

EXPORT MARKET DEVELOPMENT GRANTS ADMINISTRATIVE GUIDELINES

PART 7

APPLICATION FOR AND PAYMENT OF A GRANT

SECTIONS 70 – 73 GUIDELINES

Applying for a grant

7.1.1

Applications for a grant may only be made online, using the EMDG online application form. This is available from the Austrade website: www.austrade.gov.au/Australian/Export/Export-Grants/Apply/application-form

Please refer to this site for further information on how to apply for a grant.

Hard copy paper-based applications will not be accepted.

7.1.2 – 5 Guidelines deleted

7.1.6 Applications for approved joint ventures must be made on behalf of the joint venture by the nominated contact member. This member will be required to be specified at the time of Austrade's approval of the joint venture.

Additional material or consents that may need to be provided by some applicants in certain cases

7.2.1 Subsection 72(1) of the EMDG Act states that Austrade may provide written notice to applicants to seek specified information or specified books, records or documents. If the Applicant is a body corporate that was part of a related company group at 30 June of the relevant grant year, Austrade may provide this written notice to each body corporate that was a member of the group.

7.2.2 Similarly, subsection 72(2) of the EMDG Act states that Austrade may provide written notice to applicants to seek their written consent to enable Austrade to check criminal records in respect of the EMDG disqualifying convictions provisions at Division 4 of Part 3 and section 86 of the EMDG Act.

7.2.3 Subsection 72(3) of the EMDG Act states that the official Austrade application form must contain an explanation of Austrade's powers under subsections (1) and (2). This must include explaining the effect of these provisions. Non-compliance with subsections (1) and (2) will mean that Austrade may refuse to consider a particular application.



Australian Government
Australian Trade Commission



When may Austrade refuse to consider a particular application?

7.3.1 Austrade may refuse to consider a particular application if:

- The application is not made in a form and manner approved by Austrade
- Austrade's requests for further information/written requests made under section 72 of the EMDG Act have not been complied with
- Austrade's requests for written consent from an individual who helped in a prescribed capacity to prepare an application have not been complied with.

(Note: Austrade must refuse to consider a particular application if the application was not received within five months after the end of the grant year [see paragraph 70(2)(b) of the EMDG Act]). Similarly, Austrade must refuse to consider an application prepared by an EMDG Quality Incentive Program consultant that is received more than eight months after the end of the grant year.

Withdrawal of Claims

7.3.2 There is nothing in the EMDG Act, the Regulations or the Guidelines that prevents an applicant from withdrawing its grant application. However, enabling applicants to withdraw a claim does not mean they can circumvent the EMDG Act's other provisions such as section 47 (expenses disclosed after submitting application) and section 103 (offences related to submitting an EMDG application).

EMDG application acceptance policy

7.3.3 Applications **must** include:

1. a completed Application form, with the required declaration **signed by an authorised officer** (i.e. the applicant, sole trader or partner; or the Managing Director, Chief Executive Officer, Registered Company Secretary, Director or Chief Financial Officer of the applicant);
 2. completed schedules relevant to the application; and
 3. Any other required documents, as requested by the EMDG e-Lodge system. As applicants work through the application form, they will be asked to provide various documents, such as financials, invoices or bank statements. The types of documents requested will depend on what is in the claim.
- Applicants promoting goods that are not made in Australia must provide a 'submission containing the information requested in "A guide to applying for EMDG" at "Are the goods made in Australia".
 - Applicants that have already received two or more grants (and are not an approved body) must elect to meet either the Export Performance Requirements (Option A) or the Australian Net Benefit Requirements (Option B) in relation to that grant year.

Export Performance Requirements Option A

Applicants seeking to satisfy the **Export Performance Measure** under **Option A** must provide a schedule of export earnings received in the grant year.

Export earnings figures are to be provided for the full year on the Application form and detailed on the relevant Export Earnings schedule (Schedules 9A to 9E) applicable to the type of product/service being exported. Where individual export sales are too numerous to list, a summary of sales by month, supported by a schedule detailing at least one month's export sales, must be provided. The schedules must demonstrate that all earnings were received prior to 30 June of the grant year.

