

EXPORT MARKET DEVELOPMENT GRANTS ADMINISTRATIVE GUIDELINES

PART 8 – MISCELLANEOUS

SECTIONS 88 – 92 GUIDELINES

Approved bodies and approved joint ventures

8.1.1 Section 6 of the EMDG Act provides for certain approved entities to be eligible for a grant:

- Paragraph 6(1)(e) – a joint venture approved by Austrade
- Paragraph 6(2) – a body approved by Austrade.

Paragraph 101(1)(c) of the EMDG Act requires the Minister to determine guidelines to be complied with by Austrade to determine whether or not to make an approval.

All current guidelines are provided under the “Determinations” section of these administrative guidelines.

The following administrative guidelines should be read in conjunction with the Ministerial ones. They explain how Austrade’s approval mechanisms work for these types of EMDG applicant.

Application for approval

8.1.2 Any application for approved body or approved joint venture status must be in writing and should address the “assessment requirements” of the Ministerially-approved guidelines.

Approved bodies

8.1.3 The following guidelines apply to applications for approved body status, including applications for the renewal of approved body status:

Background

Under the EMDG Act approved bodies are able to receive EMDG support for expenses they incur promoting the products of their members.

Approved bodies are required to represent the interests of an industry, a substantial part of an industry or more than one industry.

Approved bodies may claim export promotional expenses that:

- are eligible under the EMDG scheme
- are incurred for overall promotion of its members' products rather than promotion of specific members' products
- were incurred within the scope of the organisation's approved export activity, project or purpose
- have not been, and are not likely to be, reimbursed by members.

These guidelines are based on the following Commonwealth law:

Export Market Development Grants Act 1997 – section 88 refers

Export Market Development Grants Regulations 2008 – sections 3.3 and 3.4 refer

Export Market Development Grants (Approved Body) Guidelines 2008.

Bodies applying for approval must provide Austrade a written submission addressing the following assessment criteria:

Who may apply?

An organisation must be a:

- body corporate established for a public purpose by or under an Australian law
- co-operative
- body corporate that represents the interests of one or more industries (national, state/territory or regional) or a substantial part of an industry (national, state/territory or regional).

General eligibility requirements

An organisation must:

- be a national, state/territory or regional non-profit industry organisation
- represent all members of an industry, members making up a substantial part of an industry or members of more than one industry
- be unable to distribute income to members and shareholders
- not export products unless exporting is an ancillary part of the body's activities
- operate for the benefit of third parties.

Promotional activities requirements

The organisation must have a promotional plan.

The organisation must be capable of undertaking promotional activities having regard to:

- technical and managerial skills of staff required to undertake the promotional activities
- skills and experience of staff who would undertake the promotional activities
- the effectiveness of its previous promotional activities.

The organisation must engage in promotional activities that:

- promote Australian products internationally
- are for the benefit of an industry rather than for the benefit of individual members, and
- are commercially and financially feasible.

To determine whether promotional activities are commercially and financially feasible, Austrade will have regard to the organisation's:

- proposed budget for promotional activities
- financial position
- administration costs.

N.B. Financial statements (profit and loss statement and balance sheet) for the two most recent years should be provided with an application.

Requirement to generate or be capable of generating significant net benefit to Australia

The organisation must show that it can generate or be capable of generating, from its promotional activities, significant net benefit to Australia in two or more of the following areas:

- export earnings – describe export activities of members as at the application date and their projected export earnings for the five years after the application date
- employment in Australia – state the projected increases in employment in Australia arising from the entity's promotional activities for the five years after the application date
- new capital investment in Australia – state the projected new capital investment arising from the entity's promotional activities for the five years after the application date
- introduction of new technologies in Australia – state the projected investment in new technologies arising from the entity's promotional activities for the five years after the application date
- new value-added operations in Australia – describe the projected new value-added operations in Australia arising from the entity's promotional activities for the five years after the application date.

Circumstances in which Austrade will not approve an application for approved body status

Austrade will not approve an organisation that has been formed either:

- primarily as a grants funding agent for its members, or
- primarily for the purpose of obtaining the approval, or
- where there is a high level of duplication of the promotional activities of another body operating in the same industry, or
- approval would result in a disproportionate level of funding to an industry.

How to apply

To apply for approved body status the industry body must submit a written application to Austrade addressing the assessment criteria. An application for approved body status may be made at any time. Austrade will assess the information in the application to determine whether or not the industry body meets the approval requirements listed above.

The following information is required to enable the application to be assessed:

- details about the organisation
- description of the Australian industry (national, state/territory or regional) covered by the organisation
- description of the industry's products, i.e. goods, services, intellectual property and/or know-how
- description of the proportion of businesses engaged in the total industry (national, state/territory or regional) that the organisation represents
- description of what, if any, power the organisation has to promote overseas on behalf of its members.
- organisation's representative contact details
- contact details of the nominated representative. This person should have the authority to represent the organisation. Austrade will deal with this person for all EMDG-related matters
- details on the approval requirements

- information of how each of the assessment criteria is met.

