) in the film to persons resident outside Australia for use and enjoyment outside Australia. Disposal is defined as including the sale, grant, assignment or supply (section 107 of the Act) and also must be for reward (section 111 of the EMDG Act refers).

4.7.5 Film industry applicants promoting intellectual property must demonstrate that they are promoting the disposal of intellectual property in the form of copyright.

The law of copyright is governed by the Copyright Act 1968. Apart from certain crown prerogative rights, no copyright exists in Australia in subject matters except under the Copyright Act.

Copyright exists in:

- works – original literary, dramatic, musical or artistic works whether published or unpublished
- subject matter other than works – sound recordings, cinematograph films, television and sound broadcasts and published editions of works.

These two categories are not exclusive. For example, copyright may exist in a cinematograph film as a whole, but may also exist in relation to each of the works the film is comprised of: the script (a dramatic work), drawings in an animated film (an artistic work), the music composed for the soundtrack (a musical work).

There are three types of licence in copyright:

- an “ordinary”, “bare” or “non-exclusive” licence – this is permission to the licensee to do something which would otherwise be an infringement of copyright. The licensor may still do the act himself and may grant licences to other persons to do the act
- a “sole licence” under which only the licensee and the licensor may do the act
- an “exclusive licence” permission to do the act is exclusive for the licensee and not even the licensor may do the act.

Only an exclusive licensee (or an assignee) may pursue an infringement action. A bare licensee or a sole licensee may not pursue an infringement action.

To be eligible for an EMDG grant in terms of subparagraph 37(1)(e)(i) of the EMDG Act, film industry applicants must demonstrate that they are promoting the disposal of rights in relation to work or things set out in the Copyright Act 1968 where they (or in some case their related entities – refer guideline 5.10.8) either:

- own the copyright or
- have an exclusive licence to undertake any of the acts of copyright in relation to a particular territory.

4.7.6 Film industry applicants must own the copyright or hold the exclusive right to do one or more of the following acts (as specified in section 86 of the Copyright Act 1968):

- make a copy of the film
- cause the film to be seen or heard in public
- communicate the film to the public.

4.7.7 This exclusive right can be held as owner, assignee or licensee, but not as agent.
Disposal of Eligible Film Rights

4.7.8 In general terms rights can only be disposed of to those persons who will further exploit these rights (e.g. film distributors, television networks, video distributors). The screening of a film to the general public (e.g. cinema or television audiences), including four walling activities, does not constitute disposal of film rights.

4.7.9 The granting to non-Australian residents of any of the following rights (on an exclusive basis) to market territories other than Australia for either a specified or indefinite period would constitute disposal of rights in terms of the EMDG legislation:

a) cable and other pay television
b) television distribution
c) theatrical distribution
d) non-theatrical distribution
e) video cassette
f) DVD and laser discs
g) the right to enter into agreements with distributors of the above mentioned rights.

4.7.10 The granting of ancillary rights in a film to a non-Australian resident (on an exclusive basis) in certain circumstances may also constitute an allowable disposal of rights.

4.7.11 Although film industry applicants (or in some cases their related entities – refer guideline 5.10.8) must own or hold an exclusive licence for copyright, they are not required to promote the disposal of exclusive licences. It is sufficient to assign part of intellectual property rights to third parties (e.g. assign partially as to place, time).

4.7.12 A holder of eligible rights who grants a licence to an overseas resident may continue to incur eligible expenditure in respect of that territory for that film in relation to the promotion of increased royalties from those rights. (Refer to section 38 of the EMDG Act and guidelines 5.11.1 – 13).

Key principles to be applied in assessing film industry applications where expenses are claimed for the promotion of disposals of intellectual property in the form of copyright

4.7.13

1. What work or thing does the application relate to, and what are the acts of copyright in relation to that work or thing set out in the Copyright Act? For a film industry applicant, these rights, as outlined at section 86 of the Copyright Act, include the right:

a) to make a copy of the film
b) to cause the film to be seen or heard in public
c) to communicate the film to the public.

2. Does the applicant (or in some cases their related entities – refer guideline 5.10.8):

a) own the copyright
b) have an exclusive licence to undertake any of the acts of copyright in relation to a particular territory.
3. Does the applicant (or in some cases their related entities – refer to guideline 5.10.8) have the ability to dispose of that copyright and propose to dispose of the copyright in an overseas market?
   a) disposal meaning the sale, grant, assignment or supply (section 107 EMDG Act)
   b) disposal can include either the granting to a third party of an exclusive sublicence or the granting of part of the intellectual property rights (e.g. assignment partially as to place, time).

4. Has the applicant incurred eligible expenses?
   a) Under an agreement with a film distributor, this will only occur where a producer meets/reimburses expenses of the distributor;
   b) This will not be satisfied if the applicant has been paid or is entitled to be paid any consideration for the expenses – refer to subsection 46 (1) of the EMDG Act;
   c) This will not be satisfied if the applicant is acting as an agent.

**Arrangements between film producers and film distributors**

**4.7.14** Film production companies will either promote their product directly or they will use an Australian or overseas distribution company to do the promotion.

In either case the producer must have assigned to it the copyright ownership from the film’s investors so as to enable the producer to be able to promote the copyright.

Where producers promote directly they will be entitled to claim promotional expenses.

Where a producer’s product is promoted through a distribution company (often termed distributor or distribution agent) there are likely to be some arrangements between the two parties that are relevant for determining the eligibility for EMDG grants.

The agency agreement between the producer (applicant) and the distributor should be obtained so as to be able to understand the relationship between the two parties.

Arrangements between a producer and a distributor generally involve the producer transferring or allocating some rights to the film to the distributor. These rights are commonly termed “marketing” rights but they may not give the distributor the exclusive rights to do acts of copyright. Rather, such rights often give the distributor the commercial rights to exploit the film or to promote the film so that overseas third parties can enter into contracts with the producer to themselves do acts of copyright (e.g. showing the film to the public overseas).

Distributors acquiring this type of limited right from the producers are not entitled to receive EMDG grants. The EMDG entitlement remains with the film producer.

For all claims received from film industry applicants, Austrade will examine, where relevant, the distribution agreements between producer and distributor to confirm that applicants (or in some case their related entities – refer guideline 5.10.8) satisfy the requirements of subparagraph 37(1)(e)(i) of the EMDG Act, that is, own (or are an exclusive licensee for) the copyright.

**Film production applicants claiming for distributors’ promotional activities**

**4.7.15** The distributor will often agree to pay the producer an advance on future sales. This is commonly referred to as a ‘distribution advance’ or as a ‘distribution guarantee’. No future payments will be made from sales to the applicant until the advance is fully recovered out of sales proceeds from the film.

The distributor then promotes the film and, commonly, many of its promotional expenses will be reimbursable by the producer (hence the producer potentially becomes entitled to an EMDG grant).
Promotional costs spent by a distributor may be claimable by the producer applicant where they are for activities eligible under section 33 of the EMDG Act and where they are acquitted in the applicant's accounts.

Acquittal of expenses for a production company claiming EMDG grants will usually occur by offsetting eligible export earnings against the expenses owed to the film distributor. The date of acquittal will be the date that the applicant receives the relevant royalty statement.

**EXAMPLE**

A film producer receives its first royalty statement from its distributor in September 2013. The royalty statement shows sales achieved and recoverable marketing costs relating to the film. The period of the statement was March to June 2013.

The expenses are claimable in the 2013–14 grant year, i.e. when the applicant first recognised the revenues and costs.

**Both distributor and production company claiming EMDG grants in relation to same film**

4.7.16 Each distribution agreement will need to be analysed to determine which entity holds copyright or an exclusive licence in respect of a film.

Where a claim is received from any party (producer, distributor) in relation to a particular film, Austrade will identify any other parties that have claimed or intend to claim a grant in relation to the film. This may necessitate waiting until all claims for the year in question have been received so that Austrade can be certain that grants are only paid to the owner (or exclusive licensee) of the copyright.

4.7.17 If the distributor does acquire all or some share of the film’s copyright then it may be able to claim EMDG grants in its own right as a business that owns and promotes intellectual property. They could claim relevant promotional costs incurred where these costs have not been on-charged to the producer in the royalty statement.

**Pre-Selling Expenditure**

4.7.18 Expenditure incurred by the owner or owners of copyright in a screenplay (to a yet to be produced film) will be eligible provided it can be substantiated that:

- a) the expenditure was incurred by way of promotional activities that fall within the EMDG Act’s section 33 table
- b) the expenditure was incurred for the purpose of promoting the disposal of eligible intellectual property (see above guidelines and especially 4.7.13)
- c) it can be satisfactorily demonstrated that a film was proposed to be made
- d) the film was intended to be based upon that screenplay
- e) the screenplay resulted, wholly or substantially, from work performed in Australia
- f) the film is also intended to have the requisite Australian based work inputs
- g) the expenditure must be considered reasonable in relation to the nature and purpose for which it was incurred.
4.7.19 In addition, the person(s) incurring the expenditure must:

a) hold ownership of copyright in the screenplay (either from the outset or by way of assignment), or
b) hold an exclusive licence to exploit the screenplay.

Promotional Films and Trailers

4.7.20 The eligibility of costs associated with the production of promotional films is dependent upon:

a) the purpose(s) for which the film has been produced, and
b) the nature of the expenditure. Specific guidelines are as follows:

4.7.21 Such films must have been produced to promote the disposal of eligible intellectual property (see above guidelines and especially 4.7.13).

4.7.22 Production costs are allowable expenditure only to the extent of bought-in costs incurred by the claimant.

4.7.23 This guideline has been deleted.

4.7.24 Costs of freight, projection and other costs associated with promotional films meeting the above criteria are eligible.

4.7.25 Production costs are ineligible where the promotional film:

a) was produced primarily for the purpose of attracting investment
b) is disposed of for reward in its own right or as part of the ultimate film or series
c) is intended to be used in the final production of the film or series
d) has been taken from an existing film, except for the additional costs incurred in incorporating it into the promotional state.

4.7.26 Where a promotional film or trailer is used to promote a film series, production costs are ineligible unless the claimant can clearly demonstrate that the pilot film has not been used to attract investment and that it is not intended to form part of the film series.

4.7.27 The costs of producing trailers for supply with films are ineligible – however the cost of film trailers and the like to promote the disposal of eligible film rights and increased royalty income in terms of section 38 of the EMDG Act may be eligible.
The EMDG scheme reimburses some of the costs incurred by eligible businesses engaging in eligible export promotion activities. It does not support other activities including those connected with production, product development, distribution or product certification. Expenses must be for an “approved promotional purpose”.

SECTIONS 28 AND 29 GUIDELINES

Eligible expenses – general

5.1.1 Section 28 of the EMDG Act establishes the general eligibility principles for assessing expenses. Expenses will be eligible if they:

- relate to specific promotional activities
- are genuinely incurred by applicants
- are incurred for the purpose of marketing eligible products in foreign countries.

Each of these principles is explained in the following sections of these guidelines.

5.1.2 Section 29 of the EMDG Act defines the term eligible expenses.

Expenses are eligible if the expenses:

- are claimable expenses in respect of an eligible promotional activity (as provided for in section 33 of the EMDG Act). The table at section 33 also contains references to terms which are defined elsewhere in section 31 to 38 inclusive. For example, section 32 defines the term agent as it is used in the table
- (for applicants who are approved joint ventures) relate to the activity, project or purpose of the joint venture as approved by Austrade under section 89 of the EMDG Act
- are incurred during the grant year (in terms of sections 58 and 59 of the EMDG Act). For persons who have not previously received an EMDG grant, expenses may be incurred during the grant year and the year immediately preceding the grant year
- total $15,000 or more.

Once an applicant’s eligible expenses have been calculated, the applicant’s grant is calculated according to section 63 of the EMDG Act.
SECTION 30 GUIDELINES

Eligible expenses – adjustments by Austrade

5.2.1 The guidelines for section 30 of the EMDG Act are related to those for sections 64 and 96 of the EMDG Act. If an applicant has been party to an arrangement or transaction which causes it to receive an increase in the amount of grant, Austrade may make adjustments to the assessed eligible expenses (section 30 of the EMDG Act) or the provisional grant calculation (section 64 of the EMDG Act).

More details on the application of this provision are found at guidelines 8.3.1 – 8.3.4.

SECTIONS 31 – 34 GUIDELINES

Claimable expenses in respect of eligible promotional activities

5.3.1 Section 29 of the EMDG Act details the general requirements for expenses to be eligible. The first of these requirements at subsection 29(a) of the EMDG Act is that the expenses are, under section 33 of the EMDG Act, claimable expenses in respect of an eligible promotional activity.

These guidelines describe what Austrade will approve as claimable expenses in respect of eligible promotional activities.

The table at section 33 of the EMDG Act details each eligible promotional activity (column 2) as well as what related expenses may be claimed for each of these activities (column 3). Sections 34 and 34A of the EMDG Act, respectively, clarify what is claimable under the marketing visits and overseas buyer expense categories.

The following terms are explained so that sections 31–34 of the EMDG Act can be better understood:

5.3.2 “agent”

Items 2 “Marketing Visits”, 3 “Communications”, 5 “Trade Fairs” and 6 “Literature and Advertising” allow the activity to be carried out by the applicant or the applicant’s agent.

The ordinary meaning of the word agent is to be used, i.e., that an agent is someone who has the ability and authority to act on behalf of another. For example, an applicant’s agent could include the applicant’s employees, directors, partners or any other person working in an agency capacity. Evidence that the person is working in an agency capacity will need to be confirmed by Austrade.

An agent is defined in section 32 as someone other than an Overseas Representative. Hence, where the eligible promotional activity category falls into items 2, 3, 5 and 6, and the related expense is incurred directly in relation to the activities or participation of an overseas representative, these items will be assessed as “Overseas Representation” expenses (item 1A).

5.3.3 Guideline deleted.

5.3.4 “Approved promotional purpose”

This is a further eligibility requirement under the EMDG Act. All expense categories require that for an expense to be eligible it must have been incurred for an approved promotional purpose. The definition of an approved promotional purpose is provided in section 37 of the EMDG Act. Broadly, it means that the expense has to be for:

- an eligible purpose (that is, creating, seeking or increasing demand or opportunity in a foreign country)
- promoting eligible products
- promoting products sold or intended to be sold as principal (with minor exceptions).
The onus is on the applicant to provide supporting documentation and/or evidence that the expenses were incurred for an approved promotional purpose. Refer also to the guidelines at 5.10.

5.3.5 “Closely related” persons

Some of the expense categories in the table at section 33 of the EMDG Act, such as item 1B “Marketing Consultants’ Expenses” specify that only expenses paid to persons who are not closely related to the applicant are eligible.

A ministerial guideline titled Close Relationships – General (available on the EMDG website) lists factors Austrade must take into account in forming its opinion whether a person is or is not closely related.

The general eligibility principle for determining whether or not a relationship under EMDG is close is provided at section 6 of the Determination and requires Austrade to consider any connection between the entities and the extent of any control or influence the entity can exercise over the other entity.

The determination addresses situations where both the applicant and the “closely related person” are companies with both having at least one director in common – refer to subsection 7(e) of the determination.

Where both the applicant and the other entity are companies and someone is a director of both of them, Austrade may determine that the parties are closely related. In deciding this, Austrade must consider any connection between the two companies and the potential for one to exercise control over the other.

EXAMPLE

An applicant (company A) pays company B to produce a promotional video. A has two directors one of whom is also a director of B. B has eight directors. If Austrade is satisfied that there is no possibility that A and B can collude and inflate the video expense, Austrade will determine that the parties are not closely related.

5.3.6 “to the extent”

All categories (except item 4 “free samples” and items 8 and 9 relating to the registration and protection of intellectual property) specify that expenses are eligible to the extent to which they relate to an approved promotional purpose. This means that where the eligible activity was undertaken for both eligible and ineligible purposes, only the portion which is eligible may be claimed. The onus is on the applicant to justify the apportionment claimed.

No apportionment is possible under item 4 “free samples”. It is sufficient that the expense is incurred “primarily” for an approved promotional purpose.

ELIGIBLE EXPENSES LISTED AT SECTION 33 OF THE EMDG ACT

ITEM 1A - OVERSEAS REPRESENTATION

The Overseas Representation expense category (section 331A of the EMDG Act) is capped at $200,000 per claim. However, applicants who have incurred expenses of over $200,000 on overseas representation during a grant year should include the entire amount of otherwise eligible expenditure on their claim form – not just $200,000 of it.
### Extract from section 33 of the EMDG Act

#### Claimable expenses in respect of eligible promotional activities

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<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
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| 1A       | maintaining one or more overseas representatives on a long term basis in foreign countries to the extent to which the representatives are maintained for approved promotional purposes | all reasonable expenses incurred by the applicant in:  
(a) maintaining the representatives; and  
(b) meeting the expenses incurred by the representatives in soliciting business for the applicant;  
up to a limit of:  
(c) if the applicant is a grantee in respect of any previous grant year—$200,000 for the grant year; or  
(d) if the applicant is not a grantee in respect of any previous grant year—$200,000 for the grant year and the immediately preceding year |

### What is meant by the term ‘overseas representative’?

5.4.2 Overseas representative expenses must be for long term arrangements (see 5.4.3). They may include payments made to the applicant’s subsidiary, the applicant’s own employee or branch costs, the expenses of an arm’s length, overseas engaged representative or payments to an Australian agent which include a component for overseas representation.

**EXAMPLE**

An applicant owns a hotel and promotes eligible internal tourism services. It pays management and marketing fees to an Australian agent to operate and promote the hotel. Where the agent pays amounts for its overseas-based staff or agents to provide overseas representation services, Austrade may allow these amounts as eligible expenses. The onus is on the applicant to itemise the agent’s expenses to arrive at an overseas representation component.

Costs associated with a virtual office such as an overseas phone answering and call diversion service are likely to fall within the overseas representation, communications or trade fairs/promotional events expense categories if incurred for an approved promotional purpose.

5.4.3 Only those expenses which relate to long term representation will be allowed. Evidence demonstrating the long term nature of the representation arrangement will be required. Austrade considers that 12 months is the minimum requirement for any assignment to qualify as long term.

Some overseas representation arrangements will end before the minimum 12 months period ends. Where this happens, the applicant will need to explain why the arrangement was cut short and must show evidence that its intention was for the claimed overseas representation arrangement to be in place for at least 12 months.

5.4.4 For overseas engaged and based persons (not closely related to the applicant) who provide one off market, project or market specific services, expenses may be assessable under the item 1B consultancy category (see also guidelines 5.4.33).
5.4.5 In the case of a relocated employee or any Australian person claimed as a representative, Austrade will consider where the person is ordinarily employed. Austrade will consider the whole of the period of the employment contract and not just some lesser period within the whole. For example, a person may be ordinarily employed in Australia even though for a period of the employment he or she may spend extended periods outside Australia.

5.4.6 Fees paid to Austrade may be eligible under item 1A where the services provided are of a representational nature and involve market research, market development, general promotion and business solicitation. The arrangement would need to be for 12 months or longer and be for services provided by an overseas office of Austrade. Fees paid to Austrade for short-term or one-off assignments may be claimed under Item 1B consultants’ expense category (see also guideline 5.4.32).

**Eligible expenses**

5.4.7 Overseas representation expenses will be allowed for activities such as market research or market development, general promotion and business solicitation.

5.4.8 Overseas representation expenses may include salaries, fees, rent, and motor vehicle hire/maintenance.

5.4.9 Expenses incurred by the representative in soliciting business for the applicant may include advertising, marketing visits and communication expenses. Small value gifts may be allowable as part of expenses if the cost and circumstances are reasonable and appropriate and if they include the applicant’s brand or logo.

5.4.10 Some set-up costs will be allowed, such as expenses of transporting personal effects and air fares for relocating the family of a representative who is required to shift from Australia. These expenses are considered to be incurred as part of maintaining the representative. Only those legal expenses directly related to maintaining the representative (such as expenses in obtaining a work permit for an overseas country) will be eligible.

5.4.11 Consistent with the $200,000 Item 1A expenses limit, applicants must include at item 1A any of the representative’s expenses of marketing visits, communications, advertising etc where these relate to the activities of the representative. Conversely, Austrade will not accept within item 1A any expenses incurred by the representative which were made on the applicant’s behalf such as paying the fares of the applicant’s Australian-based staff during overseas visits. Refer to the guidelines at 5.4.37 for more information on this issue.

5.4.12 Overseas representation expenses will only be allowed to the extent that they are incurred for an approved promotional purpose. Section 37 of the EMDG Act contains the definition of approved promotional purpose (the guidelines at 5.10 refer).

**EXAMPLE:**

A representative spent 80 per cent of its time on promotion of an applicant’s products and 50 per cent of the goods promoted were eligible products. In this case, 40 per cent of the representative’s expenses would be eligible.

(Note: In cases where an applicant claims the expenses of overseas representation that are set off against export earnings that are withheld by the export customer, Austrade requires evidence to show that it has been invoiced or formally charged for the claimed expenses. Austrade also needs to verify that there is a reasonable basis to the claimed amount and that the representative provided services as claimed. Applicants should also ensure that any claimed overseas representation and export earnings amounts appear in their profit and loss statements.)

5.4.13 Payments to overseas-based sports and entertainment figures to promote on the applicant’s behalf may be eligible as overseas representation.

**Ineligible expenses**

5.4.14 Austrade will not allow some set up costs, such as the legal costs of registering a business, ineligible capital items. Depreciation expenses are also ineligible.
5.4.15 Austrade will not allow expenses relating to the non-promotional activities of an overseas representative. For example, certain types of training (of a post-contractual nature), commissioning equipment, supplying after sales service, performing paid services etc will not be allowed as being for an approved promotional purpose. See guideline 5.4.12 and section 37 of the EMDG Act.

5.4.16 Guideline deleted.

5.4.17 The $350/day allowance in lieu of accommodation and other expenses incurred during an overseas visit is not applicable for overseas representatives.

5.4.18 Success fees or bonuses paid to any representative will not be accepted. Amounts that are tied in any way to sales performance will be disallowed except to the extent that the representative can demonstrate that the fees were paid to third parties for advertising and other promotional activities.

5.4.19 Termination payments or settlements in lieu of contracted expenses are not eligible as these are not considered to be for maintaining an overseas representative for an approved promotional purpose.

5.4.20 The expenses associated with large value gifts and other inducement-related expenses will be disallowed.

5.4.21 Austrade does not consider that interpreting and translating services by themselves fall within the meaning of overseas representation. However, where an overseas representative pays the expenses of an overseas-based interpreter or translator out of its overall fee, the expenses will be assessed under item 1A (overseas representation).

5.4.22 Where an applicant pays an overseas-based interpreter or translator, these expenses will usually be assessed under item 3 of the table (communications).

5.4.23 Expenses resulting from selecting or recruiting an overseas representative are not eligible because they are not for maintaining the representative. An exception to this rule will apply where an applicant has an existing representation arrangement in place and where it recruits or selects a replacement for an individual who has ceased representing the applicant.

**EXAMPLE**

Applicant uses its UK subsidiary to promote its services. The subsidiary has six employees including a sales manager promoting for the applicant. The sales manager resigns and the applicant advertises for a replacement. The expenses of advertising and associated staff recruitment will be eligible where they enable the subsidiary to continue promoting the applicant’s products.

Applicants will be limited to 65 per cent of any first class travel expenses included in their overseas representation claim.

**ITEM 1B - ENGAGING A MARKETING CONSULTANT**

The marketing consultant expense category (item 1B of the table at section 33 of the EMDG Act refers) is capped at $50,000 per claim. However, applicants who have incurred expenses of over $50,000 on marketing consultants during a grant year should include the entire amount of otherwise eligible expenditure on their claim form – not just $50,000 of it.
Claimable expenses in respect of eligible promotional activities

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<td>Activity</td>
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| 1B       | engaging as a consultant (either in or outside Australia) one or more persons who, in the opinion of the CEO of Austrade are not closely related to the applicant, to the extent to which the consultants undertake market research, or marketing activities, related to approved promotional purposes | all reasonable expenses incurred by the applicant up to a limit of:
|          |          | (a) if the applicant is a grantee in respect of any previous grant year—$50,000 for the grant year; or
|          |          | (b) if the applicant is not a grantee in respect of any previous grant year—$50,000 for the grant year and the immediately preceding year |

What is meant by the term “consultant”?

5.4.25 A consultant is any person or business who is not closely related to the EMDG applicant and who undertakes market research or marketing activities related to an approved promotional purpose. Refer to the Ministerial Guideline Export Market Development Grants (Close Relationships – General) 2002 for rules on determining whether a person is, or is not, closely related to the applicant (available from the EMDG website).

5.4.26 Consultants can be Australian or foreign residents.

What is meant by the “undertakes market research or marketing activities”?

5.4.27 The consultant must be undertaking work of a service nature. Applicants who pay “off the shelf” reports, books or market research type publications alone are not considered to be engaging a consultant to undertake work. However, where publications or reports are provided as part of an overall consulting assignment, the expenses of such an assignment, including publication expenses, will be allowed.

5.4.28 Eligible activities of a consultant would include:

- Export planning work where the plan includes marketing and market research strategies
- Identification of target export markets
- Estimation of market size
- Analysis of import data and trends
- Identifying distribution channels and potential customers
- Analysis of competitors’ performance
- Identification of appropriate pricing strategies
- Assistance in preparation of an applicant’s promotional materials and with trade display participation (this activity can also be claimed at item 5).

5.4.29 Ineligible activities of a consultant would include:

- Provision of “off the shelf” material where the applicant is not paying for work to be undertaken by the consultant (see guideline 5.4.27)
- Provision of services relating to an applicant being able to meet overseas quality accreditation standards
- Provision of advice on designing export labelling and packaging
- Any services concerned with finance for exports
- Services related to commissioning equipment or for any after-sales service
- Preparation of EMDG claims
- All legal services apart from those directly for export marketing and market research
- Provision of advice on production matters including any required product or service modifications for export markets
• Provision of product analysis reports for an applicant to be able to submit results to potential overseas clients.

What expenses are claimable?

5.4.30 Broadly, the fee for service plus actual expenses (fares, accommodation, meals and entertainment) related to the consultancy, up to a maximum limit of $50,000.

Austrade will allow payments to a consultant for advertising, travel, trade show activities etc to be claimed in other EMDG expense categories if the expenses are fully supported by invoices and payment records from the consultant and if there is evidence that the expenses relate to the applicant’s own promotional activity – refer to guideline 5.4.37.

Applicants will be limited to 65 per cent of any first class travel expenses included in their overseas representation claim.

OTHER RELEVANT ISSUES FOR BOTH ITEM 1A AND ITEM 1B EXPENSES

Eligibility of fees paid by an applicant to Austrade for market development activities

5.4.31 Payments to Austrade for trade display participation or for other advertising activities are assessable under section 33 of the EMDG Act – for item five (trade fairs etc) or item six (provision of promotional literature etc).

Where Austrade provides overseas representation-type services, the fees paid to Austrade may be eligible under item 1A Overseas Representation (see guideline 5.4.6).

5.4.32 Broadly speaking, to be eligible item 1B expenses, the expenses must be for assignments which are for marketing or market research. Most Austrade services would fall within the term marketing and market research.

Distinction between an overseas representative (Item 1A) and an overseas-based marketing consultant (Item 1B)

5.4.33 This distinction may be particularly relevant in cases where an applicant’s claimed expenses exceed one or both of the section 33 table’s expense caps for overseas representation ($200,000) and for marketing consultants ($50,000).

In many cases overseas businesses and individuals representing applicants may either be claimed as overseas representatives or as marketing consultants subject to the following specific requirements:

• Overseas representatives (Item 1A) – must be maintained on a long-term basis for an approved promotional purpose. Applicants cannot claim the expenses of relocating their staff to overseas markets for short-term assignments. Applicants may only claim for their staff under overseas representation if they have been relocated to the overseas market for at least 12 months.
• Marketing consultants (Item 1B) – must not be closely related to the applicant entity and must undertake market research or marketing activities related to an approved promotional purpose.

EXAMPLE 1

Applicant spends $250,000 on its overseas branch expenses to cover salaries, rent and other promotional expenses. It is entitled to claim $200,000 up to the overseas representation expense ceiling amount for this activity.

In this case, none of the expenses can be included under the marketing consultants’ expense category because the overseas entity representing the applicant is closely related.
Transferring claimed expenses between the marketing consultants’ expense category and the overseas representation expense category

5.4.34 Some applicants may claim expenses of services provided by overseas businesses and individuals in one of these expense categories but later realise they would be advantaged by having the expenses assessed in the other category.

Austrade will allow applicants to transfer expenses from one category to the other only if the expenses are fully eligible under the category to which they are to be transferred (i.e. Item 1A or 1B).

**EXAMPLE 2**

The applicant engages an unrelated overseas company to provide promotional and marketing services for which it pays $250,000 in a grant year and includes the entire amount in its application under the overseas representation expense category.

If the engagement of the unrelated overseas company is not done on a short term and one-off basis, this applicant could claim $200,000 in the overseas representation category and $50,000 in the marketing consultants’ expense category.

**EXAMPLE 3:**

The applicant pays $100,000 to an overseas-based marketing consultant for providing ongoing promotional services. It also has a subsidiary overseas that provides overseas representation services. The applicant pays the subsidiary $150,000 in the grant year.

This applicant may be eligible for the:

- $50,000 ceiling amount for consultants expenses
- $200,000 ceiling amount for overseas representation expenses

(Comprised of the total of its $150,000 subsidiary expenses and $50,000 of its marketing consultants expenses that are alternatively and legitimately assessable as long term overseas representation).

**EXAMPLE 1**

The applicant pays $100,000 for an unrelated overseas company to provide export promotional services and to solicit business for the applicant. It claims this amount in the marketing consultants’ expense category. This expense category is limited to $50,000.

Following the assessment of the claim, Austrade is satisfied that the overseas company is engaged on a long-term basis and that the expenses are eligible under Item 1A, and enables the applicant to transfer the amount to the overseas representation expense category.
Section 47 of the Act and beneficial transfers between the marketing consultants and overseas representation expense categories

5.4.35 Section 47 of the EMDG Act provides any expenses notified to Austrade after the application has been submitted (‘undisclosed expenses’) cannot exceed 10 per cent of the eligible expenses disclosed in the application. However, the transfer of expenses between overseas representation and marketing consultants’ expense categories (as shown in example 2 at 5.4.34 above) will not trigger the application of section 47 of the EMDG Act as long as all the expenses so transferred were disclosed in the application.

Consultant expenses included within an overseas representation claim

5.4.36 There may be cases where overseas representatives incur expenses of engaging overseas-based marketing consultants. Austrade will apply the principles in guideline 5.4.37 to determine whether the consultant fee component should be transferred to item 1B (expenses of engaging a consultant).

$200,000 overseas representation and $50,000 marketing consultants’ expenses capping issue – transferring expenses to other expense categories to circumvent caps.

5.4.37 These guidelines clarify Austrade’s policy for assessing claims where an applicant’s overseas representative and or marketing consultant incurs expenses on the following activities and where the $200,000 overseas representation and $50,000 marketing consultants’ expenses caps may be exceeded:

- Fares and communications costs
- Trade fair activities
- Provision of advertising material and promotional literature
- Consultant’s fees included within ‘overseas representation’ expenses.

In some cases these expenses may be claimed under either item 1A/1B or under other items within the table contained at section 33 of the EMDG Act.

Expenses incurred originally by Overseas Representatives – transfers to other expense categories

Item 1A of the table at section 33 of the EMDG Act includes expenses incurred by the applicant in:

(a) maintaining the overseas representative; and

(b) meeting the expenses incurred by the overseas representative in soliciting business for the applicant.

This guideline defines the type of expenses which must be assessed in categories (a) and (b) of this expense category Item 1A and those which may be assessed elsewhere in the table.
Item 1A (a) of the table provided at section 33 of the EMDG Act includes expenses incurred to enable the representative to operate on an ongoing basis such as salaries and fees, office and housing rent, communications and motor vehicle costs. These expenses must be assessed under Overseas Representation and cannot be transferred to other expense categories.

Item 1A(b) of the table provided at section 33 of the EMDG Act includes fares and travel costs for the overseas representative and its staff, communications costs, market research, advertising, trade fairs, and consultants.

Where the Item 1A(b) expenses are for the applicant’s own promotional activities and were incurred in the first place by the representative for reasons of convenience, the expenses may be transferred to other expense categories.

The test for determining whether expenses can be transferred from Item 1A to these other expense categories requires Austrade to assess whether it is the applicant’s promotional activity or whether it is the overseas representative’s activity. Section 32 of the Act precludes the assessing of expenses relating to overseas representatives’ activities in expense categories 2, 3, 5 and 6.

Where the representative is also a distributor or an on-seller of the applicant’s products, Austrade will in most cases assess marketing visits, trade fairs and advertising etc expenses incurred by the representative and then paid and claimed by the applicant to be item 1A(b) type expenses on the basis that the activity is that of the representative rather than the applicant. Factors to be considered by Austrade in assessing claims involving this issue will include:

- The nature of the overseas representation agreement to ascertain whether the promotional activities are part of the representative’s normal activity
- Which party initiates the promotional activity
- Whether the overseas representative is at arms’ length from the applicant
- Whether the applicant itself participates in the promotional activity – e.g. do its staff attend trade show?

Applicants cannot claim expenses of an item 1A(b) type under other expense categories where they relate to the expenses and activities of an overseas representative – section 32 of the EMDG Act refers. Conversely, Austrade will not include within item 1A(b) those expenses incurred by the representative which were made on the applicant’s behalf such as paying for fares for the applicant’s Australian-based staff during overseas visits.

**EXAMPLE 1**

A representative is paid an overall amount for trade fair costs but cannot demonstrate that any part of it was paid or reimbursed to independent third parties at the request of the applicant. This amount is assessable at item 1A of the section 33 table.

**EXAMPLE 2**

A representative pays independent third parties to organise the applicant’s overseas trade fairs and the applicant’s brochures. The applicant reimburses the representative for the expenses. These expenses would be assessable at items 5 and 6 of the section 33 table.
Expenses incurred originally by marketing consultants – transfers to other expense categories

The marketing consultant expense category at Item 1B of table provided at section 33 of the EMDG Act may include all costs that relate to engaging the consultant such as its fees, travel and communications expenses.

Austrade will, if necessary, allow expenses under other expense categories where an applicant reimburses a consultant for expenses relating to, for example, the applicant's participation in trade shows or for other marketing or advertising activities. These transfers from item 1B will be permitted where expenses are fully supported by invoices and payment records from the consultant and where there is evidence that the consultant has incurred direct expenses of the applicant's own promotional activity.

General assessment principles for applicants carrying on business as hotels where they claim marketing consultants and/or overseas representation expenses

5.4.38 Applicants promoting hotels make payments to other entities to carry out their hotel's export marketing. These other entities may be consultants, Australian management companies or they may be overseas representatives related or unrelated to the applicant. Accordingly, payments of this type may be assessed in ‘overseas representation’ (item 1A of the section 33 table) or ‘marketing consultants’ (item 1B of the section 33 table), depending on the relationships between the various parties.

An applicant's payments will often be based on the level of sales or as a percentage of room revenue.

An applicant's payments may be to a person who also promotes other Australian or non-Australian properties.

An applicant's lump sum or sales related payments may include components for other eligible expenses as outlined in the section 33 table such as marketing visit expenses or advertising.

A number of assessment issues arise from this method of operation:

1. Can Austrade allow as eligible expenses any payments made by way of sales-related payments? Section 49 of the EMDG Act refers.

2. Can payments to an Australian management company be eligible EMDG expenses where that management company provides overseas representation services?

3. Can applicants transfer expenses from items 1A and 1B of the section 33 table to other items in circumstances where the $200,000 overseas representation and or the $50,000 marketing consultants’
expenses caps are circumvented? Specifically, how does Austrade assess claims where the overseas representative is involved in generic promotion or advertising of properties in a hotel chain?

Austrade’s assessment approach will be based on:

1. A hotel paying its overseas representative an amount based on a percentage of room revenue may be incurring eligible expenses where Austrade is satisfied that the representative has itself spent an amount on payments for eligible promotional activities. For example, where an overseas representative is paid $100,000 by an applicant but only spends $40,000 on direct expenses promoting the applicant’s property, Austrade will assess the $40,000 component as potentially eligible. An overseas representative’s direct expenses would most commonly be for fares, advertising or communications expenses. In certain cases, salaries of the representative may be incurred in this way where there is an adequate basis for directly attributing salaries to promotion of the applicant’s property.

2. Amounts paid to an Australian management company for services which include overseas representation services are potentially eligible where Austrade is satisfied that a suitable basis exists for attributing the overseas representation services to promotion of the applicant’s property.

Austrade will examine the payments made by the management company which are the basis of any EMDG claim to ensure that these payments relate to the promotion of the applicant’s property.

3. Where an overseas representative (item 1A in the section 33 table) incurs expenses from the applicant’s payments on promotional activities to promote a property where the expense type falls within the definition of items 2–7 within the section 33 table, Austrade will apply the guideline 5.4.37. That is, Austrade will permit transfers of expenses from item 1A to the other categories in the table only when the particular expenses are directly for the applicant’s promotional activity as outlined in guideline 5.4.37. Put another way, applicants can transfer expenses where these would normally be their own expenses but for convenience have been incurred in the first place by the overseas representative. The examples in guideline 5.4.37 are also considered relevant for this Ruling.

Where an overseas representative is paid by an applicant for its own share of a generic advertising activity (say for a chain of companies or properties), the representative may make payments to third parties on behalf of the applicant for convenience as outlined above. Where this happens, Austrade will only permit a transfer from item 1A to item 6 of the section 33 table when there is a clear basis for identifying a direct cost for the applicant’s own advertising activity.

The assessment principle for identifying what is a direct cost for the applicant’s own advertising activity is that only expenses incurred by the overseas representative on behalf of the applicant only and in addition to the representative’s normal activities can be transferred. Any expenses capable of being apportioned between properties would not satisfy this principle and will be assessed by Austrade to be part of the normal activities of the representative and assessable within item 1A of the section 33 table.

