

# EXPORT MARKET DEVELOPMENT GRANTS ADMINISTRATIVE GUIDELINES

## PART 3 – PERSONS ELIGIBLE FOR A GRANT

### 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:

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

	<p>legislation and carrying on business in Norfolk Island is eligible and considered to be carrying on business in Australia.</p> <p>Note: Associations or cooperatives incorporated under Norfolk Island law are ineligible.</p>	<p>business in Christmas Island or the Cocos (Keeling) Islands is eligible and considered to be carrying on business in Australia.</p>
Partnership	<p>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.</p> <p>Note: A partnership regulated by Norfolk Island law is ineligible.</p>	<p>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.</p>

\* 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 that 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) Determination 2008*, 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*.

- (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 by commissioning 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.