

# EXPORT MARKET DEVELOPMENT GRANTS ADMINISTRATIVE GUIDELINES

## PART 5 – ELIGIBLE EXPENSES

*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 that 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		
Column 1 Item	Column 2 Activity	Column 3 Expenses
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: <ul style="list-style-type: none"> <li>(a) maintaining the representatives; and</li> <li>(b) meeting the expenses incurred by the representatives in soliciting business for the applicant;</li> </ul> up to a limit of: <ul style="list-style-type: none"> <li>(c) if the applicant is a grantee in respect of any previous grant year—\$200,000 for the grant year; or</li> <li>(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</li> </ul>

### 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.



## Extract from section 33 of the EMDG Act

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
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 for “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.*



### **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).*

## **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 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.*

### **EXAMPLE 2**

*Applicant pays \$250,000 to an unrelated overseas representative for soliciting business and marketing activities. It claims \$200,000 of this amount in the overseas representation expense category.*

*When assessing the claim, Austrade allows the \$200,000 as claimed. It confirms that the balance was incurred for eligible purposes and was paid to an unrelated business. Austrade advises the applicant that it was entitled to claim \$50,000 of the total \$250,000 in the marketing consultants category and enables the applicant to add this amount to its claim.*

## **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.*

### **EXAMPLE 3**

*An applicant pays for fares for an overseas visit of an overseas representative as well as for communications costs for the representative. Those expenses will be assessed under item 1A. Section 32 of the Act precludes the expenses of these activities of the representative being assessed anywhere other than in item 1A of the section 33 table.*

### **EXAMPLE 4:**

*An applicant's Australian-based employee visits the applicant's overseas representative. During the visit the representative incurs expenses on fares to enable this Australian-based employee to firstly, accompany the representative in travelling around its territory and secondly, to return to Australia.*

*In this case the expenses associated with the representative's travel would be assessed under item 1A and the expenses associated with the Australian-based employee would be assessed in item 2 (marketing visits).*

## **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		
Column 1 Item	Column 2 Activity	Column 3 Expenses
2	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.	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

### 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.

### Example

Depart Australia 2 May, return Australia 8 May = 7 days OVA.

**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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
4	the provision, primarily for an approved promotional purpose, of free samples to a person that is not a resident of Australia, as follows:  (a) provision outside Australia of samples relating to any eligible product of the applicant;  (b) provision in Australia of samples relating to eligible tourism services supplied by the applicant	all reasonable expenses incurred by the applicant that are attributable to the actual cost of providing the samples up to any applicable limit for the applicant in relation to a grant year

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:

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

## 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

Passenger transport by land (Based on advertised price)	20%
Passenger transport by water (Based on advertised price)	20%
Passenger transport by air (Based on advertised price)	20%
Accommodation for at least one night (Based on advertised room rate)	20%
A tour (Based on advertised cost of tour)	20%

Admission to a place, for entry to which payment is required, of any of the following kinds:

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

### 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 be 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 assesses 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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
5	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	all reasonable expenses incurred by the applicant in payments to persons that, in Austrade's opinion, were not closely related to the applicant

## 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 show room 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.*

### **EXAMPLE 2**

*An applicant is a boat exporter and it freights a boat to Europe for the purpose of demonstrating it to journalists and potential distributors. The boat is not intended to be given away but is to be returned to Australia after the promotional activity. This promotional activity would be accepted by Austrade as a private exhibition and therefore all bought-in costs relating to transporting the good and the promotional activity **would** be eligible expenses under Item 5, section 33. **n.b.** the cost of producing the boat itself **would not** be eligible.*

### **EXAMPLE 3**

*The applicant sells cosmetics and has an arrangement with an overseas retail outlet for a “below the line marketing” approach where it takes space in a shop and provides display stands that include samplers and advertising material. Part of the applicant’s expenses will be for eligible promotional activities and part will be for non-promotional business expenses such as paying for stands to hold stock in the shop.*

*Austrade will allow the eligible promotional costs under the in-store promotional event category. Applicants will need to determine a basis for determining promotional and non-promotional costs.*

### **EXAMPLE 4**

*An applicant exports jewellery and its staff take samples of jewellery for display on overseas visits. They hire hotel suites for displaying the jewellery to potential clients by way of private exhibitions. The expenses of room hire and any other bought-in promotional costs relating to the private exhibition will be allowed for EMDG purposes.*

### **EXAMPLE 5**

*An applicant brings potential overseas distributors for its products to Australia and puts on a seminar to discuss product information and marketing ideas. The expenses of venue hire and other direct bought-in advertising or promotional activities will be allowed. The transport, accommodation and meals expenses for the overseas buyers may also be allowed under section 33 – item 7 and section 34A of the EMDG Act.*

## **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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
6	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	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.

### 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. total expenses that may qualify under the EMDG Act
2. the purpose of the website and whether, and if so how, it generates income for the applicant
3. promotional expenses
4. eligible versus ineligible promotion.