An example of an expense which is potentially transferable from item 1 would be a brochure which only advertises the applicant’s property. Refer to guideline 5.8.18 for further consideration of this issue.

Similarly, where a marketing consultant itself incurs expenses on promotional activities covered elsewhere in the section 33 table (and pays for these from amounts paid by the applicant), these expenses are potentially eligible. Austrade will permit consultants’ expenses to be transferred from item 1B of the section 33 table to other expense categories within the table. For example, expenses of marketing visits, advertising or communications would be eligible subject to satisfying general eligibility criteria and subject to being directly related to promotion of the applicant’s property.

Austrade will permit transfers from ‘marketing consultants’ (item 1B) only where expenses are fully supported by invoices and payment records from the consultant and where there is evidence that the consultant has incurred direct expenses of the applicant’s own promotional activity.
ITEM 2 - MARKETING VISITS

Extract from section 33 of the EMDG Act

Claimable expenses in respect of eligible promotional activities

<table>
<thead>
<tr>
<th>Item</th>
<th>Activity</th>
<th>Expenses</th>
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<tbody>
<tr>
<td>2</td>
<td>Any visit (marketing visit) made by the applicant or its agent to any place in or outside Australia to the extent to which the visit is made for an approved promotional purpose.</td>
<td>all expenses: (a) incurred by the applicant in payments to persons that in Austrade's opinion, were not closely related to the applicant; and (b) that are allowable expenses under section 34</td>
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Eligible expenses

5.5.1 Marketing visit expenses are assessed as eligible to the extent that visits have been undertaken for an approved promotional purpose (refer to section 37 of the EMDG Act). That is, the visit must be for:

- an eligible purpose (creating, seeking or increasing demand or opportunity in a foreign country);
- promoting eligible products; and
- promoting products sold or intended to be sold as principal (with minor exceptions).

5.5.2 Marketing visit expenses will be allowed for visits made by the applicant or its agent. The term “agent” will include someone who has the ability and authority to act on behalf of the applicant. This could include reference to an applicant’s employees, directors and partners or, in certain circumstances, consultants or others engaged by the applicant for particular assignments.

5.5.3 Marketing visits can occur both within Australia and overseas. If the travel is undertaken by other than normal commercial means such as by private plane, Austrade would apply section 35 of the EMDG Act to reduce the expense to a normal commercial equivalent.

5.5.4 Eligible expenses allowed under item 2 are detailed at section 34 of the EMDG Act. They include:

- airfares – subsection 34(2) of the EMDG Act refers
- a daily visit allowances of $350 per day for visits to a place outside of Australia – subsection 34(4) and (5) of the EMDG Act refer.

Austrade considers the following services provided to a passenger by an airline to be eligible: costs incurred for baggage, airline food and drinks, seat allocation, linejumping or upgrade fees, the use of inflight entertainment, green credits for environmental rebates and ticket cancellation or baggage insurance.

5.5.5 Only 65 per cent of first class air fares may be claimed – subsection 33 (3) of the EMDG Act refers.

5.5.6 The Australian departure tax is an eligible marketing visit expense, as provided for under subsection 48(2) of the EMDG Act, noting in the great majority of cases the Australian departure tax is included in the cost of an air ticket.

5.5.7 Some visit expenses may be apportioned so that only the share which relates to an approved promotional purpose is allowed.
Claimed visits made for a combination of export promotion and other activities – e.g. importing, post contractual matters and holidays – will generally be apportioned according to eligible versus ineligible days, especially where the ineligible activities exceed 10 per cent of the expenditure claimed.

**EXAMPLE 1:**

The applicant’s employee made a ten day overseas visit where five days were spent in China for an approved promotional purpose and five days were spent on importing activities in Singapore. The air fares expense would be apportioned 50 per cent eligible and 50 per cent ineligible.

However, there are a number of cases where an applicant pays for the airfare of one of its employees to undertake eligible export promotion and then permits this employee to take some leave overseas before returning to Australia. Where an applicant can clearly demonstrate that an applicant travelled for an approved promotional purpose, that the employee’s holiday was short term and incidental to the marketing visit and that the employee made no contribution to the airfare cost, Austrade may allow the claimed airfare in full.

**EXAMPLE 2**

The applicant’s employee travels from Sydney to UK for an approved promotional purpose. This work takes 14 days after which the employee is given permission to remain in the UK for five days for private purposes. If third party evidence confirms the eligibility of the 14 days’ work, Austrade will allow the full airfare.

**EXAMPLE 3**

The applicant’s director and spouse travel together to Europe for a fortnight. They make a number of appointments with potential overseas customers but these take no more than a few days. The rest of time is not able to be substantiated but appears to have been largely spent on holiday activities. The air fares in this case will be apportioned on an eligible days versus ineligible days basis.

**Daily visits allowance**

5.5.8 There is no provision for actual accommodation and entertainment expenses and other general non-transport expenses to be allowed under the EMDG Act where the travel is undertaken by the applicant or its agent to a place outside Australia. However, subsection 34(4) of the EMDG Act provides for an overseas visit allowance (OVA) of $350 for each “working day” devoted to an approved promotional purpose up to a maximum of 21 days for each visit.

Where travellers represent two or more EMDG applicants, the OVA will be apportioned so that it does not exceed $350 per day for the combined EMDG applications. It is up to the traveller to allocate time between the applicants so that no more than $350 per day up to the maximum of 21 days is claimed by the applicants combined.

5.5.9 A “working day” is taken to be any day primarily devoted to furthering an “approved promotional purpose”. This will include travel days where the travel is integral to undertaking promotional activities. For eligible visits, Austrade will allow one day for the day of departing Australia and one day for the day of returning to Australia, regardless of the times of departure and arrival.
5.5.10 The daily allowance is claimable for “working days” in the grant year only. If the duration of a marketing visit crosses over two grant years, only the days spent on an approved promotional purpose in the particular grant year being assessed are claimable.

5.5.11 Applicants claiming for consultants fees (under expense item 1B) have the option of claiming the $350 daily allowance for the consultant’s overseas trips or else claiming reasonable and actual accommodation/entertainment costs incurred.

Ineligible expenses

5.5.12 No transport expenses related to an applicant’s overseas representatives can be allowed under the Item 2 expense category.

5.5.12.1 Ground transport expenses, such as taxi, bus and train fares and car hire are not eligible expenses for the marketing visits category. Other travel expenses such as travel insurance and visa fees are also not eligible expenses.

5.5.13 The daily visit allowance does not apply to travel undertaken within Australia. It does not apply to travel related to promoting exports to New Zealand or North Korea, or to Iran up to and including 17 January 2016.

Travel expenses where relatives travel together or meet together during overseas visits

5.5.14 Subsection 34(6) of the EMDG Act provides that where an applicant or an applicant’s agent undertakes a marketing visit outside Australia and is met by a relative who is also travelling on the applicant’s behalf, only the travel expenses relating to one person are claimable unless both have been full-time employees of the applicant for at least one year prior to the visits.

5.5.15 Section 107 of the EMDG Act defines the term “relative”. This is:

(a) a spouse of the individual; or
(b) any individual who is, or is a spouse of, a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of that individual.

n.b. the Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008 provides relevant definitions.

Note: A first cousin is not considered to be a lineal descendant, and therefore not considered to be a relative.

5.5.16 A partner who has worked full-time in a partnership, or a director who has worked in a company on a full-time and continuous basis for at least one year up to when the travel is undertaken, will be regarded as a permanent employee for these purposes notwithstanding that they do not receive a set wage or salary.

5.5.17 Where a traveller worked full-time for a previous business which has undergone a change in ownership and is therefore deemed under section 94 of the EMDG Act to be continued by the current applicant, the total length of full-time service with both the current and previous applicant may be considered to have been spent with the current applicant.

5.5.18 Where an applicant’s business has been operating for less than one year and there are no section 94 considerations, applicants will not be able to claim for more than one relative’s fares where the relatives travel together.

Domestic travel and accommodation costs related to international marketing visits

5.5.19 This guideline clarifies Austrade’s policy position where marketing visit claims include air fares and daily overseas visit allowance for time spent travelling within Australia to connect with international flights.
Subsection 34(4) of the EMDG Act 1997 provides that $350 for each day spent during any overseas marketing visit on an approved promotional purpose is to be an allowable expense for grant calculation purposes. As a general rule, domestic travel and accommodation costs will be covered where the costs are linked to meeting international flights being undertaken for export promotional purposes.

Austrade will allow any air fares expenses incurred by the applicant which are directly attributable to connecting with an international flight being undertaken for eligible export promotional purposes.

In calculating the $350 per day daily allowance, Austrade will consider the international visit to commence when the applicant’s traveller departs home to meet the particular international flight. Similarly, the visit will end for the purposes of the $350 per day calculation when the traveller returns home.

The arrangements for travelling to and from the airport should be as direct as reasonable. The $350 per day allowance is only payable in relation to travel time.

**EXAMPLE:**

The applicant travels from a regional centre in NSW to Sydney by plane on 1 July and, being required to leave for USA at 7am 2 July, stays at a Sydney airport hotel that night. Where the marketing visit is made for eligible purposes, Austrade will allow the air fares of the traveller and will start the $350 per day calculation on 1 July, thus providing EMDG support for the required overnight accommodation.

**ITEM 3**

Guidelines 5.6.1 to 5.6.11 have been deleted.

**ITEM 4 – FREE SAMPLES**

Extract from section 33 of the EMDG Act

<table>
<thead>
<tr>
<th>Claimable expenses in respect of eligible promotional activities</th>
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<tbody>
<tr>
<td>Column 1</td>
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<tr>
<td>Item</td>
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Section 33(4) - If an applicant in relation to a grant year was a grantee in respect of any previous grant year, the applicable limit for the applicant is $15,000 for that grant year.

Section 33(5) If:

an applicant in relation to a grant year was not a grantee in respect of any previous grant year; and
the immediately preceding financial year is not the financial year commencing on 1 July 2015;
the applicable limit for the applicant is $15,000 for that grant year and that immediately preceding financial year.
Note: If the immediately preceding financial year is the financial year commencing on 1 July 2015, then there is no applicable
limit for the applicant for the grant year.

Application of the cap on free samples

For claims lodged from 1 July 2017, a cap of $15,000 has been placed on the free sample category. Transitional
arrangements are in place so that the cap on this category does not apply to first year applicants combining two
years of expenditure, and where the first year of the two years commenced on 1 July 2015.

EXAMPLE 1

Company A will make its first claim for EMDG assistance in August 2017. As a Year 1 claimant, it has decided
to combine expenses incurred in the 2015–16 and 2016–17 financial years.

One item of expenditure for Company A is $30,500 for the cost of providing free samples across both the 2015–
16 and 2016–17 financial years. Company A would not be subject to a cap on the free sample expenditure
category for this claim only. This is because Company A is a first year claimant, combining two years of
expenditure and the first year of the claim is the financial year commencing on 1 July 2015.

EXAMPLE 2

Company B will make its first claim for EMDG assistance in August 2017. Although it is a Year 1 claimant, it
has decided to only claim expenses incurred in the 2016–17 financial year. Company B’s free sample
expenditure is $20,000, but its claim would be subject to the $15,000 cap.

However, applicants like Company B, who have incurred expenses of over $15,000 in the free sample category
during a grant year should include the entire amount of otherwise eligible expenditure on their claim form – not
just $15,000 of it.

General eligibility requirements

5.7.1 Only final or finished product samples will be eligible. The samples must be the same as any product which
would actually be provided under any future sales agreements.

The recipient of the sample must be a non-resident of Australia. Free samples of goods or services must be
provided outside Australia. Free samples of eligible tourism services must be supplied in Australia.

It is essential that the sample be provided free of charge. Where any money or consideration is received or
receivable as a result of providing a sample, the cost of the sample will not be eligible.

Where samples (except tourism samples) are distributed by the applicant both in and outside of Australia, only the
portion of actual costs attributable to the samples distributed outside of Australia may be claimed.

Eligible expenses

5.7.2 The EMDG Act allows expenses attributable to actually providing samples rather than expenses incurred in
respect of samples which may be provided at a later date. Therefore, costs of free samples are claimable in the
claim period in which the samples were given away and not necessarily in the grant year in which they were
produced.
5.7.3 Expenses incurred in providing a sample for testing or clearance in accordance with the requirements of an overseas government or marketing authority will be eligible, provided the sample is:

(a) not a prototype; and

(b) is scrapped or given away for an eligible purpose.

5.7.4 Only expenses which are attributable to the actual cost of providing the sample are claimable. This includes the costs incurred to deliver the sample such as postage or freight.

5.7.5 The cost of samples of manufactured goods is to be based on the direct costs of manufacturing and may include factory overhead loadings and labour costs. Administration and selling overheads are ineligible. No margins or profit amounts are claimable.

For the wine industry, Austrade will allow a standard $5 per bottle amount except where there is evidence that the applicant exports or offers the wine for less than this amount. Applicants promoting wine exports continue to be able to claim the actual cost of producing wine if they wish. Applicants claiming expenses of wine samples where the wine is offered for less than $5 per bottle will need to claim actual manufacturing costs.

5.7.6 Samples sent overseas for distribution by an agent or by the applicant’s overseas representative will be allowed only if it can be substantiated that the samples have been or will be actually given away by the agent or representative for an approved promotional purpose. In a literal sense, title in goods passed to an overseas agent remains with the applicant. However, in assessing claims where samples are given to an agent or a representative, Austrade will consider the expendability of the product, the reasonableness of the claimed expenses and the treatment of such stock in the applicant’s books of account.

Ineligible expenses

5.7.7 Demonstration equipment will not be claimable as free samples because it is not an exact representation of what the applicant is promoting.

Applicants giving away or loaning demonstration equipment to their overseas representative or distributor will not be able to claim in-house expenses under the “free samples” category. Some expenses may be claimable under item 6 of the section 33 table (provision of advertising material) – refer to example 3 at guideline 5.8.9.

**EXAMPLE 1**

An applicant is promoting mineral water. It gives away both bottles of mineral water together with fridges to potential overseas distributors. The fridges are given away as demonstration equipment. Only the cost of the mineral water is an eligible expense. The cost of the fridges is not a sample of the promoted product and is therefore not eligible.

**EXAMPLE 2:**

A furniture manufacturer that gives away swatches of fabric or leather to potential customers is not considered to be giving away a free sample because the give-away is not the actual product being promoted by the applicant.

5.7.8 Expenses for free samples will not be allowed where the samples are given away as a discount or for a sales-related adjustment to the recipient.

5.7.9 Expenses relating to product or prototype development or research are not eligible free samples expenses.
5.7.10 Expenses of overseas testing to ensure products meet accreditation standards of foreign countries will be ineligible except for the product cost of the samples (see guideline 5.7.3).

5.7.11 For applicants promoting any goods containing paid advertising such as magazines, Austrade considers that the advertising amounts attributable to the claimed free samples expenses must be deducted under subsection 46(1) of the EMDG Act. Refer to example 3 at guideline 5.18.3.

Eligible tourism service samples

5.7.12 Subsection 25(2) of the EMDG Act and Schedule 1 of the EMDG Regulations 2018 defines eligible tourism services.

5.7.13 Samples must be provided in Australia to foreign residents for an approved promotional purpose (refer to item 4(b) of the table at section 33 of the EMDG Act).

EXAMPLE

A bus tour operator provides free samples to an Australian inbound tour operator which in turn gives the services (whether or not packaged with other services) to foreign residents. The bus tour operator bears the cost of providing its services. The bus tour operator cannot claim free samples expenses because it did not provide the samples to an overseas resident.

5.7.14 Inbound tour operators who “buy in” tourism amenities from other Australian providers, and who subsequently give these away free of charge (FOC), are able to claim the purchase cost where they are at arms’ length from the provider.

5.7.15 Where the applicant is providing a self-owned tourism service as an FOC, (i.e. not bought-in), the applicant has the option of claiming for directly attributable costs incurred for particular samples or claiming a prescribed percentage of the “retail rate”.

5.7.16 Where applicants provide a free return air fare to and from Australia to a recipient, Austrade may allow the fares expenses where the circumstances and cost are reasonable.

Businesses claiming directly attributable costs for tourism service samples

5.7.17 The key assessment principles for assessing tourism service sample expenses are that:

- no selling or administrative overheads will be allowed
- no margins for profit will be allowed
- only direct fixed or variable expenses of providing a sample of an amenity will be allowed
- both bought-in and in-house costs are claimable.

5.7.18 Depending on the type of service, the eligible expenses may include:

- lease costs attributable to an amenity. Where an applicant promotes a hotel room, this will cover the costs attributable to the room only. No share of any lease costs for other parts of the hotel such as the office, foyer, conference room, outside entertainment areas will be allowed. Capital depreciation is ineligible
- directly attributable labour. For example, housemaid’s expenses for a room only in the case of hotels and resorts may be eligible, as would drivers/tour escorts labour expenses in the case of a bus tour
- directly attributable materials. For example, hotel room supplies, petrol in the case of a bus tour, and cost of food ingredients in the case of a restaurant
- power expenses attributable to the provision of the amenity. In the case of a hotel room, it will be the expenses attributable to the room only
- pro rata insurance directly attributable to the particular tourism amenity
- additional laundry expenses incurred in providing the FOC.

**EXAMPLE:** A hotel providing free of charge (FOC) accommodation to foreign residents incurs expenses on:

<table>
<thead>
<tr>
<th>Expense</th>
<th>Eligibility for EMDG for an FOC on a per room basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Front office wages</td>
<td>Eligible on a pro rata basis</td>
</tr>
<tr>
<td>Porters’ wages</td>
<td>Eligible to the extent to which the porter is used by the visitor</td>
</tr>
<tr>
<td>Housekeepers’ wages</td>
<td>Eligible on a per room cost basis</td>
</tr>
<tr>
<td>Duty Managers’ wages</td>
<td>Ineligible</td>
</tr>
<tr>
<td>Reservations wages</td>
<td>Ineligible</td>
</tr>
<tr>
<td>Labour on-costs</td>
<td>Eligible to the extent that eligible labour is allowed.</td>
</tr>
<tr>
<td>Cleaning supplies</td>
<td>Eligible on a per room usage basis</td>
</tr>
<tr>
<td>Electricity and gas</td>
<td>Eligible on a per room usage basis</td>
</tr>
<tr>
<td>Guest supplies/personal items</td>
<td>Eligible on a per room usage basis</td>
</tr>
<tr>
<td>Guest transport</td>
<td>Eligible if transport is provided to the visitor as part of the FOC.</td>
</tr>
<tr>
<td>Printing and stationery</td>
<td>Eligible to the extent that printing and stationery relates to the room FOC.</td>
</tr>
<tr>
<td>Repairs and maintenance</td>
<td>Eligible on a pro rata basis – actual costs divided by number of rooms</td>
</tr>
<tr>
<td></td>
<td>(including non-accommodation ones). Applicant to apportion reasonably</td>
</tr>
<tr>
<td></td>
<td>given that maintenance costs may be higher for non-accommodation</td>
</tr>
<tr>
<td></td>
<td>areas.</td>
</tr>
</tbody>
</table>

**Businesses claiming prescribed percentage of “retail rates” for tourism services samples**

5.7.19 Applicants have the option of claiming the following percentages of advertised prices for their particular amenities. Where this option is chosen, a satisfactory basis must be shown for demonstrating the advertised price or cost of the particular amenity.

**Note:** Even though the advertised price is likely to include a GST component, the percentage claimed for EMDG purposes is a notional amount and no adjustment will be made for the GST component.

**Eligible Tourism Service Samples**

<table>
<thead>
<tr>
<th>Service</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Passenger transport by land</td>
<td>20%</td>
</tr>
<tr>
<td>Passenger transport by water</td>
<td>20%</td>
</tr>
<tr>
<td>Passenger transport by air</td>
<td>20%</td>
</tr>
<tr>
<td>Accommodation for at least one night</td>
<td>20%</td>
</tr>
<tr>
<td>A tour (Based on advertised cost of tour)</td>
<td>20%</td>
</tr>
</tbody>
</table>
Admission to a place, for entry to which payment is required, of any of the following kinds:

<table>
<thead>
<tr>
<th>Kind</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>A place that has one or more outstanding natural features, or is of</td>
<td>20%</td>
</tr>
<tr>
<td>historical interest</td>
<td></td>
</tr>
<tr>
<td>a park, nature research or botanical garden</td>
<td>20%</td>
</tr>
<tr>
<td>a wildlife sanctuary or zoological garden</td>
<td>20%</td>
</tr>
<tr>
<td>a museum, art gallery or craft centre</td>
<td>20%</td>
</tr>
<tr>
<td>a place that is, or provides an amenity appropriate to tourists</td>
<td>20%</td>
</tr>
<tr>
<td>(Based on cost of admission)</td>
<td></td>
</tr>
<tr>
<td>A service provided at a restaurant (Based on advertised price)</td>
<td>50%</td>
</tr>
</tbody>
</table>

Eligibility issues associated with claiming free samples of services

**5.7.20** As with other applicants giving away samples free of charge to the recipient and claiming their cost, the basic eligibility requirements are that the service being provided free of charge must be:

- an exact specimen of the services being promoted by the applicant
- given away primarily for an approved promotional purpose within the meaning of section 37 of the EMDG Act
- provided outside Australia (unless it is a sample of a tourism service).

**5.7.21** For service providers to give away a sample which is an exact specimen of their promoted services, the recipient of the sample must be able to use and evaluate the sample in the same way that recipients of samples of manufactured products or internal tourism services would normally do. A free sample by its very nature is something generic that could be distributed to a number of potential clients for their use and evaluation.

**5.7.22** Austrade will differentiate between an eligible free service sample and the following activities:

- product development work where a service provider gives away material which has the potential to be incorporated into a final product and to be sold to the recipient at a later time
- tendering and quoting activities
- advertising-related activities.

**5.7.23** Free samples expenses for service providers would be ineligible where future work may be won subject to a contract requirement of a satisfactory free of charge completion of an earlier stage of a particular overseas development project.

**Samples of intellectual property and know-how**

**5.7.24** Austrade does not consider it possible to provide an actual sample of intellectual property or know-how. The idea of giving away intellectual property or know-how is at odds with the idea of promoting their sale and disposal.

Applicants promoting intellectual property or know-how generally do so by demonstrating their product with models or production units that incorporate the intellectual property or know-how. Alternatively, they may customise a software package for a specific overseas client to demonstrate the way it works.

The expenses of such promotional activities are not free samples expenses because the applicant’s product is not given away. Eligible expenses may be allowable in the other expense categories including item 6 advertising and item 5 trade fairs (refer to guidelines 5.8.7 and 5.8.2).
Assessment principles for performance arts or cultural exporters claiming expenses under free samples

5.7.25 The EMDG Act provides for applicants to be able to claim free samples expenses where a product (good or service) is given away free of charge to a foreign resident. Some cultural exporters (bands, orchestras, theatre companies, dance companies etc) promote themselves to overseas clients by undertaking overseas tours where they give away free services.

Subsection 46(1) of the EMDG Act requires that Austrade should deduct from eligible expenses any amounts of income received by the applicant in the course of carrying out particular promotional activities. This guideline only applies to performance arts exporters who are promoting services. Austrade guidelines relating to the eligibility of free samples expenses for intellectual property exporters are different to those that apply to goods and services exporters (refer to guideline 5.7.24).

What constitutes an eligible free sample?

To qualify as a free sample, Austrade requires that the applicant must receive no income for the claimed overseas tour activity and if this is the case, expenses can be assessed at item 4 of the section 33 table in the EMDG Act. The tour must also be conducted for the purposes of promoting an eligible income stream.

Austrade will not assess an activity to be a free sample where any of the following types of income is received or is receivable:

- performance income
- merchandising income – general artist or tour specific types
- contras/offsets (e.g. free accommodation) for the tour where the overseas recipient of the services directly or indirectly gives the applicant a non-cash benefit in return for providing the services.

**EXAMPLE 1**

An applicant performs concerts free of charge for an overseas client. The only ‘income’ it receives for offsetting tour expenses is from an Australian airline which provides free overseas travel. If the airline provides free travel through its arrangements with the applicant (say sponsorship), the applicant is still considered to have provided a ‘free sample’. However, if the airline provides free travel through arrangements made with the overseas recipient of the ‘free sample’ (say the overseas sponsor or a festival organiser), it will not be a ‘free sample’.

**EXAMPLE 2**

An applicant performs concerts at an overseas festival. It contracts with the festival organisers to provide the free services. The festival organisers use a separate company to manage festival events. This company arranges for the applicant to have free accommodation for the festival activities. In this case the applicant is considered to have received some non-cash amount in relation to providing the services and Austrade will not assess expenses under ‘free samples’.

Applicants may sometimes travel overseas to provide free samples (as defined above) for one overseas tour promoter but also to separately perform income generating concerts either as a self-promoter or for a different tour promoter. In this case, Austrade will separate out the activities. Austrade will allow the expenses of overseas free performances as ‘free samples’ where there is a demonstrated basis to do so.
**EXAMPLE 3**

The applicant travels to the USA to do concerts solely for one tour promoter. Some of these concerts are performed free of charge but some are performed for income. This tour and the applicant’s arrangements with the promoter would be regarded as one discrete promotional activity and would not assessed as a ‘free sample’ because income is received.

**EXAMPLE 4**

The applicant travels to the USA only and self-promotes its concert tour – that is, it makes its own arrangements, books its venues and promotes its concerts. Some of these concerts are free but some are performed with the applicant receiving the concert income. Austrade would assess this tour as one discrete promotional activity and would not assess it to be a ‘free sample’.

**EXAMPLE 5**

Applicant travels to Singapore and performs for a fee which fails to cover the Singapore expenses. Without returning to Australia, it travels to Japan where it performs concerts for no charge (with no contras or offsets). The Japan leg expenses would be assessable as a ‘free samples’ expense. The Singapore expenses may be assessable under the loss-making promotional tours rules (see 5.18.6) depending on whether Austrade assess the Singapore leg to be an approved promotional activity.

**Note:** Applicants undertaking promotional overseas tours that receive some income during the tour may be eligible under ‘loss-making’ provisions – refer to 5.18.6.

**5.7.26** Under the EMDG Act, approved body applicants will not be entitled to claim ‘free samples’ expenses.

**ITEM 5 – EXPENSES IN RELATION TO TRADE FAIRS, SEMINARS, IN-STORE PROMOTIONS, INTERNATIONAL FORUMS, PRIVATE EXHIBITIONS OR SIMILAR PROMOTIONAL EVENTS**

Extract from section 33 of the EMDG Act

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item</td>
<td>Activity</td>
<td>Expenses</td>
</tr>
<tr>
<td>5</td>
<td>participation by the applicant or its agent in a trade fair, seminar, in-store promotion, international forum, private exhibition or similar promotional event to the extent to which this is done for an approved promotional purpose</td>
<td>all reasonable expenses incurred by the applicant in payments to persons that, in Austrade’s opinion, were not closely related to the applicant</td>
</tr>
</tbody>
</table>
What is meant by the terms trade fair, seminar, in-store promotion, international forum, private exhibition or similar promotional event?

5.8.2 “Trade fairs” means any organised activity involving multiple exhibitors promoting their products. “In-store promotion” or “private exhibition” means any organised activity where the applicant displays its own products in a retail outlet or showroom situation. A “seminar” or “international forum” includes any organised event involving multiple participants promoting or presenting/exchanging information about a product, service or industry related to that of the applicant.

Austrade will allow eligible expenses in relation to promotional events ranging from formal trade fairs to less formal and private exhibitions.

The key eligibility requirement is that an applicant should incur expenses directly related to displaying or promoting its products at the particular event.

(Note: These types of promotional events may be held in Australia or overseas.)

5.8.3 Eligible expenses in these categories may include:

- participation fees/registration fees
- stand/booth rental charges
- the cost of freighting materials
- bought-in costs of producing demonstration or display equipment if it can be shown by the applicant that such equipment was used for approved promotional purposes (n.b. costs of producing goods promoted for sale by the applicant will not be allowed under this expense category. These costs will be assessable under ‘free samples’ expense rules).

Costs associated with a virtual office, such as an overseas phone answering and call diversion service, are likely to fall within the overseas representation, communications or trade fairs/promotional events section 33 table expense categories if incurred for an approved promotional purpose.

Serviced office costs where an applicant rents meeting rooms or other space may be allowed where the rental is for an eligible promotional activity such as a trade fair or a similar promotional event.

5.8.4 The following types of expenses will not be allowed under this category:

- payments to persons closely related to the applicant
- capital items
- non-promotional product development expenses
- non-promotional activities relating to in-store promotion expenses such as expenses of buying access to supermarkets or of holding stock in retail outlets
- expenses relating to promotional events where the expenses are billed to and paid by the overseas representative (refer to 5.4.37 and guideline 5.8.6 for clarification).

EXAMPLE 1

An applicant participates in an overseas in-store supermarket promotion. It is charged a fee for:

- space hire
- hire of display stands (with applicant’s logo although primarily provided to hold the applicant’s products)
- labour of promotional staff
- the provision of cardboard advertising posters.

In addition, it incurs expenses on giving free product samples to overseas residents. All costs would be eligible. Austrade will not, however, allow any expenses relating to obtaining the rights to sell into a supermarket or any expenses that are for obtaining a higher profile (more expensive shelf space) for an applicant’s goods.
Part 5 – Eligible Expenses

Eligible Expenses

EMDG Administrative Guidelines – July 2018

Page 26

Apportionment of item 5 expenses

5.8.5 Some promotional events claimed for by applicants will involve promotion to potential Australian/New Zealand clients (ineligible) as well as to other foreign clients (eligible). Applicants will need to demonstrate a basis to apportion out any expenses relating to the ineligible component.

Item 5 Expenses where the applicant’s overseas representative pays for the expense

5.8.6 There will be cases where expenses for trade displays may be paid for by the overseas representative but will be assessed as item 5 expenses. Guideline 5.4.37 explains Austrade’s policy position for those cases where circumvention of the $200,000 item 1A overseas representation cap may be an issue.
**EXAMPLE 1**

Where expenses are paid by the overseas representative to an independent third party for an applicant’s participation in a trade fair they may be claimed either at (b) in item 1A or at item 5 of the expenses table.

Note: Where the representative in the above example is also a distributor, Austrade may assess these expenses as item 1A expenses on the basis that the activity is that of the representative rather than the applicant.

**EXAMPLE 2**

An applicant’s overseas representative in Singapore is a branch office and pays third parties for trade fair expenses and is reimbursed by the applicant. In this case, Austrade is satisfied that the expenses are eligible under item 5 of the section 33 table in terms of guideline 5.4.37. Item 5 (column 3) at the section 33 table requires that expenses are eligible only if they are made to a person not closely related to the applicant. Even though the representative is closely related in this case, the expenses will be eligible because the representative is considered to be acting as an intermediary between the applicant and the third party payee.

**ITEM 6 – EXPENSES IN RELATION TO THE PROVISION BY THE APPLICANT OR ITS AGENT OF PROMOTIONAL LITERATURE OR OTHER ADVERTISING MATERIAL**

Extract from section 33 of the EMDG Act

<table>
<thead>
<tr>
<th>Item</th>
<th>Activity</th>
<th>Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Provision by the applicant or its agent of promotional literature or other advertising material (whether the literature or material is in an electronic form or any other form) to the extent to which this is done for an approved promotional purpose</td>
<td>All reasonable expenses incurred by the applicant in payments to person that, in the opinion of the CEO of Austrade, were not closely related to the applicant.</td>
</tr>
</tbody>
</table>

**5.8.7** Promotional literature or other advertising material includes:

- brochures, flyers, catalogues, and price listings
- television advertising, promotional videos, billboard advertising, store posters, and magazine advertising
- internet promotion
- the bought-in costs of producing material given away to advertise the applicant’s capabilities (refer to examples 1 and 2 below)
- small value gifts which contain the applicant’s logo
- sponsorship of a product or event where the applicant receives the right to display its logo or other advertising signage.

**5.8.8** All reasonable expenses incurred to produce and provide the advertising or promotional material may be claimed. For example:

- printing, layout and design costs
- translation fees
- “placement” or “time slot” charges
• postage/courier type expenses that relate to the distribution of advertising or promotional material (these costs may be claimed either under item 3 or item 6 of the section 33 table and Austrade will generally assess them under item 6 if they are claimed under this item).

5.8.9 **Ineligible** expenses would include:

• sponsorships of sports people or sporting teams in certain cases (see guidelines 5.8.13 and 14)
• payments to closely-related persons
• capital items
• sales tax
• gifts which do not include the applicant’s advertising logo
• manuals provided with sold products such as user or maintenance manuals
• expenses of prizes and trophies – these are not generally eligible because they are not advertising material or promotional literature
• certain trade fair, literature and advertising expenses billed to and paid by the overseas representative (refer to guideline 5.4.37 for clarification)
• something that is produced for the purpose of affixing to a product for sale and which merely identifies the product, identifies it as having a particular origin, identifies it as having come from a particular manufacturer or supplier or identifies it as having a particular characteristic, will not be accepted as “promotional” or “advertising”.

**EXAMPLE 1**

An applicant is in the business of making TV shows and promotes services export income. It puts together a pilot episode (claiming bought-in costs only) which is given away to potential overseas clients. This is not regarded by Austrade as a sample because the applicant is not promoting that particular pilot.

However, the bought-in expenses incurred in making the pilot episode are potentially eligible as the provision of advertising material. Austrade would need to be satisfied that the expenses were not recouped in any subsequent sale of the material included in the pilot episode.

**EXAMPLE 2**

An applicant promotes the sale of magazines (goods). It compiles CDs which contain prior years’ magazine editions and gives the CDs to potential overseas customers. As with example 1 above, Austrade would not regard the cost of CDs as a free sample because it is not an exact likeness of what the applicant is promoting.

However, Austrade would assess the bought-in cost of making and distributing the CDs as an eligible item 6 advertising expense.

**EXAMPLE 3**

An applicant promotes campervan leasing services as an internal tourism service and loans a campervan to its overseas representative for demonstration and advertising purposes. The bought-in expenses relating to the campervan may be assessed as eligible advertising expenses. It will not be eligible under “free samples” and so salary expenses for activities such as fitting out the vehicle would not be eligible.
Expenses where the applicant’s overseas representative pays for the expense

5.8.10 There will be cases where expenses for advertising may be paid for by the overseas representative but will be assessed as item 6 expenses. Guideline 5.8.6 and its example are relevant.

Expenses where promotional activities are conducted in Australia

5.8.11 Claimed expenses might include:

- advertising in publications distributed in Australia
- advertising in airline in-flight magazines
- foreign language brochures.

Austrade will generally apportion advertising expenses to the extent that the publications are read by foreign residents. On an exceptions basis, applicants that can show they have no domestic market may be entitled to receive EMDG support for the full cost of advertising to foreign residents in Australia.

With advertising expenses claimed for any publication specifically distributed to the tourism market in a particular location, Austrade looks for a sound and reasonable basis for estimating apportionment – such as the industry visitor numbers statistics that relate to measuring the percentage of foreign tourists in a city or region during a grant year. Austrade will not generally allow advertising expenses on commercial radio, television, billboards, or daily newspapers.

Apportionment of item 6 expenses

5.8.12 Some advertising material such as catalogues and brochures will be distributed for eligible and ineligible markets (Australia, New Zealand and North Korea, and up to and including 17 January 2016 for Iran). The costs of producing and distributing this material will be apportioned. This apportionment would generally be done according to the ratio of numbers distributed to foreign residents compared to the total material printed.

The apportionment would generally be based on total costs (excluding GST) without distinguishing between fixed and marginal costs. Any apportionment must include an assessment of the intended usage of the fixed costs for subsequent reprints. If the fixed costs of setting up for producing advertising material are high in relation to the run-on costs of additional copies, Austrade may assess the fixed and the marginal costs separately. Each situation will be considered on its merits.

Sponsorship

5.8.13 Where a sponsorship is directly linked to the provision of advertising material or promotional literature, certain expenses may be eligible. For example, Austrade may allow expenses of an applicant in sponsoring an event where the applicant receives the right to display its logo or other advertising signage.

5.8.14 Similarly, Austrade may allow the expenses of sponsoring sports and entertainment figures where the sponsorship is directly linked to the provision of advertising material or promotional literature.

Internet expenses

5.8.15 EMDG and website expenses

Exporters’ website expenses may be eligible for EMDG support where it is demonstrated to be for the provision of advertising material. The purpose of websites will vary and will depend on the type of business activity carried on by an applicant.

Austrade’s broad approach to determining eligibility of claimed website advertising expenses is to determine/calculate the following:
1. **Types of expenses that may qualify**

Expenses potentially eligible for EMDG support depend on the purpose to which the website is put and include:

- website set up costs, including design of site
- website annual operation and service fee
- website hosting
- domain name registration (low value and non-capital only) – n.b. these expenses will be ineligible where applicant trades in domain names
- advertising links to other websites, subject to section 49 considerations – refer to guideline 5.21.4.

2. **Purpose of website and whether, and if so how, it generates income for the applicant**

_Are website development expenses capital and ineligible for EMDG support?_

As a general rule, where claimed expenses are for adding to the structure or extending the capacity of an applicant’s business or otherwise extending the profit yielding structure of its business, the expenses will be ineligible – section 41 of EMDG Act refers.

Austrade will check the development agreement between applicant and website developer. This should define the scope of the website to be developed so that Austrade can determine whether it should be treated as capital and as the creation of intellectual property.

_Applicants whose website expenses are ineligible because they are primarily for earning direct income_

Applicants which earn income via their websites may be considered to have been repaid some or all of the claimed expenses in terms of section 46 of the EMDG Act.

Some applicants’ website development, maintenance and hosting expenses are primarily incurred to put in place an income earning structure. In this case, the majority of the site will be devoted to e-commerce activities, e.g. where all or a substantial portion of the site is blocked to all but authorised users, clients or members, or where the website has expensive functionality that enables the applicant to run a business.

Examples of income generation that may cause the application of section 46 of the EMDG Act will be where:

- The website is used as the medium for primary delivery of the applicant’s services direct to client.
- The applicant’s main source of income from the website is advertising income from clients.
Applicants such as on-line gambling businesses or membership-based organisations that predominantly use their website as the main basis of their business will be limited to claiming those expenses directly related to promoting the existence of and usage of the website to foreign residents in eligible overseas markets.