Year 3 or more applicants' must attach the Invoice and Bank statement for the entry selected by the EMDG online application.

Australian Net Benefit Requirements Option B

Applicants seeking to satisfy the **Export Performance Measure** under **Option B** must submit the documents detailed in the Export Market Development Grants (Information and Document Requirements) Determination 2008, as amended. The following is reproduced from the Determination:

4 Information and Document Requirements

- (1) For paragraphs 70 (2C) (f) and (g) of the Act, the following information and document requirements are specified:
- (a) the applicant's business plan, including the applicant's international marketing strategy;
 - (b) the applicant's audited statement of income for the grant year, including:
 - (i) the income received by the applicant from all sources including international sources; and
 - (ii) the income receivable by the applicant from all sources including international sources;
 - (ba) an opinion of the applicant's export potential, based on:
 - (i) the applicant's sales and revenue budgets for the year following the grant year; and
 - (ii) an examination of any correspondence that supports the projected export income; and
 - (iii) a comparison of the applicant's previous sales and revenue projections with actual results in those periods;
 - (c) the applicant's audited profit and loss statement for the grant year and the year preceding the grant year;
 - (d) the applicant's audited balance sheet for the grant year and the year preceding the grant year;
 - (e) a statement that details the economic benefits generated, or that will be generated, from the applicant's international business activities in 2 or more of the following areas:
 - (i) employment in Australia;
 - (ii) new capital investment in Australia;
 - (iii) introduction of new technologies in Australia;
 - (iv) new value-added operations in Australia.
- (2) For subsection (1), a reference to:
- (a) an audited statement of income; or
 - (b) an audited profit and loss statement; or
 - (c) an audited balance sheet;
- is a reference to a document that has been audited by a person who is a registered company auditor for the *Corporations Act 2001*.
- (2A) For subsection (1), a reference to an opinion of the applicant's export potential is a reference to a document that has been prepared by a person who is a registered company auditor for the *Corporations Act 2001*.

Unacceptable and incomplete applications

If the application does not have the relevant schedules and the information requested by Austrade via the online application, Austrade may deem the application not to have been made.

Austrade will only start the processing of applications when all of the relevant documents listed above are received and the application is deemed complete.

Incomplete applications, where Austrade deems the application 'not to have been made', will be returned to the applicant. Austrade will advise the Applicant of the decision by email but may delay returning the application for 14 days or until the closing date for applications (whichever is the earlier) to give the Applicant the opportunity to rectify

the noted deficiency. If information or documents are not provided following this request, Austrade will refuse to consider the application and return the application. In this situation, no grant is payable.

Applications considered to be incomplete after the closing date for applications will be deemed 'not to have been made' and returned to the applicant.

Where Austrade returns an application the client and/or consultant may resubmit the completed application for acceptance prior to the closing date for applications.

Austrade is prevented by law from considering an application where the Australian Net Benefit Requirements information and documentation required under the EMDG Act is not provided to Austrade by the closing date. This means that the application will not be accepted by Austrade (please refer to section 73(3) of the EMDG Act).

Standards for application preparation

Applicants and consultants should:

- Provide clear and accurate information in their applications,
- Complete all relevant sections of the form and schedules, and
- Provide all requested and any other relevant documents.

An applicant (or their consultant) must ensure that all contact details, including mobile phone numbers, listed on the schedules for Overseas Representatives and Marketing Consultants are current at the time of lodgement.

All expenses must be supported by invoice numbers and payment details, including cheque numbers/telegraphic transfer numbers etc. Accurate dates of payment, checked to bank statements, must also be provided on the schedules.

Each item listed on a schedule must contain a detailed description of the nature of the expense and/or the export earnings claimed. Schedules containing descriptions such as 'various' are unacceptable.