The application should be accompanied by the following declaration:

“I (organisation’s representative) present this information to Austrade believing it to be a true and correct representation of the organisation’s current position and intentions associated with this application”

- Attachments:
 - list of members
 - copy of the organisation’s export plan
 - brief CV of the key staff involved in export
 - copies of promotional brochures
 - current financial statements and a promotional budget covering the organisation’s proposed expenditure over the next three years
 - copies of enabling instruments to promote overseas on behalf of members (eg Memorandum of Incorporation and Articles of Association).

In addition, contact name and details of any consultant used to help prepare the application should be provided. The application should be signed and dated by the industry body’s representative.

What else is important?

Important things that an industry body should consider when applying for approved body status:

- The application and assessment process for approved body status is separate to the application and assessment process for an EMDG grant.
- Approved Bodies are not subject to the EMDG performance measure.
- The organisation must have an Australian Business Number (ABN) to be able to receive a grant.
- Application to vary the terms of approval may be made at any time.
- Approved bodies are not required to register for their first grant, nor pass Grants Entry requirements.
- Grants paid are assessable income for taxation purposes.

Approved Joint Ventures

8.1.4 A group of persons can apply to Austrade for approval as a joint venture. The EMDG joint venture provisions are designed to encourage small to medium businesses to collaborate to pursue specific export activities, projects or purposes that can bring significant net benefits to Australia.

Non-Australian resident businesses or Australian entities which are not themselves entitled to receive an EMDG grant (such as businesses with income exceeding \$30 million) are entitled to be members of an approved joint venture. These businesses, however, are not entitled to receive EMDG support for their own expenses.

(Refer also to approval guidelines for approved joint ventures in the Ministerial Determinations section of these guidelines.)

Austrade approval process – all categories of approved entities

8.1.6 Austrade must deal with any application for approval in accordance with the Regulations to the EMDG Act. These provide for Austrade to ask written questions of the applicant and for the applicant’s answers to also be in writing.

8.1.7 A final Austrade decision to approve or not to approve must be in writing.

8.1.8 Austrade will specify the conditions (if any) to which approval is made. For example, an approved body will in most cases be approved for the promotion of particular products and for the benefit of particular exporters or potential exporters.

8.1.9 Approval of a joint venture must specify the activity, project or purpose for which the group is approved. It will also specify who is the joint venture's nominated contact member for the purposes of applications and payments of grant. Any nominated contact member must be a resident of Australia.

8.1.10 Section 92 of the EMDG Act provides that there is a limit on the number of approved joint ventures of which any person may be a member. This limit is set by Ministerial Determination and is presently set at three. Austrade will not approve any joint venture where such an approval would result in this limit being exceeded by any member.

Arrangements for variation of an approval

8.1.12 Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power conferred on a person to make an instrument (such as written approval) includes the power to cancel or vary the instrument.

8.1.13 Circumstances for varying an approval are found at Regulation 6. They state that any variation can only be made as a result of an application for variation by the approved entity.

8.1.14 Guideline deleted.

8.1.15 Guideline deleted.

When does approval take effect and when does it expire?

8.1.16 Austrade will specify the day approval takes effect. In most cases this will form part of the approval notification advice to the applicant. The approval can be made retrospective.

EXAMPLE

A group of persons apply to be an approved joint venture. Austrade approves the joint venture by letter dated 31 October 2013. The joint venture application was for promotional expenses incurred from 1 July 2012. Austrade may backdate the approval in this case to 1 July 2012. The joint venture would then have until 30 November 2013 to lodge a 2012–13 application.

8.1.17 If Austrade does not specify any date of effect for an approval that date will be taken to be the date on which the approval is given.

8.1.18 Any approval is taken to be for a period of five years. In the above example, if Austrade made the date of effect 1 July 2010, the joint venture would be approved until 30 June 2015. Unless the approval is varied or cancelled, the joint venture can claim for grants based on eligible expenses being incurred during this five-year period.

Renewal of approvals

8.1.19 The EMDG legislation does not directly provide for renewals. However, given that approved bodies are not limited by the eight grant cut-off and approved joint ventures can receive five grants, there may be situations where applicants must apply for renewal.

Cancellation of approval

8.1.20 If Austrade is of the opinion that there are grounds for cancelling any approval, it will write to the approved entity or, in the case of an approved joint venture, to the nominated contact member with its reasons for this opinion.

The approved entity or nominated contact member will be invited to make a written submission addressing Austrade's concerns within a reasonable period. That period is to be specified in Austrade's notice.

8.1.21 Austrade will consider the matters raised in the written submission in the course of deciding whether to cancel the approval.