**EXAMPLE 1**

Applicant provides information to subscription-paying members. Its website contains some promotional pages but is largely set up to deliver services. Its grant year expenses were $50,000 for website maintenance and hosting and $10,000 for advertising links. Its grant year subscription income was $100,000.

Austrade will disallow the $50,000 website maintenance and hosting costs as being a cost of providing its subscription services.

The $10,000 advertising expenses are potentially eligible.

**EXAMPLE 2**

Applicant has set up numerous websites that provide general information or chat room facilities to particular groups of people. The only income earned from these websites is from advertisers who pay for links to their own products. This income is from the number of clicks on their advertisements and or from commissions on sales achieved by the advertisers. The applicant does not sell products promoted on its websites as principal.

One website is, for example, set up as an information and chat room site for golfers. Golf club manufacturers and golf resorts from around the world advertise on the website. The applicant receives income for each click on the manufacturers or resorts web link and or commission on sales achieved by the manufacturers and resorts. The applicant’s EMDG claim includes its own payments to Google to promote its golfers website.

Austrade will not allow these Google advertising expenses because they are incurred as part of delivering a service to the applicant’s advertising clients.

Only those expenses that the applicant incurs promoting to its own potential clients, i.e. to businesses outside Australia/New Zealand and North Korea, and outside Iran up to and including 17 January 2016, that are potential advertisers on its own websites, will be eligible.

**Applicants whose websites are partly promotional and partly for ineligible trading activities**

Applicants seeking to claim website-related expenses must demonstrate how the website is used to promote new business to clients as well as how it is used to facilitate e-commerce activities.

The onus of proof for determining the eligible percentage of website related expenses lies with the EMDG applicant.

In some cases applicants will be able to show a basis for claiming the expenses of developing and maintaining a separate promotional part of its website. In others they may claim an overall percentage of the total costs.

**Are claimed expenses a pre-payment?**

There may be cases where the web site development work is claimed for in one grant year when there was either no business activities or only a negligible level of business activity carried out to enable Austrade to assess the purpose of the web site. Section 59 of the EMDG Act (pre-payments of expenses) may be relevant in some of these cases to make expenses eligible in a year after the grant year. Alternatively, even if the web site development
service was provided in the particular grant year, Austrade may need to defer assessment until a later year when a clearer view of the uses to which a web site is put can be obtained.

3. Calculate promotional expenses

When Austrade is satisfied that some website expenses are eligible (subject to the above issues), the promotional share will be determined.

**EXAMPLE 3**

Applicant promotes eligible services and uses its website for marketing purposes. Its website is simple and contains product testimonials and other marketing information. It can be used to take orders but is not used to deliver services (except for outgoing emails).

100 per cent of bought-in expenses for website development, maintenance and hosting are eligible.

**EXAMPLE 4**

An applicant, a book retailer promoting eligible printed books, pays a website developer $100,000 for a website that has some e-commerce (trading) functionality as well as some purely promotional pages. The website developer shows that 20 per cent of its fee was for designing the promotional pages. The applicant can also demonstrate that 40 per cent of the website hits are on the promotional pages.

Austrade will allow 20 per cent of the website development with the balance being ineligible as either a capital expense or as not being for an approved promotional purpose. It will also allow 40 per cent of the website maintenance and hosting expenses. The website development and maintenance costs may be further apportioned for promotion in ineligible markets.

Austrade will only allow promotional expenses where they promote additional product sales to existing or new overseas clients.

Austrade will not allow expenses that relate to providing promotional services to the applicant’s own clients (Australian or overseas).

**EXAMPLE 5**

Applicant website promotes its own products. The website also has links to Australian and overseas businesses that engage the applicant to promote their products via its website. These businesses pay the applicant on a per hit basis. As part of delivering this service as well as for the promotion of its own products, the applicant pays for Google advertising.

The applicant earns 40 per cent of its income from the businesses paying the applicant for advertising services.

Austrade will allow up to 60 per cent of the Google advertising expenses, after excluding promotion in ineligible markets.
Note: For exclude sales-related payments e.g. commissions in terms of section 49 of the EMDG Act please refer to administrative guideline 5.21.4.

4. **Eligible versus ineligible promotion (approved promotional purpose)**

Once the eligible promotional share of expenses is calculated, Austrade will allow the share which is incurred for an approved promotional purpose in terms of section 37 of the EMDG Act, i.e. where the applicant:

- promotes eligible products versus ineligible products
- promotes as principal
- promotes to eligible markets versus ineligible markets (Australia, New Zealand and North Korea, and up to and including 17 January 2016 for Iran).

Austrade will apportion the expenses at 1 above according to how the applicant’s website is used and after taking into account the general EMDG eligibility rules.

Austrade will consider any reasonable basis for apportionment. Measuring ‘hits’ to a website and ‘hits’ to particular parts of the website would be a suitable starting point.

**Websites and free samples of services**

A small number of EMDG applicants may use their websites to deliver services in such a way that they may qualify for free samples expenses under the EMDG Act.

Free samples of a service must be an exact replica of the service that the applicant promotes for sale. Expenses of providing a limited service that, for example, blocks access to some of the normal website pages or functions will not qualify as eligible free samples.

To be eligible for EMDG support, applicants will need to incur identifiable expenses of providing free samples. Expenses such as site development, maintenance, domain registration will not normally qualify for EMDG free samples support as these expenses are incurred as website overheads to enable the business to operate. These overhead expenses will normally be recouped from sales income.

However, costs such as additional website hosting costs and internal labour for enabling free access may qualify.

**Expenses of databases**

5.8.16 Applicants in some industries incur expenses of setting up a database of clients or potential clients. For example, hotel industry applicants commonly pay consultants a booking fee as part of setting up the database. Such fees are only eligible to the extent that the database is directly used for a mail-out or similar distribution of promotional material. Database fees will not be allowed to the extent that the database is used for administration or other non-promotional activities. The onus is on the applicant to demonstrate a basis for allowing an eligible component of such expenses.

Fees paid to consultant for setting up a database will not be eligible as item 1B (marketing consultants fees) because the fees are not for actually undertaking any market research.

**Prizes**

5.8.17 Expenses of prizes and trophies may in some circumstances be considered to be an expense of providing advertising material. To be eligible, there must be a direct link between the expense of a prize and the provision of advertising material. Expenses must be reasonable in the circumstances.

**EXAMPLE**

An applicant exports jewellery and arranges an exhibition in an overseas hotel. It promotes the exhibition by distributing leaflets. As well as promoting the exhibition, the leaflets promote a raffling of an item of jewellery as a door prize to take place at the exhibition. All exhibition attendees are entered in the raffle. The purchase of jewellery items is not a requirement for entry into the raffle. In this case, the expense of the door prize would be assessed as eligible.
Hotels claiming EMDG grants for expenses of generic or brand advertising

5.8.18 Guideline 5.4.38 addresses the issue of hotels claiming for overseas representation and marketing consultants expenses and related issues. This guideline provides assessment rules for hotel applicants that operate as Australian members of international groups and that claim for generic or brand advertising.

Given that the worldwide ‘hotel group’ members will each contribute marketing funds to their representative, Head Office, Consultants etc (the term ‘representative’ will be used for simplicity) according to their individual agreements, the representative will incur generic/brand promotion with possible additional direct promotion of particular hotels. How should a claim from an Australian ‘group’ member be assessed?

Austrade will apply the following formula for assessing claims:

1. examine representative’s profit and loss statement (P & L) to establish its income from all ‘group member’ marketing contributions
2. establish the percentage of these contributions applied to marketing activities (i.e. not all marketing income will be spent on marketing activities in relevant year)
3. establish the percentage of representative’s expenses that are for eligible EMDG expense categories
4. apply these apportionments to the applicant’s claimed payments to the representative
5. there may be a further apportionment based on the representative’s ineligible expenses for promotion of Australian/New Zealand business (unless the applicant can show that it does all of the sales promotion for these markets).

It follows that two types of documents are critical to being able to assess hotel claims. Firstly, the agreement between the applicant and its representative identifying the payable marketing contributions and secondly, the representative’s P & L identifying the marketing fee income and the expenses totals.

**EXAMPLE**

An applicant is a member of a worldwide group with 20 hotels. It contributes A$250,000 marketing contributions to its international marketing representative company in Switzerland

**Step 1:** The Swiss representative company receives in total US$5 million from all 20 hotels in the grant year.

**Step 2:** Examination of the Swiss company P & L shows that it only spent US$4 million of the US$5 million on marketing expenses (80 per cent).

**Step 3:** 75 per cent of the representative’s marketing expenses were promotional activities of a type conforming to the EMDG expense categories defined at the section 33 table. The eligible expenses include substantiated salary expenses for employees on marketing activities.

**Step 4:** Allow $250,000 x 80 per cent = $200,000 x 75 per cent = $150,000

**Step 5:** Because the Swiss representative was also responsible for marketing the Australian/New Zealand hotels, a further apportionment would have to be done, most likely on a ‘rooms basis’.

**Note:**

As with all claims involving overseas representation, there is a potential for applicants to transfer expenses out of ‘overseas representation’ into other expense categories, thereby circumventing the $200,000 ‘overseas representation’ expenses cap. Austrade will only allow transferred expenses where the promotional activity is clearly that of the applicant, as opposed to being that of the representative. Where a marketing agreement between a hotel
and its representative provides for the representative to undertake export promotion activities along the lines of the above scenario, Austrade would not transfer any expenses from the overseas representation expense category. Austrade will continue to apply the policy expressed in guidelines 5.8.6 and 5.4.37.

Hotel applicants or their EMDG consultants should provide the best available evidence to justify the apportionments required in the above formulae. As a minimum, this evidence should include:

- clear identification of the relevant parts of hotel/representative marketing agreements showing the marketing components paid to representatives
- representatives’ P & L accounts (preferably audited) and calculate relevant marketing percentages as per above formulae.

**Facebook expenses**

5.8.19 The assessment principles in the above guidelines for website expenses will also apply to Facebook expense claims subject to Austrade taking account of the following issues:

- The applicant must demonstrate that the claim relates to the promotion of a particular product and that the applicant offers product for sale
- Expenses should be commercial in nature (as opposed to just raising the profile of individuals)
- Expenses related to product development, e.g. where the applicant invites suggestions from Facebook followers will not be allowed.

As with website expense claims, Austrade will use an objective approach in apportioning expenses, e.g. apportioning according to the ‘hits’ by country.

**ITEM 7 – EXPENSES RELATING TO BRINGING BUYERS TO AUSTRALIA**

*Extract from Section 33 of the EMDG Act*

<table>
<thead>
<tr>
<th>Claimable expenses in respect of eligible promotional activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Column 1</td>
</tr>
<tr>
<td>Item</td>
</tr>
<tr>
<td>7</td>
</tr>
</tbody>
</table>

5.9.1 Guideline deleted.
What types of overseas buyer/potential buyer visits will be eligible for EMDG support?

5.9.2 Inward buyer expenses will only be allowed to the extent that the buyers’ visits to Australia are made for an approved promotional purpose in terms of section 37 of the EMDG Act.

An inward visit will be taken to have been made for an approved promotional purpose if the buyers or potential buyers came to Australia to evaluate the products of the applicant with a view to purchasing them. Applicants must have products available at the time of any visit or be reasonably capable of supplying products.

Inwards visits expenses will only be allowed if they relate to export promotion. Expenses which relate, for example, to product development or investment activities, or to situations where an overseas buyer has already entered into a contract to buy products and then visits Australia to select products under that contract, will not be allowed.

This expense category will only apply to inward visits relating to buying. The measure will not be limited to visits from one buyer (as narrowly defined) from the foreign business. It will apply to any employee or agent of that business who has the influence to secure a sale for the applicant and whose inward visit (in respect of the expenses claimed by the applicant) is for the purpose of considering/making purchases from the applicant. For example, expenses will be allowed for applicants that fund a delegation from potential foreign customers where the purpose of the visit is to secure a sale.

Expenses relating to visits undertaken by, for example, overseas journalists to publicise exporters’ products will not qualify under this category.

An applicant’s claimed visit expenses must be reasonable in relation to the extent of promotion to overseas buyers or potential buyers. Holiday visits funded by EMDG applicants will not be eligible.

Where an overseas buyer or potential buyer visits Australia to meet with more than one Australian exporter, an applicant will only be entitled to receive a grant for expenses incurred on promoting its own products.

What expenses will be allowed for overseas buyer/potential buyer visits?

5.9.3 This guideline defines the allowable expenses for applicants claiming expenses relating to bringing buyers to Australia.

Allowable expenses for the inwards visits expense category of the Act’s section 33 table are defined at section 34A of the EMDG Act and will include air fares and other transport expenses. Only 65 per cent of any claimed first class airfares amounts will be claimable expenses for this expense category. Claimable expenses will include accommodation and meal expenses relating to the buyer but not to the applicant or the applicant’s employees. These expenses may be incurred both in relation to the buyer’s trip to Australia, and to the buyer’s activities while in Australia. Expenses relating to entertainment of the buyer will not be eligible.

Expenses for each claimed inwards visit will be limited to a maximum of $7,500 per buyer per visit.

EXAMPLE

An applicant pays the expenses of a delegation of three buyers to visit its plant and evaluate its products. The expenses that are eligible under section 34A of the EMDG Act relating to the three overseas buyers amount to:

<table>
<thead>
<tr>
<th>Eligible visit expenses under s 34A</th>
<th>Assessed expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Visitor 1 $7,000</td>
<td>Visitor 1 $7,000</td>
</tr>
<tr>
<td>Visitor 2 $8,000</td>
<td>Visitor 2 $7,500</td>
</tr>
<tr>
<td>Visitor 3 $9,000</td>
<td>Visitor 3 $7,500</td>
</tr>
<tr>
<td>Total $24,000</td>
<td>Total $22,000</td>
</tr>
</tbody>
</table>
To be eligible, expenses must be paid to persons not closely related to the applicant. Expenses of visits involving more than one buyer can be claimed under this category subject to each visitor’s travel being for an approved promotional purpose under the EMDG Act.

An applicant will only be able to claim a maximum of $45,000 for inward buyers’ expenses per grant year. First-time EMDG applicants amalgamating expenses in a grant year and the preceding year will be limited to $45,000 inward buyers expenses for the combined two year period.

Some applicants may be entitled to receive a grant for expenses related to inwards buyers expenses in other expense categories within the section 33 table of eligible expenses under the scheme’s current rules and will continue to be able to do so. For example, where an applicant is a hotel or resort business, its expenses of supplying accommodation free of charge to buyers or potential overseas buyers will continue to be eligible as free samples expenses (item 4 of the section 33 table).

In such cases – where expenses are claimable under other expense categories listed in the section 33 table, such as overseas representation or free samples – they will not be claimable under the overseas buyers visits category. For example, any expenses relating to a buyer who is also an overseas representative must be claimed under item 1A of the section 33 table, rather than under the new item 7 of that table.

ITEM 8 – EXPENSES RELATING TO REGISTRATION OF ELIGIBLE INTELLECTUAL PROPERTY

Extract from section 33 of the EMDG Act

<table>
<thead>
<tr>
<th>Item</th>
<th>Activity</th>
<th>Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>obtaining, under the law of a foreign country: (a) the grant or registration; or (b) the extension of the term of registration; or (c) the extension of the period of registration; of rights in relation to eligible intellectual property, if the grant, registration or extension is for an approved promotional purpose</td>
<td>all reasonable expenses incurred by the applicant in payments to persons that, in the opinion of the CEO of Austrade, were not closely related to the applicant, up to a limit of: (a) if the applicant is a grantee in respect of any previous grant year—$50,000 for the grant year; or (b) if the applicant is not a grantee in respect of any previous grant year—$50,000 for the grant year and the immediately preceding year</td>
</tr>
</tbody>
</table>

What is eligible intellectual property?

5.9.4 The intellectual property must meet the requirements of section 26 of the EMDG Act. For rights relating to trade marks, the trade mark must have been first used in Australia, or increased in significance or value because of its use in Australia. For rights relating to any other thing, that thing must have resulted to a substantial extent from research or work done in Australia.

The registration expenses can apply to:

- patents
- designs
- trademarks*
- plant breeders’ rights (PBRs)
- circuit layout rights
• confidentiality/trade secrets
• copyright.

*There is a difference between trademarks and business, company or domain names. Company and business names must be registered to comply with national, state and territory legislation. Domain names can be registered as a trade mark if they meet the requirements of the Trade Marks Act 1995.

Eligible expenses related to registration of eligible intellectual property

5.9.5 Austrade will allow the costs up to a limit of $50,000 per claim that are attributable to the registration or extension of the term or period of the registration of the intellectual property for countries other than Australia, New Zealand and North Korea, and other than Iran up to and including 17 January 2016.

Eligible expenses will be those that are directly attributable to the registration or the extension of the term of those rights under the law of a country other than Australia, New Zealand and North Korea, and other than Iran up to and including 17 January 2016.

Note: Expenses relating to supplying product analysis data is not eligible.

Expenses will only be eligible where the intellectual property is owned or held by exclusive licence by the applicant (or its related entity in terms of section 37(1A) of the EMDG Act – refer guideline 5.10.8).

Only payments to patent and trade mark attorneys and directly to the relevant government trademark and patent offices (for a Patent Cooperation Treaty application, please refer specifically to the information below) will be claimable for EMDG purposes.

Applicants promoting either the underlying intellectual property or eligible products that embody eligible intellectual property are entitled to claim their expenses of intellectual property registration.

The grant, registration or extension is required to have been made for an approved promotional purpose under section 37 and or 38 of the EMDG Act, i.e. it must be for promoting increased export sales of the applicant’s product.

Registration of intellectual property rights in Australia does not provide international protection. Expenses of registering intellectual property rights in Australia, New Zealand and North Korea, and in Iran up to and including 17 January 2016, will not be eligible. Provisional patent applications are provided for by the Patents Act 1990 and do not offer any patent protection themselves, and these are also ineligible.

Where a claimant has lodged an application under the Patent Cooperation Treaty (a PCT application), these expenses may be eligible for EMDG purposes, if they are for an approved promotional purpose. Applicants wishing to claim these expenses may be asked to provide Austrade with a statement as to the countries they will be focusing their export promotion activities on.

Expenses related to international applications may need to be apportioned to account for any ineligible countries.

Applicants may wish to check the website for IP Australia, i.e. www.ipaustralia.gov.au. IP Australia is the Australian Government agency responsible for administering patents, trademarks, designs and plant breeder’s rights.
Insurance premiums for possible infringement outside Australia and New Zealand of eligible intellectual property

Extract from section 33 of the EMDG Act

<table>
<thead>
<tr>
<th>Item</th>
<th>Activity</th>
<th>Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>obtaining insurance against costs likely to be incurred in respect of the protection of rights in relation to eligible intellectual property, if the rights have been obtained:</td>
<td>all reasonable expenses incurred by the applicant in payments to persons that, in the opinion of the CEO of Austrade, were not closely related to the applicant</td>
</tr>
<tr>
<td></td>
<td>(a) under the law of a foreign country;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) for an approved promotional purpose</td>
<td></td>
</tr>
</tbody>
</table>

Eligible expenses

5.9.6 Insurance premiums paid for protection against possible infringement, in countries outside Australia, of eligible intellectual property are eligible expenses.

Premiums are eligible to the extent they relate to the protection of intellectual property obtained under the laws of overseas countries except New Zealand and North Korea, and except Iran up to and including 17 January 2016.

The insurance costs must have been incurred for an approved promotional purpose under sections 37 and or 38 of the EMDG Act, i.e. the costs must be for promoting increased export sales of the applicant’s product.

Ineligible expenses

5.9.7 The following are ineligible expenses:

- any portion of insurance premiums paid for protection under Australian law
- any portion of costs that are for other insurances e.g. product liability
- any costs associated with defending patent and other intellectual property infringement, including any preliminary litigation fees
- any costs for intellectual property that has been licensed to an Australian resident.

Intellectual Property registration expenses and ‘approved promotional purpose’ requirements under sections 37 and 38 of the EMDG Act

5.9.8 Applicants claiming intellectual property registration expenses may not have started promoting their products in overseas markets in the grant year for which the expenses have been claimed. The EMDG Act requires that intellectual property registration expenses must be incurred for an approved promotional purpose, in order for expenses to be eligible.
The key assessment principles for intellectual property registration expenses for new businesses or business activities require that an applicant must:

1. have an eligible product capable of being sold or licensed
2. have a demonstrated intention to promote in export markets
3. be able to meet grants entry requirements.

SECTIONS 36 AND 37 GUIDELINES

Approved promotional purposes – eligible products

WHEN IS AN ACTIVITY REGARDED AS BEING FOR AN APPROVED PROMOTIONAL PURPOSE?

5.10.1 The table at section 33 of the EMDG Act states that expenses will only be eligible where they are incurred for an approved promotional purpose. This requires that expenses should be for:

- an eligible purpose (that is, creating, seeking or increasing demand or opportunity in a foreign country)
- promoting eligible products
- promoting products owned by the applicant that it intends to sell to foreign residents, i.e. principal status (with some exceptions – see 5.10.7).

The onus is on the applicant to provide supporting documentation and/or evidence that the expenses incurred relate to an approved promotional purpose.

What is meant by an eligible purpose (that is, creating, seeking or increasing demand or opportunity in a foreign country)?

Expenses should be pre-contractual

5.10.2 The EMDG Act requires that eligible expenses must be incurred in relation to an activity undertaken notionally in advance of sales. Expenses incurred before the conclusion of an agreement to sell would generally be considered eligible. The precise time at which expenses cease to be promotional will depend on the particular circumstances of an application.

Expenses related to activities performed pursuant to a contract of sale, such as after sales service, quality control testing etc. are not eligible. Expenses for activities such as the drawing up of a legal contract in order to secure an agreement that had already been reached or pre-shipment inspection would also be ineligible. Legal fees incurred in negotiating a contract are not eligible.

Where an applicant’s contribution towards promotional expenses forms part of the consideration received under a contract, these expenses will be assessed as a cost of sale and not for an approved promotional purpose.

Expenses should be promotional or for soliciting business

5.10.3 Some business activities may be carried out in advance of making sales but will not be regarded as being for an approved promotional purpose because they do not have the essential characteristics of being promotional or being for soliciting business.
Examples include:

- an applicant incurring expenses in seeking to gain product accreditation. Such accreditation may enable the applicant to export more product and/or it may also enable the applicant to receive a higher price for its product
- An applicant paying a supplier (including an overseas representative) a sign-on fee or other inducements to contract with the applicant. This can include purchasing shelf space or payments to secure the services of suppliers in the future.

The expenses of such activities are not considered to satisfy the test in section 37 of the EMDG Act for "approved promotional purpose" because the activity is one step removed from promotion or soliciting business. Activities and/or payments putting in place business structures, securing future services, incentives to enter into contracts, or developing a product prior to undertaking the promotional activities are also ineligible.

**EXAMPLE 1**

An approved body incurs expenses participating in overseas meetings and seminars with foreign government organisations. The aim of these discussions is to develop multilateral arrangements so as to make product testing and regulations easier in order to facilitate market access for the products of its members' businesses. Austrade would not allow these expenses because they are not for an "approved promotional purpose".

**Example 2**

An applicant enters into a contract with a supplier to advertise their products on the suppliers platform. The agreed fee is a $2,000 monthly payment for the performance of the advertising services. The contract also includes a one-off $10,000 sign-on payment. Austrade would allow the $2,000 monthly payment as being for an "approved promotional purpose". The $10,000 upfront payment would however be excluded as it is not considered promotional or for soliciting business.

"Foreign country" for the purposes of section 37 of the EMDG Act

**5.10.4** The definition of a foreign country is found at section 22 of the Acts Interpretation Act 1901 and is:

"Foreign country" means any country (whether or not an independent sovereign state) outside Australia and the external territories.

**Expenses should be related to engaging potential customers who will produce eligible export income directly related to the applicant**

**5.10.4.1** Expenses are not for an approved promotional purpose if they are incurred for activities to engage those who will not directly produce potential export income to the applicant. For example, expenses for promotion of free subscriptions, free membership or free readership may be considered for building and/or enhancing a product offering, and these expenses are of product development and/or post-contractual in nature. Additionally the applicant may not own the products it promotes so the principal status may not be satisfied.
Expenses must be for the promotion of eligible products

5.10.5 Refer to Part 4 of the guidelines on the rules for determining product eligibility.

Expenses of promoting non-existent products

Expenses and activities associated with feasibility studies into the existence of an export market for a non-existent product, or with assessing the feasibility of sourcing, manufacturing or producing these non-existent products would not be for an approved promotional purpose.

A promoter of intellectual property, for example, must promote identifiable property rights. It is not sufficient to promote concepts or one’s general ability to produce property rights at some time in the future.
Principal status – general principles – Promoting products owned by the applicant sold or intended to be sold by the applicant

5.10.6 In most cases, expenses will only be eligible where the applicant is promoting exports to be made in the capacity of principal. This means that the applicant must:

- own the products being promoted for export
- be the seller or intended seller* of these products to foreign residents, rather than being for example an agent of the seller
- must include transactions for claimed expenses and export earnings (if any) in the applicant’s accounts, not just in consolidated accounts or in the accounts of a related entity.

* See also section 109 for definition of sale of eligible goods; applicants promoting intellectual property or know-how must promote the disposal of intellectual property or know-how – see also sections 107 and 111 of the EMDG Act for relevant definitions.

Under section 37 of the EMDG Act, this principal status requirement applies to most applicants. It helps to ensure that grants funding is directed towards applicants that have made the investment needed to bring a product to market, and that grants are not paid twice in relation to the same export activity.

**EXAMPLE**

A company applies for an EMDG grant and incurs eligible expenses in relation to goods produced and exported by another company. The applicant is operating in an agency capacity. The expenses would not be eligible because the applicant is not the principal in exports.

Applicants not required to promote as principal

5.10.7 There are some circumstances in which it would not be appropriate to expect applicants to be the principal, so the Act effectively provides that the following do not need to be the principal to be eligible:

1. Manufacturers – Applicants that made eligible goods in Australia do not have to own the products being promoted or promote the sale of the products to a foreign resident – refer to paragraph 37(1)(b) of the EMDG Act.
2. Approved bodies and approved joint ventures – These entities are approved so that they can receive EMDG support for the promotion of their members’ products rather than for their own (refer to guideline 5.10.12).
3. Tourism service suppliers promoting sales to Australian inbound tour operators (ITOs) – By definition these applicants do not sell their services to a foreign resident, but do so via an intermediary (refer to guideline 5.10.13).
4. Event promoters – By definition these applicants do not sell their services to a foreign resident but assist the holder of an Australian event to maximise the number of foreign attendees at the event – refer to guideline 5.10.14.
5. Applicants that qualify under subsection 37(1A) – This allows some applicants to qualify where the applicant is not technically principal but, given the applicant’s business structure, could be considered to be so for the purposes of the EMDG Act.
6. Applicants promoting eligible goods made outside Australia – section 37(1)(c) of the EMDG Act refers.
PRINCIPAL STATUS ISSUES – APPLICANTS WHOSE RELATED ENTITY IS PRINCIPAL – SECTION 37(1A)

5.10.8 Some exporters, for legitimate reasons, use business structures that involve one company owning the product and another promoting it within a group of related companies. Subsection 37(1A) of the EMDG Act enables an applicant incurring eligible expenses to qualify for a grant where it and its related entity between them meet the principal status requirements outlined above, i.e. the requirement that the applicant should own the product and sell it to a foreign resident.

This measure only applies in strictly limited situations for example, when a company closely related to the applicant owns the product intended for export.

What is meant by ‘related entity’?

- a company incorporated under the Corporations Act 2001 that controls or is controlled by the applicant. The test of ‘control’ will be that found at section 50AA of the Corporations Act 2001 (see below)
- a company incorporated under the Corporations Act 2001 that has the same shareholder or shareholders as the applicant
- a director of the applicant company.

Excerpt from the Corporations Act 2001

Section 50AA Control

(1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

(2) In determining whether the first entity has this capacity:

(a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and

(b) any practice or pattern of behaviour affecting the second entity’s financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

(3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

(4) If the first entity:

(a) has the capacity to influence decisions about the second entity’s financial and operating policies; and

(b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity’s members;

the first entity is taken not to control the second entity.

Important points to note:

- The applicant itself must incur the claimed expenses to qualify under subsection 37(1A). It cannot receive EMDG support for expenses incurred by a related entity.
- The subsection 37(1A) provisions of the EMDG Act do not apply where a foreign resident owns and is the intending seller of a product.
• This measure applies to all EMDG product categories (goods, services, IP, know-how).

**EXAMPLE 1**

Company A is a member of a related companies group, incurs expenses promoting IP and is an applicant for an EMDG grant. Its parent company B owns the particular IP but assigns the marketing rights to this IP to company A. Company A (the applicant) is entitled to claim expenses for the promotion of the IP even though it does not own the product.

**EXAMPLE 2**

Company A promotes its software development services as well as computer training services. It sells the software development services to foreign clients as principal but the computer training services are to be supplied and sold by the applicant’s wholly-owned subsidiary company B.

Under subsection 37(1A), company A is entitled to claim expenses for the promotion of both its computer training services and the software development services being sold by Company B.

**Subsection 37(1A) and sections 94 and 96 considerations**

Section 94 of the EMDG Act prevents a business from circumventing the eight grant limit. Section 96 of the Act denies grants to applicants that restructure their business arrangements for the sole or dominant purpose of obtaining an increase in their EMDG entitlements.

As outlined above, the subsection 37(1A) measure is intended to give access to the scheme to applicants using certain business structures in order to further their export business. Applications that, for example, involve the creation of artificial structures primarily in order to obtain a higher grant or to obtain eligibility under subsection 37(4)(1A) may be disallowed under section 94, section 96 and/or other appropriate parts of the Act.

**EXAMPLE**

Company A and company B are members of a related company group. Company A produces scientific instruments and has received seven grants for years up to and including 2012–13 grant year for their promotion. Company B has never claimed for EMDG grants.

In the 2011–14 grant year, company B incurred expenses for promoting the products made and sold by company A, and claims a grant.

In this case, Austrade would consider applying section 94 so that company B inherits the seven-grant history of company A. Section 96 may also be applied in this situation if Austrade thinks that companies A and B have arranged that B incur expenses previously incurred by A for the sole or dominant purpose of obtaining an EMDG grant.
Subsection 37(1A) and related companies group rules

Applicants should advise Austrade when more than one member of a related company group applies for a grant. The maximum combined grant payable in a grant year for related company group members is $250,000 – refer guidelines 6.1.6 – 12.

PRINCIPAL STATUS ISSUES – PARTICULAR PRODUCT CATEGORIES

External services and principal status

5.10.9 Some applicants exporting external services will supply their services through having their Australian staff travel overseas to work for the particular client. The applicant invoices the client for the services.

Other applicants may be required by factors such as foreign government rules to have an overseas company in place in order to be able to deliver their services.

Some applicants may promote exports where the services are to be supplied in a “back to back” manner with the applicant’s related overseas company invoicing the client.

EXAMPLE

An applicant claims an EMDG grant for the promotion of architectural services to the UK. It incorporates a wholly owned subsidiary in the UK to provide representational services as well as to invoice UK clients. The applicant’s Australian staff supply the architectural services to the UK clients.

The applicant charges the UK subsidiary for the export earnings and takes up the amount as sales in its own accounts. At the same time it reimburses the subsidiary for representation and claims for these under subsection 33 of the EMDG Act – item 1A.

The fact that the applicant’s export earnings are received in the first place by the applicant’s subsidiary does not make the claim ineligible where the applicant also sells to the subsidiary. This arrangement would be eligible in terms of subsection 37(1)(d) of the EMDG Act.

Note: Austrade may, however, adjust a claim where an applicant supplying services to a client through an overseas company uses that company and its foreign resident employees to actually deliver the service. Where this happens, there may be Australian content or product eligibility issues.

Some applicants promote a package of services to foreign residents entering Australia on tourist visas for farm-stay or “cultural experience” tours that includes education, day trips to local attractions and accommodation etc. These applicants will only receive EMDG support for the promotion of products that they sell as principal and will not receive grants for promoting any service to be provided by another business from which the applicant earns commission income.

Applicants promoting works of art and principal status

5.10.10 Because of the way that art galleries and art dealers promote and export (selling on consignment), Austrade accepts that art exporters may have some difficulty in demonstrating to Austrade that they owned the relevant works of art at the time of promoting these products. Accordingly, Austrade will accept applicants exporting art to be principal in sales of art works where they can:

a) produce a document which transfers title in the artwork from the artist to the applicant for a period of time coinciding with the claimed promotional activity, and
b) produce invoices from the applicant charging the applicant for the amount of consideration payable to the artist only.

Accommodation services and principal status

5.10.11 Management companies promoting accommodation on behalf of individual strata-titled property owners will not be entitled to receive EMDG support for export promotional expenditure incurred on behalf of the owners insofar as such management companies operate in an agency rather than a principal capacity. In addition, they are generally paid for their promotional expenses from the owners’ management fees and so the reimbursement provisions of the EMDG Act apply – refer to section 46 guidelines. Refer also to guideline 4.2.5 (b).

ENTITIES APPROVED UNDER SECTION 89 OF THE EMDG ACT AND PRINCIPAL STATUS

5.10.12 The three different types of entities able to receive grants because of their approval under section 89 of the EMDG Act (approved bodies and approved joint ventures) are each subject to particular rules in respect of principal status. These rules are based on section 37 of the EMDG Act and are as follows:

Approved bodies and principal status

- should not be the principal or intended principal in exports of any product.

Approved joint ventures and principal status

- The approved entity itself is not required to be the principal but the individual members of the joint venture should be the principal or the intended principal in export transactions (or in the case of goods the member could be the manufacturer with any other person being the principal).

Tourism applicants and principal status

5.10.13 There are three categories of tourism service providers who can claim grants.

- providers of indirect tourism services who supply services to residents of Australia (inbound tour operators) who in turn supply those services to foreign residents. Applicants in this category do not have to be the principal in export transactions
- inbound tour operators (ITOs) providing indirect tourism services to foreign residents. Applicants in this category have to be principal in export transactions
- providers of tourism services (other than indirect tourism services) to foreign residents. Applicants in this category have to be principal in export transactions.

The second of these categories (ITOs) will be assessed to be principal where they can show that they buy or intend to buy product from suppliers for on-sale.

Some applicants operating as wholesalers selling to foreign “backpackers” incur most but not all expenses on promoting to “backpacker” tourists who are in Australia. These applicants must show that they are not operating as commission agents but that they are the intended principal in export transactions.

EXAMPLE

An applicant operating a backpacker hostel also promotes a range of tourism products such as dive tours or bus fares to its foreign resident guests. Where the applicant is to receive a commission from the Australian product supplier and does not have arrangements with the supplier that are consistent with being assessed as principal in transaction with the foreign resident, promotional expenses for these products will not be allowed. Refer to the dot points below (at end of guideline 5.10.13) for indicators that an applicant is supplying services as principal.
These applicants will be accepted as principal where they export the following types of product:

- starter packs purchased outside of Australia (airport pick-up, orientation tour, few days’ accommodation and food etc)
- fly drive combination tickets
- the combination of two or more eligible services in a ‘branded package’ (that is, tickets/invoices bearing the applicant's name).

Eligible single services will also be allowed subject to the following:

- Wholesaler applicant must show written agreement with its suppliers providing for the purchase and on-selling of tourism product.
- Wholesaler applicant must have freedom to set its own price for services sold.
- Wholesaler applicant, rather than the supplier, must accept liability for refunds etc.

**Event Promoters and “Approved Promotional Purpose”**

5.10.14 These rules apply to the “eligible event” product category as defined at section 25A of the EMDG Act – see guidelines 4.2.17 – 4.2.24.

Subsections 37(2) and 37(3) of the EMDG Act state the rules for deciding whether the expenses claimed for a promotional activity can be accepted to be for an approved promotional purpose.

The eligibility requirement for an event promoter’s expenses will be that the purpose for incurring expenses is promoting an eligible event so that numbers of foreign attendees is maximised – refer to subsection 37(2) of the EMDG Act.

Any activity that does not relate directly to foreign delegate boosting is ineligible, including:

- expenses of winning an event for an event holder – e.g. paying for the visit expenses of foreign representatives of an association considering holding a future event in Australia
- expenses incurred before an event holder has contractual rights to hold a particular event in Australia
- expenses related to organising an event – even if the expenses are incurred so as to make the event more attractive for potential foreign attendees
- expenses related to winning sponsorship for an event holder client (specifically excluded by subsection 37(3) of the EMDG Act.

Some expenses claimed by event promoters may need to be apportioned. For instance, an activity may be partly related to organising an event and partly related to foreign delegate boosting. In such cases, Austrade will ask event promoters to demonstrate a reasonable basis for estimating how much of the expense is eligible.

For example, where a claim is made for visit expenses for a foreign association representative to meet with the event promoter once an event is won, the expenses might be allowed according to the relative number of ‘eligible’ or promotional days compared to time spent on organising an event.

**Are expenses related to attracting foreign exhibitors to an event eligible?**

Some events may include exhibition opportunities for attendees, but in most cases the exhibition component would merely be an adjunct to the event. In such cases, as long as expenses claimed are primarily incurred for the purposes of boosting the number of foreign attendees, they will as a general rule be eligible. Where the expenses claimed are mainly about attracting exhibitors (i.e. filling the space) rather than attracting foreign attendees, they will not be eligible.

Note: Refer to 4.2.5 for guidelines applying to applicants promoting as events holders or owners.
Crowdfunding

5.10.15

Crowdfunding is the practice of finding supporters in the public domain to fund a project or venture by raising monetary contributions from the supporters. The parties involved in a crowdfunding arrangement are usually:

- a promoter of the project or venture (the Promoter);
- an intermediary who provides the crowdfunding website/platform (the Intermediary), and
- funders who contribute or pledge money towards the project or venture (the Funder).

With EMDG, the applicant is usually the Promoter.

