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## **EXPLANATORY STATEMENT**

### **Issued by authority of the Minister for Trade, Tourism and Investment**

*Export Market Development Grants Act 1997 (as amended by the Export Market Development Grants Legislation Amendment Act 2020)*

*Export Market Development Grants Rules 2021*

#### **Authority**

Section 106 of the *Export Market Development Grants Act 1997* as amended by the *Export Market Development Grants Legislation Amendment Act 2020* (the Act) will provide that the Minister may make rules prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Export Market Development Grants Legislation Amendment Act 2020* received Royal Assent on 17 December 2020. Schedule 1 – Main amendments, containing the relevant amendments to section 106, enter into force on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives Royal Assent, they commence on the day after the end of that period.

#### **Purpose**

The object of the Act, described at section 3, is to bring benefits to Australia by encouraging the creation, development and expansion of foreign markets for Australian products. This is done by providing targeted financial assistance for promotional activities and development of marketing skills, to small and medium enterprises and their representative organisations.

The Act outlines an entitlement-based grant structure for Export Market Development Grants (EMDG) and provides the principles for the grant program. The Act provides for grant agreements as is common in a traditional grants program. The grantee must comply with the Act, the Rules and the terms and conditions specified in the grant agreement (subsection 10(1) of the Act).

The purpose of the Rules is to establish operating principles for EMDG, including details around eligible persons, eligible products, eligible expenses and the types of grants available.

Details of the Rules are set out at [Attachment A](#)

#### **Background**

In October 2020, the independent *Review of assistance to small and medium*

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*enterprise (SME) exporters* (the Review) was tabled in Parliament. The Review found exporting SMEs contribute significantly to growing the Australian economy through export sales and employment of Australians. However, SMEs face a number of challenges when exporting, including the costs of doing business overseas, knowledge gaps and developing relationships. The Review found SMEs were overwhelmingly positive about EMDG, recommending the principles of EMDG be maintained. The Review also recommended EMDG provide more funding certainty by shifting from a reimbursement model to a grant structure better targeted at those most able to make use of it, while also reducing complexity in its processes.

The government accepted in principle all recommendations of the Review. The *Export Market Development Grants Legislation Amendment Act 2020* created the framework for subsequent reforms.

### **Regulation Impact Statement**

When developing the *Export Market Development Grants Legislation Amendment Act 2020*, Austrade certified that the Review had undertaken analysis equivalent to a Regulation Impact Statement. These Rules continue the legislative implementation of the reforms and that certification applies to these Rules (OBPR id: 26308).

A copy of the independent review was tabled in Parliament on 6 October 2020 and is available on the Parliament's website.

### **Consultation**

In December 2020, Austrade undertook public consultation on draft Rules, including consulting directly with industry associations and export consultants. Feedback on the draft Rules were received from 27 individuals and organisations. Analysis indicates that key stakeholders are supportive of the reforms, stressing the need for greater certainty of funding and less complexity in processes. Most concerns raised related to administrative processes, which are not the subject matter of these Rules (but will be taken into account in the grant guidelines). The draft Rules were amended in response to questions of clarity and queries about entry requirements for businesses that have been sold or otherwise changed in legal form.

The Review also involved extensive consultation, with the reviewer conducting face-to-face consultations throughout October and November 2019 in Adelaide, Melbourne, Sydney, Brisbane, Perth and via videoconference. Online feedback was sought, with 158 written submissions received. Stakeholders included over 5,000 persons who have registered with Austrade to receive EMDG news, peak bodies and export consultants.

The first steps in implement the Review's recommendations to reform EMDG were made through the amending act, the *Export Market Development Grants Legislation Amendment Act 2020*. This amending bill was subject to extensive review by the Foreign Affairs, Defence and Trade Legislation Committee (the Committee). The Committee received 41 submissions, and tabled its report on 26 November 2020. The

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Committee recommended that the bill be passed. The Committee's report can be found at:

[aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ExportMarketGrants2020/Report](http://aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/ExportMarketGrants2020/Report)

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

A Statement of Compatibility with Human Rights is at Attachment B.

## **ATTACHMENT A**

### **Details of the *Export Market Development Grants Rules 2021***

#### **Part 1 – Preliminary**

##### Section 1 – Name

Section 1 provides that the name of the instrument is the Export Market Development Grants Rules 2021.

##### Section 2 – Commencement

Section 2 provides that the Rules commence at the same time as the commencement of Schedule 1 to the *Export Market Development Grants Legislation Amendment Act 2020*.

Schedule 1 of the *Export Market Development Grants Legislation Amendment Act 2020* commences by Proclamation, or, if a proclamation is not made within six months of receiving Royal Assent, it commences on the day after the end of the six month period.

The *Export Market Development Grants Legislation Amendment Act 2020* was given Royal Assent on 17 December 2020.

##### Section 3 – Authority

Section 3 provides that the *Export Market Development Grants Act 1997* is the enabling legislation under which the Rules are made.

##### Section 4 – Definitions

A number of expressions used in the Export Market Development Grants Rules 2021 are defined in the *Export Market Development Grants Act 1997*. These expressions include **grant agreement** and **grantee**.

A reference to *Act* in these Rules means the *Export Market Development Grants Act 1997*.

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An ***Australian person*** means a person of a kind in section 15 of the Act, includes any person prescribed under paragraph 15(g) of the Act.

An ***event*** includes a conference, meeting, convention or exhibition, or a sporting, cultural or entertainment event.

A ***foreign person*** means a person who is not an ***Australian person***.

A ***foreign tourist*** means an individual who is a ***foreign person*** visiting Australia as a tourist.

***Intellectual property*** does not include rights relating to know-how.

***Know-how*** means private knowledge, information or expertise that:

- relates to commercial or industrial operations,
- has commercial value, and
- is imparted for the purposes of enabling the recipient to carry out a particular activity.