It is the responsibility of the applicant/consultant to substantiate, to Austrade's satisfaction, the eligibility of any application made under the provisions of the *Export Market Development Grants Act 1997*. Should information or documentation supplied by the applicant not establish such eligibility, then depending on the circumstances Austrade may disallow or refuse to consider the application.

Revised schedules

Austrade will only accept revised schedules where they are signed by the applicant and/or the changes are endorsed by written confirmation by the applicant.

Lodgement Date

In accordance with the *Acts Interpretation Act 1901* when 30 November falls on a weekend applications will be accepted if received on the first working date thereafter.

Approved consultants

Consultants, who are approved participants under the *Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012*, have a further three months to lodge applications on behalf of their clients. In accordance with the *Acts Interpretation Act 1901* when this date falls on a weekend applications will be accepted if received on the first working date thereafter. Austrade will publish the application closing dates on its website each year.

SECTIONS 74 - 79 GUIDELINES

Disqualified individual not to help in preparing applications

7.4.1 The object of this provision is to ensure that people who have been convicted of fraud or dishonesty offences, including EMDG claims consultants, do not participate in preparing claims.

Who is affected by this provision?

7.4.2 Applications which have been prepared by an Export Market Development Grants Consultant (defined at section 107 of the EMDG Act) and which have involved an individual helping in a prescribed capacity are subject to the provision.

7.4.3 The focus of the measure is on the individual who assisted with the preparation of the application. It is aimed at EMDG consultants together with those who assist or manage the consultants. This will include those who may not themselves publicly offer themselves as claims consultants but who do work with the consultants as employees, contractors, advisers or managers.

7.4.4 Those people who provide administrative type services such as clerical and secretarial staff and who do not apply intellectual judgement to the preparation of the application are not intended to be subject to this provision. This exclusion extends to the applicant's staff members who simply provide information to the consultant responsible for the application preparation.

What is the timing of this provision?

7.4.5 For an application to be treated as invalid under this measure, it must have been prepared by an individual working in a prescribed capacity who is disqualified at any time during the period beginning when the application is submitted and ending immediately before Austrade determines whether the applicant is entitled to a grant.

Austrade's duties in inviting applicant to lodge a fresh application

7.4.6 Austrade must, as soon as practicable after learning that a disqualified individual has assisted with the preparation of an application, advise the applicant that their application is invalid.

7.4.7 Should Austrade be satisfied that the applicant did not knowingly use a disqualified individual to prepare its EMDG application, additional time is allowed for the submission of a fresh application. This application must be submitted by the normal deadline (five months after the end of the grant year) or within 90 days of the notification that the original application was invalid, whichever is the later.

7.4.8 In some cases, Austrade may form the view that the applicant should reasonably have known that the person was disqualified. For example, where Austrade had previously advised the applicant that the person was disqualified, the applicant would not be able to resubmit an application for the grant period and no grant would be payable for that period.

What does "disqualified individual" mean?

7.4.9 "Disqualified individuals" are those persons who have been convicted of offences involving fraud or dishonesty (including offences against section 39 of the *Export Market Development Grants Act 1974*). The full range of relevant offences can be found at paragraphs 78(1)(a)-(d) of the EMDG Act inclusive.

7.4.10 The period of disqualification is limited. It starts on the day on which the conviction was recorded and ends either five years afterwards or, in a case where the conviction was for a term of imprisonment, five years after the convicted person was released from prison.

Consent to enable the check of criminal records

7.4.11 Austrade may, by written notice to an individual who has helped in a prescribed capacity to prepare an application, ask for written consent in terms of section 79 of the EMDG Act so that Austrade may enable criminal records to be checked.

7.4.12 If the individual does not comply with any request made under section 79 of the EMDG Act, Austrade may refuse to consider the application - subsection 73(3) refers.