Typically the Intermediary would charge the Promoter a flat fee, calculated on a percentage of funds raised, as well as payment processing fees. If funding isn’t successful, there are usually no fees charged. Austrade would consider the fees charged by the Intermediary to the Promoter (the EMDG applicant) in setting up the platform to be ineligible.

Whether expenses incurred in relation to a crowdfunding arrangement are eligible for EMDG purposes depend on the nature of the expense and the circumstances surrounding the arrangement. As with all EMDG expenses, crowdfunding expenses will only be eligible if they meet the requirements of Section 28(2) of the EMDG Act, namely that the expenses must be for promotional activities directly related to the revenue stream. A relevant example can be drawn from the recruitment sector, and the example provided at 5.10.4.1 is a useful one to consider in this context.

Austrade is likely to consider crowdfunding arrangements that do not link the product being promoted with a revenue stream as likely to be product or business development and therefore ineligible. This would include crowdfunding arrangements where:

- The Funder makes a donation towards the project or venture without receiving any thing in return;
- The Funder makes a payment in return for an interest (or share) in the equity of the Promoter; and
- The Funder loans money to the promoter who, in return, agrees to pay the interest on the borrowed funds.

An example of a potentially eligible arrangement is where the Promoter incurs expenses that relate to an activity that seeks to promote the product to a Funder, with the aim of selling the product to the Funder. For example, the Promoter may incur marketing costs, outside of its arrangement with the Intermediary, such as website and advertising costs. This may be eligible expenditure.

Applicants who otherwise consider the expenses they incur from the Intermediary to be eligible should present its reasons to Austrade together with sufficient supporting documentation to demonstrate the purpose of its activities and the extent of eligible purpose where necessary. Consideration should also be given to whether the expense may attract the application of section 49 of the EMDG Act (which seeks to exclude expenses such as commissions and discounts).

SECTION 38 GUIDELINES

Approved promotional purposes – return on disposal of eligible intellectual property etc

5.11.1 Section 38 of the EMDG Act applies to those applicants which incur expenses in order to increase their return on the disposal of eligible intellectual property or eligible know-how.

5.11.2 Section 38 of the EMDG Act applies where an applicant has disposed of eligible intellectual property or eligible know-how. Refer to section 107 of the EMDG Act for a definition of disposal and to section 111 of the EMDG Act for the definition of disposal of eligible intellectual property or eligible know-how.

5.11.3 An applicant’s expenses for promoting an income stream following such disposal may be eligible.
5.11.4 This income stream or return must be received at or after the time of disposal of the eligible intellectual property and must be received by way of royalty or licence fee. The promotion of a return which is by way of dividends or profits would not be eligible. There must be a direct connection between the promotional expenses and the export return.

5.11.5 Examples of applicants claiming expenses under this section:

- An Australian business promoting rights to manufacture goods overseas under licence can incur eligible expenditure in promoting the finished goods, because the Australian business would benefit from increased sales of those goods through increased royalty payments.
- An Australian company promoting the rights to use a particular trade name overseas can incur eligible expenditure in promoting the finished items.
- An Australian company owning the rights to a recording can incur eligible expenditure in promoting records that are manufactured outside Australia.

5.11.6 Section 38 of the EMDG Act also provides that the expenses of approved bodies may be for an approved promotional purpose where they are for the purpose of increasing another person’s return on the disposal by the other person of eligible intellectual property or eligible know-how to a third party.

Section 38 Eligibility considerations

5.11.7 Applicants must identify the intellectual property and know-how. Claimed expenses will be ineligible where they relate to intellectual property that is not yet in existence.

5.11.8 Know-how will be disposed of to overseas residents in a variety of ways. The onus of proving the eligibility of the know-how lies on the applicant. Substantiation should involve the provision of something in written, tangible or material form such as a manual or computer software. The know-how must be provided for export in order to assist the overseas recipient to improve its operations in some way.

5.11.9 Eligible know-how can include some element of service in its one-off delivery to overseas users but primarily it will be the passing on of knowledge to allow the recipient itself to deliver the service in question. Know-how will not be considered eligible where it is primarily the provision of on-going management services to an overseas client.

5.11.10 There must be a direct nexus between the disposal of the intellectual property/know-how and some resultant export income paid to the applicant by the recipient. This income will generally be eligible if it is received by way of royalty or licence fee.

5.11.11 Applicants can receive EMDG support for contributing to the promotion of IP and know-how after a contract has been signed in terms of section 38 of the EMDG Act. However, where an applicant’s promotion forms part of the consideration received under the contract, the promotional expenses will be assessed as a cost of sale and not for an approved promotional purpose.

What if applicants claim expenses for the promotion of a return on disposal of eligible intellectual property etc. to a related company?

5.11.12 Applicants can claim expenses for the promotion of a return on disposal of eligible intellectual property or know-how to a related company.

5.11.13 Expenses should be reasonable and should be based on commercial and bona fide business arrangements. Where Austrade is of the opinion that an applicant has entered into non bona-fide licensing arrangements that enable closely related entities to collude to circumvent EMDG goods eligibility rules, Austrade may apply section 96 of the EMDG Act – refer to guidelines 8.3.1 – 4.
SECTIONS 39 AND 40 GUIDELINES

Excluded expenses – general

5.12.1 An applicant’s claimable expenses are calculated at subsection 33(2) of the EMDG Act. This calculation will exclude amounts specified in the section 40 table and subsequently detailed at sections 41-57 of the EMDG Act inclusive as follows:

<table>
<thead>
<tr>
<th>Item</th>
<th>Expense</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Capital expenses</td>
<td>41</td>
</tr>
<tr>
<td>2</td>
<td>Expenses incurred when applicant not resident of Australia</td>
<td>42</td>
</tr>
<tr>
<td>3</td>
<td>Expenses related to trade with New Zealand</td>
<td>43</td>
</tr>
<tr>
<td>4</td>
<td>Expenses incurred in breach of trade sanction</td>
<td>44</td>
</tr>
<tr>
<td>5</td>
<td>Expenses (other financial assistance schemes)</td>
<td>45</td>
</tr>
<tr>
<td>6</td>
<td>Expenses for which applicant is paid</td>
<td>46</td>
</tr>
<tr>
<td>7</td>
<td>Expenses disclosed after submitting application</td>
<td>47</td>
</tr>
<tr>
<td>8</td>
<td>Taxes etc.</td>
<td>48</td>
</tr>
<tr>
<td>9</td>
<td>Expenses incurred as commission, discounts etc.</td>
<td>49</td>
</tr>
<tr>
<td>13</td>
<td>Expenses of approved joint venture</td>
<td>53</td>
</tr>
<tr>
<td>14</td>
<td>Expenses of applicant carrying on business in different capacities</td>
<td>54</td>
</tr>
<tr>
<td>16</td>
<td>Expenses relating to illegal activities</td>
<td>56</td>
</tr>
<tr>
<td>16A</td>
<td>Expenses of over $10,000 paid in cash by an applicant</td>
<td>56A</td>
</tr>
<tr>
<td>17</td>
<td>Expenses associated with “X”-rated films</td>
<td>57</td>
</tr>
<tr>
<td>18</td>
<td>Expenses associated with prohibited or potential prohibited internet content</td>
<td>57A</td>
</tr>
<tr>
<td>19</td>
<td>Expenses associated with telephone sex services</td>
<td>57B</td>
</tr>
<tr>
<td>20</td>
<td>Expenses relating to things they may have had a detrimental impact on Australia’s trade reputation</td>
<td>57C</td>
</tr>
</tbody>
</table>

SECTION 41 GUIDELINES

Capital expenses

5.13.1 Capital expenses are ineligible. Excluded expenses include:

- any expenses incurred with a view to purchasing or bringing a fixed asset into existence
- expenses of selecting and designing export packaging
• depreciation other than that which is part of factory overheads for applicants claiming expenses of
  production for free samples
• capitalised costs of demonstration/display equipment used to promote products.

(N.B. Expenses relating to registering the applicant’s intellectual property, e.g. patents, trademarks are not
  excluded under section 41 – refer to guideline 5.9.1 – 7.)

5.13.2 EMDG claims are received for expenses relating to a wide range of websites, some solely promotional and
  others for a combination of promotion and e-commerce activities where applicants use their websites to earn
  assessable income (refer guideline 5.8.15).

The key eligibility principle is that expenses of website development will be eligible for EMDG support where they
  relate to export promotion and where there is no demonstrated basis for assessing the expenses as capital.

**EXAMPLE**

Only part of an applicant’s total website development costs are capitalised. Its website development costs
  include both a promotional front end and administrative back end. Can the capitalised amount be allocated
  against the back end costs or should the capitalisation be pro-rated across the front and back end expenses?

Consistent with the above guideline, Austrade will allocate the capitalised component to the administrative
  backend expenses where there is a demonstrated basis to do this and where there is no accounting basis to
capitalise the claimed promotional costs.

**SECTION 42 GUIDELINES**

Expenses incurred when applicant not a resident of Australia

5.14.1 The term resident of Australia is defined at section 114 of the EMDG Act. Any expenses incurred by an
  applicant for grant at a time when the applicant was not a resident of Australia are excluded from eligibility.
  (Refer to section 53 with respect to the application of this rule to approved joint ventures)

**SECTION 43 GUIDELINES**

Expenses related to trade with New Zealand

5.15.1 New Zealand is not an eligible market for EMDG purposes. Any promotional activity which promotes
  exports to New Zealand will not be eligible.

**EXAMPLE**

An applicant claims expenses associated with promoting exports of services to be supplied in Malaysia but
  where the contract is between the applicant and a New Zealand company. The expenses would be assessed as
  ineligible because they relate to trade with New Zealand.
SECTION 44 GUIDELINES

Expenses incurred in breach of trade sanction

5.16.1 Expenses are ineligible where they relate to an activity and a country subject to a trade sanction. Please refer to the Department of Foreign Affairs and Trade’s website for details on current trade sanctions.

5.16.2 All expenses incurred in respect of those countries declared by the Minister for the purposes of the EMDG Act, will be ineligible under section 44 of the EMDG Act. Currently, expenses that are incurred in respect of the North Korean market are ineligible, and in respect of the Iran market are ineligible up to and including 17 January 2016.

5.16.3 Guideline deleted.

SECTION 45 GUIDELINES

Other financial assistance schemes

5.17.1 There are currently no Austrade administered financial assistance schemes that will affect EMDG applicants.

SECTION 46 GUIDELINES

Expenses for which applicant is paid

5.18.1 Section 46 of the EMDG Act requires that applicants limit their claims to genuinely incurred expenses and that they are not repaid by another person for the claimed expenses. This prevents parties other than the applicant from, in effect, claiming “through” the applicant, and prevents applicants from claiming in respect of activities where the applicant in fact bore little or no risk.

5.18.2 Subsection 46(1) of the EMDG Act provides that any payment which is received or receivable for work carried out by an applicant in the course of undertaking promotional activity will be deducted from eligible expenses.

“Reimbursements” and other related payments received by applicants

5.18.3 The term “reimbursement” is not actually used in the EMDG Act but may be used as a convenient shorthand way of saying “a payment inconsistent with section 46”. In practice the issue is whether or not section 46 of the EMDG Act is to be applied. Applicants that receive any reimbursement or contribution from another party that is tied or directly related to the claimed promotional activity are considered to have been repaid an amount in terms of section 46 of the EMDG Act.

What is meant by “tied or directly related” in determining whether section 46 of the EMDG Act should be applied?

Where a payment is received to cover a specific expense such as a contribution to a trade fair cost and this payment was directly related to the claimed expense and the promotional activity, it will be taken to be “paid” in terms of section 46 of the EMDG Act – refer to example 1 below.

Where a company receives general funding from its parent company to enable it to be able to undertake its business activities, and the company spends some of this on export marketing promotion the funding received
would not be assessed to be “paid” in terms of section 46 of the EMDG Act. The receipt of income was not directly related to the claimed promotional activity.

If a company is partly funded by the Government for general activities and also raises its own funds from commercial activities, the funding it receives from Government is also not taken to be “repaid” in terms of section 46 of the EMDG Act – as above. If a company receives most funding from commercial activities and also receives a grant from a government in relation to its marketing activities, Austrade will examine all details of the grant to determine whether it is directly for one or more of the applicant’s promotional activities. If so, Austrade will determine that the grant is tied or directly related to the promotional activities and that section 46 of the EMDG Act should be applied.

Under the Government’s Research and Development (R&D) tax incentive arrangement, a 45 per cent refundable tax offset equivalent to a deduction of 150 per cent will be available to companies with annual income of less than $20 million that undertake eligible R&D activities. These companies can receive a refundable tax offset of 45 per cent of their R&D spending as part of the processing of their tax return.

Some EMDG applicants may claim IP registration expenses that fall within their R&D expenditure for which the tax offset has been paid or is payable. Where this happens, Austrade will apply section 46 of the EMDG Act to disallow any claimed expenses for which the R&D tax offset has been paid.

**EXAMPLE 3**

An exporter of magazines which contains paid advertising claims expenses of free samples. Austrade would calculate the cost of providing magazine samples in the normal way—refer to guideline 5.7.5. However, unless special circumstances are found to exist and in order to arrive at a genuine cost amount incurred, advertising income attributable to the magazines given away must be deducted from the claimed expenses.

Accordingly, the eligible expenses of magazine samples will be established by apportioning paid advertising receipts against the cost of providing the publication, including distribution costs, and applying that ratio of eligible costs to samples given away.

**EXAMPLE 4**

A merchant promotes goods overseas by providing advertising material to potential overseas customers. The Australian businesses supplying the merchant with products also contribute towards the advertising expenses of the merchant by paying an advertising allowance. These contributions from the suppliers are deducted from the merchant’s EMDG expenses because of the operation of section 46 of the EMDG Act.

**Note:** Refer to 5.10.11 for consideration of management companies promoting accommodation on behalf of property owners. Where these property managers are paid for their export promotional activities from the individual owners’ management fees, section 46 of the EMDG Act is applicable.

**APPLICANTS EARNING INCOME IN THE COURSE OF THEIR CLAIMED PROMOTIONAL ACTIVITIES**

5.18.4 Applicants which earn income in the course of a claimed promotional activity may be considered to have been repaid some or all of the claimed expenses (even though these expenses may be disallowed for other reasons under the EMDG Act – commonly because they are not for an “approved promotional purpose” in terms of section 37 of the EMDG Act).

The issue often arises where marketing visits are made for more than one purpose. Sections 33 and 37 of the EMDG Act provide for visit expenses to be apportioned – refer to guideline 5.5.7.
Some visits will be made essentially for non-promotional reasons where, say, an applicant performs paid services. However, where such applicants can identify particular days spent on approved promotional activities on an overseas trip which involved paid business activities, Austrade may allow the expenses in relation to the approved promotional activities.

**EXAMPLE 4**

An applicant travels to USA to perform paid services for 10 days. Its airfares and other costs for these 10 days are taken to be “paid” by the USA client in terms of section 46 of the Act. The expenses are also disallowed because they are not for an “approved promotional purpose”. However, at the completion of the project the applicant spent five days promoting to potential new clients. If adequate substantiation is provided to the eligibility of the additional five day’s work, Austrade will allow $1,500 for the visit allowances but no airfares.

Other applicants might claim for visits that are mainly for eligible promotional activities in terms of the EMDG Act but receive some income during the visit where this income falls within the provisions of section 46 of the EMDG Act.

**Note:** This example covers applicants promoting license income. Guideline 5.18.6 addresses the issue of music and arts exporters incurring expenses by way of loss-making overseas promotional tours.

**EXAMPLE 5**

An applicant’s employee travelled to Europe for two weeks for an “approved promotional purpose”. During the return flight to Australia a stopover was made in Hong Kong where a $1,000 fee was received by the applicant for one day’s work. Is the $1,000 to be treated as a reimbursement against the cost of airfares?

Because the fee income is not overly significant and was only earned on one day, the overall purpose of the visit is accepted to be eligible. Austrade would not directly deduct $1,000 from claimed expenses in terms of section 46 of the Act but the receipt of income would be treated as follows:

- No OVA amount would be paid for the one day’s ineligible activity.
- The claimed airfare amount would be apportioned where the non-promotional day represented a significant (over 10 per cent) proportion of the total trip days.

Any other contributions received by an applicant that can in any way be seen as an offset against any claimed expenses must be deducted for grants purposes.

**PAYMENTS TO APPROVED BODIES – SECTION 46 REIMBURSEMENT ISSUES**

**5.18.5** Approved bodies are approved under section 89 of the EMDG Act as industry organisations to promote Australian products on behalf of their particular industry.

Section 46 of the EMDG Act applies when an applicant has been reimbursed for its claimed expenses and can have application to approved bodies in circumstances over and above those which normally occur with other eligible categories of applicants. The typical situations where the section applies for other applicants are where the applicant entity may be paid for its promotional work or where it receives third party reimbursement of its promotional expense e.g. from a government agency. These circumstances are as applicable to approved bodies as to other categories of entity.
However, the owners of individual applicant entities eg sole traders, companies and partnerships have a fundamentally different relationship with their entities than members have with approved bodies. Owners of individual entities fund the entity by way of capital injection, loans or via retention of profits from sales or other revenue. Promotional activities are usually funded from a combination of these sources but where funds are specifically injected into the entity for a particular activity, those contributions are credited against either capital or loan accounts. Where this occurs the applicant entity is deemed to have acquitted the expenditure on their own account and section 46 of the EMDG Act has no application.

With approved bodies, typically their sole source of funding is from members and they have little or no general revenue. Members’ contributions are not recorded against the member’s account and instead are recognised as revenue. All or nearly all promotional expenses will normally in the first instance be funded by member contributions of some sort (in later years the previous year’s grant may also represent a considerable portion of the funds). Eligible expenses therefore that have been funded from member contributions require consideration in terms of section 46 of the EMDG Act.

**Approved body expenses paid out of regular subscriptions or levies**

Approved bodies are entitled to receive grants based on their expenses made out of the proceeds of their members’ regular subscriptions or levies where this income is spent for the benefit of the particular body’s wider membership. Austrade will take subscriptions or levies as they relate to approved bodies to include any payment or charge that provides a membership service or any right to receive promotional services from the industry organisation. These payments would be charged on a uniform basis, that is, same fee for all members or the fee based on size of enterprise. For assessment issues to do with other member contributions to an approved body, see below.

Approved bodies will generally be entitled to receive a grant based on their eligible expenses made from members’ regular subscriptions or levies charged by the body for generic promotion of its members’ products. Austrade will not apply section 46 of the EMDG Act to this type of general income where the approved body is seen to apply the funds to generic promotion of its members’ products.

**EXAMPLE 1**

An approved body charges its 50 members an annual subscription of $5,000. It spends this money on its own management staff costs as well as paying $60,000 for a marketing consultant who is engaged to provide a strategy document on how the Approved Body’s membership can best access export markets. It doesn’t receive any other contributions from members apart from these subscriptions.

The expenses that qualify for EMDG grant purposes, including $60,000 consultants’ expenses, will be allowed because they are for the generic promotion of the members’ products.

**Approved body expenses paid out of other member contributions (based on members paying the approved body for particular promotional activities)**

The aim of the EMDG approved body provisions is to assist export focused industry organisations to promote Australian products on behalf of their particular industry. Their promotional activities should be for the benefit of the generic industry rather than for the benefit of individual members (see Ministerial Determination).

Some approved bodies may receive amounts from its members which are additional to annual or regular subscriptions or levies. For example, an approved body might organise and pay for a trade fair or trade mission and recoup its expenses by charging its members a participation fee. Where this happens, the promotional activity might be:

1. **Fully generic:**

For the benefit of the wider approved body membership/generic industry;
2. **Substantially generic:**
Assessed to be for the benefit of the generic industry/wider approved body membership even though the individual approved body member receives some individual benefits;

3. **Insufficiently generic:**
Assessed to have insufficient generic component in relation to the benefits received by individual members.

1. **Fully generic – approved body expenses entirely for the benefit of the wider membership**
Where an approved body spends these other contributions on promotional activities that benefit all of its members, Austrade will not apply section 46 of the EMDG Act and will allow the relevant expenses.

**EXAMPLE 2**

An approved body received $1,000 from each of its 50 members as an annual subscription and in addition charged its 30 largest members (by turnover) an amount of $2,000 to produce a $60,000 video promoting the generic industry to potential overseas customers. The video did not promote or even refer to any of the individual approved body members.

This $60,000 would be allowed and section 46 of the EMDG Act would not be applied because the expense is for promoting the export interests of all industry members.

2. **Substantially generic – approved body expenses incurred for substantially generic industry promotional activities with members receiving some individual benefits**
Where a promotional activity is carried out for the benefit of the generic industry but also provides identifiable benefits to the approved body’s individual member, Austrade will only allow an approved body’s expenses in situations where it substantially adds generic value to the promotional activity. For Austrade not to apply section 46, the approved body will need to demonstrate that it adds substantial value to the promotional activity by adding a major generic component (as opposed to just participating in funding arrangements enabling members to receive an EMDG benefit for their individual promotional activities). Factors which would go to demonstrating this could include:

- in the case of trade fairs, clear national industry focus or presence and Australian industry members co-locating, badging of the trade fair in name of approved body, representatives from approved body secretariat in attendance
- an indication that the promotional activity is initiated and run by the approved body
- evidence of agreement from the wider membership that some individual representatives authorised to promote on behalf of the industry
- evidence that the whole industry/wider industry organisation membership potentially receive benefits from the promotional activity
- a demonstrated ability of individual members to answer product queries on behalf of wider membership.

**EXAMPLE 3**

Applicant has many members and organises regular trade fairs. Subsidised fares and overseas trade fair expenses represent some of the benefits of membership. Individual members pay the approved body for fares and trade fairs with the approved body claiming its own outgoings on these expenses in its own EMDG claim. Members exhibit together as part of a national industry stand organised by the Approved Body but promote individually as well as participate in a generic industry promotion.
The approved body in this scenario initiates, promotes and organises promotional activities. It produces brochures and organises local press publicity for activities as well as arranging for particular potential buyers and distributors to attend and meet with its members.

Because the approved body is seen to add substantial generic value to its members’ promotional activities in this case, Austrade will not apply section 46 of the EMDG Act and so will pay a grant to the approved body based on its expenses. In this case the approved body’s members would not be able to claim their payments to the approved body as part of their individual EMDG applications.

3. Insufficiently generic – approved body expenses incurred for promotional activities where there is insufficient generic component

Approved bodies can receive grants where they incur expenses on promoting the export interests of a national industry and its wider membership. Conversely, an approved body’s expenses will be disallowed where their promotional activities solely benefit individual participating members without any demonstrated flow on to the wider membership. Austrade will apply section 46 where member contributions are assessed to benefit the individual member rather than the generic industry, i.e. where the member pays an approved body for a promotional activity entered into solely or primarily for the individual’s benefit.

Section 46 will be applied where the approved body doesn’t significantly add value to the promotional activities carried out by the individual members. The EMDG approved body provisions are not intended to allow individual businesses to receive grants assistance for their individual promotional activities via the approved body.

**EXAMPLE 4**

An approved body operates nationally with its 200 members traditionally exporting to USA and Europe. However, a group of six industry representatives decide to promote to China. They arrange for the approved body to arrange and pay for visit expenses and China trade fair expenses and then they repay the approved body. The promotional activity was carried out independently of the approved body (except for funding arrangements) and it added no value to the activity. Are these expenses eligible for the approved body?

The approved body is claiming for a promotional activity where the benefits are received by the individual members. Section 46 of the EMDG Act would be applied because the approved body is directly reimbursed for particular promotional activities.

In effect the approved body in this case is being used as a mechanism to provide EMDG benefits to individual members.

The individual members in this case may be entitled to apply for EMDG benefits in their own right.

Individual approved body members claiming their payments to approved bodies in their own claims

Members will commonly pay an annual subscription or general levies set on a country, region or promotional activity basis. Additional contributions may also be paid for particular promotional activities.

As a general rule, the subscriptions/levies will be spent on generic industry promotion and claimed in the approved body’s EMDG claim. Therefore, the individual member will not be entitled to claim any part of these payments in its own claim.

Other member payments may be for promotional activities that only benefit the individual member (refer to example 4 above) and these will not be allowed in the approved body claim. Accordingly, the individual member may be able to claim these expenses in its own claim.
To prevent double-dipping between approved body and member, Austrade will accept written advice from the approved body detailing which of its member contributions were spent on generic and non-generic promotional activities respectively. Individual members will then be able to claim for their payments for promotional activities that only benefited themselves (assuming that the payments are for eligible expenses listed in the table at section 33 of the EMDG Act).

**Approved bodies that receive funding from Government and other organisations – section 46 issues**

Some approved bodies receive funding from Governments and other organisations additional to members’ subscriptions and levies. Where this funding is directly tied to particular promotional activities, e.g. where the approved body is contracted to carry out services for the funding provider, Austrade may apply section 46 and/or section 37 of the EMDG Act by assessing expenses paid from this funding as representing part of the consideration received under a contract.

**Section 46 - assessment principles for performance arts or ‘cultural’ exporters claiming expenses associated with overseas touring losses**

5.18.6 The EMDG Act provides for applicants to be able to claim ‘free samples’ expenses where a product (good or service) is given away free of charge to a foreign resident. Some ‘cultural’ exporters (bands, orchestras, theatre companies, dance companies etc) promote themselves to overseas clients by undertaking overseas tours where they give away free services. A more common practice is for the performance arts exporters to promote themselves by travelling overseas to perform concerts etc in the course of which income will be received.

This guideline explains how Austrade will apply section 46 of the EMDG Act to treat any income received in relation to these overseas tours.

Subsection 46(1) of the EMDG Act requires that Austrade should deduct from eligible expenses any amounts of income received by the applicant in the course of carrying out particular promotional activities.

**Austrade will consider allowing eligible expenses associated with loss-making overseas tours when the visit meets the requirements of section 37 of the EMDG Act as follows:**

- The applicant undertakes a promotional visit for which it makes a cash loss based on all income (including performance income, contras, merchandising income and intellectual property/CD sales income) and actual expenses; and
- The overseas tour is for an ‘approved promotional purpose’ and is made primarily to promote future business. Applicants would need to substantiate this by showing, for example, that reviews of its shows are used to promote future business or that they are seeking overseas promoters to stage future shows;
- The applicant can show from contemporaneous material that it budgeted for a loss in its overseas tours and that its intention was to promote future export business by being prepared to tour for the loss. That is, Austrade will not accept that a visit is for an ‘approved promotional purpose’ where an intended commercial tour resulted in a subsequent and unbudgeted loss.

**Austrade will disallow the expenses associated with loss-making overseas tours when any of the following apply:**

- The applicant made a ‘cash’ profit on the tour.
- The visit was made as part of a contractual obligation e.g. to promote a recording or as a condition for receiving grant or sponsorship income.
- The visit was primarily undertaken for a holiday or to increase the profile of the applicant for the Australian market.
- The visit was primarily undertaken to increase the ‘life experience’ of an applicant’s employees or performers.
- The applicant is an established and/or successful performance exporter.
• The applicant makes regular and frequent overseas tours, e.g. annually, with no significant growth in export revenues from one year to the next, such as where the touring is part of its regular business activities as required by its set up rules or constitution.

• The income received is significant, e.g. applicant is touring as a ‘headline act’, such that all tour expenses are better characterised as a cost of sales rather than as promotional expenses.

In deciding whether a tour is undertaken for an approved promotional purpose, Austrade may examine any agreements with an applicant’s sponsors or promoters.

Austrade will examine the income/expenses for an overseas tour and calculate the loss percentage factor.

Loss percentage factor

The tour’s loss percentage factor is the ratio of total tour income to total tour expenses, i.e.

Total tour income ÷ total tour expenses

Income will be all income and includes:

- performance income (whether paid as cash or as agreed amount paid as free tour expenses e.g. accommodation)
- government grants
- sponsorship income
- travel allowances
- merchandising income.

Expenses will be all expenses that directly relate to the tour including expenses of advertising the tour and management expenses directly related to the tour. It would not include overhead-type expenses including administrative overheads.

Applicants are not entitled to calculate expenses for the loss percentage factor on the basis of OVA or any other deemed amount. Expenses for the loss percentage factor should be based on actual expenses. These expenses must be substantiated.

Application of loss percentage factor to an EMDG claim

The general section 46 assessment principle in the EMDG Act is that all income received by an applicant from touring will be applied to all of the expenses (those eligible for EMDG support and those that are not) on a uniform basis.

**EXAMPLE 1**

Applicant earns income of $50,000 on an overseas tour.

Its touring expenses are $100,000 for eligible EMDG expense items and $100,000 for activities ineligible for EMDG support. It also claims $100,000 OVA.

Section 46 of the EMDG Act is applied such that the income is allocated equally to the eligible and the ineligible expenses. The loss percentage factor (total income divided by total expenses) is 25 per cent. Therefore, $25,000 is deducted from the eligible expenses and from OVA, leaving the applicant with $75,000 eligible expenses plus $75,000 OVA.
EXAMPLE 2

The applicant planned a promotional tour with an overseas promoter. The agreed budget and the actual tour financials were as follows:

<table>
<thead>
<tr>
<th>Income</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income from direct sponsorship for the tour</td>
<td>25,000</td>
</tr>
<tr>
<td>Income from performances received by applicant from promoter</td>
<td>25,000</td>
</tr>
<tr>
<td>Aust Council grant</td>
<td>15,000</td>
</tr>
<tr>
<td></td>
<td>$65,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Total</th>
<th>EMDG eligible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fares</td>
<td>70,000</td>
<td>70,000</td>
</tr>
<tr>
<td>Promotional events expenses (e.g. staging costs)</td>
<td>60,000</td>
<td>30,000</td>
</tr>
<tr>
<td>Accommodation and living expenses</td>
<td>60,000</td>
<td>80,000 *</td>
</tr>
<tr>
<td>Salaries for performers</td>
<td>70,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$260,000</td>
<td>$180,000</td>
</tr>
<tr>
<td>Loss</td>
<td>$195,000</td>
<td></td>
</tr>
</tbody>
</table>

* OVA basis applies to claimed EMDG expenses

The loss percentage factor is total income ÷ total expenses or 65,000 ÷ 260,000 = 25%

Apply this factor to the EMDG eligible expenses and OVA:

$180,000 @ 0.25 = $45,000 is deducted from the claimed expenses and OVA total amount.

Applicants using campervans or buses with built in accommodation for overseas tours

Applicants will be able to include campervan hire costs as the basis for calculating the tour loss percentage factor – see above. Where this happens, they will be able to claim OVA for eligible promotional travel days in their EMDG claim. However, in calculating their claimable marketing visits amount, they must at the same time exclude the share of expenses attributable to accommodation and other non-travel and fares expenses. The onus for calculating and excluding expenses related to accommodation etc is with the applicant and this calculation must be done.

EXAMPLE 3

The applicant tours USA by hired campervan. The tour is accepted by Austrade as eligible in all respects. The applicant earns some income and claims under the loss-making provisions.

In compiling its EMDG claim, this applicant will be entitled to claim OVA for the eligible days.

Previously, applicants could claim the proportion of the campervan hire fee that could be attributed to transportation costs. From 1 July 2017, ground transport costs are no longer eligible expenses under the marketing visit category, and so cannot be claimed.

To account for the income earned by the band during the tour, the claimed amount, together with any other claimed expenses, will be apportioned according to the loss percentage factor – see above.
before the application is submitted to Austrade.

**Note:** the applicant must supply the basis for splitting campervan costs between the travel and the accommodation costs at the time of applying for any grant

5.18.7 Subsection 46(1A) of the EMDG Act exempts events promoter applicants from the general EMDG Act provisions dealing with reimbursements.

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**EXAMPLE**

An events promoter that has a contract with a medical industry association client is an EMDG applicant. The client is staging a future medical conference in Australia and engages the events promoter to both manage and promote the event (including to foreign residents). The contract between the two parties provides for the events promoter to be directly or indirectly reimbursed for its expenses of export promotion. The applicant can receive an EMDG grant based on the eligible expenses that it incurs regardless of any reimbursements received.

Claimed expenses that are based on waiving a debt are to be disregarded

5.18.8 Subsection 46(2) of the EMDG Act operates to prevent eligible expenses being created when an applicant waives an overseas person’s debt to the applicant. If there had been an intention on the part of an overseas person to repay the applicant for an outstanding loan or to pay for goods supplied and the debt was written off or waived, the losses cannot be regarded as eligible expenses.

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**EXAMPLE**

An applicant sells goods to an overseas representative for on-sale. The representative could not pay and the applicant waived the debt. The applicant claimed for the cost of the goods on the basis that they were samples. Austrade would not allow this item.

**SECTION 47 GUIDELINES**

Expenses disclosed after submitting application

5.19.1 This provision limits the amount of additional grant payable as a result of an applicant disclosing expenses additional to those originally included in their application.

This section applies to a claim if, after the claim is submitted, but before Austrade determines whether the applicant is entitled to the grant, the applicant discloses expenses not claimed in its original application. Such expenses are called *undisclosed expenses*.

If the total amount of the undisclosed expenses exceeds 10 per cent of the amount of the eligible expenses disclosed in the original application (*disclosed expenses*), then Austrade will exclude these undisclosed expenses to the extent that they exceed 10 per cent of the disclosed expenses.

It should be noted that the 10 per cent limitation applies to eligible expenses only.
EXAMPLE 1

A claim is submitted on 30 November for $225,000 expenses. After assessment by Austrade a grant of $100,000 is determined based on $215,000 eligible expenses. The applicant subsequently informs Austrade that it in fact incurred an additional undisclosed $40,000 expenses in the grant year. The $40,000 is found to be eligible.

However, Austrade can only pay the applicant a grant based on total expenses of \(215,000 + 10\text{ per cent of } 215,000\) which is $236,500. The grant would be $113,250.

5.19.2 Applicants should take care to include all eligible expenses at the time of claim lodgement. There may be scenarios where negative adjustments to a claim cause eligible expenses to be less than $20,000. Austrade can only ever allow a maximum of 10 per cent of assessed eligible expenses.

EXAMPLE 3

An applicant claimed the maximum $200,000 amount for item 1A overseas representation expenses. In doing so, the applicant omitted to list other overseas representation expenses totalling at least $100,000 that it had incurred. In assessing the claim, Austrade assessed the $200,000 overseas representation expenses to be only 50 per cent eligible. The applicant requested that its unclaimed overseas representation expenses be added to the claim.

Austrade would treat this case no differently to examples 1 and 2. That is, the additional (undisclosed) expenses would be limited to 10 per cent of the allowed total based on the disclosed expenses.

SECTION 48 GUIDELINES

Taxes etc

5.20.1 Australian departure tax is an eligible expense. However, all other taxes, levies or other contributions made under an Australian law (as defined at section 107 of the EMDG Act) are ineligible.

SECTION 49 GUIDELINES

Expenses incurred as commissions, discounts etc

5.21.1 Expenses which are determined by reference to the level of sales achieved do not generally qualify under the scheme. This exclusion includes remuneration by way of commission, success fees, salary, retainer or fee and amounts in the nature of discounts or credits that relate directly or indirectly to the level of sales.

5.21.2 Some sales related expenses may be eligible to the extent that the recipient of the expenses can demonstrate that the allowance was spent on eligible promotional activities.

EXAMPLE

An overseas distributor is given an advertising allowance based on a percentage of sales turnover which amounts to $20,000 in total in a grant year. If the distributor can demonstrate that $15,000 of this amount was paid for
newspaper advertising, the $15,000 may be eligible expenses subject to general eligibility criteria being satisfied.

Disguised payments

5.21.3 Austrade will not allow expenses which ostensibly may be for export promotion but which are in fact for:

- subsidising price reductions by the applicant’s overseas distributors
- intended compensation for increased prices charged by the applicant for goods supplied to its overseas distributor
- commission on sales.

Internet advertising

5.21.4 EMDG applicants advertising on web sites may pay for their product exposure on a sales related basis – see also guideline 5.8.15–20.

<table>
<thead>
<tr>
<th>Type of internet advertising</th>
<th>Assessment rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost per placement – this is payment of a fixed amount for a given exposure on a site irrespective of how much interest is generated.</td>
<td>Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.</td>
</tr>
<tr>
<td>Cost per impression – the most common form of web advertising, the advertiser is paid according to the number of impressions or times a web page showing the advert is brought up on a computer for viewing.</td>
<td>Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.</td>
</tr>
<tr>
<td>Cost per click – similar to per impression above except that the consumer/viewer ‘clicks’ into the web page and the advertising rate reflects those who click, not just those who view the page.</td>
<td>Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.</td>
</tr>
<tr>
<td>Cost per lead – similar to per click above, except that the consumer/viewer clicks into the web page and buys something. The advertising rate is then per transaction. Is increasingly used in Affiliate campaigns.</td>
<td>Claimed expenses are tied to the number of product sales made or to the value of sales made and are therefore ineligible according to section 49 of the EMDG Act.</td>
</tr>
<tr>
<td>Affiliation Marketing – again similar to per lead cost above, except that the advertiser is paid a percentage of the sales rather than a flat rate per transaction.</td>
<td>Claimed expenses are tied to the number of product sales made or to the value of sales made and are therefore ineligible according to section 49 of the EMDG Act.</td>
</tr>
</tbody>
</table>

SECTION 53 GUIDELINES

Expenses of Approved Joint Venture

5.25.1 Businesses can be members of joint ventures even though they are not eligible to receive a grant in their own right.
Examples are foreign resident businesses and businesses with an income exceeding $30 million. Grants for approved joint ventures are based on the expenses of the individual members of the joint venture to the extent that the expenses are for the approved joint venture activity. The joint venture grant will be based on the total of the expenses of the members with some exceptions.

The joint venture cannot receive a grant for expenses incurred under the following circumstances:

- the expenses of a member of the joint venture incurred at a time when the member was not a resident of Australia. The definition of resident of Australia is found at section 114 of the EMDG Act
- the expenses of a member of a joint venture whose income for the grant year exceeds $50 million.

5.25.2 In approving a group of persons as a joint venture, Austrade must specify the activity, project or purpose for which the group is approved (paragraph 89(4)(a) of the EMDG Act refers).

