

EXPLANATORY STATEMENT

Issued by authority of the Minister for Trade and Tourism

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

Export Market Development Grants Amendment Rules 2024

Authority

Section 106 of the *Export Market Development Grants Act 1997* (EMDG Act) provides 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.

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 establishing a grants program to provide targeted financial assistance for promotional activities and development of marketing skills, to Australian small and medium enterprises (SMEs) and their representative organisations.

The Act outlines the structure and principles for the Export Market Development Grants (EMDG) program. The purpose of the *Export Market Development Grants Rules 2021* (EMDG Rules) is to establish operating principles for EMDG, including details around eligibility for a grant, eligible products, eligible expenses, and the types of grants available. Grants are paid in accordance with a grant agreement between the CEO of Austrade and a grantee. A grantee must spend the grant money, as well as at least a matching amount of their own money, on eligible expenses in relation to marketing eligible products.

The purpose of the *Export Market Development Grants Amendment Rules 2024* (Amendment Rules 2024) is to introduce changes to ensure that the program meets its objectives. These objectives are: supporting those SMEs that are ready to export, or to expand their export promotion activity, and that have the capacity and capability to develop their marketing and promotional skills, in support of their export products and services. The Amendment Rules 2024 changes are necessary to more effectively allocate grant funding to applicants and better achieve the objectives of the Act.

Details of the Amendment Rules 2024 are set out at [Attachment A](#)

A Statement of Compatibility with Human Rights is at [Attachment B](#).

Background

Reformed EMDG program

In accordance with the *Export Market Development Grants Act 1997 section 106A Review of the scheme*, the Minister must cause an independent review of the EMDG scheme no later than five years after completion of the previous review. In line with the most recent independent review of EMDG – the *2020 Review of assistance to small and medium enterprise exporters* (the ‘Fisher review’) – the reformed EMDG program commenced in 2021-2022.

In October 2020, in accordance with section 106A(4), the Fisher review was tabled in Parliament. It found that SME exporters contribute significantly to growing the Australian economy, both through export sales and the employment of Australians.

The Fisher review proposed that EMDG shift from a reimbursement model to a grant structure which would provide up-front grant amount certainty, introduce Tiers for exporters at different stages of their export maturity, and reduce complexity in administrative processes. The *Export Market Development Grants Legislation Amendment Act 2020* created the framework for reforms to the grant program, and the *Export Market Development Rules 2021* established the operating principles and eligibility for the program. The first grant round commenced in 2021-2022 and there have now been three grant rounds.

Operational Review of EMDG

Amendments made as part of the reforms created much higher demand on available funds and delivered lower grant amounts than was anticipated. Many stakeholders argued that these lower grant amounts impacted the ability of EMDG to deliver meaningfully for Australian export businesses.

In response to these issues, the Government initiated an internal *Operational Review* of the EMDG program in August 2022. The scope of the Operational Review considered policy settings, client experience, systems, processes, communications, and program delivery. Details about consultations undertaken during the Operational Review are summarised below.

The Review found EMDG grant amounts were not in line with stakeholder expectations. The average grant amount in Rounds 1 and 2 of the reformed EMDG (\$23,825) was 42 per cent less than the average grant amount over the 2016-17 to 2020-21 period under the former reimbursement scheme (\$41,255) due to the increased number of eligible applications. The Operational Review predicted that in the coming years, as application numbers continue to increase, grant amounts would continue to decline. The effect of this, is that Australian exporters would have smaller grants to effectively develop new markets and support expanding and diversifying Australia’s trading relationships. Adjustments to the program settings and eligibility

requirements were recommended. The EMDG Operational Review, including a summary of the consultations, is published on the Austrade website.

Strategic refocus of EMDG

Following the operational review, Austrade commenced a strategic refocus of EMDG. The refocus will maximise the benefits to businesses and Government of EMDG grants, support Australia's trade diversification and ensure the sustainable management of the program. That means EMDG will have a focus on supporting Australian exporters to develop new markets in line with trade diversification priorities and opportunities, deliver impactful grants to those businesses most able to effectively use the funds, and ensure sustainability of the program.