SECTION 80 GUIDELINES

Austrade must determine applicant's entitlement to grant

7.5.1 This section states that Austrade must consider each application except for those situations provided for in section 73 (see guideline 7.3.1):

- The application is not made in a form and manner approved by Austrade and is not received within five months of the end of the grant year
- The applicant, or if the applicant is a body corporate that is part of a related company group as defined at section 107 of the EMDG Act, any related company, has not provided Austrade with the specified information (books, records or documents) requested under subsection 72(1) of the EMDG Act
- The applicant has not provided written consent to enable Austrade to check criminal records for the purposes of the Act's disqualifying convictions provisions
- An individual who has helped, in a prescribed capacity, to prepare the application, has not complied with a request of Austrade to enable criminal records to be checked for the "disqualified individual" provisions at section 78 of the EMDG Act.

7.5.2 Section 80 of the EMDG Act requires Austrade to determine whether the applicant is entitled to a grant. If the applicant is entitled to a grant, Austrade is required to determine the amount of the grant as soon as practicable.

The applicant becomes entitled to the grant once Austrade has determined that the entitlement exists.

SECTIONS 81 - 84 GUIDELINES

When is a grant payable?

7.6.1 Section 80 of the EMDG Act provides for an applicant to become entitled to a grant. Sections 81 - 84 of the EMDG Act detail when this grant becomes payable.

7.6.2 Most applications for a grant year will be determined in the year following the grant year. For example, most 2014-15 applications will be processed during 2015-16. Of these determinations, most will be made before the *balance distribution date*.

7.6.3 The significance of the balance distribution date is explained at section 68 of the EMDG Act (guidelines 6.2.5-10 refer). Austrade will determine the demand for balance amounts towards the end of the grant year.

7.6.4 Soon after the balance distribution date, Austrade will determine the *payout factor* to be applied to the balance amounts. It will then make balance amount determinations.

When is a grant payable where the applicant becomes entitled to grant before the balance distribution date?

7.6.5 This situation refers to what the EMDG Act at subsection 81(1) describes as Austrade's first determination. This will be when Austrade assesses the claim and determines that a provisional grant entitlement exists.

- a) If the applicant's provisional grant does not exceed the initial payment ceiling amount for the grant year, the applicant becomes entitled to the grant when Austrade makes the determination (particular rules apply where applicant is a member of a related company group-see section 83 of the EMDG Act)
- b) If the applicant's provisional grant exceeds the initial payment ceiling amount for the grant year, the applicant is entitled to be paid an advance which is equal to the initial payment ceiling amount. This amount is payable by Austrade at the time of this first determination (particular rules apply where applicant is a member of a related company group-see section 83 of the EMDG Act).

(Note: The balance amount will not be considered to be determined until after the balance distribution date for the year following the grant year. Refer to note 1 accompanying section 81 of the EMDG Act for an explanation of this point.)

When is a grant payable where the applicant becomes entitled to the grant after the balance distribution date?

7.6.6 A grant is payable where the applicant becomes entitled to the grant after the balance distribution date in the following circumstances:

- a) the balance amount is determined at some time after the balance distribution date - see note 1 accompanying section 81 of the EMDG Act;
- b) Austrade may not have made a first determination of the claim until after the balance distribution date;
- c) a supplementary grant is payable (as a result of a successful appeal by an applicant) after the balance distribution date.

7.6.7 The grant is payable, subject to particular rules for members of related company groups, (see section 83 of the EMDG Act) as follows:

- If the determination is made before 1 July next following the balance distribution, on that 1 July
- If the determination is made later, on the day that the determination is made.

Circumstances in which no grant is payable

7.6.8 Austrade may have determined that a grant entitlement exists in terms of section 80 of the EMDG Act. This grant would not be payable in those circumstances stated at subdivision 3 or sections 85 - 87 of the EMDG Act (refer to guideline 7.7.1).

Particular rules where an applicant is a member of a related company group

7.6.9 Because related company groups are limited to combined grants for their members' of \$250,000 in any grant year, Austrade has particular rules to prevent that cap being exceeded.

7.6.10 Section 83 of the EMDG Act provides that no grant or advance on account of a grant is payable to any company group member until all determinations for all group member applicants for that grant year have been finalised. The definition of finalised is at subsection 83(2) of the EMDG Act and means when all avenues of appeal (including to the Administrative Appeals Tribunal) against an Austrade determination have been exhausted.