A person is a related entity of another if one person is a body incorporated under the *Corporations Act 2001* and the other is either an individual or a body incorporated under the *Corporations Act 2001*, and any of the following apply:

- one person controls the other person (within the meaning of section 50AA of the *Corporations Act 2001*), or
- the same shareholder or shareholders own all the shares in both persons, or
- one person is a director of the other person.

The following words and phrases are defined in other sections in these Rules:

- Section 27 of these Rules defines ***designated connection***.
- Subsection 15(4) of these Rules defines ***disqualifying conviction*** of a grantee.
- Subsection 15(3) defines ***outstanding***.
- Section 5 defines ***ready to export***.
- Subsection 17(2) defines ***representative body***.
- Subsection 17(2)(a) defines ***represented group***.
- Section 6 defines ***software***.
- Subsection 20(2) defines ***tourism services***.
- Subsection 16(3) defines ***under insolvency administration***.

#### Section 5 – Definition of ***ready to export***

Under section 16 of the Act, a person must be a kind of person mentioned in section 15 of the Act and must satisfy the conditions set out in the Act and Rules to be eligible for a grant.

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Subsection 16(2) of the Act sets out some of these conditions. Under paragraph 16(2)(a) of the Act a person must be ready to export eligible products or, under paragraph 16(2)(b) of the Act, exporting eligible products and seeking to expand their export promotion activity for eligible products to be eligible for a grant.

Section 5 of these Rules provides the definition of ready to export provided for under paragraph 16(2)(a) of the Act.

Under section 5, a person is ready to export if they meet two requirements.

First, the person must not have previously exported eligible products.

Second, the person must have the appropriate skills to market the eligible product in a foreign country. These skills can be demonstrated in one of two ways. The person can complete the tool provided by Austrade to determine their readiness for export. If upon completion of that tool, they consider they are ready to export they can make a declaration to Austrade stating that, as a result of completing Austrade's export readiness tool, they believe they are ready to export. Alternatively, the person can complete export readiness training. That training can be conducted by a wide range of providers including the Commonwealth, a State or Territory, a representative body as defined in these Rules, or by any other person or body.

#### Section 6 – Definition of software

Under section 17 of the Act, the Rules can prescribe eligible products and required conditions for those eligible products.

Section 17 of these Rules prescribes software as an eligible product. Section 17 also prescribes goods, intellectual property, know-how and services as eligible products.

Section 6 of these Rules defines software as a combination of goods, and intellectual property or know-how, and services provided in relation to software, such as management or maintenance of software.

Under subsection 6(2), copyright in the software is an essential element of the product.

Under subsection 6(3), an eligible product that fulfils the definition provided in this section 6 is software for the purposes of the EMDG program. It is not a good, intellectual property or know-how, or service.

#### Part 2 – Eligible kinds of persons

##### Section 7 – Australian individual

Under section 15 of the Act, one of the kinds of persons eligible for a grant is an individual who is Australian within the meaning of the Rules (subsection 15(a) of the Act).

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Section 7 of these Rules defines ‘Australian’ for the purposes of subsection 15(a) of the Act as an individual whose principal place of residence is in Australia.

#### Section 8 – Australian partnership

Under section 15 of the Act, one of the kinds of persons eligible for a grant if they satisfy the conditions under section 16 of the Act is a partnership that is Australian within the meaning of the Rules (subsection 15(d) of the Act).

Section 8 of these Rules provides that an Australian partnership is one where the partnership was formed and operates under a law of a State or Territory and at least half the persons are Australian persons as defined in the Act.

#### Section 9 – Australian trust

Under section 15 of the Act, one of the kinds of persons eligible for a grant if they satisfy the conditions under section 16 of the Act is a trust that is Australian within the meaning of the Rules (subsection 15(e) of the Act).

Section 9 of these Rules provides that an Australian trust is one where the trustee, or each trustee, of the trust is an Australian person as defined in the Act.

#### Section 10 – Eligibility condition for applicants other than representative bodies

Under section 16 of the Act, a person must be a kind of person mentioned in section 15 of the Act and must satisfy the conditions set out in the Act and Rules to be eligible for a grant. Sections 10 to 16 of these Rules provide conditions that must be satisfied for a person to be eligible.

Subsection 10(1) provides that the condition set out in subsection 10(2) is a condition that must be satisfied by a person other than a representative body. The condition set out at subsection 10(2) must be satisfied at the time the person applies for a grant.

The condition set out in subsection 10(2) is that the person’s turnover must be less than \$20,000,000.

The condition set out in subsection 10(3) is that the person must have a plan to market eligible products.

#### 11 – Eligibility condition for applicants that are representative bodies

Subsection 11 sets out a condition for an applicant that is a representative body. This condition must be satisfied at the time the person applies for the grant (subsection 11(1)).

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The condition set out in subsection 11(2) is that the representative body must have a plan to market eligible products if their application is for a grant for promotional activities.

Section 12 – Eligibility condition for all applicants and grantees: ABN

Under subsection 12(1), the condition set out in subsection 12(2) must be satisfied by all persons. The condition must be satisfied when they are:

- an applicant, that is at the time the person applies for a grant, and
- a grantee, that is at all times when the person is a party to a grant agreement.

The condition set out in subsection 12(2) is that the person must have an ABN within the meaning of the *A New Tax System (Australian Business Number) Act 1999*.

Section 13 – Eligibility condition for all applicants and grantees: 8 year cap on grants

Subsection 13(1) provides that the condition set out on subsection 13(2) is a condition that must be satisfied by a person other than a representative body. The condition set out at subsection 13(2) must be satisfied immediately before the person enters into a grant agreement.

The condition set out in subsection 13(2) is that the person cannot enter into a grant agreement if doing so would lead to the person receiving EMDG grants for more than 8 financial years.

Subsection 13(3) provides that the condition set out on subsection 13(4) is a condition that must be satisfied by a person other than a representative body. The condition set out at subsection 13(4) must be satisfied immediately before a grant or instalment of a grant is paid to the person.