Any claim for expenses by a joint venture which are for activities that do not conform to the specified and approved activity, project or purpose of the joint venture will not be eligible.

SECTION 54 GUIDELINES

Expenses of applicant carrying on business in different capacities

5.26.1 Some applicants may be carrying on business in their own right as well as in the capacity of trustee of a trust estate. Each individual claim should be limited to the claimed expenses of the one or the other type of business.

EXAMPLE

Company A lodges a claim as trustee for trust estate A. Company A also carries on business in its own right as well as being trustee for another trust estate B. Its claim also includes expenses for company A’s own activities as well as for trust estate B. Company A and trust estates A and B are all claiming EMDG grants in the one grant year.

Austrade requires a claim for each business entity which incurs expenses. Therefore, company A would be required to lodge a separate claim for expenses incurred on its own behalf. In addition, it would also lodge separate claims for the expenses that it incurs as trustee for trust estates A and B.

SECTION 56 GUIDELINES

Expenses relating to illegal activities
5.28.1 This section excludes expenses which involve illegal activities. The illegal activities may involve illegal products or any illegal way of carrying on an applicant's business activities. Alternatively they may involve the carrying out of some type of promotional activity which is illegal in the country (which may include Australia) where it is carried out.

**EXAMPLE 1**

An applicant spends $200,000 promoting goods. $50,000 of that amount was incurred in paying cash inducements or giving expensive gifts to individuals in the country of export where these inducements/gifts are illegal. Therefore, only $150,000 of the claimed expenses can be allowed.

**EXAMPLE 2**

An applicant incurs expenses on TV advertising of cigarettes in a country where this method of promotion of cigarettes is illegal. These expenses would be ineligible.

**EXAMPLE 3**

An applicant is carrying on business as an inbound tour operator. Under the legislation of the Australian state where the applicant operates, tour operators are required to be licensed in order to be able to carry on business if their turnover exceeds a certain $ amount. This applicant is contravening state law by being unlicensed. Austrade would accordingly exclude its claimed expenses under section 56.

**EXAMPLE 4**

An applicant is carrying on business as an education broker, i.e., the applicant is promoting education courses to overseas students on behalf of Australian education institutions. Under the ESOS Act, all education institutions promoting courses to overseas students must be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). Education brokers promoting the courses of non-registered institutions to overseas students where the institution is required to be registered would be deemed by Austrade to be incurring expenses related to illegal activities. Austrade would accordingly exclude its claimed expenses under section 56.

Section 56A – Expenses of over $10,000 paid in cash

5.28.2 This section of the Act limits the eligibility of cash payments made by applicants to $10,000 per claim.
For the purposes of this measure, ‘cash payments’ are those where the applicant pays off the expenses by physically transferring currency to the person to whom the expenses are payable.

For claims where an applicant’s supplier of goods and services is paid by cash but where the applicant does not directly supply that cash in one unbroken transaction, refer to guidelines 5.30.13 and 14.

### EXAMPLE 1
The applicant travels overseas, pays A$50,000 worth of US $100 bills to his overseas representative, and then lodges an EMDG claim. The only expense item on the claim is the A$50,000 payment.

### EXAMPLE 3
The applicant pays currency equivalent to A$50,000 into a bank account. The bank transfers these funds to the overseas representative’s account from which the representative draws cash to pay both its own salary and to pay the applicant’s other creditors.

Assuming that the overseas representative expenses are otherwise eligible, section 56A does not apply and the entire A$50,000 expenses is claimable.

The applicant pays A$30,000 worth of US $100 bills to another overseas representative, and then lodges an EMDG claim. The only expense items on the claim are the A$50,000 and A$30,000 payments.

Austrade will only allow expenses of A$10,000 (assuming that the overseas representative expenses are otherwise eligible). The A$70,000 balance is ineligible under section 56A.

Section 56A does not apply to cash amounts paid by an applicant into a bank account in order to pay its export promotional expenses.

### SECTION 57, 57A, 57B AND 57C GUIDELINES

Expenses associated with X-rated publications, films, computer games or internet content, telephone sex services and things that may have had a detrimental impact on Australia’s trade reputation.

5.29.1 Applicants are prevented from claiming expenses relating to all forms of pornography export such as films, publications, computer games, material distributed via the internet or by any other means and telephone sex services. This exclusion applies to those products where the content is equivalent to or rated more highly than the X-rated film category.

5.29.2 Section 57 of the EMDG Act should be read in conjunction with relevant product and classification definitions at section 107 of the EMDG Act. Austrade will rely on the censorship classifications existing under Australian laws referred to in these definitions.

5.29.3 Subsection 57(2) of the EMDG Act states that expenses will be ineligible where they are for promotion of a film, publication or computer game that has not yet been given a classification but Austrade has reason to believe that the film will be refused classification or given an X classification. To gain an exemption from the operation of this section, the producer of the applicant’s film, publication or computer game would need to give Austrade a written declaration. This would state that he/she understands the current relevant Classification Board classification guidelines and that the film, publication or computer game in question does not contain material which might lead to the refusal of classification or to the imposition of an X classification.
5.29.4 Section 57A of the EMDG Act excludes expenses of promoting internet content that is:

(a) prohibited content; or
(b) potential prohibited content.

The definition of prohibited content and potential prohibited content is at section 107 of the EMDG Act.

It should be noted that expenses associated with any promotional activity related to the prohibited or potential prohibited Internet content will be ineligible. This exclusion will apply, for example, to applicants promoting search engine facilities where the search engine offers access to prohibited content. Such applicants will need to apportion their claims to exclude any expenses relating to the ineligible activity.

5.29.5 Section 57B of the EMDG Act excludes expenses incurred in respect of promotional activities relating to a telephone sex service.

Refer to section 107 of the EMDG Act for a definition of a telephone sex service.

5.29.6 Section 57C of the EMDG Act excludes expenses if the activity may have had, or involved a thing that may have had a detrimental impact on Australia’s trade reputation. Similarly, expenses may be excluded if the purpose related to an otherwise eligible product that may have had a detrimental impact on Australia’s trade reputation.

While an activity or a product may not in itself be illegal, the Government’s support of such products or activities by way of an EMDG grant may clause detriment to Australia’s standing as a trading nation. A finding that an expenses is an excluded expense does not immediately render the entire claim ineligible (unless the claim was comprised

EXAMPLE 1

Company A promotes its live entertainment production overseas. Some of the themes of the show are graphic and extreme, and lead to negative publicity in the local and overseas media. Some of the comments in the media are critical not only of the company, but also of Australia, with the media outlets encouraging people not to trade with or visit Australia as a result.

Austrade would consider the extent of the coverage and the impact it had on Australia’s reputation in determining if the expenses were excluded expenses.

EXAMPLE 2

Company B promotes a product in a foreign country. While the product itself is legal and inoffensive, the company uses promotional methods that are offensive in that foreign country. As a result, the company is the subject of adverse media coverage, which also points out that the company is an Australian company.

Austrade would consider the extent of the coverage and the impact it has had on Australia’s reputation overseas.

entirely of excluded expenses).
SECTIONS 58 AND 59 GUIDELINES

When are expenses incurred?

5.30.1 Subsection 29(c) of the EMDG Act requires that expenses be incurred by an applicant.

Subsection 58(1) of the EMDG Act states that expenses are incurred by an applicant only at the time when the amount of the expense has been acquitted.

Subsection 58(2) of the EMDG Act states that an expense is acquitted at the time that it is:
  - paid off or
  - set off.

5.30.2 Subsections 58(3) and (4) of the EMDG Act describe two particular types of payments:
  - Expenses paid by cheques or payment orders are not eligible expenses until actually debited to the applicant's account.
  - Eligible expenses paid by way of the transfer or issue to a person of shares are not acquitted and therefore are not considered to be incurred.

5.30.3 The general rule is that Austrade will consider expenses to have been incurred only when the amount of the expenses has been acquitted and the respective goods and services have been provided. Section 59 of the EMDG Act provides Austrade with a discretion to disallow any claimed expenses where the amount has been correctly incurred but all or some of the goods and services for which the applicant incurred the expenses were not received before the end of the grant year – refer to guidelines addressing eligibility of expense prepayments at 5.30.10 – 12.

However, when an applicant pays for expenses in the year immediately preceding the year in which the goods or services were actually received, Austrade will generally enable the applicant to claim the expenses in the later grant year.

**EXAMPLE**

An applicant paid for brochures by cheque in June 2014 and a 30 June debit entry appears on its bank statement. It received the brochures in August 2014.

Even though the expenses were incurred in the 2013–14 grant year, Austrade would allow the applicant to claim for them in the 2014–15 grant year.

There may be a small number of cases where Austrade would not allow the applicant to claim the expenses in the later grant year, e.g. where applicants claiming high value items look to circumvent the Act's general eligibility rules e.g. the eight grant limit, $200,000 cap for overseas representation expenses, $50,000 cap for marketing consultants expenses and section 47 (limiting unclaimed expenses to 10 per cent of eligible claimed expenses).

Acquittal date

5.30.4 The date when an amount is paid off or set off in terms of section 58 of the EMDG Act.
The applicant purchases an airline ticket and travels overseas in May 2014. The fare is not paid by the applicant until 6 July 2014. 6 July 2014 will be the acquittal date. The fares cost will be an eligible expense in 2014–15. The $300 per day allowance will, however, be paid for the promotional days in May 2014 in the 2013–14 grant year.

5.30.5 Payment by cheque or money order

An expense amount acquitted by cheque or payment order will be considered to have been paid only when it is debited to the applicant's bank or financial institution account. That is, expenses represented by unpresented cheques as at 30 June of a particular grant year do not constitute expenses incurred in that grant year.

5.30.6 This guideline is deleted.

5.30.7 Items acquitted by being paid off. This is generally monetary payment by the applicant to the provider of goods and/or services.

The term paid off may also mean that an account for the provision of goods and services is paid by an agent of the applicant. An agent in this case is a person who has been specifically authorised in a written agreement to act for the principal so as to create or effect legal relations between the principal and third parties. The liability, therefore, must belong to the applicant and is expenditure incurred by the applicant if it is reflected in the applicant's profit and loss statement.

EXAMPLE 1

The applicant's legal agent is authorised to arrange advertising on the applicant's behalf to a certain value, pay it and be reimbursed. The agent arranges advertising and pays the account. The advertising is clearly for the applicant who would be liable to pay the account should the agent not pay the expense. If the expense is reflected in the applicant's profit and loss statement then it is acquitted at the time when the agent pays the account.

Sometimes people closely related to an applicant such as its directors or employees will incur third party expenses on the applicant's behalf in the absence of a formal written agreement. Where there is evidence that the applicant intends to repay or has repaid the director or employee, Austrade will take the expense to have been incurred when it was paid in the first place by the director or employee.

EXAMPLE 2

Applicant's director pays for a June 2014 overseas trade show expense on his personal credit card with the relevant statement showing a 20 June 2014 debit. The applicant reimburses the director by cheque with the cheque being presented on 10 July 2014.

In this case Austrade accepts that the expense was paid by the director in the first place in the capacity of agent of the applicant and will take the acquittal date to be 20 June 2014.

EXAMPLE 3
The applicant’s agent has no legal authority to act on behalf of the applicant. The agent arranges some brochure printing. The invoice for the brochures does not refer to the applicant and the provider of the brochures is unaware of the applicant’s interest. In this case the expense is not acquitted until the applicant pays the agent.

**Note:** Expenses must be taken up in an applicant’s books of account, not just in consolidated accounts or in the accounts of a related entity.

### 5.30.8 Expenses acquitted by a lender of money to an applicant

A short-term liability of an applicant which is paid directly by a lender of money is acquitted by the applicant at the time it was paid by the lender. A lender of money may include a director or a related company or a third party such as a bank. The loan must be a genuine one with real intention to repay. For amounts exceeding $10,000 or where there are repeated advances made, Austrade may need to see a formal loan agreement between the parties.

Items that are taken up in an applicant’s accounts as a long-term liability will not be accepted as acquitted because of the uncertainty attached to their repayment, and the possibility that they may be converted to equity.

**EXAMPLE**

A director of an applicant company undertakes an overseas trip for the applicant. The company lacks the funds to pay for the trip so the director pays the travel costs. By way of loan accounts, the costs appear in the applicant’s balance sheet as a current liability. If Austrade accepts the arrangements as genuine, the date of expense acquittal will be when the director pays the account for travel.

### Credit cards

A common example of a lender of money paying for expenses of an applicant is where a financial institution issuing credit cards debits an applicant’s credit card account. Austrade receives claims for credit card expenses where:

1. the applicant’s employees, directors or other agents use credit cards held by the applicant itself, e.g. corporate credit cards to incur expenses; or
2. the applicant’s employees, directors or other agents use their personal credit cards to incur expenses with the applicant to reimburse the individual credit card holder.

For either scenario, Austrade will take the acquittal date to be the date the expense is debited on the credit card statement providing:

- The applicant has either received the particular goods or services or the payment is a bona fide pre-payment – see guidelines 5.30.10 – 12;
- The expense is reflected in the applicant’s profile and loss account and balance sheet (or is paid after year end by the applicant); and
- Austrade has no reason to think the credit card debt will not be paid by the holder.

### Items acquitted by way of set off

**5.30.9** Paragraph 58(2)(b) of the EMDG Act provides for expenses to be acquitted by being set off. This would involve being offset by the applicant against money owed to the applicant via a written account rendered by the applicant’s creditor (for which appropriate contra entries are recorded in the applicant’s books of account). All corresponding journal entries should be contemporaneous and must be completed by 30 June of the claim year.
EXAMPLE

The overseas representative owes the applicant $100,000 for the applicant’s exports. The applicant owes the representative $120,000 for fees and operating costs of representation. The applicant is entitled to $120,000 eligible expenses if it pays the balance of $20,000 in the relevant grant year.

Overseas representation expenses paid by way of set off

In cases where an applicant claims expenses of overseas representation that are set off against export earnings that are withheld by the export customer, Austrade requires evidence to show that it has been invoiced or formally charged for the claimed expenses. Austrade needs to verify that there is a reasonable basis to the claimed amount and that the representative provided services as claimed. Applicants should also ensure that any claimed overseas representation and export earnings amounts appear in their profit and loss statement. All corresponding journal entries should be contemporaneous and must be completed by 30 June of the grant year.

Prepayments of expenses

5.30.10 In most cases, expenses will be considered to have been incurred only when the amount of the expenses is acquitted and the respective goods or services have been provided.

5.30.11 Where the provision of goods and services takes place in a grant year subsequent to that in which the related expenses were acquitted, section 59 of the EMDG Act provides for a discretion to treat the expenses as being incurred in the later year. There may be some circumstances where the expenses will be eligible in the year that the expenses were acquitted or incurred.

5.30.12 The exercise of the discretion in regard to prepayments will depend upon the particular circumstances of each case taking into account the nature and/or timing of the goods or services provided.

Bona fide prepayments may include:

- non-refundable payments (either as deposits or full payment) to businesses not closely related to the applicant that normally require pre-payments. The applicant should show that there was a requirement to pre-pay the amount
- advance payments for air fares that are required to be made in order to secure a seat reservation or that are required to be made for visits made within three months of the end of the grant year. To be allowed as a prepayment in a particular grant year, the prepaid visits should have been undertaken before Austrade assesses the applicant’s claim.

EXAMPLE 1

Applicant is required to pay in June 2014 for a visit to take place in September 2014. The air fares expenses may be allowed in the 2013–14 grant year as long as the visit has been undertaken before Austrade assesses the applicant’s 2013–14 claim.

EXAMPLE 2

Applicant pays for 5,000 brochures but only gives away 500 in grant year. Under normal circumstances, the full expense of the 5,000 brochures would be eligible in the year that the expense is paid.

Austrade will closely examine any prepaid expenses for year 8 applicants but the above general principles will still apply.
Cash payments

(Refer also to section 56A of the EMDG Act and to guideline 5.28.2. The following guidelines are to be used when applicants do not directly pay the providers of goods and services for the claimed expenses, i.e. in cases when section 56A of the EMDG Act does not apply)

5.30.13 Where large-value expense items and especially ‘overseas representation’ expenses are acquitted by payment of cash, the applicant will have to provide sufficient evidence and an ‘audit trail’ to Austrade that proves in accordance with the civil standard of proof (reasonable satisfaction or balance of probabilities) that the applicant has genuinely incurred the particular expense.

5.30.14 In identifying the ‘audit trail’, applicants should demonstrate that there is evidence:

- that the applicant received goods or services for the claimed amount
- as to the source of funds for the claimed expenses
- that the applicant received value for money
- as to how the recipient or provider of the goods or services used the cash.

5.30.15 June 30 falling on a weekend and timing of expenses incurred

To be eligible, expenses must be incurred or acquitted on or prior to June 30 of the grant year, including when June 30 falls on a weekend. This approach is consistent with the Acts Interpretation Act 1901, as that Act has no application to situations where expenses are incurred on the Monday following a weekend in which June 30 of a grant year falls.

5.30.16 Situations where applicants incur expenses but do not receive the goods or services paid for

There will be a range of situations where applicants pay for a promotional activity but do not proceed with that activity.

In such circumstances, if the applicant receives a refund or reimbursement for the expense incurred, it will not be an eligible expense as the applicant is not out of pocket.

However, if the applicant in such circumstances incurs an expense in relation to the “paid for but not carried out or delivered” promotional activity, Austrade will allow the expense provided that:

- the applicant, when incurring the expense, genuinely intended to carry out the activity/take delivery of the promotional service
- the applicant’s failure to receive the benefit for which the expense was incurred was caused by circumstances or events beyond the applicant’s control
- the expense is reasonable
- it is clear that the applicant is not entitled to a refund for the expense.

The 2001 terrorist-related crisis and the Ansett Airlines collapse of the same year provide an example. Applicants may have incurred expenditure on marketing visits, air travel, trade fair participation or promotional campaigns etc but then:

- been forced by the crisis or collapse to cancel their planned activity
- had the event, trip or other activity cancelled on them by another party
- decided, given the crisis or the collapse, that it was no longer appropriate to go ahead with the planned activity
- otherwise incurred export marketing-related losses due to the crisis or the collapse.

In such cases, the applicant may have incurred otherwise eligible expenses but not received the relevant goods or services. As a general rule, these expenses will nevertheless be regarded as eligible.

5.30.17 Events promoters and eligible expenses
The 2001 EMDG legislative amendments provided access to the EMDG scheme for events promoters. Other sections of the guidelines deal with general eligibility issues for events promoters claiming EMDG grants.

Refer to:

4.2.18 – 4.2.25 for the product definition rules.

5.10.14 for the rules explaining what is an “approved promotional purpose” for events promoter applicants;

5.18.6 for the provisions exempting events promoter applicants from the EMDG Act’s general rules applying to reimbursements of expenses.

Also relevant are guidelines 5.30.1 – 16 that explain the general eligibility rules dealing with the need for all types of EMDG applicants to properly incur expenses.

The EMDG Act clearly distinguishes between the activities of an events promoter and the activities of an event holder. It provides for a written contract between events promoter applicants and their event holder clients whereby the events promoter is engaged to promote an eligible event to foreign residents – refer to the Act’s s 107 definition of events promoters. Section 37(2) of the EMDG Act provides for grants to be paid only to events promoters and not to event holders (except for particular events that fall within eligible internal services – refer to the EMDG Act’s Regulations).

What rules will Austrade apply for determining whether or not an events promoter incurs expenditure in terms of sections 28, 29 and 33 of the EMDG Act?

- The events promoter must pay or acquit the expenses of promotional activities.
- Expenses will not be allowed where the events promoter simply reimburses event holder clients for the client’s expenses relating to promotional activities.
- Where the expenses relating to a promotional activity are first met by a cheque signed by the event holder or out of an account not controlled by the events promoter, the events promoter will not be deemed to have incurred relevant expenses for an approved promotional purpose.

**EXAMPLE**

An events promoter has a contract with an event holder client that is intending to stage a future convention. Under the contract between the two parties, the events promoter is to be paid management fees for both organising and promoting the event (including to foreign residents). However, the contract provides for the event holder to itself pay for some of the promotional expenses and for the events promoter to pay for other specific promotional activities.

Austrade will pay an EMDG grant to the events promoter based on the expenses that it incurs or pays. The expenses paid for by the event holder will not qualify for EMDG grant purposes even where the events promoter reimburses the event holder.

**5.30.18 Use of frequent flyer points to pay for claimed marketing visits expenses**

Use of frequent flyer points to pay for air fares will not be eligible for EMDG purposes unless the individual traveller charges the grant applicant separately for the travel cost.
How to work out an applicant’s provisional grant amount

6.1.1 The provisional grant amount is the maximum amount each applicant is entitled to in respect of a grant year. The provisional grant is calculated according to the rules outlined at section 63 of the EMDG Act.

6.1.2 Applicants will not necessarily receive their provisional grant amount in full. Some circumstances where grants might be reduced are where:

- The provisional grant amount exceeds the initial payment ceiling amount. The total annual cost of the EMDG scheme is capped and if demand for grants exceeds the budgeted amount, applicants with provisional grants exceeding the initial payment ceiling amount will have their grants paid on a pro-rata basis. Refer to sections 66 – 69 of the EMDG Act for an explanation on how the provisional grant calculation relates to the actual grant payable to an applicant.
- An applicant’s grant is adjusted because of the application of section 96 of the EMDG Act. Such adjustments arise from Austrade’s determination that an applicant:
  
  (a) claimed unsubstantiated, unreasonable, uncommercial or non-bona fide expenses; or
  
  (b) entered into arrangements for the sole or dominant purpose of obtaining a grant or increasing the amount of a grant.

- The applicant is a member of a related company group and other members of the group have also applied for a grant in respect of the grant year and the group’s provisional total grant amount exceeds $250,000. In this case grants will be pro-rated according to the formula at subsection 65(2) of the EMDG Act.

General calculation

6.1.3 Subsection 63(1) of the EMDG Act states that the provisional grant is based on:

- [50% of the applicant’s “eligible expenses” for the grant year] less $2,500.

“Eligible expenses” must be at least $15,000 in the grant year – refer paragraph 29(d) of the EMDG Act. First-time
applicants can combine expenses incurred in the grant year with those of the year immediately preceding the grant year – refer sub-paragraph 29(c)(i) of the EMDG Act. The combined expenses are assessed under the rules applicable to the grant year.

6.1.4 The maximum provisional grant payable is $150,000 – refer to subsection 63(4) of the EMDG Act.

6.1.5 Guideline deleted.

Calculation where applicant is a member of a related company group

6.1.6 The maximum of the total provisional grants paid to a related company group is $250,000.

6.1.7 Individual group members should lodge individual grant applications and these will continue to be assessed in the normal manner. Once all applications lodged by corporate group members have been assessed, the individual grant amounts will be adjusted, on a pro-rata basis, should the total assessments of the company group exceed $250,000.

6.1.8 The terms related company and related company group are defined at section 107 of the EMDG Act.

6.1.9 Under the Corporations Act the expression “related bodies corporate” has a widely known meaning. The EMDG Act adopts this definition. That is, “related company” in the EMDG Act has exactly the same meaning as “related body corporate” in the Corporations Law and includes all holding companies and all subsidiaries in a corporate group.

6.1.10 Companies are part of a group if (per Corporations Act sections 46–50):

- a company is a subsidiary of another, or
- a company is a holding company of another, or
- subsidiaries are held by the same holding company.

6.1.11 A company is a subsidiary of another company if:

- the holding company controls the composition of the subsidiary’s board
- the holding company can control more than 50 per cent of the voting rights in the subsidiary
- the holding company holds more than 50 per cent of the issued capital; or the subsidiary is a subsidiary of a holding company which, in turn, is held by another company.

**EXAMPLE 1**

<table>
<thead>
<tr>
<th>Company</th>
<th>Individual Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company A [a holding company]</td>
<td>$150,000</td>
</tr>
<tr>
<td>Company B [a subsidiary of A]</td>
<td>$100,000</td>
</tr>
<tr>
<td>Company C [a subsidiary of B]</td>
<td>$125,000</td>
</tr>
</tbody>
</table>

Total: $375,000

As the total group assessment exceeds $250,000, each individual claim is then adjusted on a pro-rata basis:

<table>
<thead>
<tr>
<th>Company</th>
<th>Adjustment</th>
<th>Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>150,000/375,000 x $250,000</td>
<td>= $100,00</td>
</tr>
<tr>
<td>B</td>
<td>100,000/375,000 x $250,000</td>
<td>= $66,667</td>
</tr>
<tr>
<td>C</td>
<td>125,000/375,000 x $250,000</td>
<td>= $83,333</td>
</tr>
</tbody>
</table>

Total of Payments to Group Members = $250,000
EXAMPLE 2

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company A [a holding company] individual assessment</td>
<td>$100,000</td>
</tr>
<tr>
<td>Company B [a subsidiary of A] individual assessment</td>
<td>$20,000</td>
</tr>
<tr>
<td>Company C [a subsidiary of A] individual assessment</td>
<td>$40,000</td>
</tr>
<tr>
<td>Company D [a subsidiary of C] individual assessment</td>
<td>$60,000</td>
</tr>
<tr>
<td><strong>Total Group Assessment</strong></td>
<td><strong>$220,000</strong></td>
</tr>
</tbody>
</table>

As the total group assessment is less than $250,000, each individual claim is then paid at the individually assessed rate.

Timing of Austrade payments to related company group members

6.1.12 Sections 80 – 84 of the EMDG Act (guidelines 7.4.1–7.5.6) inclusive refer to Austrade’s requirements to pay grants to applicants.

Section 83 of the EMDG Act refers directly to payments to related company group members. The important point to note is that because of the possibility of the $250,000 group cap being exceeded in the event of successful appeals by group members, Austrade will not make payments to any group member until the period for lodging appeals has passed.

Export performance requirements

6.1.13 Under section 63(3) of the EMDG Act, applicants other than approved bodies and approved trading houses that have:

- already received two EMDG grants; and
- elected grants Option A for a particular grant year

will be subject to the EMDG Act’s export performance requirements. The Export Market Development Grants (Export Performance Requirements) Instrument 2018 contains the rules for measuring an applicant’s export earnings as follows (see especially the table at section 2.1 (2) of the Determination).

Under this test applicants will receive the lesser of:

- 50% of (total eligible expenses less A$5,000)*; and
- The relevant % of export earnings depending on how many grants you have received.

* Subject to the maximum legislated grant amount of $150,000.

EXAMPLE 1

An applicant has received six grants and applies for its seventh grant for the 2013–14 grant year. Its eligible expenses are $200,000 meaning that its provisional grant based on expenses alone would be $97,500.

Its claimed 2013–14 grant year exports are $400,000 meaning that if it chose Option A (export performance requirements) and if its claimed exports were assessed as eligible, its grant would be $20,000.

However, if this applicant was to have any or all of its claimed export earnings disallowed by Austrade, e.g. if it was assessed not to be the principal in transactions, its grant would be reduced, possibly to a zero amount. This applicant could not then revert to Option B (ANBRs).
These percentages are as follows:

<table>
<thead>
<tr>
<th>GRANT YEAR</th>
<th>% OF EXPORT EARNINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>40</td>
</tr>
<tr>
<td>4</td>
<td>20</td>
</tr>
<tr>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>6</td>
<td>7.5</td>
</tr>
<tr>
<td>7 and 8</td>
<td>5</td>
</tr>
</tbody>
</table>

### Types of eligible export transactions

#### Export earnings – goods

**6.1.14** Item 1 in section 2.1 (2) of the Export Performance Requirements Determination notes eligible goods to be goods that are:

(a) made in or outside of Australia; and  
(b) exported by the applicant from Australia; and  
(c) sold by the applicant at any time to a person that is not a resident of Australia.

**EXAMPLE 1**

An applicant contracts with a UK buyer to supply Australian wine. It exports the wine and receives consideration for the export transaction in the 2013–14 grant year.  

The consideration received in 2013–14 for the free on board (FOB) export earnings value will be the assessed export earnings amount for the applicant.

**EXAMPLE 2**

An applicant sells wine to foreign tourists in Australia. The wine is taken out of Australia by the tourists.  

The consideration received in 2013–14 for the FOB export earnings value will be the assessed export earnings amount for the applicant.  

**N.B.** Section 2.4 of the Determination enables the applicant in this case to be taken to be the exporter even though the buyer exports the goods.
EXAMPLE 3
An applicant exports medical equipment to its USA branch during 2012–13. The equipment was held in a warehouse as consignment stock but not sold until 2013–14 and later years.

The consideration received in 2013–14 for the consignment sales, and which is based on the FOB export earnings value, will be the applicant’s assessed export earnings.

For consignment sales, payments received by the claimant (that is, gross receipts) are to be reduced to FOB values of the goods sold by deducting:

- ocean freight
- insurance
- customs and clearing charges
- internal freight in country of sale
- warehousing costs
- interest on advances etc relating to the provision of that consignment stock originally.

EXAMPLE 4
An applicant is a manufacturer and sells to an Australian wholesaler that in turn sells to foreign residents.

The applicant is not able to claim any eligible export earnings for exported goods that are not sold by it to a foreign resident.

EXAMPLE 5
An applicant promotes eligible goods that it has made in China by a related company and claims eligible EMDG expenses for the promotion of these goods.

The China made goods are sold by the applicant to customers in USA and delivered from China without coming to Australia.

The applicant is entitled to claim the consideration received during the 2013–14 grant year for the sale of the goods to the USA customers.

N.B. Section 2.1 (6) of the Determination provides that if goods are exported from one country to another, the amount or value of the consideration is the free on board value of the goods from the country of delivery.

EXAMPLE 6
An applicant promotes eligible goods that it has made in China by a related company and claims eligible EMDG expenses for the promotion of these goods.

The China made goods are sold by the related company to customers in China.

The applicant is not able to claim any eligible export earnings for exported goods that are not sold by it to a foreign resident.
**Principal status**

6.1.16 Eligible export earnings must be based on amounts received for goods sold by the applicant. Section 109 of the EMDG Act provides that a person is taken to sell eligible goods only if Austrade is satisfied that the property in the goods passes from that person to a person that is not a resident of Australia at the time when the goods are sold.

The goods can be sold either in or outside Australia.

To substantiate the issue of principal status for goods, Austrade may examine:

- a) the sales contract between the applicant and the overseas purchaser
- b) invoice/s from the applicant to the purchaser
- c) bills of lading/air waybills
- d) evidence that the sale has been taken up in the applicant’s profit and loss (P&L) statement
- e) the payment flow – transfer of title from claimant to an overseas resident.

EMDG applicants may make arrangements for financing their export activities with businesses such as those providing factoring services. For example, in a factoring operation, there will be a sales contract between the applicant and the overseas purchaser, a bill of lading/air waybill, and the P&L evidence, however, the invoice is made out to the factoring organisation, which is often an Australian company.

Where EMDG applicants’ factoring arrangements are done on an arm’s length and bona fide basis and are purely for financing the export business, they will be accepted as principal in export transactions. The amount claimable as export earnings will be the amount invoiced to the foreign resident customer – refer to ‘Accounting for agent’s commission etc’ below – guideline 6.1.18 refers.

**Free on board (FOB) export values**

6.1.17 FOB values would normally be calculated by taking the selling price to the overseas buyer and deducting any costs incurred by the exporter in transporting the goods beyond the point of export (freight and insurance).

FOB values include:

- material costs
- labour costs
- value of packaging
- seller’s mark-up
- freight ex works to the point of export
- domestic insurance for the risk in bringing the goods to the point of export
- export duties
- internal taxes
- agent’s commission or brokerage to the point of export
- costs of obtaining and drawing up export documents in bringing the goods to the vehicle of export
- loading or wharfage or porterage charges.

FOB values exclude:

- duties, taxes and consular fees imposed by the country of destination
- transport charges beyond the point of export
- marine freight and insurance
- patent, trade mark, licensing charges etc in the country of destination.

There will also be cases where the goods are sold in Australia to a foreign resident buyer who is in Australia.
If the buyer later exports the goods, section 2.4 of the *Export Market Development Grants (Export Performance Requirements) Instrument 2018* provides that the seller (not the buyer) is taken to be the exporter of the goods.

**Accounting for agent’s commission etc**

**6.1.18** FOB export earnings are generally deemed to include commission paid or payable to an agent. However, amounts representing discounts or similar payments are excluded.

For example, where an applicant invoices a customer but only receives 95 per cent of the invoiced amount, there are two likely scenarios:

a) If the customer is simply taking advantage of a 5 per cent discount, then the eligible EMDG earnings will be the 95 per cent amount.

b) If an agent (such as a factoring business) is paid the 5 per cent fee by either the applicant or the customer, that fee is considered to be part of the applicant’s EMDG eligible earnings. The onus is on the applicant to substantiate that the commission is eligible for inclusion and that it has been paid. This rule also applies where an applicant uses a factoring organisation to finance an export sale.

**Export earnings – services**

**Item 3 in the section 2.1 (2) table of the Export Performance Requirements Determination – export earnings for eligible non-tourism services sold by the applicant to non-Australian residents**

**6.1.19** This covers all eligible services that do not fall within the meaning of the following two schedules in the EMDG Regulations 2008 as follows:

- Schedule 1 Tourism services;
- Schedule 2 Services that are not non-tourism services.

The deduction of amounts paid or payable outside Australia will be made when an applicant engages local non-Australian resident contractors to carry out part of the work on an overseas project. That is, where an applicant pays part of the selling price to contractors who perform part of the service, the amount paid to the contractor will be deducted. However, Austrade will not deduct general expenses incurred by an applicant in relation to receiving consideration for the supply of its external services.

**Item 4 in the section 2.1 (2) table – export earnings for events**

**6.1.20** Note: This item only applies to event promoters. Event holders or owners may be eligible for EMDG support under the eligible tourism services product category, but only where they have not engaged an event promoter.

Because events promoters do not themselves export, the EMDG rules attribute the event holder’s export earnings to event promoter.

The event promoter will claim the sum of the eligible export earnings of all of its event holder clients – whether Australian or foreign residents – for a particular grant year for EMDG purposes, as if these were its own exports.

The event holder’s export earnings to be attributed to the events promoter will include:

- the event admission or entrance fees of foreign residents
- the event holder’s sales of goods or services in connection with the event – including accommodation or pre- and post-event tours – if the sales are made to a foreign resident who attends the event in Australia.
Export earnings that do not relate to the attendance at an Australian event by a foreign resident will not qualify as export earnings for EMDG purposes. For example, sponsorship paid to the event holder by a foreign corporation would not be eligible export earnings for the events promoter.

Given that export earnings are attributed to the events promoters, it is important that events promoters have arrangements in place with their event holder clients that ensure that the events promoters will have access to the appropriate export earnings information.

As a general rule, Austrade will not require a detailed transaction-level accounting of their clients’ earnings from events promoters, but will endeavour to assist events promoters to comply with this requirement in a practical manner which recognises the realities of the situation. The export performance test does not apply until the events promoter’s third grant, by which time Austrade would expect to have negotiated a mutually satisfactory way of meeting this requirement with each claimant.

Only sales revenues earned by the event holder(s) that the event promoter has contracted will count.

**How are export earnings allocated where there is more than one events promoter for an event?**

It is expected that there would usually be an obvious basis to allocate an event holder’s export earnings in such cases, such as a geographic basis.

The EMDG legislation provides for regulations to provide for allocating export earnings between two or more events promoters, but there are no plans to draft such regulations at this stage. Austrade would prefer at this stage to handle any such cases by seeking agreement on a case by case basis.

**Items 5, 6 and 7 in the section 2.1 (2) table of the Export Performance Requirements Determination – export earnings for exporters of eligible tourism services**

**6.1.21** Suppliers of eligible tourism services to Australian resident inbound tour operators (ITOs) where the ITO on-sells the services to foreign resident tourists are entitled to 20 per cent of the value of the consideration received during the grant year for the sales of the services.

N.B. The term ‘inbound tour operator’ (ITO) is not defined in the Export Market Development Grants (Export Performance Requirements) Instrument 2018. For the purpose of the Determination, this term is taken to mean any Australian business that buys eligible tourism services from an Australian supplier for on-sale to foreign residents.

**EXAMPLE 1**

An applicant operates a hotel and sells rooms to an Australian inbound tour operator (ITO) for on-sale to foreign residents. In the 2013–14 grant year the applicant charges the ITO and is paid $100,000 for these room sales.

The applicant is entitled to $20,000 for the purposes of the EMDG export performance requirements.

Inbound tour operators (ITOs) supplying eligible tourism services to foreign residents that the ITOs had purchased from another tourism services supplier are entitled to claim 80 per cent of the amount or value of the consideration received during the grant year for the sale of the service.
**EXAMPLE 2**

The inbound tour operator (ITO) referred to in example 1 above invoices the hotel rooms to foreign residents for $150,000 and receives this amount in the 2013–14 grant year. Because the ITO purchased the rooms from an Australian hotel, the ITO is entitled to claim 80 per cent or $120,000 export earnings for this transaction.

Any EMDG applicant that sells eligible tourism services based on its own amenities will be entitled to claim 100 per cent of the sales income received in the grant year. Some tourism applicants may own tourism amenities and package these with bought-in services for on-sale to foreign resident tourists. These applicants will be able to claim 100 per cent of earnings based on the sale of their own amenities and 80 per cent of earnings based on selling their bought-in services.

**EXAMPLE 3**

An applicant owns buses and buys in other amenities such as accommodation and admission to tourist attractions for packaging for sale to foreign residents. 100 per cent of the income from the buses will be eligible and 80 per cent of the income from the bought-in amenities will be eligible.

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**Item 8 in section 2.1 (2) table of the Export Performance Requirements Determination—export earnings for exporters of eligible intellectual property or eligible know-how**

6.1.22 These categories of products (eligible intellectual property and eligible know-how) are defined at sections 26 and 27 of the EMDG Act respectively. The definition of disposal of eligible intellectual property and eligible know-how is found at section 111 of the EMDG Act. It requires that the intellectual property or know-how is disposed of for reward to a person that is not a resident of Australia for use or enjoyment outside Australia.

The eligible earnings will be the amount received in return for that disposal by the applicant as principal in export transactions during the grant year.