SECTIONS 85 - 87 GUIDELINES

Circumstances in which a grant is not payable

7.7.1 Although a grant entitlement may have been determined by Austrade in terms of section 80 of the EMDG Act, there will be some circumstances where the grant or an advance on account of the grant is not payable:

- a) The applicant is not a resident of Australia at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination
- b) There are disqualifying convictions (as defined at section 16 and 17 of the EMDG Act) outstanding against the applicant or, if the applicant is a trustee of a trust estate, against the trustee or any beneficiary of the trust estate, at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination
- c) The applicant is subject to the insolvency provisions (as defined at sections 87B and 87C of the EMDG Act) at the time of grant determination or at any time until the issuing of any grant notice of determination – refer to guideline 7.7.2
- d) Applicants that do not have an Australian Business Number (ABN) at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination. In the case of approved joint venture applicants, where not all members may be required to have an ABN, the joint venture's nominated contact member will be the only entity that is required to have an ABN

(Note: Applicants are not required to have an ABN at the time of lodgement of a claim)

- e) those educational institution applicants providing courses to overseas students in Australia which are required to be registered under the *Education Services for Overseas Students (Registration of Providers and Financial Regulations) Act 1991* (The ESOS Act) that are unregistered at the time of grant determination or at any time until the issuing by Austrade of any grant notice of determination.

Refer to section 87A of the *EMDG Act*.

This measure will not apply to any applicant providing educational services as follows:

- One that is not subject to the provisions of the ESOS Act. Generally this will be where an applicant promotes courses to foreign residents who are not visiting or intending to visit Australia under a student visa.
- One that is exporting educational courses and subcontracting the actual teaching services to another educational institution.
- One that is exporting educational courses on behalf of an educational institution that is registered under the ESOS Act.
- One that is providing and exporting educational courses in conjunction with another educational provider who is registered under the ESOS Act.

It is up to EMDG applicants to determine whether they are subject to the provisions of the ESOS Act.

- f) The applicant or its associate is not a fit and proper person to receive a grant – refer to guideline 7.7.3.

(Note: If any grant or advance on account of a grant has been paid to any applicant at any time before they were subject to the circumstances described at (a) – (f) above, no recovery action would be taken by Austrade (assuming that section 103 of the EMDG Act dealing with convictions and repayment provisions is not applicable.)

EXAMPLE

A company applies for a 2013-14 EMDG grant. In November 2014 Austrade determines a provisional grant of \$100,000. The applicant receives an advance based on the initial payment ceiling amount of \$60,000 in December 2014. One of its directors becomes bankrupt in February 2015. Austrade will not pay the balance amount that the applicant would otherwise have been entitled to. Nor would Austrade recover the \$60,000 advance paid to the company (unless section 103 of the Act is relevant to the applicant's circumstances).

SECTIONS 87B AND 87C GUIDELINES

Insolvency administration

When is a person disqualified from receiving a grant because of being subject to the legislation's insolvency provisions?

7.7.2 Section 87 of the EMDG Act states that no grant, or an advance on account of a grant, is payable when, or at any time after the person becomes entitled to the grant or advance, the person is subject to the insolvency provisions.

Who is subject to insolvency provisions?

The term individual is not limited to sole trader applications. It also refers to people who are partners or directors of applicants or of businesses who are members of approved joint ventures. The Act uses the term *associates* to define these individuals. Refer to section 107 for the definition of *associate*.

In what circumstances are individuals subject to insolvency administration?

Section 87B of the EMDG Act lists a number of situations where individuals may have been subject to the section 50 and division 2 of part X provisions of the *Bankruptcy Act 1966* or of equivalent legislation in a foreign country or external territory. Austrade will regard any individual who has been in or is in any of these situations as being under insolvency administration.

Subsection 87C(2) of the EMDG Act provides that where a person administering any insolvent *body corporate* states that the *body corporate* is able to pay all debts as and when they become payable, Austrade will not declare the *body corporate* to be insolvent. It should be noted that there is no equivalent provision in section 87B of the EMDG Act for individuals or partnerships.