The condition set out in subsection 13(4) is that the person cannot receive a payment for a grant or an instalment of a grant if doing so would result in the person receiving an EMDG grant for more than 8 financial years.

Subsection 13(5)(a) deals with the meaning of grant for the purposes of subsections 13(2) and 13(4). A reference to a grant in these subsections means a grant under the Act as in force at any time and the *Export Market Development Grants Act 1974*, repealed on 1 January 1997, as in force at any time on or after 1 July 1990.

Paragraph 13(5)(b) deals with phoenix activity. Examples of phoenix activity include where a business changes ownership and the new owner carries on a similar business to the one carried on by a former owner; or where a company is liquidated, placed into voluntary administration or abandoned, and the business activities are taken over by a current or new entity, such as a related company in a corporate group.

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Noting that a person cannot receive more than 8 financial years of grant payments, under paragraph 13(5)(b), when determining whether a person has received more than 8 financial years of a grant, the CEO of Austrade is able to include the grants of another grantee where phoenix activity has occurred. When making this decision the CEO of Austrade must be satisfied that the grantee is conducting the business that the other person conducted, taking into account relevant matters. These relevant matters include:

- consideration of the nature and assets of the businesses conducted by the grantee and the other person (paragraph 13(5)(b)(i)), and
- the individuals controlling or constituting the grantee and the other person (paragraph 13(5)(b)(ii)), and
- any other matters the CEO considers relevant (paragraph 13(5)(b)(iii)).

This provision is made for the purposes of determining the requirements in subsections 13(2) and 13(4).

The decision made by the CEO under paragraph 13(5)(b) is reviewable by the Administrative Appeals Tribunal, as provided for under section 55 of these Rules.

#### Section 14 – Eligibility condition for applicants and grantees that are representative bodies

Section 14 of these Rules sets out conditions that must be satisfied by a representative body when they are an applicant (that is when they apply for a grant) (paragraph 14(1)(a)) and when they are a grantee (that is when they have a grant agreement) (paragraph 14(1)(b)).

If the representative body intends to provide eligible training activities, the representative body must have the skills and experience necessary to either deliver or arrange for the delivery the training. The training must enable members of the representative body to become ready to export (subsection 14(2)).

#### Section 15 – Eligibility condition for all grantees: no disqualifying convictions

Under subsection 13(2) of these Rules a grantee must not have an outstanding disqualifying conviction. This condition continues throughout the life of the agreement. A person cannot be a grantee if they have an outstanding disqualifying conviction. If a person enters into a grant agreement, and they are convicted of a disqualifying conviction while a grantee, they are no longer an eligible person and therefore no longer eligible for a grant.

Subsection 13(3) specifies the length of time during which any disqualifying conviction is outstanding. Starting on the day on which a conviction is recorded, the conviction is outstanding until:

- five years after the individual is released from prison (if the conviction was for a term of imprisonment) (paragraph 13(3)(a)), or



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- five years after the day on which the conviction was recorded (paragraph 13(3)(b)).

Disqualifying convictions are convictions of the person for an offence described at subsection 13(4) of these Rules. These offences encompass fraud offences, including fraud offences against the Commonwealth:

- subsection 206B(1) of the *Corporations Act 2001*. This provision relates to the automatic disqualification of a person from managing a corporation. The offences described in this provision include certain offences against the *Corporations Act 2001* and certain offences of dishonesty (paragraph 13(4)(a))
- fraud and dishonesty offences in the *Criminal Code* at sections 134.1, 134.2, 135.1, 135.2, 135.4, 136.1, 137.1 or 137.2 where they relate to a grant, including an application for a grant (paragraph 13(4)(b))
- any of the following offences where they relate to offences mentioned in paragraphs 13(4)(a) and (b)
  - the offence in section 6 of the *Crimes Act 1914*, which relates to a person being an accessory after the fact
  - ancillary offences in the *Criminal Code*, which includes offences such as attempting to commit an offence, urging the commission of an offence or conspiring with another person to commit an offence
  - offences in State or Territory law that corresponds to the Commonwealth offences referred to in paragraphs 13(4)(c)(i) and 13(4)(c)(ii).

#### Section 16 – Eligibility condition for grantees other than representative bodies: not under insolvency administration

The condition described in section 16 of these Rules applies to all persons other than representative bodies.

This condition applies at all times while the person is a grantee. A person is a grantee while they have a grant agreement with the Commonwealth under the Act and these Rules (subsection 16(1)).

If the person is under insolvency administration they are not an eligible person (subsection 16(2)). If a person becomes a grantee and, while still a grantee, enters into insolvency administration, they are no longer an eligible person.

The meaning of under insolvency administration is provided at subsection 16(3). A grantee is under insolvency administration when any of the following apply:

- if the grantee is an individual and
  - they are an undischarged bankrupt (paragraph 16(3)(a)(i))
  - a composition, deed of arrangement or deed of assignment is in operation with the grantee's creditors under a law relating to bankruptcy (paragraph 16(3)(a)(ii))

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- a final judgment for a debt has been made against the grantee (paragraph 16(3)(a)(iii))
  - if the grantee is an incorporated body as described paragraph 15(b) or (c) of the Act and
    - a receiver of property of the grantee (paragraph 16(3)(b)(i))
    - a receiver and manager of property of the grantee (paragraph 16(3)(b)(i))
    - an administrator of the grantee (paragraph 16(3)(b)(ii))
    - an administrator of a deed of company arrangement executed by the grantee (paragraph 16(3)(b)(ii))
    - a liquidator of the grantee (paragraph 16(3)(b)(iii))
    - any other controller of the grantee (paragraph 16(3)(b)(iv))is appointed under the *Corporations Act 2001*
  - if the grantee is an incorporated body referred to in paragraph 15(b) or (c) of the Act and
    - a controller equivalent to any mentioned in paragraph 16(3)(b) is appointed, under a law other than the *Corporations Act 2001*, to the grantee or the property of the grantee
  - if the grantee is a partnership and
    - a partner in the partnership is under insolvency administration as described in paragraph 16(3)(a), 16(3)(b) or 16(3)(c)
  - if the grantee is a trust and
    - a trustee of the trust is under insolvency administration within the meaning of paragraph 16(3)(a), 16(3)(b) or 16(3)(c).