8.1.22 Austrade will cancel an approval where it is not possible to vary the approval to meet the guidelines for the approval of an organisation as an approved entity as are then in force.

8.1.23 Austrade will cancel an approval where there has been a failure to comply with the conditions to which the approval is subject.

SECTIONS 93 AND 94 GUIDELINES

Effect of change in ownership of a business on the allocation of eligible expenses

Underlying principles of section 94

As provided for in section 93 (Object of Division) of the EMDG Act, the philosophy of section 94 is that grants attach to a particular business regardless of any changes of ownership of the business. Section 94 makes businesses receiving grants subject to both the beneficial and the restrictive provisions of the Act.

Accordingly, when a change of ownership of a business occurs, section 94 enables Austrade to regard the new owner, for grant calculation purposes, as having carried on the relevant business at the earlier time.

Background

8.2.1 Section 94 of the EMDG Act may apply if a person is carrying on a business (the 'new business') which is the same or similar to one carried on previously by another person (the 'old business')

Section 94 of the EMDG Act

94 *Change in ownership of business etc.*

- (1) *Subsection (2) applies if:*
- (a) *at any time, a person (the **previous owner**) carried on a particular business (the **old business**) in Australia; and*
 - (b) *at a later time, another person (the **new owner**) carries on:*
 - (i) *the business or a part of the business (the **relevant part**); or*
 - (ii) *a business (the **new business**) that, at that time, is similar to the old business, or a part of the old business (the **relevant part**), carried on by the previous owner before that time, to such an extent that the CEO of Austrade is satisfied that the new business should be treated as a continuation of the old business; and*
 - (c) *the new owner applies for a grant in respect of a grant year.*

Note: Decisions whether 2 businesses are similar are subject to guidelines determined by the Minister under section 101.

- (2) For the purposes of this Act, the CEO of Austrade must treat particulars of the previous owner as being those of the applicant in the following ways:
- (a) any eligible expenses incurred by the previous owner in the capacity of owner of the business (or of the relevant part) are to be treated as having been incurred by the new owner;
 - (b) if the CEO had decided that the previous owner met the grants entry requirements—the new owner is to be treated as if the CEO had decided that it had met the grants entry requirements;
 - (c) any grant, or advance on account of grant, paid or payable (whether under this Act or under the repealed Act) to the previous owner in the capacity of owner of the business (or of the relevant part) is to be treated as having been paid, or as being payable, to the new owner;
 - (d) any other aspect of the business (or of the relevant part) is to be treated as if it had been carried on by the new owner.

Note: For **eligible expenses**, **repealed Act** and **grants entry requirements** see section 107.

There are two separate tests under section 94(1)(b) that are used to determine whether section 94(2) applies to an applicant.

(a) The first test [section 94(1)(b)(i)]:

Does the new owner carry on a business which is a continuation of the business, or part of the business, carried on by the previous owner, even though it is being carried on by a different person?

Under section 94 of the EMDG Act, the Ministerial Guidelines should not be used in this first test. This test does not require Austrade to measure similarities but rather, to determine whether the new business is the same as the old business or part of it.

This first test requires Austrade to determine whether the business being carried on by the new owner is the business (or part of the business) which had been carried on by the previous owner; or put another way, the business being carried on by the new owner is a continuation of the business (or part of the business) carried on by the previous owner.

If the answer is “yes”, then section 94(2) of the EMDG Act applies.

It is only necessary to go to the second test if the answer to the first is “no”.

(b) The second test [section 94(1)(b)(ii)]:

Is the business carried on by the new owner so similar to the business, or part of the business, carried on by the previous owner that, having regard to the Ministerial Guidelines, it should be treated as a continuation of the business carried on by the previous owner?

If the answer is “yes” then section 94(2) of the EMDG Act applies.

Under the second test (only), in deciding whether the new business is so similar that it should be treated as a continuation of the old business, Austrade must take into account the Ministerial Guideline *EMDG (Change of Ownership) Guidelines 2006*. It states:

- (1) In determining, for the purposes of subparagraph 94 (1) (b) (ii) of the Export Market Development Grants Act 1997, whether a business or a part of a business (the old business) that was carried on by a person is similar to a business (the new business) being carried on by another person to such

an extent that the new business should be treated as a continuation of the old business, Austrade must comply with these Guidelines.

- (2) In determining whether the new business is similar to the old business, Austrade must have regard to the similarities (if any) and the differences (if any) between:
- a) the product of the new business and that of the old business; and
 - b) the activities that are carried out in the course of the business of the new business and the activities that were carried out in the course of the old business; and
 - c) the customers, including the export market customers, of the new business and those of the old business; and
 - d) the directors, shareholders, and management personnel of the new business and those of the old business; and
 - e) the suppliers to the new business and those to the old business; and
 - f) the overseas representatives of the new business and those of the old business; and
 - g) the employees of the new business and those of the old business; and
 - h) the markets, including the export markets, of the new business and those of the old business; and
 - i) the premises from which the new business is conducted and the premises from which the old business was conducted; and
 - j) the logo of the new business and that of the old business; and
 - k) the property and assets, including the intellectual property, of the new business and those of the old business.