In what circumstances are body corporates taken to be under insolvency administration?

Subsection 87C(1) of the EMDG Act lists the situations under the Corporations Law (and equivalent legislation for external territories and foreign countries) in which a body corporate is considered to be under insolvency administration for the purposes of this legislation.

Subsection 87C(2) EMDG Act enables the person administering the body corporate (defined at 87C(3) of the EMDG Act) to certify that the particular body corporate is able to pay all its debts as and when they become due and payable.

7.7.3 Denial of grants where Austrade forms a view that an applicant or its associate is a 'not fit and proper person'

Background

The 'not fit and proper person' test under section 87AA of the EMDG Act provides for the non-payment of an EMDG grant if Austrade has formed the opinion, in accordance with the relevant Ministerial Guidelines, that a person, or an associate of the person, is not a fit and proper person to receive a grant.

The relevant Ministerial Guidelines are in the Determinations section of the Guidelines – refer to *Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015*.

The purpose of this test is to allow for the non-payment of grants to persons whose behaviour is considered to be inconsistent with accepted community standards of commercial and personal propriety or whose support would impinge upon the reputation of Austrade or Australia as an exporting nation.

The 'not fit and proper person' test applies to applicants and their 'associates'. Part 2 of the Ministerial Guidelines sets out the definition of 'associate'. This may include responsible officers, managers, members, partners, significant shareholders, persons with influence or control over the applicant, and relatives of such persons.

When will Austrade consider applying the 'not fit and proper person' test?

For a person to be considered for application of the 'not fit and proper' test, one or more of the factors listed in Part 3 of the Ministerial Guidelines would have to apply, that is, the person would have:

- been convicted of offences; and/or
- had some sort of penalties or sanctions imposed on them, or likely to be imposed on them; and/or
- had critical assessments made of them by a tribunal or regulatory body; and/or
- been under insolvency administration; and/or
- have been a responsible officer of a business that has failed; and/or
- otherwise been subject to reasonable concerns about their personal, commercial, financial or professional character, status or reputation.

It is not intended that the test be applied to exclude otherwise respectable individuals who have been associated with a minor misdemeanour or minor personal failing. As a general rule, the test would only be applied if suggestions of serious misbehaviour or misconduct give Austrade reasonable cause to doubt that an applicant or an associate is a fit and proper person.

The fact that an individual meets one of the criteria above would not of itself necessarily mean the person would be determined to be not fit and proper. For a person to be considered not fit and proper it would be necessary for the case to involve serious instances of bad behaviour or misconduct, for example:

- situations in which the person may be viewed by the Australian community as inappropriate to represent and promote the public interest of Australia in relation to trade overseas; and/or
- situations where the person's record is such that it might be concluded that they do not merit Government recognition or taxpayer support.

For example, this might hypothetically include cases involving persons:

- whose behavior while involved in overseas trading activities would reflect badly on Australia's image abroad;
- who have been involved in improper corporate dealings, for example a major corporate collapse with significant social implications; or
- who are known to have been convicted in relation to serious personal improprieties.

Austrade will not fully test every EMDG application under section 87AA of the EMDG Act to establish eligibility for payment. It will only investigate whether a person is 'not fit and proper' where there is information to suggest a person may be 'not fit and proper'. Equally, however, where Austrade has reasonable cause to doubt that an applicant or an associate is a fit and proper person, it will take steps to gather information on which to form an informed decision on the issue.

EXAMPLE 1

An associate of the applicant was previously subject to a disqualification by the Australian Securities and Investment Commission from being a director or being involved in the management of a company. The disqualification period has lapsed and the associate is a current director of the applicant.

Austrade seeks and obtains consent from the applicant to approach ASIC for more information on the matter. ASIC documentation shows that the disqualification was of a technical nature as the associate was a director of three or more failed companies in a private corporate group that was wound up. However, the applicant and ASIC documentation confirm that no public money was lost as a result of the company failures. The applicant is also able to show that corporate governance has been reviewed and that similar failures are unlikely in the future.