#### Section 17 – Exclusion from subsection 16(2) of the Act: representative body

Paragraph 16(2)(b) of the Act sets out eligibility conditions for all persons, unless the Rules exclude the person from the paragraph. The eligibility conditions contained in section 16(2)(b) of the Act are that the person be either ready to export eligible products or exporting eligible products and seeking to expand their export promotion activity for eligible products.

Under section 17(1) of these Rules a representative body is excluded from the requirements in paragraph 16(2)(b) of the Act.

Section 17(2) of these Rules defines representative body. A representative body is a person who:

- promotes the interests of a group of Australian persons, as defined by the Act and these Rules (paragraph 17(2)(a)), and
  - the person promotes those interests in a way that is representative of the members of
    - an industry or
    - a substantial part of an industry or
    - more than one industry (paragraph 17(2)(b))
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- all, or a substantial number of, the represented group are either
    - exporting eligible products and seeking to expand their export promotion activity (paragraph 17(2)(c)(i)) (some of their members may not be exporting but are members of the body), or
    - have a designated connection to a product as described in section 27 of these Rules (paragraph 17(2)(c)(ii)), and
  - while a grant agreement has effect, the person will have eligible expenses for
    - promotional activities (paragraph 17(2)(d)(i)), or
    - training activities (paragraph 17(2)(d)(ii)), and
  - the representative body does not
    - export eligible products (paragraph 17(2)(e)(i)), or
    - where the representative body does export, exporting is not one of the representative body's primary activities (paragraph 17(2)(e)(ii)), and
  - the representative body does not distribute income to its members or shareholders (paragraph 17(2)(f)).

Subsection 17(3) clarifies that paragraph 17(2)(d)(ii) refers to a representative body.

#### Section 18 – Eligible products

Section 18 of these Rules list the types of products that are eligible products. These are:

- goods (paragraph 18(a))
- services (paragraph 18(b))
- events (paragraph 18(c))
- intellectual property (paragraph 18(d))
- know-how (paragraph 18(e)) and
- software (paragraph 18(f)).

#### Section 19 – Condition for goods

Section 19 describes the conditions that must be satisfied for a good to be an eligible product.

Under subsection 19(1) the goods must not be excluded by the Act or the Rules, including the requirements of subsections 19(2) and 19(3) of these Rules.

To be an eligible product, the goods must satisfy at least one of the following requirements:

- The goods are a primary product of Australia. The primary product is a product that is mined, harvested, raised or fished within Australia (paragraph 19(1)(a)).
- The goods are mainly made from a primary product of Australia as described in paragraph 19(1)(a) (paragraph 19(1)(b)). This paragraph does not require the goods come into their final form in Australia.

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- The goods are made from imported material or components and those material or components are manufactured or assembled in Australia. The process or operation the material or components undergo must
    - result in a new product (paragraph 19(1)(c)(i)), or
    - substantially transform the materials or components (paragraph 19(1)(c)(ii)), or
    - be an important stage in the manufacture of a product that will be produced outside Australia (paragraph 19(1)(c)(iii)).
  - The goods are not made in Australia, however at least 3 of the 4 requirements at the paragraph 19(1)(d) apply to the goods. Those requirements are that
    - the assets used to make the goods ready for sale are mainly or substantially based in Australia (paragraph 19(1)(d)(i)). These assets can include things such as real property assets, equipment used to design components or moulds or machinery, office equipment or transport equipment
    - the activities undertaken to make the goods ready for sale are mainly or substantially carried on in Australia (paragraph 19(1)(d)(ii)). These activities can include things such as design, research and development, marketing and management of activities
      - any assessment made under paragraphs 19(1)(d)(i) and (ii) does not include consideration of the assets or activities used in the manufacture of the goods
    - a significant proportion of the value of the goods is added in Australia (paragraph 19(1)(d)(iii)). An assessment of value added can include an assessment of things such as the design, research and development, promotion and management of activities.
    - significant employment is generated in Australia through making the goods (paragraph 19(1)(d)(iv)).

#### Section 20 – Condition for tourism services

Section 20 sets out the conditions that a tourism service must satisfy for the service to be an eligible product.

Under subsection 20(1) of these Rules, tourism services must be supplied in Australia to foreign persons in order to be an eligible product. Tourism services can only be eligible products if they are not excluded by section 22 of the Rules.

Subsection 20(2) of these rules describes the services that are tourism services. Those services are

- the supply of passenger transport by land, including vehicles for hire
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- but does not include a transfer service for foreign tourists (paragraph 20(2)(a))
  - the supply of transport by water (paragraph 20(2)(a))
  - the supply of transport by air (paragraph 20(2)(a))
  - accommodation for at least one night to a foreign tourist
    - As stated in subsection 20(1) in order to be an eligible product, tourism services must be supplied to foreign persons. Where accommodation is provided to a foreign person other than a foreign tourist it is not an eligible product.
    - If a foreign person is in Australia for reasons other than tourism and that person undertakes a leisure trip within Australia, the supply of accommodation to that person during their leisure trip is considered to be a supply of an eligible product.
    - For example, a foreign person who is in Australia for business purposes is not a foreign tourist, therefore the accommodation provided to that foreign person does not fall within paragraph 20(2)(c). However if that foreign person undertakes a leisure trip while in Australia, accommodation provided to that person during that trip falls within paragraph 20(2)(c).
  - tours (paragraph 20(2)(d))
  - paid admission to places visited by tourists listed in paragraph 20(2)(e):
    - a place that has one or more outstanding natural features
    - a place that is of historical interest
    - a park
    - a nature reserve
    - a botanical garden
    - a wildlife sanctuary
    - a zoological garden
    - a museum
    - an art gallery
    - a craft centre
    - a place that is, or provides, an amenity appropriate to tourists, or
    - an event
  - services at a place the main purpose of which is to provide a venue and associated facilities for meetings, conventions and exhibitions (paragraph 20(2)(f))
  - services of a restaurant or café (paragraph 20(2)(g))
  - services directly related to gambling in a casino licensed under an Australian law (paragraph 20(2)(h)).