Withholding tax levied by overseas governments on royalties earned by Australian residents in those countries is not regarded as being part of the consideration received for the disposal of eligible industrial property rights or of eligible know-how. That is, the consideration received by the applicant is the net amount after deduction of the source of the withholding tax.

**Export earnings – related entities**

6.1.23 Section 2.5 of the Export Market Development Grants (Export Performance Requirements) Instrument 2018 provides that the export earnings of an applicant’s related entity are taken to have been earned by the applicant itself in the following circumstances:

1. The applicant must be incorporated under the Corporations Act 2001; and
2. The applicant claims expenses of promoting export sales for a related entity *; and
3. The export earnings of this related entity* are attributable to the promotion of export sales by the applicant.

* Related entity means:
• a company incorporated under the Corporations Act 2001 (Corporations Act) that controls or is controlled by the applicant. The test of ‘control’ is that found at section 50AA of the Corporations Act

• a company incorporated under the Corporations Act that has the same shareholder or shareholders as the applicant

• a board-approved Australian resident shareholder/director of the applicant company.

**EXAMPLE**

Applicant company XYZ Pty Ltd incurs expenses of promoting export sales of IP in relation to medical treatment owned by its parent company ABC Pty Ltd in its 2013–14 EMDG claim. XYZ claims in the grant year and prior years were limited to expenses for the promotion of the medical treatment IP royalties, although ABC also exported goods during 2013–14. These goods exports were achieved independently of any promotional expenses ever claimed in any XYZ claim.

ABC Pty Ltd receives IP royalty income of $500,000 during 2013–14. It also receives $100,000 from the sales of its goods. Austrade will only deem the $500,000 export earnings amount to have been received by XYZ for the purposes of the EMDG export performance requirements.

In cases where two entities related under section 37(1A) of the EMDG Act both claim expenses promoting a particular product, the export earnings earned by one of them may be apportioned, on some objective basis, between the two entities for the purposes of section 2.5 of the Export Market Development Grants (Export Performance Requirements) Instrument 2018. The export earnings cannot be claimed in their entirety by each applicant.

**EXAMPLE:**

Company A and Company B are related entities. They promote the same intellectual property. While each company is able to identify its own promotional expenditure, they cannot identify whose promotional effort generated the export earnings.

In this case, the export earnings must not be claimed in their entirety by each applicant. Austrade would expect the companies to identify an objective way to apportion the export earnings between Company A and Company B. The export earnings entered into each claim should reflect this apportionment, and include a note that documents the rationale for the apportionment.

**EXAMPLE**

Company A is a holding company that owns IP in relation to a medical product. It incurs patent registration expenses but does not export in its own right. It has received two prior grants and claims an EMDG grant in 2013–14 grant year.

Company B earns $200,000 export income from the sale of its medical product in 2013–14. The earnings of this entity that can be attributed to the promotion of export sales by the applicant can be claimed.
Export earnings – contra arrangements

6.1.24 Austrade will allow earnings under contra or offset arrangements where the applicant owes the overseas customer a matching amount and where it can substantiate the legitimacy of the arrangement.

Export earnings – conversion from foreign currency amounts

6.1.25 Applicants should generally claim the Australian dollar amounts received as detailed in bank statements.

For applicants that have export earnings deposited into their foreign currency bank accounts, Austrade will apply the exchange rate prevailing on the day the earnings are received.

Export earnings – New Zealand and markets subject to trade sanctions

6.1.26 No export earnings will be allowed for New Zealand or North Korea. For Iran, no export earnings acquired up to and including 17 January 2016 will be allowed.

Export earnings – deposits and prepayments

6.1.27 Applicants receiving payment from customers before the shipment of goods or before the supply of services will be entitled to claim export earnings when they are received as long as the payment received is taken up as revenue in the applicant’s profit and loss statement for the particular grant year. Payments received from foreign resident customers that are held in the balance sheet at 30 June of the particular grant year will not be allowed as export earnings for that grant year.

6.1.28 The Export Market Development Grants (Export Performance Requirements) Instrument 2018 requires that exports to markets subject to trade sanctions will be ineligible. Exports to North Korea will not be eligible, and exports to Iran will not be eligible up to and including 17 January 2016.

6.1.29 GST and export earnings

All exports will be assessed for EMDG purposes at their full sales price (which may include the GST component in some cases, particularly for internal services such as tourism).

6.1.30 Export earnings based on management charges to an applicant’s related overseas entity

Austrade will not generally allow offset arrangements with an applicant’s overseas related entity where the applicant claims a management charge as export earnings. Austrade considers that in most cases such management charges represent a cost recovery amount for the resources the applicant has spent on supporting its related overseas entity. Austrade will consider circumstances where an applicant can substantiate that the management charges between members of a related group are both reasonable and commercial, and where the charges are in the nature of service delivery.

SECTIONS 66 – 69 GUIDELINES

How to work out the amount of grant

6.2.1 Divisions 3 and 4 of Part 6 (sections 66 – 69) of the EMDG Act cover the rules for calculating the amount of grant payable to an applicant.
6.2.2 Since 1 July 1997 funding for the EMDG scheme has been capped. Up to five per cent of this can be directed to the administration of the scheme. To ensure that the cap is not exceeded, grants are paid under a split payment system. Grants up to an amount termed the “initial payment ceiling amount” will be paid in full. Grants exceeding this amount will be paid in two instalments.

6.2.3 The “initial payment ceiling amount” is the maximum payment an applicant can receive immediately following assessment of their application by Austrade. This amount is set by Ministerial determination and is advised by Austrade before the end of the particular grant year.

Applicants will fall into one of two categories:

1. **Applicant’s provisional grant does not exceed the “initial payment ceiling amount”**

2. **Applicant’s provisional grant exceeds the “initial payment ceiling amount”**

6.2.4 Where an applicant’s provisional grant amount as determined by Austrade is equal to or less than the initial payment ceiling amount, the grant will be paid immediately following assessment by Austrade.

6.2.5 Where an applicant’s provisional grant exceeds the “initial payment ceiling amount”, only the “initial payment ceiling amount” is payable in the first instance.

6.2.6 Unpaid provisional grants (balance grants) are then dealt with in the following manner:

During June of the year following the particular grant year, Austrade will total the amounts paid out as initial payments (including payments for earlier years if applicable) and also administrative outlays for that year. The balance subtracted from the total EMDG scheme appropriation will be the amount distributed.

6.2.7 The Minister is required to determine the date at which this calculation is made. This date, set by Ministerial determination, is called the “balance distribution date”. The “payout factor” is determined as soon as practicable following the “balance distribution date”.

6.2.8 The “payout factor” will be applied to all unpaid provisional grants so that the balance amounts can be paid. The payout factor ensures the funding cap for that grant year is not exceeded. Unless outstanding provisional grants equal or fall below the amount calculated to be distributed, the payout factor will be a multiplier of less than 1. That is, all outstanding provisional grant amounts will be reduced proportionately.

6.2.9 The actual formula for the “payout factor” can be found at Regulation 3 accompanying the Act.

6.2.10 It should be noted that the “payout factor” applies to the grant year for which an application was submitted and all determinations in relation to that year.

**EXAMPLE:**

Applicant claims a grant for 2013–14. A grant greater than the initial payment ceiling amount is determined and paid late in the processing cycle in June 2015. The payout factor for 2013–14 grant year applications is, for the purposes of this example only, determined to be 0.75. An appeal is lodged and processed in August 2015 with a supplementary grant being determined. The supplementary grant will be based on application of the same 2013–14 payout factor of 0.75.
SECTIONS 70 – 73 GUIDELINES

Applying for a grant

7.1.1

Applications for a grant may only be made online, using the EMDG online application form. This is available from the Austrade website: www.austrade.gov.au/Export/Export-Grants/Application-forms.

Please refer to this site for further information on how to apply for a grant.

Hard copy paper-based applications will not be accepted.

7.1.2 – 5

Guidelines deleted

7.1.6

Applications for approved joint ventures must be made on behalf of the joint venture by the nominated contact member. This member will be required to be specified at the time of Austrade’s approval of the joint venture.

Additional material or consents that may need to be provided by some applicants in certain cases

7.2.1

Subsection 72(1) of the EMDG Act states that Austrade may provide written notice to applicants to seek specified information or specified books, records or documents. If the Applicant is a body corporate that was part of a related company group at 30 June of the relevant grant year, Austrade may provide this written notice to each body corporate that was a member of the group.

7.2.2

Similarly, subsection 72(2) of the EMDG Act states that Austrade may provide written notice to applicants to seek their written consent to enable Austrade to check criminal records in respect of the EMDG disqualifying convictions provisions at Division 4 of Part 3 and section 86 of the EMDG Act.

7.2.3

Subsection 72(3) of the EMDG Act states that the official Austrade application form must contain an explanation of Austrade’s powers under subsections (1) and (2). This must include explaining the effect of these provisions. Non-compliance with subsections (1) and (2) will mean that Austrade may refuse to consider a particular application.
When may Austrade refuse to consider a particular application?

7.3.1 Austrade may refuse to consider a particular application if:

- the application is not made in a form and manner approved by Austrade
- Austrade’s requests for further information/written requests made under section 72 of the EMDG Act have not been complied with
- Austrade’s requests for written consent from an individual who helped in a prescribed capacity to prepare an application have not been complied with.

Note: Austrade must refuse to consider a particular application if the application was not received within five months after the end of the grant year (see paragraph 70(2)(b) of the EMDG Act). Similarly, Austrade must refuse to consider an application prepared by an EMDG Quality Incentive Program consultant that is received more than eight months after the end of the grant year.

Withdrawal of Claims

7.3.2 There is nothing in the EMDG Act, the Regulations or the Guidelines that prevents an applicant from withdrawing its grant application. However, enabling applicants to withdraw a claim does not mean they can circumvent the EMDG Act’s other provisions such as section 47 (expenses disclosed after submitting application) and section 103 (offences related to submitting an EMDG application).

EMDG application acceptance policy

7.3.3 Applications must include:

1. a completed application form, with the required declaration signed by an authorised officer (i.e. the applicant, sole trader or partner; or the Managing Director, Chief Executive Officer, Registered Company Secretary, Director or Chief Financial Officer of the applicant)
2. completed schedules relevant to the application
3. any other required documents, as requested by the EMDG e-Lodge system. As applicants work through the application form, they will be asked to provide various documents, such as financials, invoices or bank statements. The types of documents requested will depend on what is in the claim.

- Applicants promoting goods that are not made in Australia must provide a ‘submission containing the information requested in “A guide to applying for EMDG” at “Are the goods made in Australia”.

- Applicants that have already received two or more grants (and are not an approved body) must elect to meet either the Export Performance Requirements (Option A) or the Australian Net Benefit Requirements (Option B) in relation to that grant year.

Export Performance Requirements Option A

Applicants seeking to satisfy the Export Performance Measure under Option A must provide a schedule of export earnings received in the grant year.

Export earnings figures are to be provided for the full year on the Application form and detailed on the relevant Export Earnings schedule (Schedules 9A to 9E) applicable to the type of product/service being exported. Where individual export sales are too numerous to list, a summary of sales by month, supported by a schedule detailing at least one months’ export sales, must be provided. The schedules must demonstrate that all earnings were received prior to 30 June of the grant year.

Applicants in years three to eight of the scheme must attach the invoice and bank statement for the entry selected by the EMDG online application.
Australian Net Benefit Requirements Option B

Applicants seeking to satisfy the Export Performance Measure under Option B must submit the documents detailed in the Export Market Development Grants (Information and Document Requirements) Instrument 2018, as amended. The following is reproduced from the Determination:

4 Information and Document Requirements

(1) For paragraphs 70 (2C) (f) and (g) of the Act, the following information and document requirements are specified:

(a) the applicant’s business plan, including the applicant’s international marketing strategy
(b) the applicant’s audited statement of income for the grant year, including:
   (i) the income received by the applicant from all sources including international sources; and
   (ii) the income receivable by the applicant from all sources including international sources
(ba) an opinion of the applicant’s export potential, based on:
   (i) the applicant's sales and revenue budgets for the year following the grant year; and
   (ii) an examination of any correspondence that supports the projected export income; and
   (iii) a comparison of the applicant’s previous sales and revenue projections with actual results in those periods
(c) the applicant’s audited profit and loss statement for the grant year and the year preceding the grant year
(d) the applicant’s audited balance sheet for the grant year and the year preceding the grant year
(e) a statement that details the economic benefits generated, or that will be generated, from the applicant’s international business activities in 2 or more of the following areas:
   (i) employment in Australia
   (ii) new capital investment in Australia
   (iii) introduction of new technologies in Australia
   (iv) new value-added operations in Australia.

(2) For subsection (1), a reference to:

(a) an audited statement of income; or
(b) an audited profit and loss statement; or
(c) an audited balance sheet

is a reference to a document that has been audited by a person who is a registered company auditor for the Corporations Act 2001.

(2A) For subsection (1), a reference to an opinion of the applicant’s export potential is a reference to a document that has been prepared by a person who is a registered company auditor for the Corporations Act 2001.

Unacceptable and incomplete applications

If the application does not have the relevant schedules and the information requested by Austrade via the online application, Austrade may deem the application not to have been made.

Austrade will only start processing an applications when all of the relevant documents listed above are received and the application is deemed complete.

Incomplete applications, where Austrade deems the application ‘not to have been made’, will be returned to the applicant. Austrade will advise the Applicant of the decision by email but may delay returning the application for 14 days or until the closing date for applications (whichever is the earlier) to give the Applicant the opportunity to rectify
the noted deficiency. If information or documents are not provided following this request, Austrade will refuse to consider the application and return the application. In this situation, no grant is payable.

Applications considered to be incomplete after the closing date for applications will be deemed ‘not to have been made’ and returned to the applicant.

Where Austrade returns an application the client and/or consultant may resubmit the completed application for acceptance prior to the closing date for applications.

Austrade is prevented by law from considering an application where the Australian Net Benefit Requirements information and documentation required under the EMDG Act is not provided to Austrade by the closing date. This means that the application will not be accepted by Austrade (please refer to section 73(3) of the EMDG Act).

**Standards for application preparation**

Applicants and consultants should:

- provide clear and accurate information in their applications
- complete all relevant sections of the form and schedules
- provide all requested and any other relevant documents.

An applicant (or their consultant) must ensure that all contact details, including mobile phone numbers, listed on the schedules for *Overseas Representatives and Marketing Consultants* are current at the time of lodgement.

All expenses must be supported by invoice numbers and payment details, including cheque numbers/telegraphic transfer numbers etc. Accurate dates of payment, checked to bank statements, must also be provided on the schedules.

Each item listed on a schedule must contain a detailed description of the nature of the expense and/or the export earnings claimed. Schedules containing descriptions such as ‘various’ are unacceptable.

It is the responsibility of the applicant/consultant to substantiate, to Austrade’s satisfaction, the eligibility of any application made under the provisions of the *Export Market Development Grants Act 1997*. Should information or documentation supplied by the applicant not establish such eligibility, then depending on the circumstances Austrade may disallow or refuse to consider the application.

**Revised schedules**

Austrade will only accept revised schedules where they are signed by the applicant and/or the changes are endorsed by written confirmation by the applicant.

**Lodgement Date**

In accordance with the *Acts Interpretation Act 1901* when 30 November falls on a weekend applications will be accepted if received on the first working date thereafter.

**Approved consultants**

Consultants, who are approved participants under the *Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012*, have a further three months to lodge applications on behalf of their clients. In accordance with the *Acts Interpretation Act 1901* when this date falls on a weekend applications will be accepted if received on the first working date thereafter. Austrade will publish the application closing dates on its website each year.
Disqualified individual not to help in preparing applications

7.4.1 The object of this provision is to ensure that people who have been convicted of fraud or dishonesty offences, including EMDG claims consultants, do not participate in preparing claims.

Who is affected by this provision?

7.4.2 Applications which have been prepared by an Export Market Development Grants Consultant (defined at section 107 of the EMDG Act) and which have involved an individual helping in a prescribed capacity are subject to the provision.

7.4.3 The focus of the measure is on the individual who assisted with the preparation of the application. It is aimed at EMDG consultants together with those who assist or manage the consultants. This will include those who may not themselves publicly offer themselves as claims consultants but who do work with the consultants as employees, contractors, advisers or managers.

7.4.4 Those people who provide administrative type services such as clerical and secretarial staff and who do not apply intellectual judgement to the preparation of the application are not intended to be subject to this provision. This exclusion extends to the applicant’s staff members who simply provide information to the consultant responsible for the application preparation.

What is the timing of this provision?

7.4.5 For an application to be treated as invalid under this measure, it must have been prepared by an individual working in a prescribed capacity who is disqualified at any time during the period beginning when the application is submitted and ending immediately before Austrade determines whether the applicant is entitled to a grant.

Austrade’s duties in inviting an applicant to lodge a fresh application

7.4.6 Austrade must, as soon as practicable after learning that a disqualified individual has assisted with the preparation of an application, advise the applicant that their application is invalid.

7.4.7 Should Austrade be satisfied that the applicant did not knowingly use a disqualified individual to prepare its EMDG application, additional time is allowed for the submission of a fresh application. This application must be submitted by the normal deadline (five months after the end of the grant year) or within 90 days of the notification that the original application was invalid, whichever is the later.

7.4.8 In some cases, Austrade may form the view that the applicant should reasonably have known that the person was disqualified. For example, where Austrade had previously advised the applicant that the person was disqualified, the applicant would not be able to resubmit an application for the grant period and no grant would be payable for that period.

What does “disqualified individual” mean?

7.4.9 “Disqualified individuals” are those persons who have been convicted of offences involving fraud or dishonesty (including offences against section 39 of the Export Market Development Grants Act 1974). The full range of relevant offences can be found at paragraphs 78(1)(a)-(d) of the EMDG Act inclusive.

7.4.10 The period of disqualification is limited. It starts on the day on which the conviction was recorded and ends either five years afterwards or, in a case where the conviction was for a term of imprisonment, five years after the convicted person was released from prison.
Consent to enable the check of criminal records

7.4.11 Austrade may, by written notice to an individual who has helped in a prescribed capacity to prepare an application, ask for written consent in terms of section 79 of the EMDG Act so that Austrade may enable criminal records to be checked.

7.4.12 If the individual does not comply with any request made under section 79 of the EMDG Act, Austrade may refuse to consider the application – subsection 73(3) refers.

SECTION 80 GUIDELINES

Austrade must determine applicant’s entitlement to grant

7.5.1 This section states that Austrade must consider each application except for those situations provided for in section 73 (see guideline 7.3.1):

- The application is not made in a form and manner approved by Austrade and is not received within five months of the end of the grant year.
- The applicant, or if the applicant is a body corporate that is part of a related company group as defined at section 107 of the EMDG Act, any related company, has not provided Austrade with the specified information (books, records or documents) requested under subsection 72(1) of the EMDG Act.
- The applicant has not provided written consent to enable Austrade to check criminal records for the purposes of the Act’s disqualifying convictions provisions.
- An individual who has helped, in a prescribed capacity, to prepare the application, has not complied with a request of Austrade to enable criminal records to be checked for the “disqualified individual” provisions at section 78 of the EMDG Act.

7.5.2 Section 80 of the EMDG Act requires Austrade to determine whether the applicant is entitled to a grant. If the applicant is entitled to a grant, Austrade is required to determine the amount of the grant as soon as practicable.

The applicant becomes entitled to the grant once Austrade has determined that the entitlement exists.

SECTIONS 81 – 84 GUIDELINES

When is a grant payable?

7.6.1 Section 80 of the EMDG Act provides for an applicant to become entitled to a grant. Sections 81 – 84 of the EMDG Act detail when this grant becomes payable.

7.6.2 Most applications for a grant year will be determined in the year following the grant year. For example, most 2014–15 applications will be processed during 2015–16. Of these determinations, most will be made before the balance distribution date.

7.6.3 The significance of the balance distribution date is explained at section 68 of the EMDG Act (guidelines 6.2.5-10 refer). Austrade will determine the demand for balance amounts towards the end of the grant year.

7.6.4 Soon after the balance distribution date, Austrade will determine the payout factor to be applied to the balance amounts. It will then make balance amount determinations.
When is a grant payable where the applicant becomes entitled to grant before the balance distribution date?

7.6.5 This situation refers to what the EMDG Act at subsection 81(1) describes as Austrade’s first determination. This will be when Austrade assesses the claim and determines that a provisional grant entitlement exists.

   a) If the applicant’s provisional grant does not exceed the initial payment ceiling amount for the grant year, the applicant becomes entitled to the grant when Austrade makes the determination (particular rules apply where applicant is a member of a related company group—see section 83 of the EMDG Act).

   b) If the applicant’s provisional grant exceeds the initial payment ceiling amount for the grant year, the applicant is entitled to be paid an advance which is equal to the initial payment ceiling amount. This amount is payable by Austrade at the time of this first determination (particular rules apply where applicant is a member of a related company group—see section 83 of the EMDG Act).

(Note: The balance amount will not be considered to be determined until after the balance distribution date for the year following the grant year. Refer to note 1 accompanying section 81 of the EMDG Act for an explanation of this point.)

When is a grant payable where the applicant becomes entitled to the grant after the balance distribution date?

7.6.6 A grant is payable where the applicant becomes entitled to the grant after the balance distribution date in the following circumstances:

   a) the balance amount is determined at some time after the balance distribution date – see note 1 accompanying section 81 of the EMDG Act

   b) Austrade may not have made a first determination of the claim until after the balance distribution date

   c) a supplementary grant is payable (as a result of a successful appeal by an applicant) after the balance distribution date.

7.6.7 The grant is payable, subject to particular rules for members of related company groups, (see section 83 of the EMDG Act) as follows:

   • If the determination is made before 1 July next following the balance distribution, on that 1 July.
   • If the determination is made later, on the day that the determination is made.

Circumstances in which no grant is payable

7.6.8 Austrade may have determined that a grant entitlement exists in terms of section 80 of the EMDG Act. This grant would not be payable in those circumstances stated at subdivision 3 or sections 85 – 87 of the EMDG Act (refer to guideline 7.7.1).

Particular rules where an applicant is a member of a related company group

7.6.9 Because related company groups are limited to combined grants for their members’ of $250,000 in any grant year, Austrade has particular rules to prevent that cap being exceeded.

7.6.10 Section 83 of the EMDG Act provides that no grant or advance on account of a grant is payable to any company group member until all determinations for all group member applicants for that grant year have been finalised. The definition of finalised is at subsection 83(2) of the EMDG Act and means when all avenues of appeal (including to the Administrative Appeals Tribunal) against an Austrade determination have been exhausted.
Circumstances in which a grant is not payable

7.7.1 Although a grant entitlement may have been determined by Austrade in terms of section 80 of the EMDG Act, there will be some circumstances where the grant or an advance on account of the grant is not payable:

a) the applicant is not a resident of Australia at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination

b) there are disqualifying convictions (as defined at section 16 and 17 of the EMDG Act) outstanding against the applicant or, if the applicant is a trustee of a trust estate, against the trustee or any beneficiary of the trust estate, at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination

c) the applicant is subject to the insolvency provisions (as defined at sections 87B and 87C of the EMDG Act) at the time of grant determination or at any time until the issuing of any grant notice of determination – refer to guideline 7.7.2

d) applicants that do not have an Australian Business Number (ABN) at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination. In the case of approved joint venture applicants, where not all members may be required to have an ABN, the joint venture’s nominated contact member will be the only entity that is required to have an ABN

(Note: Applicants are not required to have an ABN at the time of lodgement of a claim)

e) those educational institution applicants providing courses to overseas students in Australia which are required to be registered under the Education Services for Overseas Students (Registration of Providers and Financial Regulations) Act 1991 (The ESOS Act) that are unregistered at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination.

Refer to section 87A of the EMDG Act.

This measure will not apply to any applicant providing educational services as follows:

- one that is not subject to the provisions of the ESOS Act. Generally this will be where an applicant promotes courses to foreign residents who are not visiting or intending to visit Australia under a student visa
- one that is exporting educational courses and subcontracting the actual teaching services to another educational institution
- one that is exporting educational courses on behalf of an educational institution that is registered under the ESOS Act
- one that is providing and exporting educational courses in conjunction with another educational provider who is registered under the ESOS Act.

It is up to EMDG applicants to determine whether they are subject to the provisions of the ESOS Act.

f) The applicant or its associate is not a fit and proper person to receive a grant – refer to guideline 7.7.3.

(Note: If any grant or advance on account of a grant has been paid to any applicant at any time before they were subject to the circumstances described at (a) – (f) above, no recovery action would be taken by Austrade (assuming that section 103 of the EMDG Act dealing with convictions and repayment provisions is not applicable.)
EXAMPLE

A company applies for a 2013–14 EMDG grant. In November 2014 Austrade determines a provisional grant of $100,000. The applicant receives an advance based on the initial payment ceiling amount of $60,000 in December 2014. One of its directors becomes bankrupt in February 2015. Austrade will not pay the balance amount that the applicant would otherwise have been entitled to. Nor would Austrade recover the $60,000 advance paid to the company (unless section 103 of the Act is relevant to the applicant’s circumstances).

SECTIONS 87B AND 87C GUIDELINES

Insolvency administration

When is a person disqualified from receiving a grant because of being subject to the legislation’s insolvency provisions?

7.7.2 Section 87 of the EMDG Act states that no grant, or an advance on account of a grant, is payable when, or at any time after the person becomes entitled to the grant or advance, the person is subject to the insolvency provisions.

Who is subject to insolvency provisions?

The term individual is not limited to sole trader applications. It also refers to people who are partners or directors of applicants or of businesses who are members of approved joint ventures. The Act uses the term associates to define these individuals. Refer to section 107 for the definition of associate.

In what circumstances are individuals subject to insolvency administration?

Section 87B of the EMDG Act lists a number of situations where individuals may have been subject to the section 50 and division 2 of part X provisions of the Bankruptcy Act 1966 or of equivalent legislation in a foreign country or external territory. Austrade will regard any individual who has been in or is in any of these situations as being under insolvency administration.

Subsection 87C(2) of the EMDG Act provides that where a person administering any insolvent body corporate states that the body corporate is able to pay all debts as and when they become payable, Austrade will not declare the body corporate to be insolvent. It should be noted that there is no equivalent provision in section 87B of the EMDG Act for individuals or partnerships.

In what circumstances are body corporates taken to be under insolvency administration?

Subsection 87C(1) of the EMDG Act lists the situations under the Corporations Law (and equivalent legislation for external territories and foreign countries) in which a body corporate is considered to be under insolvency administration for the purposes of this legislation.

Subsection 87C(2) EMDG Act enables the person administering the body corporate (defined at 87C(3) of the EMDG Act) to certify that the particular body corporate is able to pay all its debts as and when they become due and payable.
7.7.3 Denial of grants where Austrade forms a view that an applicant or its associate is a ‘not fit and proper person’

Background

The ‘not fit and proper person’ test under section 87AA of the EMDG Act provides for the non-payment of an EMDG grant if Austrade has formed the opinion, in accordance with the relevant Ministerial Guidelines, that a person, or an associate of the person, is not a fit and proper person to receive a grant.

The relevant Ministerial Guidelines are in the Determinations section of the Guidelines – refer to Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015.

The purpose of this test is to allow for the non-payment of grants to persons whose behaviour is considered to be inconsistent with accepted community standards of commercial and personal propriety or whose support would impinge upon the reputation of Austrade or Australia as an exporting nation.

The ‘not fit and proper person’ test applies to applicants and their ‘associates’. Part 2 of the Ministerial Guidelines sets out the definition of ‘associate’. This may include responsible officers, managers, members, partners, significant shareholders, persons with influence or control over the applicant, and relatives of such persons.

When will Austrade consider applying the ‘not fit and proper person’ test?

For a person to be considered for application of the ‘not fit and proper’ test, one or more of the factors listed in Part 3 of the Ministerial Guidelines would have to apply, that is, the person would have:

- been convicted of offences; and/or
- had some sort of penalties or sanctions imposed on them, or likely to be imposed on them; and/or
- had critical assessments made of them by a tribunal or regulatory body; and/or
- been under insolvency administration; and/or
- have been a responsible officer of a business that has failed; and/or
- otherwise been subject to reasonable concerns about their personal, commercial, financial or professional character, status or reputation.

It is not intended that the test be applied to exclude otherwise respectable individuals who have been associated with a minor misdemeanour or minor personal failing. As a general rule, the test would only be applied if suggestions of serious misbehaviour or misconduct give Austrade reasonable cause to doubt that an applicant or an associate is a fit and proper person.

The fact that an individual meets one of the criteria above would not of itself necessarily mean the person would be determined to be not fit and proper. For a person to be considered not fit and proper it would be necessary for the case to involve serious instances of bad behaviour or misconduct, for example:

- situations in which the person may be viewed by the Australian community as inappropriate to represent and promote the public interest of Australia in relation to trade overseas; and/or
- situations where the person’s record is such that it might be concluded that they do not merit government recognition or taxpayer support.

For example, this might hypothetically include cases involving persons:

- whose behavior while involved in overseas trading activities would reflect badly on Australia’s image abroad
- who have been involved in improper corporate dealings, for example a major corporate collapse with significant social implications
- who are known to have been convicted in relation to serious personal improprieties.

Austrade will not fully test every EMDG application under section 87AA of the EMDG Act to establish eligibility for payment. It will only investigate whether a person is ‘not fit and proper’ where there is information to suggest a
person may be ‘not fit and proper’. Equally, however, where Austrade has reasonable cause to doubt that an applicant or an associate is a fit and proper person, it will take steps to gather information on which to form an informed decision on the issue.

**EXAMPLE 1**

An associate of the applicant was previously subject to a disqualification by the Australian Securities and Investment Commission from being a director or being involved in the management of a company. The disqualification period has lapsed and the associate is a current director of the applicant.

Austrade seeks and obtains consent from the applicant to approach ASIC for more information on the matter. ASIC documentation shows that the disqualification was of a technical nature as the associate was a director of three or more failed companies in a private corporate group that was wound up. However, the applicant and ASIC documentation confirm that no public money was lost as a result of the company failures. The applicant is also able to show that corporate governance has been reviewed and that similar failures are unlikely in the future.

*Austrade would generally not apply section 87AA of the EMDG Act in these circumstances.*

**EXAMPLE 2**

An applicant carries on a successful exporting business. A relative of the applicant’s sole director/shareholder, and therefore an ‘associate’ of the applicant, has a civil judgement against them for a serious matter, as the result of action by another government instrumentality.

The judgement and the behaviour of the associate are the subject of continuous adverse reporting in the media for this and other matters. The other matters, whilst not sufficient in themselves to warrant applying section 87AA of the EMDG Act, adversely affect the character of the associate in the public’s eyes.

*Austrade seeks and obtains consent from the applicant/associate to obtain information from that government instrumentality. The information confirms the matter to be of a serious nature.*

*Austrade would generally apply section 87AA in these circumstances.*

### 7.7.4 Denial of grants where applicant’s EMDG consultant or its associate is determined to be a ‘not fit and proper person’

EMDG consultants have an interest in the outcome of their clients’ EMDG assessments and have an increasingly high public profile associated with the EMDG scheme. For example, Austrade promotes the services of EMDG consultants who have a demonstrated record of lodging accurate applications under the Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012 scheme.

The Export Market Development Grants Amendment Act 2014 amends the Act by providing for Ministerial Guidelines (2014 amendment guidelines) to be made and complied with by the CEO of Austrade in forming an opinion as to whether an EMDG consultant or its associate is not a fit and proper person.

The 2014 Amendment Act provides that where an EMDG grant application is prepared by an EMDG consultant who is or whose associate is deemed to be not fit and proper, the application is deemed not to have been made and the applicant is invited to make a fresh application.

The 2004 instrument defines who is an associate of an EMDG applicant. In the 2014 amendment guidelines, the classes of people who are “associates” are different depending on whether the CEO is applying section 79A or section 87AA of the EMDG Act. Section 2.3 applies only for the purposes of the section 79A fit and proper test for...
EMDG consultants, while section 2.4 applies only for the purposes of the section 87AA fit and proper test for applicants. Section 2.2 applies to both EMDG consultants and to applicants.

The 2014 amendment guidelines also amend the definition of associates in the 2004 instrument so that they apply to individuals who have significant indirect shareholding in companies. Where section 2.5 (1) of the guidelines use the term *voting power*, this should be taken to mean effective control and decision making power.

The associates of a consultant include potentially important participants in the consultant’s business activities whose improper behaviour can raise serious doubts about the consultant’s reputation.

The 2014 amendment guidelines contain assessment criteria to enable the CEO of Austrade to decide whether an EMDG consultant or any of its associates should be assessed to be not a fit and proper person.

In applying the assessment criteria set out in the Guidelines, it is expected that the CEO would only form an opinion that a consultant was not a fit and proper person where there was a relevant concern with that person’s capacity, trustworthiness or character to act as a consultant in the best interests of both their applicant client and the public funds from which EMDG grants are paid.

Without seeking to exhaustively list the circumstances in which an opinion could appropriately be formed that a consultant was not a fit and proper person, some examples are illustrative. A simple, isolated and explicable mistake would not be expected to be sufficient to warrant an opinion that a person was not a fit and proper person to act as an EMDG consultant, but repeated and material errors of the same or similar type may well be sufficient. Similarly, the making of a claim based on an interpretation of the law or the factual circumstances that is reasonably arguable although not agreed by Austrade would not be sufficient, but the making of claims that are palpably inconsistent with the law or that misrepresent the factual circumstances may be sufficient.

The power to reject a claim lodged by an EMDG consultant who is in the opinion of the CEO not a fit and proper person is viewed as significant and not to be exercised except in materially serious and warranted circumstances. Moreover, the fact that such decisions are subject to review by the Administrative Appeals Tribunal is expected to both temper the exercise of the power and provide rights of recourse to those affected.
Approved bodies and approved joint ventures

8.1.1 Section 6 of the EMDG Act provides for certain approved entities to be eligible for a grant:

- Paragraph 6(1)(e) – a joint venture approved by Austrade
- Paragraph 6(2) – a body approved by Austrade.

Paragraph 101(1)(c) of the EMDG Act requires the Minister to determine guidelines to be complied with by Austrade to determine whether or not to make an approval.

All current guidelines are provided under the “Determinations” section of these administrative guidelines.

The following administrative guidelines should be read in conjunction with the Ministerial ones. They explain how Austrade’s approval mechanisms work for these types of EMDG applicant.

Application for approval

8.1.2 Any application for approved body or approved joint venture status must be in writing and should address the “assessment requirements” of the Ministerially-approved guidelines.

Approved bodies

8.1.3 The following guidelines apply to applications for approved body status, including applications for the renewal of approved body status:

Background

Under the EMDG Act approved bodies are able to receive EMDG support for expenses they incur promoting the products of their members.
Approved bodies are required to represent the interests of an industry, a substantial part of an industry or more than one industry.

Approved bodies may claim export promotional expenses that:

- are eligible under the EMDG scheme
- are incurred for overall promotion of its members’ products rather than promotion of specific members’ products
- were incurred within the scope of the organisation’s approved export activity, project or purpose
- have not been, and are not likely to be, reimbursed by members.

These guidelines are based on the following Commonwealth law:

*Export Market Development Grants Act 1997* – section 88 refers

*Export Market Development Grants Regulations 2018* – sections 3.3 and 3.4 refer


Bodies applying for approval must provide Austrade a written submission addressing the following assessment criteria:

**Who may apply?**

An organisation must be a:

- body corporate established for a public purpose by or under an Australian law
- co-operative
- body corporate that represents the interests of one or more industries (national, state/territory or regional) or a substantial part of an industry (national, state/territory or regional).

**General eligibility requirements**

An organisation must:

- be a national, state/territory or regional non-profit industry organisation
- represent all members of an industry, members making up a substantial part of an industry or members of more than one industry
- be unable to distribute income to members and shareholders
- not export products unless exporting is an ancillary part of the body’s activities
- operate for the benefit of third parties.

**Promotional activities requirements**

The organisation must have a promotional plan.

The organisation must be capable of undertaking promotional activities having regard to:

- technical and managerial skills of staff required to undertake the promotional activities
- skills and experience of staff who would undertake the promotional activities
- the effectiveness of its previous promotional activities.

The organisation must engage in promotional activities that:

- promote Australian products internationally
- are for the benefit of an industry rather than for the benefit of individual members, and
- are commercially and financially feasible.
To determine whether promotional activities are commercially and financially feasible, Austrade will have regard to the organisation’s:

- proposed budget for promotional activities
- financial position
- administration costs.

**N.B.** Financial statements (profit and loss statement and balance sheet) for the two most recent years should be provided with an application.

**Requirement to generate or be capable of generating significant net benefit to Australia**

The organisation must show that it can generate or be capable of generating, from its promotional activities, significant net benefit to Australia in two or more of the following areas:

- export earnings – describe export activities of members as at the application date and their projected export earnings for the five years after the application date
- employment in Australia – state the projected increases in employment in Australia arising from the entity’s promotional activities for the five years after the application date
- new capital investment in Australia – state the projected new capital investment arising from the entity’s promotional activities for the five years after the application date
- introduction of new technologies in Australia – state the projected investment in new technologies arising from the entity’s promotional activities for the five years after the application date
- new value-added operations in Australia – describe the projected new value-added operations in Australia arising from the entity’s promotional activities for the five years after the application date.

**Circumstances in which Austrade will not approve an application for approved body status**

Austrade will not approve an organisation that has been formed either:

- primarily as a grants funding agent for its members, or
- primarily for the purpose of obtaining the approval, or
- where there is a high level of duplication of the promotional activities of another body operating in the same industry, or
- approval would result in a disproportionate level of funding to an industry.

**How to apply**

To apply for approved body status the industry body must submit a written application to Austrade addressing the assessment criteria. An application for approved body status may be made at any time. Austrade will assess the information in the application to determine whether or not the industry body meets the approval requirements listed above.