What are the business arrangements which may cause section 94 to apply?

8.2.2 The EMDG claim form asks applicants:

“Has any part of your business previously been carried on by another person...?”

Examples where a business or part of a business may have been previously carried on by another person include:

- a new business set up by the owners, directors or employees of a business that has received EMDG grants
- a new owner acquires a business for which the previous owner received EMDG grants.

If applicants disclose such an arrangement or if one is found to exist by Austrade, Austrade must then decide whether section 94 of the EMDG Act applies, and, if so, under which of the two tests above the section applies.

Which of the two section 94 tests will apply?

8.2.3 Where the new owner of a business has acquired and carries on a business or a part of a business, Austrade will generally apply the first test. Where the new owner changes the acquired business, Austrade will generally apply the second test and consider the factors in the Ministerial guidelines.

Where a new business is set up without the new owners acquiring a business or part of a business, e.g. its owners acquire assets other than an actual business or goodwill, the second test will apply – see example 4 below.

EXAMPLE 1

Applicant Company A is a manufacturer of automotive components. It claims its first grant for the 2012–13 grant year.

On 1 July 2012 Company A acquired another automotive components business activity from Company B. Company B had received three EMDG grants in earlier years directly related to this business activity. Company B continues to carry on other business activities.

During 2012–13, Company A continues to carry on the acquired business as a separate business unit or division.

After consideration of section 94 issues, Austrade concludes that the acquired business, previously carried on by Company B, is now being conducted by the new owner Company A in terms of section 94(1)(b)(i) of the EMDG Act.

This decision is therefore made under the first test. Austrade will not apply the Ministerial guidelines in this case.

EXAMPLE 2

An EMDG applicant Company C received three EMDG grants in the years up to and including 2005–06 for its promotion of engineering services. Company C was owned and controlled by two director /shareholders. These two owners had a falling out and on 1 July 2006, one of these owners sold his shares in Company C to the other owner.

The owner who acquired the shares then set up Company D on 1 July 2013. Soon after this, Company C transferred the business (including assets, goodwill and some export and Australian market third party contracts) to Company D.

Company D then operated in the same engineering services industry, at first only in the Australian market. However, in 2008–09 Company D began export promotion activities and claimed an EMDG grant for that year.

Austrade would apply the first test in this case. The Ministerial guidelines will not be applied in this case.

EXAMPLE 3

An EMDG applicant Company E received eight grants up to 1995 for the promotion of office computer furniture. Its business was sold to Company F in 1997 for approximately \$100,000. Company F has operated since 1997 manufacturing a range of furniture. It ceased manufacturing and selling office computer furniture in 2001 and since then has made home furniture e.g. lounge suites and reclining chairs. It commenced export promotion of its home furniture range in 2009 and in the 2013–14 grant year its exports were \$1 million. It applies for a 2013–14 EMDG grant on the basis that section 94 does not apply. Given the passage of time and the change in Company F's business activity, Austrade would apply the second test.

EXAMPLE 4

Company G received three grants for grant years up to 2005 for promotion of dairy products. In 2006 it became insolvent and some of its assets were sold in that year to Company H. These assets included plant, equipment and staff but did not include goodwill. Some of Company G's staff were also employed by Company H.

Company H did not start export promotion until 2013–14. Although it also manufactures dairy products, Austrade will apply the second test in this case and will consider the relevant Ministerial guidelines in determining whether section 94 should apply.

Applicants' section 94 submissions

8.2.4 If Austrade forms an initial view that a business ('new business') carried on by an applicant is a continuation of an 'old business' for EMDG purposes in terms of section 94(1)(b)(i) of the EMDG Act, Austrade will notify the applicant accordingly.

If the applicant wishes to contest this decision, the submission should include reasons why the 'new business' is not a continuation of an 'old business'.

Depending on the circumstances, it may be appropriate for the applicant to provide a written submission clarifying the relationship between the old and new business.

If Austrade forms an initial view that a business ('new business') carried on by an applicant is similar to the 'old business' to such an extent that it should be treated as a continuation of the 'old business' in terms of section 94(1)(b)(ii) of the EMDG Act, Austrade will notify the applicant accordingly. The applicant's submission should address all the factors (2a to 2k) listed in the Ministerial guideline *EMDG (Change of Ownership) Guidelines 2006*, and should explain the similarities and the differences between the old and new business in relation to each factor.

As well, the submission should include any arguments that the applicant wishes to make concerning whether Austrade should or should not treat the new business as a continuation of the old business.