### Section 21 – Conditions for services other than tourism services

Section 21 sets out the conditions that all services, other than tourism services, must satisfy in order to be an eligible product.

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All services, other than tourism services, must be supplied to foreign persons outside Australia (paragraph 21(a)) and at least three of the four subparagraphs at paragraph 21(b) must apply to the service:

- the assets used to make the services ready for sale or supply are mainly or substantially based in Australia (subparagraph 21(b)(i))
  - these assets can include things such as real property assets or office equipment
- the activities resulting in the services being made ready for sale or supply are mainly or substantially carried on in Australia (subparagraph 21(b)(ii))
  - these activities can include things such as design, research and development, marketing and management of activities
- for services supplied outside Australia – a significant proportion of the value of the services is added in Australia (subparagraph 21(b)(iii))
- the supply of the services directly generates significant employment in Australia (subparagraph 21(b)(iv)).

The services must not be excluded by section 22.

#### Section 22 – Excluded services

Section 22 of these Rules lists the services that are excluded from the EMDG program. Tourism services (section 20 of these rules) and services (section 21 of these Rules) are only eligible products if they are not excluded by section 22 of the Rules.

Services that relate to

- migration to Australia, including proceedings or actions to enter or remain in Australia
- adoption, custody or welfare of a child
- proceedings about the maintenance of a person
- proceedings under the *Family Law Act 1975*
- identification, procurement, lease, sale or purchase of assets in Australia (whether tangible or intangible), including cash, real estate, stocks, options or shares
- protection, operation or maintenance of assets held in Australia
- compliance with the laws of Australia
- prostitution
- pornographic material, including pornographic material in publications, films or computer games, or accessible on the internet
- activities or products that are unlawful
- the provision of a gambling service by a person not licensed under an Australian law to provide the service.

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Tourism services (section 20) and services other than tourism services (section 21) do not include:

- a service supplied in Australia to foreign tourists that is not described in section 20 of these Rules (paragraph 22(2)(a)), or
- a service for the selection or recruitment of students to work in Australia (paragraph 22(2)(b)).

#### Section 23 – Condition for events

An event must be either

- held in Australia (paragraph 23(a)), or
- if the event is online – provided by an Australian person (paragraph 23(b))

to be an eligible product.

#### Section 24 – Condition for intellectual property and know-how

To be an eligible product

- a trade mark must have been first used in Australia or have increased in significance or value because of its use in Australia (paragraph 24(a))
- for intellectual property rights relating to any thing other than trade marks and know-how, the thing or know-how must be wholly or substantially the result of research or work done in Australia (paragraph 24(b)).

#### Section 23 – Condition for software

To be an eligible product, the software's copyright must be wholly or substantially the result of research or work done in Australia,

### Part 4 – Eligible expenses

#### Division 1 – Eligible expenses

##### Section 26 – Eligible expenses of a person in respect of promotional activities

Under section 18(1) of the Act, the Rules are able to prescribe the eligible expenses of the person. Section 18(2) of the Act requires eligible expenses be for promotional or training activities. The purpose of these activities must be marketing, or developing skills in marketing, eligible products in foreign countries.

Under section 18(3) of the Act, excluded expenses described in either the Act or these Rules are not eligible expenses.

Section 26 of these Rules prescribes requirements for all eligible expenses. Paragraph 26(1)(a) of these Rules reflects section 18 of the Act, outlined above, and requires the expenses listed at paragraph 26(1)(c) to be in respect of a promotional activity undertaken for the purposes of marketing an eligible product in a foreign country.

Paragraph 26(1)(b) requires the person to have a designated connection to the eligible product. Designated connection is defined in section 27 of these Rules.

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Paragraph 26(1)(c) requires the eligible expense be one that is described in sections 28 to 36 of these Rules.

Subsection 26(2) reflects section 18(3) of the Act, and states that the excluded expenses found at Division 5 of Part 2 of the Act and at Division 2 of this Part of the Rules are excluded expenses.

#### Section 27 – Designated connection to eligible product

In order for the expenses of a person to be an eligible expense, the person must have a designated connection to the eligible product. For most eligible products this means the grantee must own the product. For some eligible products, a grantee will be undertaking promotional activities as a result of a relationship or agreement with the owner of the eligible product, described as a designated connection.

Under subsection 27(1), a designated connection to a good is where:

- the person owns the goods (paragraph 27(1)(a)), or
- a related entity owns the goods (paragraph 27(1)(a)), or
- the person owns, or holds an exclusive licence for, one or more intellectual property rights in relation to the goods (paragraph 27(1)(b)), or
- a related entity owns, or holds an exclusive licence for, one or more intellectual property rights in relation to the goods (paragraph 27(1)(b)), or
- if the person is a representative body, members of the represented group
  - own the goods in the way described in paragraph 27(1)(a) or
  - own, or hold an exclusive licence for, one or more intellectual property rights in relation to the goods as described in paragraph 27(1)(b).

Under subsection 27(2), a designated connection to a service is where:

- the person supplies the service (paragraph 27(2)(a)); or
- if the person is a representative body, members of the represented group supply the services (paragraph 27(2)(b)).