The following information is required to enable the application to be assessed:

- details about the organisation
- description of the Australian industry (national, state/territory or regional) covered by the organisation
- description of the industry’s products, i.e. goods, services, intellectual property and/or know-how
- description of the proportion of businesses engaged in the total industry (national, state/territory or regional) that the organisation represents
- description of what, if any, power the organisation has to promote overseas on behalf of its members.
- organisation’s representative contact details
- contact details of the nominated representative. This person should have the authority to represent the organisation. Austrade will deal with this person for all EMDG-related matters
- details on the approval requirements
• information of how each of the assessment criteria is met.

The application should be accompanied by the following declaration:

“I (organisation’s representative) present this information to Austrade believing it to be a true and correct representation of the organisation’s current position and intentions associated with this application”

• Attachments:
  o list of members
  o copy of the organisation’s export plan
  o brief CV of the key staff involved in export
  o copies of promotional brochures
  o current financial statements and a promotional budget covering the organisation’s proposed expenditure over the next three years
  o copies of enabling instruments to promote overseas on behalf of members (eg Memorandum of Incorporation and Articles of Association).

In addition, contact name and details of any consultant used to help prepare the application should be provided. The application should be signed and dated by the industry body’s representative.

What else is important?

Important things that an industry body should consider when applying for approved body status:

• The application and assessment process for approved body status is separate to the application and assessment process for an EMDG grant.
• Approved Bodies are not subject to the EMDG performance measure.
• The organisation must have an Australian Business Number (ABN) to be able to receive a grant.
• Application to vary the terms of approval may be made at any time.
• Approved bodies are not required to register for their first grant, nor pass Grants Entry requirements.
• Grants paid are assessable income for taxation purposes.

Approved Joint Ventures

8.1.4 A group of persons can apply to Austrade for approval as a joint venture. The EMDG joint venture provisions are designed to encourage small to medium businesses to collaborate to pursue specific export activities, projects or purposes that can bring significant net benefits to Australia.

Non-Australian resident businesses or Australian entities which are not themselves entitled to receive an EMDG grant (such as businesses with income exceeding $30 million) are entitled to be members of an approved joint venture. These businesses, however, are not entitled to receive EMDG support for their own expenses.

(Refer also to approval guidelines for approved joint ventures in the Ministerial Determinations section of these guidelines.)

Austrade approval process – all categories of approved entities

8.1.6 Austrade must deal with any application for approval in accordance with the Regulations to the EMDG Act. These provide for Austrade to ask written questions of the applicant and for the applicant’s answers to also be in writing.

8.1.7 A final Austrade decision to approve or not to approve must be in writing.
8.1.8 Austrade will specify the conditions (if any) to which approval is made. For example, an approved body will in most cases be approved for the promotion of particular products and for the benefit of particular exporters or potential exporters.

8.1.9 Approval of a joint venture must specify the activity, project or purpose for which the group is approved. It will also specify who is the joint venture’s nominated contact member for the purposes of applications and payments of grant. Any nominated contact member must be a resident of Australia.

8.1.10 Section 92 of the EMDG Act provides that there is a limit on the number of approved joint ventures of which any person may be a member. This limit is set by Ministerial Determination and is presently set at three. Austrade will not approve any joint venture where such an approval would result in this limit being exceeded by any member.

Arrangements for variation of an approval

8.1.12 Subsection 33(3) of the Acts Interpretation Act 1901 provides that a power conferred on a person to make an instrument (such as written approval) includes the power to cancel or vary the instrument.

8.1.13 Circumstances for varying an approval are found at Regulation 6. They state that any variation can only be made as a result of an application for variation by the approved entity.

8.1.14 Guideline deleted.

8.1.15 Guideline deleted.

When does approval take effect and when does it expire?

8.1.16 Austrade will specify the day approval takes effect. In most cases this will form part of the approval notification advice to the applicant. The approval can be made retrospective.

**EXAMPLE**

A group of persons apply to be an approved joint venture. Austrade approves the joint venture by letter dated 31 October 2013. The joint venture application was for promotional expenses incurred from 1 July 2012. Austrade may backdate the approval in this case to 1 July 2012. The joint venture would then have until 30 November 2013 to lodge a 2012–13 application.

8.1.17 If Austrade does not specify any date of effect for an approval that date will be taken to be the date on which the approval is given.

8.1.18 Any approval is taken to be for a period of five years. In the above example, if Austrade made the date of effect 1 July 2010, the joint venture would be approved until 30 June 2015. Unless the approval is varied or cancelled, the joint venture can claim for grants based on eligible expenses being incurred during this five-year period.

Renewal of approvals

8.1.19 The EMDG legislation does not directly provide for renewals. However, given that approved bodies are not limited by the eight grant cut-off and approved joint ventures can receive five grants, there may be situations where applicants must apply for renewal.

Cancellation of approval

8.1.20 If Austrade is of the opinion that there are grounds for cancelling any approval, it will write to the approved entity or, in the case of an approved joint venture, to the nominated contact member with its reasons for this opinion.
The approved entity or nominated contact member will be invited to make a written submission addressing Austrade’s concerns within a reasonable period. That period is to be specified in Austrade’s notice.

8.1.21 Austrade will consider the matters raised in the written submission in the course of deciding whether to cancel the approval.

8.1.22 Austrade will cancel an approval where it is not possible to vary the approval to meet the guidelines for the approval of an organisation as an approved entity as are then in force.

8.1.23 Austrade will cancel an approval where there has been a failure to comply with the conditions to which the approval is subject.

SECTIONS 93 AND 94 GUIDELINES

Effect of change in ownership of a business on the allocation of eligible expenses

Underlying principles of section 94

As provided for in section 93 (Object of Division) of the EMDG Act, the philosophy of section 94 is that grants attach to a particular business regardless of any changes of ownership of the business. Section 94 makes businesses receiving grants subject to both the beneficial and the restrictive provisions of the Act.

Accordingly, when a change of ownership of a business occurs, section 94 enables Austrade to regard the new owner, for grant calculation purposes, as having carried on the relevant business at the earlier time.

Background

8.2.1 Section 94 of the EMDG Act may apply if a person is carrying on a business (the ‘new business’) which is the same or similar to one carried on previously by another person (the ‘old business’)

Section 94 of the EMDG Act

94 Change in ownership of business etc.

(1) Subsection (2) applies if:

(a) at any time, a person (the previous owner) carried on a particular business (the old business) in Australia; and

(b) at a later time, another person (the new owner) carries on:

(i) the business or a part of the business (the relevant part); or

(ii) a business (the new business) that, at that time, is similar to the old business, or a part of the old business (the relevant part), carried on by the previous owner before that time, to such an extent that the CEO of Austrade is satisfied that the new business should be treated as a continuation of the old business; and

(c) the new owner applies for a grant in respect of a grant year.

Note: Decisions whether 2 businesses are similar are subject to guidelines determined by the Minister under section 101.
For the purposes of this Act, the CEO of Austrade must treat particulars of the previous owner as being those of the applicant in the following ways:

(a) any eligible expenses incurred by the previous owner in the capacity of owner of the business (or of the relevant part) are to be treated as having been incurred by the new owner;

(b) if the CEO had decided that the previous owner met the grants entry requirements—the new owner is to be treated as if the CEO had decided that it had met the grants entry requirements;

(c) any grant, or advance on account of grant, paid or payable (whether under this Act or under the repealed Act) to the previous owner in the capacity of owner of the business (or of the relevant part) is to be treated as having been paid, or as being payable, to the new owner;

(d) any other aspect of the business (or of the relevant part) is to be treated as if it had been carried on by the new owner.

Note: For eligible expenses, repealed Act and grants entry requirements see section 107.

There are two separate tests under section 94(1)(b) that are used to determine whether section 94(2) applies to an applicant.

(a) The first test [section 94(1)(b)(i)]:

Does the new owner carry on a business which is a continuation of the business, or part of the business, carried on by the previous owner, even though it is being carried on by a different person?

Under section 94 of the EMDG Act, the Ministerial Guidelines should not be used in this first test. This test does not require Austrade to measure similarities but rather, to determine whether the new business is the same as the old business or part of it.

This first test requires Austrade to determine whether the business being carried on by the new owner is the business (or part of the business) which had been carried on by the previous owner; or put another way, the business being carried on by the new owner is a continuation of the business (or part of the business) carried on by the previous owner.

If the answer is “yes”, then section 94(2) of the EMDG Act applies.

It is only necessary to go to the second test if the answer to the first is “no”.

(b) The second test [section 94(1)(b)(ii)]:

Is the business carried on by the new owner so similar to the business, or part of the business, carried on by the previous owner that, having regard to the Ministerial Guidelines, it should be treated as a continuation of the business carried on by the previous owner?

If the answer is “yes” then section 94(2) of the EMDG Act applies.

Under the second test (only), in deciding whether the new business is so similar that it should be treated as a continuation of the old business, Austrade must take into account the Ministerial Guideline EMDG (Change of Ownership) Guidelines 2006. It states:

(1) In determining, for the purposes of subparagraph 94 (1) (b) (ii) of the Export Market Development Grants Act 1997, whether a business or a part of a business (the old business) that was carried on by a person is similar to a business (the new business) being carried on by another person to such
an extent that the new business should be treated as a continuation of the old business, Austrade must comply with these Guidelines.

(2) In determining whether the new business is similar to the old business, Austrade must have regard to the similarities (if any) and the differences (if any) between:

a) the product of the new business and that of the old business; and

b) the activities that are carried out in the course of the business of the new business and the activities that were carried out in the course of the old business; and

c) the customers, including the export market customers, of the new business and those of the old business; and

d) the directors, shareholders, and management personnel of the new business and those of the old business; and

e) the suppliers to the new business and those to the old business; and

f) the overseas representatives of the new business and those of the old business; and

g) the employees of the new business and those of the old business; and

h) the markets, including the export markets, of the new business and those of the old business; and

i) the premises from which the new business is conducted and the premises from which the old business was conducted; and

j) the logo of the new business and that of the old business; and

k) the property and assets, including the intellectual property, of the new business and those of the old business.

What are the business arrangements which may cause section 94 to apply?

8.2.2 The EMDG claim form asks applicants:

“Has any part of your business previously been carried on by another person…?”

Examples where a business or part of a business may have been previously carried on by another person include:

- a new business set up by the owners, directors or employees of a business that has received EMDG grants
- a new owner acquires a business for which the previous owner received EMDG grants.

If applicants disclose such an arrangement or if one is found to exist by Austrade, Austrade must then decide whether section 94 of the EMDG Act applies, and, if so, under which of the two tests above the section applies.

Which of the two section 94 tests will apply?

8.2.3 Where the new owner of a business has acquired and carries on a business or a part of a business, Austrade will generally apply the first test. Where the new owner changes the acquired business, Austrade will generally apply the second test and consider the factors in the Ministerial guidelines.

Where a new business is set up without the new owners acquiring a business or part of a business, e.g. its owners acquire assets other than an actual business or goodwill, the second test will apply – see example 4 below.
EXAMPLE 1

Applicant Company A is a manufacturer of automotive components. It claims its first grant for the 2012–13 grant year.

On 1 July 2012 Company A acquired another automotive components business activity from Company B. Company B had received three EMDG grants in earlier years directly related to this business activity. Company B continues to carry on other business activities.

During 2012–13, Company A continues to carry on the acquired business as a separate business unit or division.

After consideration of section 94 issues, Austrade concludes that the acquired business, previously carried on by Company B, is now being conducted by the new owner Company A in terms of section 94(1)(b)(i) of the EMDG Act.

This decision is therefore made under the first test. Austrade will not apply the Ministerial guidelines in this case.

EXAMPLE 2

An EMDG applicant Company C received three EMDG grants in the years up to and including 2005–06 for its promotion of engineering services. Company C was owned and controlled by two director /shareholders. These two owners had a falling out and on 1 July 2006, one of these owners sold his shares in Company C to the other owner.

The owner who acquired the shares then set up Company D on 1 July 2013. Soon after this, Company C transferred the business (including assets, goodwill and some export and Australian market third party contracts) to Company D.

Company D then operated in the same engineering services industry, at first only in the Australian market. However, in 2008–09 Company D began export promotion activities and claimed an EMDG grant for that year.

Austrade would apply the first test in this case. The Ministerial guidelines will not be applied in this case.
Applicants' section 94 submissions

8.2.4 If Austrade forms an initial view that a business (‘new business’) carried on by an applicant is a continuation of an ‘old business’ for EMDG purposes in terms of section 94(1)(b)(i) of the EMDG Act, Austrade will notify the applicant accordingly.

If the applicant wishes to contest this decision, the submission should include reasons why the ‘new business’ is not a continuation of an ‘old business’.

Depending on the circumstances, it may be appropriate for the applicant to provide a written submission clarifying the relationship between the old and new business.

If Austrade forms an initial view that a business (‘new business’) carried on by an applicant is similar to the ‘old business’ to such an extent that it should be treated as a continuation of the ‘old business’ in terms of section 94(1)(b)(ii) of the EMDG Act, Austrade will notify the applicant accordingly. The applicant’s submission should address all the factors (2a to 2k) listed in the Ministerial guideline EMDG (Change of Ownership) Guidelines 2006, and should explain the similarities and the differences between the old and new business in relation to each factor.

As well, the submission should include any arguments that the applicant wishes to make concerning whether Austrade should or should not treat the new business as a continuation of the old business.

8.2.5 Effect of applying section 94

- If Austrade decides that section 94 applies, the implications may include:

(a) Restrictive implications:
• the applicant will be deemed to have received grants paid to the earlier EMDG applicant that previously carried on the business
• with a transfer occurring during a grant year under review, no grant is payable where combined income exceeds $50 million
• for transfers occurring during the grant year under review, the maximum combined provisional grant will be $150,000.

(b) **Beneficial implication:**
• the applicant will be treated as having met the requirements of grants entry if Austrade decides that the previous owner met these requirements
• continuity of employee status for relatives travelling together outside Australia at the same time
• only one $15,000 expenses threshold deduction applies when a business undergoes a change of ownership during the grant year under review
• when the former owner did not submit a claim for its share of expenses, section 94 of the EMDG Act credits the new owner with these expenses which would otherwise be lost for grants purposes.

If section 94 applies, which grants paid to a ‘previous business owner’ will be applied to a current EMDG applicant?

8.2.6 In applying section 94 of the EMDG Act to a current applicant, Austrade will identify those grant years for which the previous business received EMDG grants which related to the activities of the current applicant. In most cases this will be all grants but there will be some cases where the former owner carried on more than one business activity. For section 94 of the EMDG Act to be applied it must be possible to confirm that an identifiable portion of past grants was in respect of the particular business activity of the current applicant.

In this case it will be necessary to isolate from the eligible expenditure included in the original owner's claim for each year a discrete amount that related to the business activity in question. Composite items of expenditure in this case may be apportioned between activities if there exists a reasonable basis for doing so.

Other considerations associated with section 94 application

8.2.7 Each year's claim for an applicant may be assessed against the section 94 assessment criteria independently from other years' assessments. For example, an applicant not subject to the application of section 94 of the EMDG Act in one year may in a later year submit a claim which shows that its business activity is, in fact, similar to an earlier one which received grants. Section 94 of the EMDG Act may be applied in this case from this point on.

The EMDG Act requires Austrade to treat all grants paid to a legal entity as part of that entity's grants history regardless of whether it diversifies its activities (with minor exceptions). This means, for example, that all grants paid to a company with a particular Australian Company Number will be part of that company's grants history regardless of any change of ownership or any change of company name.

Refer to section 8 of the EMDG Act and to guideline 3.6.1 for minor exceptions to this rule.

**EXAMPLE**

Company A received 7 grants up to 2012–13. On 1 July 2013 the company was sold to new owners who changed the company name and also diversified the business's activities. Regardless of the diversification, the legal entity with the same ACN as company A is still considered to have received 7 grants should it apply for an additional grant.

Once section 94 of the EMDG Act applies to an applicant acquiring a business activity, the applicant will continue to be 'credited' with the grants history of the acquired business activity together with its own grants history. If the...
acquired activity in relation to which section 94 of the EMDG Act was applied is sold, the grants history attached to that activity would be regarded as being sold off with that activity. Those past grants would no longer be considered receivable for the current business but any other grants paid to an applicant would continue to be part of its grants history.

SECTIONS 95 AND 96 GUIDELINES

Power to adjust expenses and provisional grant amounts

This Division of the EMDG Act describes Austrade’s power to disregard expenses that are not properly substantiated, or that are unreasonable, uncommercial or non bona-fide or those that result from structuring arrangements entered into for the sole or dominant purpose of obtaining an undue increase in EMDG entitlement.

1. Subparagraph 96(1)(a)(i) – Expenses not properly substantiated

8.3.1 This includes any expenses where applicants are not able to show, after a request from Austrade, that their claimed expenses are substantiated as to cost or to purpose.

EXAMPLE

Applicant and a Chinese company are members of a joint venture in China that delivers a range of products and services in China. The joint venture provides ineligible post-sales services and promotes the applicant’s products. The applicant pays $120,000 per month to the joint venture for these services and claims that $60,000 of this amount should be eligible for EMDG support. After discussion, Austrade requests the client in writing to substantiate the portion of the payment that applies to the promotion of sales of its products but the applicant is unable to meet this request. Austrade disallows the expenses under section 96 of the EMDG Act.

2. Subparagraph 96(1)(a)(ii) – Expenses may not be reasonable, commercial or bona fide

8.3.2 Where Austrade is of the opinion that an applicant’s claimed expenses are unreasonable, non-commercial or non-bona-fide, it may write to an applicant in terms of section 96 to seek an explanation as to why the expenses should not be adjusted (disallowed) under the section.

The focus of the test for reasonableness and commerciality hinges on the nature of the expenses rather than on their effect. The main issue is whether the applicant’s expenses were incurred in purchasing goods and services at normal (reasonable) market rates with a genuine (commercial) intent to expand the applicant’s export markets.

The mere fact that the applicant has incurred expenses but has not received any export sales does not make the expenses unreasonable or uncommercial for this purpose. Austrade recognises that the commercial realities of export marketing may often mean a considerable time lag between expenditure and sales, and that not all export marketing activities can be expected to be successful.

Examples of unreasonable, non-commercial or non-bona fide expenses might include:

   a) inflated or unjustified charges for export promotion and marketing services
Austrade will pay particular attention to representatives who are closely related to applicants so that the parties do not collude to inflate claims.

**EXAMPLE 1**

Applicant claims $500,000 expenses in the 2011–14 grant year to promote its products in a number of export markets. It has received EMDG grants in earlier years but is yet to export its products.

Austrade questions whether the expenses are reasonable or commercial in terms of section 96 of the EMDG Act.

However, an examination of the facts shows that all the expenses are properly substantiated, that they are eligible under the relevant provisions of the EMDG Act, that they are reasonable in relation to the market value of the goods and services that the applicant purchased in incurring the expenses, and that they have been incurred as part of a genuine export marketing drive. Austrade allows the expenses.

**EXAMPLE 2**

Applicant claims $500,000 expenses in the 2010–11 grant year to promote its products in a number of export markets. It has received EMDG grants in earlier years but is yet to export its products.

Austrade questions whether the expenses are reasonable or commercial.

An examination of the facts shows that some of the expenses seem to be inflated well above normal market rates, and that some of them seem to have been incurred in paying related parties for marketing activities of which only sketchy details are available.

Austrade considers disallowing the expenses under various sections of the Act, and then writes to the applicant in terms of subsection 96(2) of the EMDG Act.

b) non-bona fide licensing arrangements enabling closely related entities to collude to circumvent EMDG goods eligibility rules

**EXAMPLE**

The applicant promotes licensing income based on disposing of its intellectual property (IP) to a related Chinese company.

The Chinese company charges the applicant for promoting the Chinese-manufactured products with the applicant claiming these expenses in terms of section 38 of the EMDG Act.

Austrade considers that the applicant’s agreement with the Chinese licensee is primarily entered into so that it can receive an EMDG grant. Austrade considers that the IP is generic in nature and that there is no evidence such as patent records to indicate that it has real value.

Austrade writes to the applicant in terms of subsection 96(2) advising of its preliminary view that the claimed promotional expenses are not reasonable, commercial or bona fide. The applicant is unable to show that section 96 should not apply and Austrade disallows the claimed expenses.
c) applicant’s claimed expenses primarily benefit its overseas related entities.

**Paragraph 96(1)(a) and other sections of the EMDG Act**

8.3.3 In most cases, the CEO of Austrade can adjust the expenses of an applicant where this needs to happen without applying section 96 of the EMDG Act (for example under sections 29 and 33 of the EMDG Act). It can also request additional material and information needed to substantiate an applicant’s claim under subsection 72(1) of the EMDG Act.

Section 96 of the EMDG Act applies where Austrade becomes aware of unsubstantiated or unreasonable (e.g. unreasonably high) expense claims. Applicants have the opportunity to respond to Austrade’s written advice in terms of section 96 of the EMDG Act and have the opportunity to provide additional information and to explain why the section should not apply.

Any decisions made under section 96 are subject to review by the Administrative Appeals Tribunal following internal review by Austrade.

**Paragraph 96(1)(b) of the EMDG Act – Transactions and arrangements entered into for the sole or dominant purpose of obtaining a grant or an increase in the amount of a grant**

**EXAMPLE**

Applicant is a wine merchant that has been exporting bottled wine for many years to the UK. It has a wholly owned trading subsidiary in the UK that acts as its overseas representative. The applicant paid this subsidiary $200,000 for representation in the 2013–14 grant year. The applicant has no local sales and in spite of being in business for 10 years is yet to make a profit on its export business. The applicant’s mark-up to its UK subsidiary averages 40 per cent whereas the subsidiary marks up its prices by about 300 per cent, enabling the subsidiary to have consistently earned profits.

Austrade forms the view that the promotional expenses are uncommercial and unreasonable in relation to its anticipated returns compared to those of its UK subsidiary and writes to the applicant in terms of subsection 96(2) of the EMDG Act.

The applicant is unable to show that the claimed expenses are reasonable and commercial and so they are disallowed under section 96 of the EMDG Act.

8.3.4 This section applies to arrangements and transactions that are entered into for the sole or dominant purpose of maximising EMDG entitlements. Where Austrade has reason to believe that the section should apply, it is required to write to the applicant in terms of subsection 96(2) of the EMDG Act, giving reasons for its opinion. The applicant can then provide additional information or reasons in support of its claim.

**EXAMPLE 1**

Company A has income of $100 million in 2013–14. It has no EMDG grants history. On 1 June 2014 it incorporates a wholly-owned subsidiary company B to carry on a business activity previously carried on by a division of A. The income of company B is less than $50 million. Company B incurs enough eligible expenses to receive a grant.

After discussion, Austrade may write to the applicant in terms of subsection 96(2) advising that in its opinion the arrangement appears to have been entered into for the sole or dominant purpose of obtaining a grant.
EXAMPLE 2
An applicant enters into an agreement with an overseas customer where the applicant provides eligible services to that customer. The original agreement between the parties does not provide for the applicant to incur claimable promotional expenses.

The customer and applicant revise the arrangement so that each has obligations. The new agreement requires that the applicant be paid up front for the delivery of its services, and that the customer be paid for the provision of market research (which is, prima facie, a claimable expense). Austrade investigations reveal that the amounts are offset against each other and no money actually changes hands. It is also apparent that the substantive terms of the agreement were not satisfied in that neither party performed genuine services.

Austrade writes to the applicant advising that this arrangement appears to have been entered into primarily for the applicant to be able to receive an EMDG grant. Unless the applicant shows Austrade that this is not the case, its expenses will be disallowed in terms of section 96. Other sections of the Act may also be used to disallow these amounts.

SECTION 97 – 99 GUIDELINES

Review of decisions

Austrade internal review of decisions

8.4.1 Under the provisions of subsection 98(1) of the EMDG Act, a person who is dissatisfied with an Austrade decision affecting a claim or any other matter listed at paragraph 97(1)(a)–(j) of the EMDG Act, may appeal the particular decision.

Appeals must be limited to expenses and export earnings disclosed either in the original claim or during the assessment process.

Any decision made by Austrade in relation to the matters covered at paragraph 97(1)(a)–(j) of the EMDG Act must be communicated to persons in writing. This notification will include a statement covering the person’s review rights.

Any request for reconsideration must be made by written notice and must be received within 30 days of the date on which the person first received notice of the decision or within such further period as the CEO of Austrade allows. The request for reconsideration must set out the reasons for making the request. Austrade has discretion to allow a further period for receiving appeals in special cases.

Subsection 98(4) of the EMDG Act states that Austrade must reconsider the decision and may confirm or vary the decision as Austrade thinks fit.

Administrative Appeals Tribunal

8.4.2 Any person who is dissatisfied with the result of Austrade’s reconsideration may appeal to the Administrative Appeals Tribunal. In communicating the result of the reconsideration, Austrade is required to notify affected persons of their appeal rights under the Administrative Appeals Tribunal Act 1975.

8.4.3 It should be noted that a person cannot appeal to the Administrative Appeals Tribunal (AAT) before first having the decision reviewed by Austrade in terms of subsection 98(4) of the EMDG Act.
8.4.4 Once Austrade has internally reconsidered its decision on an applicant's appeal in terms of section 98 of the Act, then section 99 of the Act provides for an applicant dissatisfied with an Austrade internal review (appeal) decision to appeal to the AAT.

8.4.5 Under subsection 29(2) of the AAT Act an applicant must submit an appeal to the AAT within 28 days of receiving advice from Austrade of its internal appeal reconsideration decision, although the Tribunal does have a discretion to accept late applications. Fees are payable to the AAT at the time of lodging an application.

8.4.6 Under section 37 of the AAT Act, Austrade must provide the Tribunal with:

(a) a statement setting out findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision;

(b) documents in the possession of Austrade that are considered relevant to the review of the decision by the Tribunal.

8.4.7 A copy of the section 37 statement is provided to an applicant. An applicant can also obtain a statement of reasons for an Austrade decision under section 28 of the AAT Act prior to applying for an AAT review.

8.4.8 The first stage of a Tribunal review is usually a preliminary conference of the parties chaired by a Tribunal member or Deputy President. The purpose of the conference is to identify the points of difference between the parties and, in some cases, to allow Austrade to consider any additional materials provided by the applicant with a view to resolving the matters in contention without the necessity of a Tribunal hearing. Most AAT applications involving the EMDG Act are resolved or withdrawn prior to hearing.

8.4.9 At AAT hearings the Tribunal seeks to ensure that each party has a reasonable opportunity to put their case. Although it has the power to make its own inquiries by summoning witnesses or subpoenaing documents, it generally relies on the evidence and material put before it by the parties. The Tribunal is not bound by the rules of evidence.

8.4.10 In reviewing a decision the Tribunal assumes all the powers and functions of the original decision maker. Thus, if the Tribunal comes to the conclusion that an Austrade decision should be varied or set aside, it has the power to vary the original decision or to make some other decision. The Tribunal may also decide to remit a matter to the original decision maker for further consideration. The Tribunal usually delivers its decisions and the reasons for it in writing.

8.4.11 A party dissatisfied with a Tribunal decision may appeal to the Federal Court under subsection 44(1) of the AAT Act. However, this appeal right is restricted to the Tribunal's findings on questions of law as distinct from its findings on questions of fact.

Other Commonwealth agencies/legislation that may assist applicants with the review of any Austrade decisions:

The Commonwealth Ombudsman

8.4.12 The function of the Ombudsman is to investigate complaints made to him about the administrative actions of Commonwealth Departments and authorities. The Ombudsman is an independent official, with power to investigate a complaint and to recommend remedial action. The Ombudsman is impartial when investigating a complaint made to him. If the Ombudsman finds that a complaint is justified and he considers that some remedial action should be taken, he reports accordingly to Austrade. Austrade then has an onus to take remedial action to the satisfaction of the Ombudsman, although it is not compelled as a matter of law to accept his recommendations, or to take any action at all.

The Ombudsman has the power to refuse to investigate complaints in certain circumstances. If an investigation is conducted and the complaint is found to be unjustified, the Ombudsman advises all parties concerned of his findings and the reasons for his decision.
Administrative Decisions (Judicial Review) Act 1977 – AD(JR) Act

8.4.13 The AD(JR) Act allows persons to challenge decisions of an administrative character by Commonwealth authorities, including Austrade, which they consider are not in accordance with the appropriate legislation. The Act does not apply to decisions which are subject to review by the AAT.

The process of judicial review differs both from proceedings before the AAT and investigations by the Ombudsman. Proceedings are generally conducted in the Federal Court to obtain a ruling on whether a certain administrative decision is defective in law. Unlike the AAT, the Court does not stand in place of the decision maker and can only issue orders pursuant to a question of law. However orders made by the Court are mandatory.

Section 13 of the AD(JR) Act provides for a person dissatisfied with an administrative decision made pursuant to an Act of Parliament to obtain a statement of reasons for the decision. Requests for such statements concerning decisions taken under the EMDG Act should be made in writing to the General Manager of the Export Market Development Grants scheme in Austrade.

Freedom of Information

8.4.14 Under the Freedom of Information Act 1982, any person able to use an Australian address has a right of access to certain documents held by Austrade. EMDG applicants will generally be granted access to files dealing with Austrade’s administration of their own claims. However such documents may not be available to other persons, as under the Act, Austrade is obliged to consult with third parties whose interests are likely to be affected by disclosure, and the views of third parties will be taken into account when considering release of such documents. In addition, Austrade may also deny access to documents under the exempting provisions of Part IV of the FOI Act. In particular, documents which relate to claims currently under investigation will be subject to the exemption provisions of the Act.

A full description of Austrade’s operations and the documents it holds is published in Austrade’s Annual Report as required by section 8 of the FOI Act. In accordance with section 9 of the FOI Act, statements listing the Austrade documents available for inspection or purchase can be obtained from Information Access Offices administered by the Australian Archives.

SECTION 100 GUIDELINES

Accreditation of Export Market Development Grants consultants

8.5.1 This section provides for Austrade to make a legislative instrument should it introduce a scheme for the accreditation of consultants.

SECTION 101 GUIDELINES

Ministerial guidelines

8.6.1 This section specifies the circumstances where Guidelines must and where Guidelines may be determined by the Minister.

8.6.2 All guidelines determined by the Minister that continue to have effect are found in the “Determinations” section of these guidelines.

(Note: Subsections 68(1) and 68(2) of the EMDG Act also require that the Minister for Trade may make determinations about the initial payment ceiling amount and the date which is the balance distribution date for a grant year.)
SECTION 103 AND 104 GUIDELINES

Repayment of a grant

When can Austrade take recovery action in relation to grants paid?

8.8.1

(a) Where a person being the applicant or an associate of the applicant is convicted of offences against section 134.1, 134.2, 135.1, 135.2, 135.4 or 136.1 of the Criminal Code and the offence related to an application for an EMDG grant; and

(b) Where a grant or an advance on account of a grant has been paid by Austrade to an applicant because of the making of a statement that was false or misleading or because of the use of a book, record or document that contained information that was false or misleading.

What is the Austrade recovery action?

8.8.2 If Austrade has paid the grant or an advance on account of the grant, the applicant must repay the amount of the grant or of the advance to Austrade. It should be noted that this is the full amount of the grant or advance and not just a part which may be attributable to the conviction.

How does Austrade recover the grant?

8.8.3 The repayable amount is a debt due to Austrade and may be either:

- deducted from any amount payable to the applicant under the EMDG Act; or
- recovered by Austrade from the applicant in a court of competent jurisdiction.

SECTION 106 GUIDELINES

Regulations

8.9.1 Section 106 of the EMDG Act authorises the Governor-General to make Regulations for the proper functioning of the Act. Some sections of the Act specify the need for Regulations.

These sections are:

- subsection 69(4) (payout factor)
- subsection 89(1) (approval procedures for approved bodies, approved trading houses and approved joint ventures)
- section 107 (prescribing what are eligible services).

A copy of the Export Market Development Grants Regulations 2018 is provided in a separate section in these guidelines.
## ADMINISTRATIVE APPEALS TRIBUNAL & FEDERAL COURT CASE LISTING

<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 9</strong> Australian Net Benefit Requirements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Whether requirements are satisfied</td>
<td>239</td>
<td><em>Digislide Holdings Ltd</em></td>
<td>18-Nov-11</td>
<td>[2011]AATA 822</td>
<td>3.7</td>
</tr>
<tr>
<td><strong>Section 20: Grants Entry Requirements</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Grants Entry Requirements</td>
<td>197</td>
<td><em>Cash Converters Ontario Pty Ltd</em></td>
<td>16-Feb-99</td>
<td>W1998/252</td>
<td>3.18.11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>209</td>
<td><em>Beanda International Development (Australia) Pty Ltd</em></td>
<td>26-Oct-00</td>
<td>N2000/373</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>222</td>
<td><em>Australian Brand Enterprises Pty Ltd</em></td>
<td>2-Mar-05</td>
<td>V2004/744</td>
<td></td>
</tr>
<tr>
<td><strong>Section 24: Eligible Goods</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 (1)</td>
<td>Eligible Goods – definition, existence of</td>
<td>38</td>
<td><em>Bristol Myers Co Pty Ltd</em></td>
<td>23-Apr-85</td>
<td>N84/202</td>
<td>4.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>97</td>
<td><em>IDPAC IKA Pty Ltd</em></td>
<td>18-Feb88</td>
<td>S87/26</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>111</td>
<td><em>Jingles Australia Pty Ltd</em></td>
<td>16-May-90</td>
<td>W90/57</td>
<td></td>
</tr>
<tr>
<td>24(b)</td>
<td>Eligible goods made outside Australia</td>
<td>237</td>
<td><em>Polar Pacific Pty Ltd</em></td>
<td>19-Jan-2011</td>
<td>[2011]AATA 19</td>
<td></td>
</tr>
<tr>
<td>24(4)</td>
<td>Eligible goods – whether Australia derives significant net benefit from export of goods in question</td>
<td>216</td>
<td><em>Oppidan Pty Ltd</em></td>
<td>15-Jul-02</td>
<td>N2001/1595</td>
<td>4.1.16</td>
</tr>
<tr>
<td>25</td>
<td>Eligible services</td>
<td></td>
<td><em>Allocated Bullion Exchange Limited</em></td>
<td>25-Nov-16</td>
<td>AATA 939</td>
<td>Regulations</td>
</tr>
<tr>
<td>25(1)</td>
<td>Eligible services – must be “supplied” by applicant</td>
<td>207</td>
<td><em>Far North Queensland Destination Management Co. Pty Ltd</em></td>
<td>15-Nov-00</td>
<td>Q1999/514</td>
<td>4.2.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>208</td>
<td><em>Southbank Corporation Pty Ltd</em></td>
<td>9-Feb-00</td>
<td>Q1999/1026</td>
<td>4.2.5</td>
</tr>
<tr>
<td>25 (3)</td>
<td>Eligible Services – contract of sale with buyer resident outside Australia</td>
<td>74</td>
<td><em>KMW Systems Pty Ltd</em></td>
<td>7-Jan-87</td>
<td>V86/306</td>
<td>3.9</td>
</tr>
<tr>
<td></td>
<td></td>
<td>211</td>
<td><em>Graham Marsh Golf Design Pty Ltd</em></td>
<td>5-Nov-01</td>
<td>W 1999/51</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Eligible Services – ineligible as overseas company not agent of applicant</td>
<td>140</td>
<td><em>Hellmann International Forwarders Pty Ltd</em></td>
<td>10-Sep-93</td>
<td>N91/597</td>
<td></td>
</tr>
</tbody>
</table>

*denotes Federal Court Case

As at July 2018

(any hyperlinks that are incorrect please report to - jennifer.nolan@austrade.gov.au)
<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligible services – whether supplied outside Australia</td>
<td>227</td>
<td>Proclaim Management Solutions Pty Ltd</td>
<td>30-Jan-07</td>
<td>V2006/587</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sections 26 &amp; 27: Eligible Intellectual Property &amp; Know-How</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Copyright – difference between licences &amp; assignments</td>
<td>106</td>
<td>Nostata Pty Ltd</td>
<td>25-May-89</td>
<td>N88/45</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Copyright – licences – exclusive &amp; residual rights</td>
<td>106</td>
<td>Nostata Pty Ltd</td>
<td>25-May-89</td>
<td>N88/45</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Copyright – rights in relation to copyright</td>
<td>59</td>
<td>Nomad Films (International) Pty Ltd</td>
<td>30-May-86</td>
<td>VG1 59 of 1985*</td>
<td>4.7.14</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Thorn EMI Pty Ltd</td>
<td>15-Jun-88</td>
<td>N87/1266</td>
<td>4.6</td>
</tr>
<tr>
<td></td>
<td>Copyright in adapted works – definitions, Arrangements &amp; transcriptions</td>
<td>91</td>
<td>Transistor Music Pty Ltd</td>
<td>13-Oct-87</td>
<td>N86/247</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Copyright in relation to works</td>
<td>107</td>
<td>Film Funding &amp; Management Pty Ltd</td>
<td>26-May-89</td>
<td>G992 of 1988*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Copyright not yet in existence – sales of future copyrights</td>
<td>91</td>
<td>Transistor Music Pty Ltd</td>
<td>13-Oct-87</td>
<td>N86/247</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>230</td>
<td>Box Sentry Pty Ltd</td>
<td>31-Jul-07</td>
<td>AATA 1610</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Disposal definition – complete loss/alienation</td>
<td>113</td>
<td>DP &amp; P J Petersen</td>
<td>3-Jul-90</td>
<td>Q89/126</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Industrial Property Rights – definition</td>
<td>69</td>
<td>Sea King Fisheries Pty Ltd</td>
<td>30-Apr-86</td>
<td>W85/121</td>
<td>4.6.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>91</td>
<td>Transistor Music Pty Ltd</td>
<td>13-Oct-87</td>
<td>N86/247</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ownership of IPR’s</td>
<td>100</td>
<td>Thorn EMI Pty Ltd</td>
<td>15-Jun-88</td>
<td>N87/1266</td>
<td>4.6.4,5</td>
</tr>
<tr>
<td></td>
<td>Know how – interpretation</td>
<td>73</td>
<td>Seaway Yachts Pty Ltd</td>
<td>18-Dec-86</td>
<td>N85/632</td>
<td>4.4.2-3</td>
</tr>
<tr>
<td></td>
<td>Software not yet in existence</td>
<td>230</td>
<td>Box Sentry Pty Ltd</td>
<td>31-Jul-07</td>
<td>AATA 1610</td>
<td>5.10.5</td>
</tr>
<tr>
<td><strong>Sections 28 &amp; 29: Eligible Expenses - General</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>28(2) &amp; 29</td>
<td>Expenditure definition</td>
<td>97</td>
<td>IDPAC IKA Pty Ltd</td>
<td>18-Feb-88</td>
<td>S87/26</td>
<td>5.1.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>58</td>
<td>Sea King Fisheries Pty Ltd</td>
<td>30-Apr-86</td>
<td>W85/121</td>
<td></td>
</tr>
</tbody>
</table>