Austrade would generally not apply section 87AA of the EMDG Act in these circumstances.

EXAMPLE 2

An applicant carries on a successful exporting business. A relative of the applicant's sole director/shareholder, and therefore an 'associate' of the applicant, has a civil judgement against them for a serious matter, as the result of action by another government instrumentality.

The judgement and the behaviour of the associate are the subject of continuous adverse reporting in the media for this and other matters. The other matters, whilst not sufficient in themselves to warrant applying section 87AA of the EMDG Act, adversely affect the character of the associate in the public's eyes.

Austrade seeks and obtains consent from the applicant/associate to obtain information from that government instrumentality. The information confirms the matter to be of a serious nature.

Austrade would generally apply section 87AA in these circumstances.

7.7.4 Denial of grants where applicant's EMDG consultant or its associate is determined to be a 'not fit and proper person'

EMDG consultants have an interest in the outcome of their clients' EMDG assessments and have an increasingly high public profile associated with the EMDG scheme. For example, Austrade promotes the services of EMDG consultants who have a demonstrated record of lodging accurate applications under the *Export Market Development Grants (Extended Lodgement and Consultant Quality Incentive) Determination 2012* scheme.

The *Export Market Development Grants Act 2014* (the 2014 Amendment Act) amended the Act by providing for Ministerial guidelines (2014 amendment guidelines) to be made and complied with by the CEO of Austrade in forming an opinion as to whether an EMDG consultant or its associate is not a fit and proper person.

The 2014 Amendment Act provides that where an EMDG grant application is prepared by an EMDG consultant who is or whose associate is deemed to be not fit and proper, the application is deemed not to have been made and the applicant is invited to make a fresh application.

The 2004 instrument defines who is an associate of an EMDG applicant. In the 2014 amendment guidelines, the classes of people who are "associates" are different depending on whether the CEO is applying section 79A or section 87AA of the EMDG Act. Section 2.3 applies only for the purposes of the section 79A fit and proper test for EMDG consultants, while section 2.4 applies only for the purposes of the section 87AA fit and proper test for applicants. Section 2.2 applies to both EMDG consultants and to applicants.

The 2014 amendment guidelines also amend the definition of associates in the 2004 instrument so that they apply to individuals who have significant indirect shareholding in companies. Where section 2.5 (1) of the guidelines use the term *voting power*, this should be taken to mean effective control and decision making power.

The associates of a consultant include potentially important participants in the consultant's business activities whose improper behaviour can raise serious doubts about the consultant's reputation.

The 2014 amendment guidelines contain assessment criteria to enable the CEO of Austrade to decide whether an EMDG consultant or any of its associates should be assessed to be not a fit and proper person.

In applying the assessment criteria set out in the Guidelines, it is expected that the CEO would only form an opinion that a consultant was not a fit and proper person where there was a relevant concern with that person's capacity, trustworthiness or character to act as a consultant in the best interests of both their applicant client and the public funds from which EMDG grants are paid.

Without seeking to exhaustively list the circumstances in which an opinion could appropriately be formed that a consultant was not a fit and proper person, some examples are illustrative. A simple, isolated and explicable mistake would not be expected to warrant an opinion that a person was not a fit and proper person to act as an EMDG consultant, but repeated and material errors of the same or similar type may well be sufficient. Similarly, the making of a claim based on an interpretation of the law or the factual circumstances that is reasonably arguable although not agreed by Austrade would not be sufficient, but the making of claims that are palpably inconsistent with the law or that misrepresent the factual circumstances may be sufficient.

The power to reject a claim lodged by an EMDG consultant who is in the opinion of the CEO not a fit and proper person is viewed as significant and not to be exercised except in materially serious and warranted circumstances. Moreover, the fact that such decisions are subject to review by the Administrative Appeals Tribunal is expected to both temper the exercise of the power and provide rights of recourse to those affected.