Under subsection 27(3), a designated connection to an event is where:

- the person provides the event (paragraph 27(3)(a)), or
- the person is the promoter of an event (paragraph 27(3)(b)), or
- under paragraph 27(3)(c), if the person is a representative body, members of the represented group:
  - provide the event as described under paragraph 27(3)(a)), or
  - are the promoters of an event as described under paragraph 27(3)(b)).

To establish that a person is the promoter of an event, there will be a written agreement with the person providing the event.

Under subsection 27(4), a designated connection to intellectual property and know-how is where:

- the person owns the intellectual property or know-how (paragraph 27(4)(a)),  
or



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- the person is licensed to promote the intellectual property or know-how by its owner (paragraph 27(4)(b)), or
  - under paragraph 27(4)(c), the person is a representative body, and members of the represented group:
    - own the intellectual property or know-how as described under paragraph 27(4)(a), or
    - are licensed to promote the intellectual property or know-how by the owner as described under paragraph 27(4)(b)).

Under subsection 27(5), to establish a designated connection to software the grantee must establish a designated connection to each element of the software. This means:

- in relation to intellectual property for the software:
  - the person owns, or holds an exclusive licence to use, copyright in the software or that part of the software that is in the form of intellectual property (paragraph 27(5)(a)), and
  - the person has a designated connection to the software as described in subsection 27(4) of these Rules (paragraph 27(5)(d)).
- in relation to goods:
  - the person has a designated connection to the goods as described in subsection 27(1) of these Rules (paragraph 27(5)(b)), and
- in relation to services:
  - the person has a designated connection to the software as described in subsection 27(2) of these Rules (paragraph 27(5)(c)).

Under subsection 27(6), if the person is a representative body, the representative body has a designated connection to software if members of the designated group have the designated connection to the software described in subsection 27(5).

An individual who is Australian (section 15(a) of the Act) and a body incorporated under the *Corporations Act 2001* (section 15(b) of the Act) are eligible persons where they satisfy the conditions set out in section 16 of the Act. Under subsection 27(7) of these Rules, these persons are related entities of a body incorporated under the *Corporations Act 2001* if:

- the person controls, or is controlled by, the body (within the meaning of section 50AA of the *Corporations Act 2001*) (paragraph 27(7)(a)), or
- the same shareholder or shareholders own all the shares in both the person and the body (paragraph 27(7)(b)), or
- the person is a director of the body (paragraph 27(7)(c)).

#### Section 28 – Maintaining representative in foreign country

Expenses of maintaining an overseas representative in a foreign country for more than 6 months in a financial year are eligible expenses in so far as the representative is undertaking:

- research into the market in the foreign country for the eligible product (paragraph 28(a)), or

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- promotional activities done for the purpose of marketing the eligible products in the foreign country (paragraph 28(b)).

These eligible expenses do not include the expenses of an overseas representative in so far as their activities are outside of those matters identified in paragraphs 28(a) and 28(b) of these Rules.

#### Section 29 – Short trips to foreign country

Expenses for up to 21 days continuous travel for the person, or a representative of the person, between Australia and a foreign country are an eligible expense.

This expense does not include remuneration and remuneration-like expenses as described as section 45.

#### Section 30 – Consultants

Expenses for consultants are eligible expenses where the consultant is undertaking:

- research into the market in the foreign country for the eligible product (paragraph 30(a)), or
- promotional activities done for the purpose of marketing the eligible products in the foreign country (paragraph 30(b)).

This expense does not include remuneration and remuneration-like expenses as described as section 45.

#### Section 31 – Short trips within Australia

Expenses for up to 21 days continuous travel for the person, or a representative of the person, within Australia are an eligible expense. The expense must be in order to undertake activities that relate to marketing the eligible product to potential foreign buyers. This type of travel is often undertaken to attend promotional events such as trade fairs. There is no restriction as to the number of times per grant or per year such travel is undertaken.

This expense does not include remuneration and remuneration-like expenses as described as section 45.

#### Section 32 – Foreign buyer visits

Under section 32 of these Rules expenses for the travel of a prospective foreign buyer(s) of a person's eligible product between Australia and a foreign country and within Australia is an eligible expense. That expense includes up to 21 days of travel undertaken continuously. The purpose of the travel will be for the grantee to undertake promotional activities for their eligible product.

This expense does not include remuneration and remuneration-like expenses as described as section 45.

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### Section 33 – Soliciting for business in a foreign country

Expenses of activities done to solicit for business in the foreign country for the eligible products is an eligible expense where those activities are undertaken by the person or a representative of the person.

This expense does not include remuneration and remuneration-like expenses as described as section 45.

### Section 34 – Free samples

The expenses for providing a free sample of the eligible product to a person in a foreign country is an eligible expense (paragraph 34(a)).

Where the eligible product is a tourism service, the expense for providing a free sample in Australia to a person from a foreign country is an eligible expense (paragraph 34(b)).

### Section 35 – Promotional and advertising material

The cost to produce promotional or advertising materials targeted at promoting the eligible product in a foreign country is an eligible expense (paragraph 35(a)).

The cost of providing marketing and promotional material to persons in a foreign country is an eligible expense (paragraph 35(b)).

This expense does not include remuneration and remuneration-like expenses as described as section 45.

### Section 36 – Intellectual property rights

The expense for the grant or registration of intellectual property rights in a foreign country is an eligible expense where the intellectual property is an eligible product.

This expense does not include remuneration and remuneration-like expenses as described as section 45.

### Section 37 – Eligible expenses of a person in respect of training activities

Under subsection 37(1) of these Rules, training activities are an eligible expense for a representative body if the training is delivered, or arranged to be delivered, by the representative body. The purpose of the training must be to develop the skills of members of the represented group in marketing eligible products in foreign countries.

Under subsection 37(2), expenses for obtaining training activities are an eligible expense for those persons who are ready to export. The purpose of the training must be to develop the skills of the person in marketing eligible products in foreign countries.