8.2.5 Effect of applying section 94

- If Austrade decides that section 94 applies, the implications may include:

(a) **Restrictive implications:**

- the applicant will be deemed to have received grants paid to the earlier EMDG applicant that previously carried on the business
- with a transfer occurring during a grant year under review, no grant is payable where combined income exceeds \$50 million
- for transfers occurring during the grant year under review, the maximum combined provisional grant will be \$150,000.

(b) Beneficial implication:

- the applicant will be treated as having met the requirements of grants entry if Austrade decides that the previous owner met these requirements
- continuity of employee status for relatives travelling together outside Australia at the same time
- only one \$15,000 expenses threshold deduction applies when a business undergoes a change of ownership during the grant year under review
- when the former owner did not submit a claim for its share of expenses, section 94 of the EMDG Act credits the new owner with these expenses which would otherwise be lost for grants purposes.

If section 94 applies, which grants paid to a 'previous business owner' will be applied to a current EMDG applicant?

8.2.6 In applying section 94 of the EMDG Act to a current applicant, Austrade will identify those grant years for which the previous business received EMDG grants which related to the activities of the current applicant. In most cases this will be all grants but there will be some cases where the former owner carried on more than one business activity. For section 94 of the EMDG Act to be applied it must be possible to confirm that an identifiable portion of past grants was in respect of the particular business activity of the current applicant.

In this case it will be necessary to isolate from the eligible expenditure included in the original owner's claim for each year a discrete amount that related to the business activity in question. Composite items of expenditure in this case may be apportioned between activities if there exists a reasonable basis for doing so.

Other considerations associated with section 94 application

8.2.7 Each year's claim for an applicant may be assessed against the section 94 assessment criteria independently from other years' assessments. For example, an applicant not subject to the application of section 94 of the EMDG Act in one year may in a later year submit a claim which shows that its business activity is, in fact, similar to an earlier one which received grants. Section 94 of the EMDG Act may be applied in this case from this point on.

The EMDG Act requires Austrade to treat all grants paid to a legal entity as part of that entity's grants history regardless of whether it diversifies its activities (with minor exceptions). This means, for example, that all grants paid to a company with a particular Australian Company Number will be part of that company's grants history regardless of any change of ownership or any change of company name.

Refer to section 8 of the EMDG Act and to guideline 3.6.1 for minor exceptions to this rule.

EXAMPLE

Company A received 7 grants up to 2012–13. On 1 July 2013 the company was sold to new owners who changed the company name and also diversified the business's activities. Regardless of the diversification, the legal entity with the same ACN as company A is still considered to have received 7 grants should it apply for an additional grant.

Once section 94 of the EMDG Act applies to an applicant acquiring a business activity, the applicant will continue to be 'credited' with the grants history of the acquired business activity together with its own grants history. **If the**

acquired activity in relation to which section 94 of the EMDG Act was applied is sold, the grants history attached to that activity would be regarded as being sold off with that activity. Those past grants would no longer be considered receivable for the current business but any other grants paid to an applicant would continue to be part of its grants history.

SECTIONS 95 AND 96 GUIDELINES

Power to adjust expenses and provisional grant amounts

This Division of the EMDG Act describes Austrade's power to disregard expenses that are not properly substantiated, or that are unreasonable, uncommercial or non bona-fide or those that result from structuring arrangements entered into for the sole or dominant purpose of obtaining an undue increase in EMDG entitlement.

1. Subparagraph 96(1)(a)(i) – Expenses not properly substantiated

8.3.1 This includes any expenses where applicants are not able to show, after a request from Austrade, that their claimed expenses are substantiated as to cost or to purpose.

EXAMPLE

Applicant and a Chinese company are members of a joint venture in China that delivers a range of products and services in China. The joint venture provides ineligible post-sales services and promotes the applicant's products. The applicant pays \$120,000 per month to the joint venture for these services and claims that \$60,000 of this amount should be eligible for EMDG support. After discussion, Austrade requests the client in writing to substantiate the portion of the payment that applies to the promotion of sales of its products but the applicant is unable to meet this request. Austrade disallows the expenses under section 96 of the EMDG Act.

2. Subparagraph 96(1)(a)(ii) – Expenses may not be reasonable, commercial or bona fide

8.3.2 Where Austrade is of the opinion that an applicant's claimed expenses are unreasonable, non-commercial or non-bona-fide, it may write to an applicant in terms of section 96 to seek an explanation as to why the expenses should not be adjusted (disallowed) under the section.

The focus of the test for reasonableness and commerciality hinges on the nature of the expenses rather than on their effect. The main issue is whether the applicant's expenses were incurred in purchasing goods and services at normal (reasonable) market rates with a genuine (commercial) intent to expand the applicant's export markets.

The mere fact that the applicant has incurred expenses but has not received any export sales does not make the expenses unreasonable or uncommercial for this purpose. Austrade recognises that the commercial realities of export marketing may often mean a considerable time lag between expenditure and sales, and that not all export marketing activities can be expected to be successful.