*denotes Federal Court Case

As at July 2018

(any hyperlinks that are incorrect please report to - jennifer.nolan@austrade.gov.au)
## ADMINISTRATIVE APPEALS TRIBUNAL & FEDERAL COURT CASE LISTING

<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>Eligible expenditure</td>
<td>6</td>
<td>Zinc Corporation &amp; Others</td>
<td>7-Aug-81</td>
<td>V80/44</td>
<td>5.1</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – must be incurred by the applicant</td>
<td>55</td>
<td>Mitchell Meat Pty Ltd</td>
<td>31-Jan-86</td>
<td>V85/60</td>
<td>No specific reference</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – correct characterisation of expenditure fundamental</td>
<td>92</td>
<td>Ibrahim Ghazi</td>
<td>4-Nov-87</td>
<td>N87/26</td>
<td>No specific reference</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – correct characterisation of expenditure fundamental</td>
<td>202</td>
<td>CDS Pty Ltd</td>
<td>30-Aug-99</td>
<td>V1998/1267</td>
<td>No specific reference</td>
</tr>
<tr>
<td>69</td>
<td>About Australia Pty Ltd</td>
<td>121</td>
<td>Kallis Australian Shipyards Pty Ltd</td>
<td>5-Nov-91</td>
<td>W91/10</td>
<td>5.1</td>
</tr>
</tbody>
</table>

### Section 33: Eligible Promotional Activities

<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>33 (1A)</td>
<td>Eligible expenditure – overseas representatives</td>
<td>49</td>
<td>Hassib-El-Bayeh</td>
<td>28-Aug-85</td>
<td>N84/593</td>
<td>5.1, 5.4.2</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – overseas representatives</td>
<td>194</td>
<td>Alloy Metal Holdings Pty Ltd</td>
<td>6-Nov-98</td>
<td>V97/95</td>
<td>No specific reference</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – overseas representatives</td>
<td>206</td>
<td>Montreal Lace</td>
<td>29-Sep-00</td>
<td>V97/1483</td>
<td>No specific reference</td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – overseas representatives</td>
<td>209</td>
<td>Beanda International Development (Australia) Pty Ltd</td>
<td>26-Oct-00</td>
<td>N2000/373</td>
<td>No specific reference</td>
</tr>
<tr>
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<td>V85/60</td>
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<td>Eligible expenditure – overseas representatives</td>
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<td>SEAF Pty Ltd</td>
<td>19-Nov-01</td>
<td>W2000/363</td>
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<td>Eligible expenditure – overseas representatives</td>
<td>58</td>
<td>Sea King Fisheries</td>
<td>30-Apr-86</td>
<td>W85/121</td>
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<td>Eligible expenditure – overseas representatives</td>
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<td>Sea King Fisheries Pty Ltd</td>
<td>26-Jun-87</td>
<td>W85/121</td>
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<td>Sea King Fisheries</td>
<td>5-Nov-86</td>
<td>G57 of 1986*</td>
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<td>Eligible expenditure – overseas representatives</td>
<td>70</td>
<td>Sahara Export Co Pty Ltd / Green Flag Pty Ltd</td>
<td>12-Nov-86</td>
<td>N85/219</td>
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<td>Eligible expenditure – overseas representatives</td>
<td>146</td>
<td>Doble Telescopic Lighting Pty Ltd</td>
<td>23-Dec-15</td>
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### Section 33

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<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>33 (1B)</td>
<td>Eligible expenditure –</td>
<td>84</td>
<td>Yogesh Jogia Diamonds</td>
<td>26-Jun-87</td>
<td>W86/256</td>
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<td>219</td>
<td>About Australia Pty Ltd</td>
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<td>[2003] AATA 308 Q2002/1057</td>
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<td>146</td>
<td>Pacific Granite &amp; Sandstone Pty Ltd</td>
<td>30-Jun-95</td>
<td>N94/1145</td>
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</table>

*denotes Federal Court Case

As at July 2018

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<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>eligibility directly dependent upon applicant/consultancy relationship – must be separate entities</td>
<td>188</td>
<td></td>
<td><em>Shanghai International Holding Corporation (Oceania) Pty Ltd</em></td>
<td>11-Feb-98</td>
<td>N97/33</td>
<td>Min. Det. 1/1997 CRP</td>
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<td>Eligible expenditure – agent must be acting on behalf of principal</td>
<td>204</td>
<td></td>
<td><em>Dronpool Pty Ltd &amp; BHA Industries Pty Ltd</em></td>
<td>28-Oct-99</td>
<td>N97/1327 N97/1328</td>
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</tr>
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<td>Eligible expenditure – consultants</td>
<td>109</td>
<td></td>
<td><em>De Montigne Pimm</em></td>
<td>8-Sep-89</td>
<td>V87/512</td>
<td>5.4.25-30</td>
</tr>
<tr>
<td>Consultancy Agreements – payments to Directors</td>
<td>72</td>
<td></td>
<td><em>Super Grasse Pty Ltd</em></td>
<td>4-Dec-86</td>
<td>N86/273</td>
<td>5.4.25</td>
</tr>
<tr>
<td>Market Research – eligible expenses – apportionment</td>
<td>120</td>
<td></td>
<td><em>ME Massen</em></td>
<td>28-Oct-91</td>
<td>W90/170</td>
<td>5.4.27-29</td>
</tr>
<tr>
<td>Payments to consultants – soliciting business – definition/purpose/actions amounting to eligible expenditure</td>
<td>101</td>
<td></td>
<td><em>Film Funding &amp; Management Pty Ltd</em></td>
<td>17-Jun-88</td>
<td>N87/737</td>
<td>5.7.1, 5.7.6</td>
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<td></td>
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<td>15-Jun-88</td>
<td>N87/1266</td>
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<td></td>
<td>45</td>
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<td><em>Geoffrey Thompson &amp; Growers Co- op</em></td>
<td>24-Jul-85</td>
<td>VG34 of 1985*</td>
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<tr>
<td></td>
<td>92</td>
<td></td>
<td><em>Ibrahim Ghazi</em></td>
<td>4-Nov-87</td>
<td>N87/26</td>
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<td>78</td>
<td></td>
<td><em>Solahart International Pty Ltd</em></td>
<td>7-May-87</td>
<td>W86/253</td>
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</tr>
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<td>Eligible expenditure – free samples</td>
<td>57</td>
<td></td>
<td><em>Opal Cordial Co Pty Ltd</em></td>
<td>11-Apr-86</td>
<td>V85/222</td>
<td>5.7.1, 5.7.6</td>
</tr>
<tr>
<td></td>
<td>195</td>
<td></td>
<td><em>Rala Information Services Pty Ltd</em></td>
<td>10-Dec-98</td>
<td>N97/1222</td>
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<td>204</td>
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<td><em>Dronpool Pty Ltd &amp; BHA Industries Pty Ltd</em></td>
<td>28-Oct-99</td>
<td>N97/1327 N97/1328</td>
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</tr>
<tr>
<td>Samples – definition</td>
<td>54</td>
<td></td>
<td><em>Middle East Marketing Organisation Pty Ltd</em></td>
<td>20-Dec-85</td>
<td>N85/128, N85/241</td>
<td>5.7</td>
</tr>
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<td>73</td>
<td></td>
<td><em>Seaway Yachts Pty Ltd</em></td>
<td>18-Dec-86</td>
<td>N85/632</td>
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<tr>
<td></td>
<td>210</td>
<td></td>
<td><em>Total Design Pty Ltd</em></td>
<td>17-Jan-02</td>
<td>Q2001/54</td>
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</table>
### ADMINISTRATIVE APPEALS TRIBUNAL & FEDERAL COURT CASE LISTING

<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Samples – absorption costing</td>
<td>54</td>
<td>Middle East Marketing Organisation Pty Ltd</td>
<td>20-Dec-85</td>
<td>N85/138, N85/241</td>
<td>5.7.2-5</td>
<td></td>
</tr>
<tr>
<td>33 (6)</td>
<td>Eligible expenditure – promotional literature – annual reports</td>
<td>123</td>
<td>Lithium Australia Ltd</td>
<td>29-Nov-91</td>
<td>W91/54</td>
<td>5.8.7</td>
</tr>
<tr>
<td>Eligible expenditure – advertising</td>
<td>54</td>
<td>Middle East Marketing Organisation Pty Ltd</td>
<td>20-Dec-85</td>
<td>N85/138, N85/241</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eligible expenditure – advertising – internet / e-commerce</td>
<td>55</td>
<td>Mitchell Meat Pty Ltd</td>
<td>31-Jan-86</td>
<td>V85/60</td>
<td>5.8.15-20</td>
<td></td>
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<tr>
<td>Eligible expenditure – advertising – securing publicity – soliciting business</td>
<td>45</td>
<td>Geoffrey Thompson &amp; Growers Co-op</td>
<td>24-Jul-85</td>
<td>VG 34 of 1985*</td>
<td>5.8.8</td>
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<td></td>
<td>5.10.6</td>
<td></td>
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<tr>
<td>Stickers attached to plastic wrapping of exported meat products not promotional literature or other advertising material</td>
<td>78</td>
<td>Solahart International Pty Ltd</td>
<td>7-May-87</td>
<td>W86/253</td>
<td>5.8.9</td>
<td></td>
</tr>
<tr>
<td>Display boxes – substantiation</td>
<td>229</td>
<td>Elderstone Nominees Pty Ltd</td>
<td>27-Apr-07</td>
<td>W2006/244</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>241</td>
<td>HYFN (Australia) Pty Ltd</td>
<td>27-Feb-12</td>
<td>[AATA] 114</td>
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</tbody>
</table>

**Section 34: Eligible Expenses – Marketing Visits**

| 34 | Eligible expenditure – marketing trips | 44 | Jock Makin & Co Pty Ltd | 5-Jul-85 | S84/66 | 5.5.1 |
| | | 66 | Hogarth Galleries Pty Ltd | 3-Oct-86 | N85/432 |  |
| | | 52 | Iziko Australia Pty Ltd / Enaton Australia Pty Ltd | 27-Nov-85 | N84/289, N84/291 |  |
| 34 (4) & (5) | Marketing trips – overseas visits allowance | 199 | Dr John Weldon | 4-Mar-99 | A98/206 | 5.5.8-13 |
| 34A | Eligible expenditure – overseas buyers | 139 | Wescorp Livestock International Pty Ltd | 21-Feb-92 | W91/111 | 5.9.2 |

*denotes Federal Court Case

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As at July 2018

Page 5 of 18
<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES</th>
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<td></td>
<td></td>
<td></td>
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<td></td>
<td>CHAPTER REF</td>
</tr>
<tr>
<td>Section 35: Reasonable Expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Reasonable expenses – determination by Austrade</td>
<td>189</td>
<td><strong>Capri Software (Australia) Pty Ltd</strong></td>
<td>12-Jan-88</td>
<td>W97/4</td>
<td>5.30.13-14</td>
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<td><strong>Jennifer Webster</strong></td>
<td>10-Dec-02</td>
<td>Q2001/667</td>
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<td>Section 37: Approved Promotional Purpose – eligible products</td>
<td></td>
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<td>37(1)</td>
<td>Agent / Principal – must be principal in export transaction</td>
<td>133</td>
<td><strong>Boral Cyclone / Blue Circle Southern Cement</strong></td>
<td>19-Oct-92</td>
<td>N91/559</td>
<td>5.10.7</td>
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<td><strong>Fliway AFA International</strong></td>
<td>4-Dec-92</td>
<td>NG383 of 1992*</td>
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<td><strong>Rural Chemical Industries Pty Ltd</strong></td>
<td>28-Sep-83</td>
<td>N82/57</td>
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<td></td>
<td></td>
<td>61</td>
<td><strong>Stretch Your Wings Australia Pty Ltd</strong></td>
<td>29-Jul-86</td>
<td>N84/589</td>
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<tr>
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<td><strong>Vin Tin Pty Ltd</strong></td>
<td>31-May-84</td>
<td>W83/32</td>
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<td><strong>Graham Marsh Golf Design Pty Ltd</strong></td>
<td>5-Nov-01</td>
<td>W1999/37</td>
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<td>Contracts related expenditure ineligible</td>
<td>55</td>
<td><strong>Mitchell Meat Pty Ltd</strong></td>
<td>31-Jan-86</td>
<td>V85/60</td>
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<tr>
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<td></td>
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<td><strong>Opal Cordial Co Pty Ltd</strong></td>
<td>11-Apr-86</td>
<td>V85/222</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>73</td>
<td><strong>Seaway Yachts Pty Ltd</strong></td>
<td>18-Dec-86</td>
<td>N85/632</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – creating or seeking opportunities, increasing demand, soliciting business</td>
<td>173</td>
<td><strong>Goodsports Pty Ltd</strong></td>
<td>28-Feb-97</td>
<td>S95/240</td>
<td>5.10.1</td>
</tr>
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<td></td>
<td></td>
<td>175</td>
<td><strong>Fletcher Projects Pty Ltd</strong></td>
<td>11-Mar-97</td>
<td>N96/594</td>
<td>5.10.9</td>
</tr>
<tr>
<td></td>
<td></td>
<td>182</td>
<td><strong>Vita Health Laboratories (Australia) Pty Ltd</strong></td>
<td>20-Aug-97</td>
<td>N95/588</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>192</td>
<td><strong>Wavemaster International Pty Ltd</strong></td>
<td>2-Oct-98</td>
<td>W97/156</td>
<td></td>
</tr>
<tr>
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<td>207</td>
<td><strong>Far North Queensland Destination Management Co Pty Ltd</strong></td>
<td>15-Nov-00</td>
<td>Q1999/514</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Eligible expenditure – post contractual / sales related</td>
<td>92</td>
<td><strong>Ibrahim Ghazi</strong></td>
<td>4-Nov-87</td>
<td>N87/26</td>
<td>5.10.6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15</td>
<td><strong>Ampol Ltd</strong></td>
<td>14-Jan-83</td>
<td>82/34</td>
<td>5.10.5,6</td>
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</tbody>
</table>

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As at July 2018

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<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
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<tbody>
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<td>expenditure not eligible</td>
<td>45</td>
<td></td>
<td>Geoffrey Thompson &amp; Growers Co-op</td>
<td>24-Jul-85</td>
<td>VG 34 of 1985*</td>
<td></td>
</tr>
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<td></td>
<td>35</td>
<td></td>
<td>Geoffrey Thompson &amp; Growers Co-op</td>
<td>25-Jan-85</td>
<td>V84/234</td>
<td></td>
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<tr>
<td></td>
<td>68</td>
<td></td>
<td>Jet Pack International Pty Ltd</td>
<td>31-Oct-86</td>
<td>V84/442</td>
<td></td>
</tr>
<tr>
<td>Eligible expenditure – legal fees incurred</td>
<td>192</td>
<td></td>
<td>Wavemaster International Pty Ltd</td>
<td>2-Oct-98</td>
<td>W97/156</td>
<td>5.10.6</td>
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<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Eligible expenditure – approved</td>
<td>86</td>
<td></td>
<td>Commercial Graphic Studios Pty Ltd</td>
<td>10-Jul-87</td>
<td>N86/611</td>
<td>5.10</td>
</tr>
<tr>
<td>approved promotional purpose</td>
<td>52</td>
<td></td>
<td>Iziko Australia Pty Ltd / Enaton</td>
<td>27-Nov-85</td>
<td>N84/289, N84/291</td>
<td></td>
</tr>
<tr>
<td>Australia Pty Ltd</td>
<td>44</td>
<td></td>
<td>Jock Makin &amp; Co Pty Ltd</td>
<td>5-Jul-85</td>
<td>S84/66</td>
<td></td>
</tr>
<tr>
<td>Did a product exist that was</td>
<td>230</td>
<td></td>
<td>Box Sentry Pty Ltd</td>
<td>31-Jul-07</td>
<td>AATA 1610</td>
<td>5.10.5</td>
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<td></td>
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<td></td>
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<tr>
<td></td>
<td>74</td>
<td></td>
<td>KMW Systems Pty Ltd</td>
<td>7-Jan-87</td>
<td>V86/306</td>
<td></td>
</tr>
<tr>
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<td>142</td>
<td></td>
<td>MH Group Pty Ltd</td>
<td>8-Aug-94</td>
<td>N93/858</td>
<td></td>
</tr>
<tr>
<td></td>
<td>55</td>
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<td>31-Jan-86</td>
<td>V85/60</td>
<td>5.10</td>
</tr>
<tr>
<td></td>
<td>54</td>
<td></td>
<td>Middle East Marketing Organisation Pty Ltd</td>
<td>20-Dec-85</td>
<td>N85/138, N85/241</td>
<td></td>
</tr>
<tr>
<td></td>
<td>32</td>
<td></td>
<td>Miller Pohang Coal Co Pty Ltd</td>
<td>26-Oct-84</td>
<td>N84/150</td>
<td></td>
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<tr>
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<td>47</td>
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<td>Miller Pohang Coal Pty Ltd</td>
<td>9-Aug-85</td>
<td>G410 of 1985*</td>
<td></td>
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<tr>
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<td>106</td>
<td></td>
<td>Nostata Pty Ltd</td>
<td>25-May-89</td>
<td>N88/45</td>
<td></td>
</tr>
<tr>
<td></td>
<td>11</td>
<td></td>
<td>Parker Pen (Australia) Pty Ltd</td>
<td>8-Jul-82</td>
<td>N81/215</td>
<td></td>
</tr>
<tr>
<td></td>
<td>73</td>
<td></td>
<td>Seaway Yachts Pty Ltd</td>
<td>18-Dec-86</td>
<td>N85/632</td>
<td></td>
</tr>
<tr>
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<td>91</td>
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<td>Transistor Music Pty Ltd</td>
<td>13-Oct-87</td>
<td>N86/247</td>
<td></td>
</tr>
<tr>
<td>Purpose of expenditure – definition /</td>
<td>97</td>
<td></td>
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<td>18-Feb-88</td>
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*denotes Federal Court Case

As at July 2018

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<th>DEC DATE</th>
<th>CASE REF</th>
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<td>236</td>
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<td>Peter Elton</td>
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**Section 38: Approved Promotional Purpose – Eligible Intellectual Property**

| 38 | Intellectual property rights – disposal of – must be ‘clearly envisaged’ | 163 | New Development Corporation Pty Ltd | 23-Aug-96 | N95/1440 | 4.3 |
|    |                                                                      | 185 | Hot Shoe Shuffle Australia Pty Ltd   | 1-Oct-97  | N96/542  |                |
|    | Rights – not existing at the time of promotion – IPR’s must exist and owned by the claimant | 91 | Transistor Music Pty Ltd            | 13-Oct-87 | N86/247  | 5.11.7-13 |
|    |                                                                      | 197 | Cash Converters Ontario Pty Ltd     | 16-Feb-99 | W1998/252 |                |
|    |                                                                      | 203 | Australian Trade Commission v Disktravel & others | 22-Oct-99 | FCA 1399* |                |
|    | Trusts – implied/resulting – re ownership of IPR’s                  | 105 | Indoor Sports Marketing             | 21-Apr-89 | W88/149  |                |
|    |                                                                      | 177 | Go Medical Industries Pty Ltd       | 11-Sep-96 | W95/428  | 5.11 |
|    | Joint ventures – disposal of IPRs                                   |      |                                            |        |          |                |
|    | Eligible Know how – return on disposal of                           | 170 | Photo Corporation of Australia Pty Ltd | 11-Feb-97 | N96/557  | 5.11.12,13 |

**Section 41: Capital Expenses**

| 41 | Capital expenditure – distinction between revenue/capital outgoings | 110 | Halisa Pty Ltd                        | 22-Feb-90 | N89/175 | 5.13.1 |
|    |                                                                      | 36  | Queensland Mines Ltd                  | 8-Feb-85  | N83/728 |                |
|    | Capital expenditure ineligible                                      | 198 | International Universities of Australia Pty Ltd (IUA) | 24-Mar-99 | V96/1145 |                |

*denotes Federal Court Case

As at July 2018

(any hyperlinks that are incorrect please report to - jennifer.nolan@austtrade.gov.au)
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<th>SECTION</th>
<th>ITEM</th>
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**Section 46: Reimbursement**

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<th>ITEM</th>
<th>REF</th>
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<th>DEC DATE</th>
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**Section 49: Expenses Incurred as Commission, Discounts etc.**

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<td>Jet Pack International Pty Ltd</td>
<td>31-Oct-86</td>
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<td>Discounts on sales</td>
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<td>Opal Cordial Co Pty Ltd</td>
<td>11-Apr-86</td>
<td>V85/222</td>
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<td>Illegal activities – must be proven illegal both in Australia and country of export</td>
<td>186</td>
<td>L’Anne Kane International Pty Ltd</td>
<td>6-Apr-98</td>
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<td>Acquittal of Expenditure – payment by credit card</td>
<td>119</td>
<td>90 Alana Pty Ltd</td>
<td>10-Oct-91</td>
<td>V91/219</td>
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<td>15-Apr-88</td>
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<td>Acquittal by set-off</td>
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<td>Suncoast Gold Macadamias (Australia) Ltd</td>
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<td>Acquittal – cash payments</td>
<td>206</td>
<td>Montreal Lace</td>
<td>29-Sep-00</td>
<td>V97/1483</td>
<td>5.30.13,14</td>
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<td>Expenditure incurred</td>
<td>130</td>
<td>Austec International (East European) Pty Ltd</td>
<td>17-Jun-92</td>
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As at July 2018

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</tbody>
</table>

Section 59: Incurring Expenses – Goods
59 Prepayments of expenses – patents
190 Qlicksmart Pty Ltd 16-Jun-98 Q97/546 5.30.10,11,12

Section 63: Provisional Grant Amount
63 Amount of grant entitlement – determination of
126 Correia l’Zaknic & Others 14-Feb-92 W90/255 6.1
63(3) Export Performance Test 99 Film Funding & Management Pty Ltd 9-May-88 N87/1136 6.1.5

Sections 70-73 & 80: Application for/Payment of Grant
70 (2) Additional claims for a particular grant year – not possible under the legislation
53 Vitauts Labsvirs 6-Dec-85 S84/154 7.1.1
70, 71 & 73(2), 80 Claims receipt procedures & late lodged claims
108 Ainsworth Aristocrat International 7-Jun-89 N88/633 7.1.4
93 Rivate Pty Ltd 10-Nov-87 N87/141 7.1.5, 7.5.1
94 Solarex Pty Ltd 1-Dec-87 G319 of 1987* 7.1.4
62 Kamil Export Co Pty Ltd 12-Aug-86 V86/58 7.1.4
38 Bristol Myers Co Pty Ltd 23-Apr-85 N84/202 7.1.4
96 Michael Camilleri 27-Jan-88 V87/266 7.1.4
1 Maunsell & Partners 7-Aug-80 V80/10 7.1.4
53 Vitauts Labsvirs 6-Dec-85 S84/154 7.1.4

*denotes Federal Court Case
As at July 2018
Page 11 of 18
<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
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<tr>
<td>70 (2C)</td>
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<td>238</td>
<td><em>The Wizard Group Pty Ltd</em></td>
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<td>[2011]AATA 383</td>
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<td>196</td>
<td><em>Alpha Chemicals (Australia) Pty Ltd</em></td>
<td>10-Dec-98</td>
<td>N98/581</td>
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</tr>
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<td>71</td>
<td>Claims – place of lodgement – can only be to the Commission not a carrier – application ‘received’ when received by Austrade</td>
<td>87</td>
<td><em>Cotel Pty Ltd</em></td>
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<td>Request for further information – compliance</td>
<td>172</td>
<td><em>Gutteridge Haskins and Davey Pty Ltd</em></td>
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</table>

**Section 87: Insolvency Administration**

| 87B & C | Insolvency administration – effect on grant entitlement | 205 | *Luna Lighting International (Con Kallergis Pty Ltd)* | 6-Oct-00 | V1999/1448 | 7.7.1 |
|         | | | *Carbon Planet Limited* | 9-Aug-12 | [AATA]526 | |

**Sections 93 & 94: Change in Ownership of Business**

| 93 & 94 | Continuing business arrangements | 215 | *Muirfield International Group Pty Ltd* | 25-Jun-02 | V2001/844 | 8.2 |
|         | | | | | | |
| 93 & 94 | Limitation of the number of grants, whether applicant is carrying on a business that is the same or similar to previous business – degree of inter-relationship and continuation of previous activities. | 215 | *Nysan and Asia Pacific Pty Ltd* | 7-Apr-15 | [2015] AATA 208 | |
| 94      | Business arrangements/activity – definition as used in Section | 64 | *Campervans (Australia) Pty Ltd* | 29-Aug-86 | V85/561 | 8.2.5 |
|         | | 145 | *Magee* | 8-Dec-94 | V94/98 | |

*denotes Federal Court Case

As at July 2018

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<table>
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<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
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<td>94</td>
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As at July 2018

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<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
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<td>21 Sept -09</td>
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<td>[2009] AATA 713</td>
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<td>17 Apr-13</td>
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<td>[AATA]537</td>
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</table>

**Section 95 & 96: Applicant Party to Transaction Resulting in Obtaining Grant**

| 95 & 96 | Eligible expenditure – linkage with grant entitlement | 126 | Correia Zaknic & Others | 14-Feb-92 | W90/255 | 8.3 |
|         | Applicant party to “Act or Thing” resulting in grant or increase in grant amount | 51 | Edward Souery & Co Pty Ltd | 18-Nov-85 | V85/280 |          |
|         |                                                | 52 | Iziko Australia Pty Ltd / Enaton Australia Pty Ltd | 27-Nov-85 | N84/289 | N84/291 |
|         |                                                | 169 | World Geoscience Corporation Ltd | 20-Aug-97 | WAG21 of 1997* |          |
|         | Adjustments of amounts                         | 26 | Gilbertson Group of Companies | 1-Feb-84 | V83/22 |          |
|         | Applicability & application of section         | 126 | Correia Zaknic & Others | 14-Feb-92 | W90/255 |          |
|         |                                                | 52 | Iziko Australia Pty Ltd / Enaton Australia Pty Ltd | 27-Nov-85 | N84/289 | N84/291 |

**Sections 95 & 96 contd**

|         | Avoidance Provisions – sections’ limitations | 53 | Vitauts Labsvirs | 6-Dec-85 | S84/154 |          |
|         | Discretion to use section 94                 | 64 | Campervans (Australia) Pty Ltd | 29-Aug-86 | V85/561 |          |

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<table>
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<th>SECTION</th>
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<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
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<td>Rearrangement of business activity to increase liability for grant</td>
<td>168</td>
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<td>Safetycare Australia Pty Ltd</td>
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<td>V95/1215 VG741 of 1996</td>
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<td>Business rearrangement</td>
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<td>Muirfield International Group Pty Ltd</td>
<td>15-Jun-02</td>
<td>V2001/844</td>
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</table>

**Sections 97-99: Review of Decisions – Austrade, AAT**

| 97-99 | AAT applications – Commission restricted to original disallowances | 55 | Mitchell Meat Pty Ltd | 31-Jan-86 | V85/60 | 8.4.2-11 |
|       | AAT constraints on the interpretative role | 36 | Queensland Mines Ltd | 8-Feb-85 | N83/728 |
|       | | 36 | Queensland Mines Ltd | 8-Feb-85 | N83/728 |
|       | | 104 | Richard Schrapnel | 21-Nov-88 | VG174 of 1988* |
|       | AAT jurisdiction – not earlier than 1978/9 | 114 | Geoscan Pty Ltd | 7-Dec-90 | W90/205 |
|       | | 52 | Iziko Australia Pty Ltd / Enaton Australia Pty Ltd | 27-Nov-85 | N84/289, N84/291 |
|       | | 53 | Vitauts Labsvirs | 6-Dec-85 | S84/154 |
|       | AAT not bound by rules of evidence | 66 | Hogarth Galleries Pty Ltd | 3-Oct-86 | N85/432 |
|       | | 94 | Solarex Pty Ltd | 1-Dec-87 | G319 of 1987* |
|       | Accrued rights | 75 | JR Exports Pty Ltd | 19-Mar-87 | G396 of 1986* |
|       | | 63 | JR Exports Pty Ltd | 14-Aug-86 | S86/50 |
|       | Discretionary provisions of the legislation – extension of appeal lodgement time | 52 | Iziko Australia Pty Ltd / Enaton Australia Pty Ltd | 27-Nov-85 | N84/289, N84/291 | 8.4.5 |
|       | | 51 | Edward Souery & Co Pty Ltd | 18-Nov-85 | V85/280 |
| Late appeals | 129 | Meridien Trade Australia Pty Ltd | 1-Jun-92 | N91/67, N91/669 |
| Extension of time to lodge AAT appeal | 240 | Torian Wireless Pty Ltd | 9-Dec-11 | [AATA]947 |
| Review of grant determinations | 53 | Vitauts Labsvirs | 6-Dec-85 | S84/154 | 8.4.8,9,10 |
| | 183 | Associated Products Pty Ltd | 22-Aug-97 | N97/356 |
| Stay of AAT decision pending Federal Court appeal | 88 | WA Meat Exports Pty Ltd | 29-Jul-87 | Verbal decision | 8.4.11 |

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As at July 2018

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<th>SECTION</th>
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<th>GUIDELINES CHAPTER REF</th>
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<td>Underwood Exports Pty Ltd</td>
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<td>VG167 of 1996*</td>
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</table>

**Section 104**

|        | Recovery of EMDG grants | 36  | Queensland Mines Ltd | 8-Feb-85 | N83/728  |                         |
|        |                          | 201 | Suncoast Gold Macadamias (Aust) Ltd | 21-May-99 | Q1997/490 |                         |
|        |                          | ---- | Tradigrain Aust Pty Ltd (n.b. EEG scheme case but principles relevant) | 15-Aug-84 | S84/20 |                         |

**Section 109**

| S 109  | Sale of eligible goods | 233 | Nepenthe Wines Pty Ltd | 3-Nov-08 | 200600407 | 5.10 |

**Regulations**

| 8      | Eligible internal services – Education | 165 | Sato Transpacific Pty Ltd | 5-Sep-96 | N95/1878 | Regulations |
|        | Schedule 2 Non-tourism services – assets held in Australia | | Asia Pacific Aircraft Storage Pty Ltd | 6-Nov-14 | [2014] AATA835 | 4.2.6 |

**Ministerial Determinations**

| Min Det EMDG Close Relationships General Det 2002 | Associated company – meaning | 139 | Westcorp Livestock International Pty Ltd | 21-Feb-92 | W91/111 | Min Det 1/1997 CRP |
|                                                | Arms Length Test – consultants | 176 | CHK Engineering Pty Ltd | 1-May-97 | N96/899 |                         |
|                                                | Arms Length Tests – potential to control as sufficient – definition of control | 122 | Bassarab Holdings Pty Ltd | 18-Nov-91 | W91/10 |                         |
|                                                |                                       | 109 | De Montigne Pimm | 8-Sep-89 | V87/512 |                         |
|                                                |                                       | 27  | Vin Tin Pty Ltd | 31-May-84 | W83/32 |                         |
|                                                |                                       | 90  | WA Meat Exports Pty Ltd | 11-Sep-87 | WAG49 of 1987 |                         |
|                                                |                                       | 76  | WA Meat Exports Pty Ltd | 8-Apr-87 | W86/222 |                         |
|                                                |                                       | 144 | Agen Biomedical Ltd | 21-Apr-95 | Q94/361 |                         |
|                                                |                                       | 141 | Alphazen Holdings Pty Ltd | 27-Jul-94 | W93/165 |                         |
|                                                |                                       | 101 | Film Funding & Management Pty Ltd | 17-Jun-88 | N87/737 |                         |

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<table>
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<th>SECTION</th>
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<th>GUIDELINES CHAPTER REF</th>
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<td>N83/728</td>
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<td>21-Nov-88</td>
<td>VG174 of 1988*</td>
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<td>Super Grasse</td>
<td>4-Dec-86</td>
<td>N86/273</td>
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<td>Directors/Associates – payments to</td>
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<td>Middle East Marketing Organisation Pty Ltd</td>
<td>20-Dec-85</td>
<td>N85/128, N85/241</td>
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<td>4-Dec-86</td>
<td>N86/273</td>
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<td>V87/512</td>
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<td>Port Jackson Fine Art Pty Ltd</td>
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<th>GUIDELINES CHAPTER REF</th>
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<td>107</td>
<td>Film Funding &amp; Management Pty Ltd</td>
<td>26-May-89</td>
<td>G992 of 1998*</td>
<td>Chapter 6.1</td>
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<tr>
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<td>Export earnings – contracts, export definition</td>
<td>131</td>
<td>Goodman Fielder Industries Ltd</td>
<td>30 Jun-92</td>
<td>NG21 of 1992*</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>233</td>
<td>Nepenthe Wines Pty Ltd</td>
<td>3-Nov-08</td>
<td>200600407</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Export earnings – eligible tourism services</td>
<td>208</td>
<td>Southbank Corporation Pty Ltd</td>
<td>9-Feb-00</td>
<td>Q1999/1026</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Export earnings – joint venture</td>
<td>70</td>
<td>Sahara Export Co Pty Ltd / Green Flag Pty Ltd</td>
<td>12-Nov-86</td>
<td>N85/219</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Export earnings – agents</td>
<td>180</td>
<td>Christmas Island Resort</td>
<td>16-Jun-97</td>
<td>N96/45</td>
<td></td>
</tr>
</tbody>
</table>

Judicial Review

<table>
<thead>
<tr>
<th>SECTION</th>
<th>ITEM</th>
<th>REF</th>
<th>APPLICANT</th>
<th>DEC DATE</th>
<th>CASE REF</th>
<th>GUIDELINES CHAPTER REF</th>
</tr>
</thead>
<tbody>
<tr>
<td>80, 87, 87C</td>
<td>Administrative law challenge to decisions</td>
<td></td>
<td>Garrett</td>
<td>5-Feb-15</td>
<td>FCA 39</td>
<td></td>
</tr>
</tbody>
</table>
10 Power of Minister to give directions

(1) The Minister may give to the CEO, in writing, such directions with respect to the performance of his or her functions, and the exercise of his or her powers, under this Act, as appear to the Minister to be necessary.

Note: A direction under this section is included in the annual report: see section 92.

(3) Nothing in subsection (1) shall be construed as empowering the Minister to determine that the CEO should deal in a particular manner with a particular person, or with a particular claim or application for a grant or other benefit, under the Export Market Development Grants Act 1997.

(4) A direction of the Minister under this section shall not operate so as to affect prejudicially an application under the Export Market Development Grants Act 1997 in relation to a grant year (within the meaning of that Act) that commenced before the day on which the direction was given.

(5) This section does not affect the operation of any other provision of this Act or of any other Act that confers a power upon the Minister to give directions to the CEO.

(6) A direction under this section is not a legislative instrument.

94 Secrecy

(1) This section applies to a person who is or has been:
   (a) the CEO; or
   (b) a member of the staff of the Commission referred to in section 60; or
   (c) a consultant engaged under section 62.

(2) Subject to this section, a person to whom this section applies shall not, either directly or indirectly, except for the purposes of this Act:
(a) make a record of, or divulge or communicate to any person, any information concerning the affairs of another person acquired by the first-mentioned person by reason of his or her employment; or
(b) produce to any person a document relating to the affairs of another person furnished for the purposes of this Act.

Penalty: Imprisonment for 12 months or 20 penalty units, or both.

(3) Subsection (2) does not apply to the disclosure of information, or the production of a document, to the Minister, to the Secretary of the Department, or to an officer of the Department designated by the Secretary.

(4) Subsection (2) does not prevent a person to whom this section applies from communicating, or making available to another person:

(b) the following information relating to payments of grants authorised by the CEO under the Export Market Development Grants Act 1997 or the Export Market Development Grants Act 1974:
   (i) the name and address of a person to whom the CEO has authorised a payment;
   (ii) the amount of a grant to a person;
   (iii) the industry to which a grant relates; and
(c) any information of a statistical nature relating to the making of grants under the Export Market Development Grants Act 1974 or the Export Market Development Grants Act 1997.

(5) A person to whom this section applies shall not be required to divulge or communicate to a court any information referred to in subsection (2) or to produce in a court any document referred to in that subsection, except when it is necessary to do so for the purposes of, or of a prosecution for an offence against, this Act, the Export Market Development Grants Act 1974 or the Export Market Development Grants Act 1997.

(6) A person to whom information is communicated under subsection (3) and an employee or other person under that person’s control are, in respect of that information, entitled to rights and privileges, and subject to obligations and liabilities, under subsections (2) and (5) as if they were persons referred to in subsection (1).

(7) In this section:

  court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

  produce includes to permit access to.
LEGISLATIVE INSTRUMENTS UNDER THE EXPORT MARKET DEVELOPMENT GRANTS (EMDG) ACT 1997

- Export Market Development Grants (Approved Body) Guidelines 2018
- Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015
- Export Market Development Grants (Australian Net Benefit Requirements) Determination 2018
- Export Market Development Grants (Change in Ownership of Business) Guidelines 2016
- Export Market Development Grants (Approved Joint Ventures) Guidelines 2018
- Export Market Development Grants (Genuinely Carrying on a Business) Guidelines 2018
- Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012
- Export Market Development Grants (Export Performance Requirements) Instrument 2018
- Export Market Development Grants (Grants Entry Requirements) Determination 2016
- Export Market Development Grants (Information and Document Requirements) Instrument 2018
- Export Market Development Grants (Iran Sanctions) Repeal Declaration 2016
- Export Market Development Grants Regulations 2018