#### 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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
7	bringing one or more buyers (or potential buyers) that are not residents of Australia to Australia to the extent to which the buyers are brought to Australia for an approved promotional purpose	all expenses: <ul style="list-style-type: none"> <li>(a) incurred by the applicant in payments to persons that, in Austrade's opinion, were not closely related to the applicant; and</li> <li>(b) that are allowable expenses under section 34A;               <ul style="list-style-type: none"> <li>up to a limit of:                   <ul style="list-style-type: none"> <li>(c) if the applicant is a grantee in respect of any previous grant year—\$45,000 for the grant year; or</li> <li>(d) if the applicant is not a grantee in respect of any previous grant year—\$45,000 for the grant year and the immediately preceding year</li> </ul> </li> </ul> </li> </ul>

**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:

Eligible visit expenses under s 34A		Assessed expenses	
Visitor 1	\$7,000	Visitor 1	\$7,000
Visitor 2	\$8,000	Visitor 2	\$7,500
Visitor 3	\$9,000	Visitor 3	\$7,500
Total	\$24,000	Total	\$22,000

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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
8	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	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

### 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](http://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

Claimable expenses in respect of eligible promotional activities		
Column 1 Item	Column 2 Activity	Column 3 Expenses
9	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:  (a) under the law of a foreign country; and  (b) for an approved promotional purpose	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

### 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.

### **Example 1**

*Applicant operates a recruitment service. Its income is generated on placing a candidate with an employer. On this business model, the applicant's customers are employers who pay for the placement services, not candidates. Therefore, marketing to prospective employers is eligible but the cost of "marketing" to prospective candidates is ineligible as candidates are not the source of income.*

### **Example 2**

*Applicant publishes a free newspaper. It generates income from the placements of advertising space. The cost of marketing to the readership is not eligible as no income can be produced. However, the cost of marketing to a prospective advertiser is eligible, as it is directly related to income generating activities.*

### **Example 3**

*Applicant develops a free App for consumers. It seeks to license the App to businesses wanting to capture opportunities from the free user base of the App. For the App to be more attractive to potential business licensees, applicant undertakes social media marketing campaigns to attract free users of the App. In this case, the social media marketing expenses are not targeted at potential business licensees but for developing or enhancing a product offering, and is therefore, ineligible.*

### **Example 4**

*Applicant develops a free online tool for consumers. It sells advertising spaces on its website and charges a percentage for conversion of sales to businesses. It incurs expenses in search engine campaigns to attract consumer traffic to its website. These expenses are ineligible as the activities are targeted at non-fee paying consumers, i.e. being operational and/or post-contractual in nature, and the campaigns are predominately for promotion of the advertisers' products, i.e. applicant is not the principal.*

### **Example 5**

*Applicant develops an online market place. It promotes the services of the market place to both buyers and sellers but only charges sellers a commission for sales transactions. While the identifiable expenses are eligible if they are for promotional activities targeted at attracting sellers who are the source of income, the promotional expenses related to recruiting buyers are ineligible.*

## **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 20113–14 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 artist to 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:

List of excluded expenses		
Column 1 Item	Column 2 Expense	Column 3 Section
1	Capital expenses	41
2	Expenses incurred when applicant not resident of Australia	42
3	Expenses related to trade with New Zealand	43
4	Expenses incurred in breach of trade sanction	44
5	Expenses (other financial assistance schemes)	45
6	Expenses for which applicant is paid	46
7	Expenses disclosed after submitting application	47
8	Taxes etc.	48
9	Expenses incurred as commission, discounts etc.	49
13	Expenses of approved joint venture	53
14	Expenses of applicant carrying on business in different capacities	54
16	Expenses relating to illegal activities	56
16A	Expenses of over \$10,000 paid in cash by an applicant	56A
17	Expenses associated with "X"-rated films	57
18	Expenses associated with prohibited or potential prohibited internet content	57A
19	Expenses associated with telephone sex services	57B
20	Expenses relating to things that may have had a detrimental impact on Australia's trade reputation	57C

## 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

### **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.*

*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.*

any claimed expenses for which the R&D tax offset has been paid.

**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 6**

#### **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

#### **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.*

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.

#### **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:

Income	\$	
Income from direct sponsorship for the tour	25,000	
Income from performances received by applicant from promoter	25,000	
Aust Council grant	15,000	
	\$65,000	
<b>Expenses</b>	<b>Total</b>	<b>EMDG eligible</b>
Fares	70,000	70,000
Promotional events expenses (e.g. staging costs)	60,000	30,000
Accommodation and living expenses	60,000	80,000 *
Salaries for performers	70,000	
	\$260,000	\$180,000
Loss	\$195,000	

\* 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.

#### **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.

#### **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 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

### **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.*

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.

## **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.

Type of internet advertising	Assessment rules
Cost per placement – this is payment of a fixed amount for a given exposure on a site irrespective of how much interest is generated.	Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.
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.	Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.
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.	Expenses are not related to number of product sales or to a level of sales so would be prima facie eligible.
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.	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.
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.	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.

## 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

**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.*

is carried out.

**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.*

*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 cause detriment to Australia's standing as a trading nation. A finding that an expense 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.

#### **EXAMPLE**

*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 unrepresented 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 events 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.