Examples of unreasonable, non-commercial or non-bona fide expenses might include:

- a) inflated or unjustified charges for export promotion and marketing services

Austrade will pay particular attention to representatives who are closely related to applicants so that the parties do not collude to inflate claims.

EXAMPLE 1

Applicant claims \$500,000 expenses in the 2013–14 grant year to promote its products in a number of export markets. It has received EMDG grants in earlier years but is yet to export its products.

Austrade questions whether the expenses are reasonable or commercial in terms of section 96 of the EMDG Act.

However, an examination of the facts shows that all the expenses are properly substantiated, that they are eligible under the relevant provisions of the EMDG Act, that they are reasonable in relation to the market value of the goods and services that the applicant purchased in incurring the expenses, and that they have been incurred as part of a genuine export marketing drive. Austrade allows the expenses.

EXAMPLE 2

Applicant claims \$500,000 expenses in the 2010–11 grant year to promote its products in a number of export markets. It has received EMDG grants in earlier years but is yet to export its products.

Austrade questions whether the expenses are reasonable or commercial.

An examination of the facts shows that some of the expenses seem to be inflated well above normal market rates, and that some of them seem to have been incurred in paying related parties for marketing activities of which only sketchy details are available.

Austrade considers disallowing the expenses under various sections of the Act, and then writes to the applicant in terms of subsection 96(2) of the EMDG Act.

- b) non-bona fide licensing arrangements enabling closely related entities to collude to circumvent EMDG goods eligibility rules

EXAMPLE

The applicant promotes licensing income based on disposing of its intellectual property (IP) to a related Chinese company.

The Chinese company charges the applicant for promoting the Chinese-manufactured products with the applicant claiming these expenses in terms of section 38 of the EMDG Act.

Austrade considers that the applicant's agreement with the Chinese licensee is primarily entered into so that it can receive an EMDG grant. Austrade considers that the IP is generic in nature and that there is no evidence such as patent records to indicate that it has real value.

Austrade writes to the applicant in terms of subsection 96(2) advising of its preliminary view that the claimed promotional expenses are not reasonable, commercial or bona fide. The applicant is unable to show that section 96 should not apply and Austrade disallows the claimed expenses.

- c) applicant's claimed expenses primarily benefit its overseas related entities.

Paragraph 96(1)(a) and other sections of the EMDG Act

8.3.3 In most cases, the CEO of Austrade can adjust the expenses of an applicant where this needs to happen without applying section 96 of the EMDG Act (for example under sections 29 and 33 of the EMDG Act). It can also request additional material and information needed to substantiate an applicant's claim under subsection 72(1) of the EMDG Act.

Section 96 of the EMDG Act applies where Austrade becomes aware of unsubstantiated or unreasonable (e.g. unreasonably high) expense claims. Applicants have the opportunity to respond to Austrade's written advice in terms of section 96 of the EMDG Act and have the opportunity to provide additional information and to explain why the section should not apply.

Any decisions made under section 96 are subject to review by the Administrative Appeals Tribunal following internal review by Austrade.

Paragraph 96(1)(b) of the EMDG Act – Transactions and arrangements entered into for the sole or dominant purpose of obtaining a grant or an increase in the amount of a grant

EXAMPLE

Applicant is a wine merchant that has been exporting bottled wine for many years to the UK. It has a wholly owned trading subsidiary in the UK that acts as its overseas representative. The applicant paid this subsidiary \$200,000 for representation in the 2013–14 grant year. The applicant has no local sales and in spite of being in business for 10 years is yet to make a profit on its export business. The applicant's mark-up to its UK subsidiary averages 40 per cent whereas the subsidiary marks up its prices by about 300 per cent, enabling the subsidiary to have consistently earned profits.

Austrade forms the view that the promotional expenses are uncommercial and unreasonable in relation to its anticipated returns compared to those of its UK subsidiary and writes to the applicant in terms of subsection 96(2) of the EMDG Act.

The applicant is unable to show that the claimed expenses are reasonable and commercial and so they are disallowed under section 96 of the EMDG Act.

8.3.4 This section applies to arrangements and transactions that are entered into for the sole or dominant purpose of maximising EMDG entitlements. Where Austrade has reason to believe that the section should apply, it is required to write to the applicant in terms of subsection 96(2) of the EMDG Act, giving reasons for its opinion. The applicant can then provide additional information or reasons in support of its claim.

EXAMPLE 1

Company A has income of \$100 million in 2013–14. It has no EMDG grants history. On 1 June 2014 it incorporates a wholly-owned subsidiary company B to carry on a business activity previously carried on by a division of A. The income of company B is less than \$50 million. Company B incurs enough eligible expenses to receive a grant.