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Subsection 37(3) ensures no double dipping occurs for training expenses described in section 37. Where a representative body is entitled to a grant for training expenses, it is not an eligible expense for a person accessing that training.

Subsection 36(4) clarifies that training expenses are not eligible expenses if they are excluded expenses under Division 5 of Part 2 of the Act, or Division 2 of this Part of the Rules.

## Division 2 – Excluded expenses

### Section 38 – Excluded expenses

The Rules under this Division are made under section 18(3) of the Act which provides that an expense is not an eligible expense if it is excluded by the Act or the rules.

### Section 39 – Soliciting sponsorship for event

Expenses of a grantee are excluded expenses if the purpose of the expense is to solicit for sponsorship for an eligible event.

### Section 40 – Capital expenses

Expenses of a grantee are excluded expenses where they are of a capital nature. Eligible expenses for intellectual property described in section 36 of these Rules are not capital expenses.

### Section 41 – Trade with New Zealand

Expenses of a grantee in respect of trade with New Zealand are excluded expenses.

### Section 42 – Paid expenses

Where the grantee has been paid consideration, or is entitled to be paid consideration, for anything they have done it is an excluded expense.

### Section 43 – Taxes etc.

Payments of a tax, levy or other contribution under an Australian law are excluded expenses. Charges imposed by the *Passenger Movement Charge Act 1978* are not excluded expenses.

### Section 44 – Sales-related expense in relation to eligible product

Sales-related expenses are excluded expenses.

Sales-related expenses are expenses that are based on the level of sales made.

Examples of sales-related expenses include:

- any remuneration in the form of salary, retainer or fee determined by sales or commercial transactions related to the eligible product, either directly or indirectly (paragraph 44(2)(a))
- any other remuneration determined by sales or commercial transactions related to the eligible product, either directly or indirectly (paragraph 44(2)(b))

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- discounts and credits, or amounts equivalent to discounts or credits, allowed or paid that relate to the level of sales of eligible products.

Sales-related expenses are not limited to the examples in subsection 44(2).

#### Section 45 – Remuneration and remuneration-like expenses

Section 45 of these Rules ensures that the grant does not cover the remuneration of employees, directors, partners and trustees for certain eligible expenses.

Under subsection 45(1) of these Rules the remuneration of the persons listed are excluded expenses where they relate to the eligible expenses listed in subsection 45(2).

The persons listed at section 45(1) are:

- individuals who are ordinarily employed by the grantee (paragraph 45(1)(a)(i))
- individuals who are ordinarily employed by a related entity of the grantee (paragraph 45(1)(a)(i))
- where the grantee is a company – a director of the company (paragraph 45(1)(a)(ii))
- a director of a company that is a related entity of the grantee (paragraph 45(1)(a)(iii))
- where the grantee is a partnership – a partner in the partnership (paragraph 45(1)(a)(iv))
- where the grantee is a trust – a trustee of the trust (paragraph 45(1)(a)(v)).

Travel allowances are not excluded expenses for the eligible expenses listed in subsection 45(2) (paragraph 45(1)(b)).

The eligible expenses to which subsection 45(1) applies are:

- section 29 (short trips to foreign country)
- section 30 (consultants)
- section 31 (short trips within Australia)
- section 32 (foreign buyer visits)
- section 33 (soliciting for business in foreign country)
- section 35 (promotional and advertising material)
- section 36 (intellectual property rights).

#### Section 46 – Illegal activities

The EMDG program does not provide grant money for the illegal activities of a grantee. The costs of an activity are an excluded expense if the expense is for an activity that is illegal in the place where the activity occurs and at the time it occurs. That place can be Australia or any other country. Illegal activities may involve an illegal way of promoting a product in a country or promoting a product in a country where it is illegal to promote the product.

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### Section 47 – Detrimental impact

Expenses of a grantee that may have a detrimental impact on Australia's trade reputation are not eligible. A decision about whether an expense may have a detrimental impact on Australia's trade reputation is made by the CEO of Austrade. Under section 55 of these Rules this decision is reviewable by the Administrative Appeals Tribunal (subsection 47(1)).

Products of a grantee that may have a detrimental impact on Australia's trade reputation are not eligible expenses. A decision about whether product may have a detrimental impact on Australia's trade reputation is made by the CEO of Austrade. Under section 55 of these Rules this decision is reviewable by the Administrative Appeals Tribunal (subsection 47(2)).

The expense or production or sale of product may not be illegal, nevertheless the Government's support through EMDG of an expense or product may cause detriment to Australia's standing as a trading nation.

### Part 5 – Grants

#### Section 48 – Requirements for grant agreements

Each grant described in this Part has a maximum number of financial years for which the grant is payable (subsections 49(2), 50(2), 51(2) and 52(2)). Under subsection 48(1) a grant agreement must not exceed that maximum number of years.

Each grant described in this Part has a maximum amount allowable each financial year (subsections 49(3), 50(3), 51(3) and 52(3)). Under subsection 48(2) a grant agreement must not exceed that maximum amount each financial year.

Under subsection 48(3) payment made to grantees may not exceed a total of \$770,000. Eligible persons are able to receive a total of 8 financial years of grants (section 13 of these Rules), however the total amount payable over those 8 years cannot exceed \$770,000, regardless of the maximum grant amount allowable each financial year for their grant.

Subsection 48(3) does not apply to representative bodies (noting that section 13 of these Rules does not apply to representative bodies) (subsection 48(4)).

Subsection 48(5)(a) provides the meaning of grant for the purposes of subsections 46(3). A reference to a grant in this subsection means a grant under the Act as in force at any time and the *Export Market Development Grants Act 1974*, repealed on 1 January 1997, as in force at any time on or after 1 July 1990.