After discussion, Austrade may write to the applicant in terms of subsection 96(2) advising that in its opinion the arrangement appears to have been entered into for the sole or dominant purpose of obtaining a grant.

EXAMPLE 2

An applicant enters into an agreement with an overseas customer where the applicant provides eligible services to that customer. The original agreement between the parties does not provide for the applicant to incur claimable promotional expenses

The customer and applicant revise the arrangement so that each has obligations. The new agreement requires that the applicant be paid up front for the delivery of its services, and that the customer be paid for the provision of market research (which is, prima facie, a claimable expense). Austrade investigations reveal that the amounts are offset against each other and no money actually changes hands. It is also apparent that the substantive terms of the agreement were not satisfied in that neither party performed genuine services.

Austrade writes to the applicant advising that this arrangement appears to have been entered into primarily for the applicant to be able to receive an EMDG grant. Unless the applicant shows Austrade that this is not the case, its expenses will be disallowed in terms of section 96. Other sections of the Act may also be used to disallow these amounts.

SECTIONS 97 – 99 GUIDELINES

Review of decisions

Austrade internal review of decisions

8.4.1 Under the provisions of subsection 98(1) of the EMDG Act, a person who is dissatisfied with an Austrade decision affecting a claim or any other matter listed at paragraph 97(1)(a)-(j) of the EMDG Act, may appeal the particular decision.

Appeals must be limited to expenses and export earnings disclosed either in the original claim or during the assessment process.

Any decision made by Austrade in relation to the matters covered at paragraph 97(1)(a)-(j) of the EMDG Act must be communicated to persons in writing. This notification will include a statement covering the person's review rights.

Any request for reconsideration must be made by written notice and must be received within 30 days of the date on which the person first received notice of the decision or within such further period as the CEO of Austrade allows. The request for reconsideration must set out the reasons for making the request. Austrade has discretion to allow a further period for receiving appeals in special cases.

Subsection 98(4) of the EMDG Act states that Austrade must reconsider the decision and may confirm or vary the decision as Austrade thinks fit.

Administrative Appeals Tribunal

8.4.2 Any person who is dissatisfied with the result of Austrade's reconsideration may appeal to the Administrative Appeals Tribunal. In communicating the result of the reconsideration, Austrade is required to notify affected persons of their appeal rights under the *Administrative Appeals Tribunal Act 1975*.

8.4.3 It should be noted that a person cannot appeal to the Administrative Appeals Tribunal (AAT) before first having the decision reviewed by Austrade in terms of subsection 98(4) of the EMDG Act.

8.4.4 Once Austrade has internally reconsidered its decision on an applicant's appeal in terms of section 98 of the Act, then section 99 of the Act provides for an applicant dissatisfied with an Austrade internal review (appeal) decision to appeal to the AAT.

8.4.5 Under subsection 29(2) of the AAT Act an applicant must submit an appeal to the AAT within 28 days of receiving advice from Austrade of its internal appeal reconsideration decision, although the Tribunal does have a discretion to accept late applications. Fees are payable to the AAT at the time of lodging an application.

8.4.6 Under section 37 of the AAT Act, Austrade must provide the Tribunal with:

- (a) a statement setting out findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decisions;
- (b) documents in the possession of Austrade that are considered relevant to the review of the decision by the Tribunal.

8.4.7 A copy of the section 37 statement is provided to an applicant. An applicant can also obtain a statement of reasons for an Austrade decision under section 28 of the AAT Act prior to applying for an AAT review.

8.4.8 The first stage of a Tribunal review is usually a preliminary conference of the parties chaired by a Tribunal member or Deputy President. The purpose of the conference is to identify the points of difference between the parties and, in some cases, to allow Austrade to consider any additional materials provided by the applicant with a view to resolving the matters in contention without the necessity of a Tribunal hearing. Most AAT applications involving the EMDG Act are resolved or withdrawn prior to hearing.

8.4.9 At AAT hearings the Tribunal seeks to ensure that each party has a reasonable opportunity to put their case. Although it has the power to make its own inquiries by summoning witnesses or subpoenaing documents, it generally relies on the evidence and material put before it by the parties. The Tribunal is not bound by the rules of evidence.

8.4.10 In reviewing a decision the Tribunal assumes all the powers and functions of the original decision maker. Thus, if the Tribunal comes to the conclusion that an Austrade decision should be varied or set aside, it has the power to vary the original decision or to make some other decision. The Tribunal may also decide to remit a matter to the original decision maker for further consideration. The Tribunal usually delivers its decisions and the reasons for it in writing.

8.4.11 A party dissatisfied with a Tribunal decision may appeal to the Federal Court under subsection 44(1) of the AAT Act. However, this appeal right is restricted to the Tribunal's findings on questions of law as distinct from its findings on questions of fact.

Other Commonwealth agencies/legislation that may assist applicants with the review of any Austrade decisions:

The Commonwealth Ombudsman

8.4.12 The function of the Ombudsman is to investigate complaints made to him about the administrative actions of Commonwealth Departments and authorities. The Ombudsman is an independent official, with power to investigate a complaint and to recommend remedial action. The Ombudsman is impartial when investigating a complaint made to him. If the Ombudsman finds that a complaint is justified and he considers that some remedial action should be taken, he reports accordingly to Austrade. Austrade then has an onus to take remedial action to the satisfaction of the Ombudsman, although it is not compelled as a matter of law to accept his recommendations, or to take any action at all.

The Ombudsman has the power to refuse to investigate complaints in certain circumstances. If an investigation is conducted and the complaint is found to be unjustified, the Ombudsman advises all parties concerned of his findings and the reasons for his decision.

Administrative Decisions (Judicial Review) Act 1977 – AD(JR) Act

8.4.13 The *AD(JR) Act* allows persons to challenge decisions of an administrative character by Commonwealth authorities, including Austrade, which they consider are not in accordance with the appropriate legislation. The Act does not apply to decisions which are subject to review by the AAT.

The process of judicial review differs both from proceedings before the AAT and investigations by the Ombudsman. Proceedings are generally conducted in the Federal Court to obtain a ruling on whether a certain administrative decision is defective in law. Unlike the AAT, the Court does not stand in place of the decision maker and can only issue orders pursuant to a question of law. However orders made by the Court are mandatory.

Section 13 of the *AD(JR) Act* provides for a person dissatisfied with an administrative decision made pursuant to an Act of Parliament to obtain a statement of reasons for the decision. Requests for such statements concerning decisions taken under the EMDG Act should be made in writing to the General Manager of the Export Market Development Grants scheme in Austrade.

Freedom of Information

8.4.14 Under the *Freedom of Information Act 1982*, any person able to use an Australian address has a right of access to certain documents held by Austrade. EMDG applicants will generally be granted access to files dealing with Austrade's administration of their own claims. However such documents may not be available to other persons, as under the Act, Austrade is obliged to consult with third parties whose interests are likely to be affected by disclosure, and the views of third parties will be taken into account when considering release of such documents. In addition, Austrade may also deny access to documents under the exempting provisions of Part IV of the *FOI Act*. In particular, documents which relate to claims currently under investigation will be subject to the exemption provisions of the Act.

A full description of Austrade's operations and the documents it holds is published in Austrade's Annual Report as required by section 8 of the *FOI Act*. In accordance with section 9 of the *FOI Act*, statements listing the Austrade documents available for inspection or purchase can be obtained from Information Access Offices administered by the Australian Archives.

SECTION 100 GUIDELINES

Accreditation of Export Market Development Grants consultants

8.5.1 This section provides for Austrade to make a legislative instrument should it introduce a scheme for the accreditation of consultants.

SECTION 101 GUIDELINES

Ministerial guidelines

8.6.1 This section specifies the circumstances where Guidelines must and where Guidelines may be determined by the Minister.

8.6.2 All guidelines determined by the Minister that continue to have effect are found in the "Determinations" section of these guidelines.

(Note: Subsections 68(1) and 68(2) of the EMDG Act also require that the Minister for Trade may make determinations about the initial payment ceiling amount and the date which is the balance distribution date for a grant year.)

SECTIONS 103 AND 104 GUIDELINES

Repayment of a grant

When can Austrade take recovery action in relation to grants paid?

8.8.1

(a) Where a person being the applicant or an associate of the applicant is convicted of offences against section 134.1, 134.2, 135.1, 135.2, 135.4 or 136.1 of the *Criminal Code* and the offence related to an application for an EMDG grant; and

(b) Where a grant or an advance on account of a grant has been paid by Austrade to an applicant because of the making of a statement that was false or misleading or because of the use of a book, record or document that contained information that was false or misleading.

What is the Austrade recovery action?

8.8.2 If Austrade has paid the grant or an advance on account of the grant, the applicant must repay the amount of the grant or of the advance to Austrade. It should be noted that this is the full amount of the grant or advance and not just a part which may be attributable to the conviction.

How does Austrade recover the grant?

8.8.3 The repayable amount is a debt due to Austrade and may be either:

- deducted from any amount payable to the applicant under the EMDG Act; or
- recovered by Austrade from the applicant in a court of competent jurisdiction.

SECTION 106 GUIDELINES

Regulations

8.9.1 Section 106 of the EMDG Act authorises the Governor-General to make Regulations for the proper functioning of the Act. Some sections of the Act specify the need for Regulations.

These sections are:

- subsection 69(4) (payout factor)
- subsection 89(1) (approval procedures for approved bodies, approved trading houses and approved joint ventures)
- section 107 (prescribing what are eligible services).

A copy of the *EMDG Regulations 2008* is provided in a separate section in these guidelines.