Paragraph 48(5)(b) deals with phoenix activity in a similar manner to subsection 13(5)(b). Noting that a person cannot receive more than \$770,000 of grant payments, when determining whether a person has received more than this amount, the CEO of Austrade is able to include the grants of another grantee where phoenix activity has

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occurred. When making this decision the CEO of Austrade must be satisfied that the grantee is conducting the business that the other person conducted taking into account relevant matters. These relevant matters include:

- consideration of the nature and assets of the businesses conducted by the grantee and the other person (paragraph 48(5)(b)(i)), and
- the individuals controlling or constituting the grantee and the other person (paragraph 48(5)(b)(ii)), and
- any other matters the CEO considers relevant (paragraph 48(5)(b)(iii)).

The decision made by the CEO under paragraph 48(5)(b) is reviewable by the Administrative Appeals Tribunal under section 55 of these Rules.

#### Section 49 – Tier 1 agreement

A Tier 1 agreement is where the grantee is ready to export at the time they enter into the grant agreement (subsection 49(1)).

A Tier 1 grant agreement is for a maximum of 2 years (subsection 49(2)).

A Tier 1 grant agreement is for a maximum of \$40,000 each financial year (subsection 49(3)).

#### Section 50 – Tier 2 agreement

A Tier 2 agreement is where the grantee has already exported and is seeking to expand their export promotion activities (paragraph 50(1)(a)) and is not a Tier 3 agreement (paragraph 50(1)(b)).

A Tier 2 grant agreement is for a maximum of 3 years (subsection 50(2)).

A Tier 2 grant agreement is for a maximum of \$80,000 each financial year (subsection 50(3)).

#### Section 51 – Tier 3 agreement

A Tier 3 agreement is where the grantee has already exported and is seeking to expand their export promotion activities (paragraph 51(1)(a)) and one of the terms and conditions of the agreement is that the grantee must make a strategic shift in their marketing of their eligible product (paragraph 51(1)(a)).

A Tier 3 grant agreement is for a maximum of three years (subsection 49(2)).

A Tier 3 grant agreement is for a maximum of \$150,000 each financial year (subsection 49(3)).

#### Section 52 – Representative agreement

Section 52 of these Rules describes the type of grant available to representative bodies. It is called a representative agreement (subsection 52(1)).

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A grant agreement for a representative body is for a maximum of 3 years (subsection 52(2)).

A grant agreement for a representative body is for a maximum of \$150,000 each financial year (subsection 52(3)).

#### Section 53 – Amount of grant

Section 21 of the Act requires the CEO of Austrade to determine the amount of a grant to be made to a person in accordance with the method prescribed in the Rules.

Subsection 53(1) states the amount of a grant under a grant agreement is the total of the instalments payable under the agreement each financial year.

Under subsection 53(2) the total amount of instalments payable each financial year is half of the total amount of the grantee's eligible expenses for that financial year; or if a total is not agreed, the maximum available under each grant for each financial year as stated in subsections 49(3), 50(3), 51(3) and 52(3)).

Subsection 53(2) is limited by subsection 53(3), which states that the instalment payment is reduced to ensure that total payments for the grantee payments do not exceed \$770,000 (subsection 48(3) of these Rules) and that where the person has spent less than the agreed amount, the instalment does not exceed the requirement to spend at least a matching amount of their own money (section 54 of these Rules).

Subsection 53(4) clarifies that where a grant agreement is entered into after the beginning of the financial year, it may include eligible expenses of the grantee for that whole financial year.

#### Section 52 – Failure to spend agreed amount

A grant agreement will set out the maximum grant payable in a financial year to a grantee. Where the grantee does not spend the agreed amount set out in the grant agreement on eligible expenses, the CEO must reduce the grant paid.

The reduction in the grant paid must ensure that the grantee is paid grant monies for eligible expenses that ensure compliance with the terms and conditions in their grant agreement. These terms and conditions include a requirement that the person spend the grant money and, at least, a matching amount of their own money on eligible expenses. It is a requirement under subsection 10(2) of the Act this be a term and condition of the grant agreement.

### Part 6 – Miscellaneous

#### Section 55 – Reviewable decisions

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Under section 97 of the Act certain decisions of the CEO of Austrade are reviewable by the AAT. Paragraph 97(d) of the Act provides that the Rules can provide for decisions of the CEO to be reviewable.

Section 55 of these Rules provides that the following decisions are reviewable by the Administrative Appeals Tribunal:

- to exclude the expense of a person because it might have a detrimental impact on Australia's trade reputation, made under subsection 45(1)
- to exclude the expense of a person in relation to an eligible product because providing assistance for the product might have a detrimental impact on Australia's trade reputation, made under subsection 45(2)
- that a grantee is conducting a business that is substantially the same as that of another person who has previously received a grant, made under paragraphs 12A(5)(b) and 46(5)(b).

## Part 7 – Application and transitional provisions

### Section 56 – Additional definition of ready to export

A person is ready to export if they have already received one grant under the Act prior to the amendment made through Schedule 1 to *the Export Market Development Grants Legislation Amendment Act 2020*, and the person satisfies section 5(b) of the definition of ready to export.

### Section 57 – Disqualifying conviction of a grantee

Under section 15 of these Rules all grantees must have no outstanding disqualifying convictions. The definition of disqualifying conviction of a grantee is provided at subsection 15(4) of these Rules. This definition includes a conviction of the person before and after the commencement of these Rules (subsection 57(1)).

Paragraph 15(4)(c) provides the definition for a disqualifying conviction of a grantee, which includes reference to offences relating to grants (including an application for a grant). Under subsection 57(2) those offences include reference to offences that relate to a grant (including an application for a grant) under the Act as in force at any time before or after the commencement of these Rules.

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## **ATTACHMENT B**

### **Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

#### ***Export Market Development Grants Rules 2021***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

The Regulations simplify and streamline the Export Market Development Grants processes, and reorient the processes from a reimbursement model to a grants model. Grants are provided to Australian small and medium enterprise exporters who are seeking to promote their Australian products in foreign markets.

#### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.