Austrade released an EMDG refocus consultation paper and undertook extensive consultation with over 500 stakeholders (see consultation section below), as well as data analysis and research into comparable domestic and international programs.

Research conducted by Austrade's Office of the Chief Economist has informed the amendments to EMDG. The analysis showed that businesses that received an EMDG grant outperformed exporters which did not receive a grant. The program delivered benefits for its participants in terms of their turnover growth, and their likelihood of continuing to export. However, only 29 per cent of businesses with annual turnover less than \$250,000 had export success. This contrasts with export success of 65 to 85 per cent for the larger turnover groups. This analysis supports a program design that encourages exporters to move up tiers of EMDG grants as they grow in size, and explore new market opportunities.

Amendments

Significant aspects of the Amendment Rules 2024 are outlined below. The EMDG Act expressly contemplates the operational matters addressed by the Amendment Rules 2024 being provided for in the EMDG Rules, rather than in the Act itself. For example, s 16(1)(b) of the Act contemplates the EMDG Rules prescribing eligibility conditions. The Explanatory Memorandum for the Export Market Development Grants Legislation Amendment Act 2020, which established the current framework, relevantly explains Parliament's rationale for this approach (emphasis added):

The 2020 independent *Review of financial assistance to SME exporters* (the Review) examined how the Australian Government can best deliver financial assistance to SME exporters. The Review found the policy intent of the EMDG Act remains relevant and recommends retaining the EMDG framework, while better targeting the grant and simplifying and streamlining its administration. **This will be achieved by amending the EMDG Act to retain policy principles in the Act and moving the program operational rules into subordinate legislation, with administration managed through guidelines.**

The EMDG program will now be structured as a more traditional entitlement-based grants program.

Part 1—Eligibility conditions

The Amendment Rules 2024 amend eligibility requirements to provide support for Australian exporters to develop new markets in line with trade diversification priorities, deliver impactful grants to those businesses most able to effectively use the funds, and ensure sustainability of the program.

The new eligibility requirements align with other comparable export grant and finance programs domestically and internationally, including the long-standing eligibility requirements of Export Finance Australia.

Amendments will facilitate the allocation of grants to eligible applicants until funding is exhausted, in line with the Commonwealth Grants Rules Guidelines and other comparable Commonwealth grant programs. For example, the Department of Climate Change, Energy, the Environment and Water's Energy Efficiency Grants for Small and Medium Enterprises program, and the Department of Agriculture, Fisheries and Forestry's Support Plantation Establishment Program. The Amendment Rules 2024 provide certainty for applicants, and the government in managing the program within budget, with grant amounts known by applicants ahead of the round to assist with export planning.

Support for trade priorities

The Amendment Rules 2024 will allow for the program or parts of the program to provide grants to support marketing and promotional activities targeting particular markets as identified by the Austrade CEO. If required, this will enable EMDG to support trade priorities. This may also help to incentivise diversification, support greater market development outside of traditional and well-established markets and increase economic resilience.

Eligibility conditions for applicants that are not representative bodies

Amending the eligibility for the program will help to ensure that the funding is targeted to SMEs that are ready to export or to expand their export promotion activity, as intended by the Act.

The eligibility thresholds introduced into the Amendment Rules 2024 were informed by data analysis and research into comparable domestic and international export grants programs to identify criteria used to establish business viability and program eligibility. These programs had common export business success characteristics, such

as at least two years in business and minimum annual turnover requirements. These findings were further validated by Austrade's Chief Economist data analysis.

The new criteria will increase the likelihood of export success for businesses and deliver better value for money in terms of return on investment and benefits to the Australian economy. It will lead to more meaningful grant amounts for those businesses most likely to succeed.

The Amendment Rules 2024 include an enhanced export readiness test for Tier 1 (ready to export). Tier 1 applicants will need to demonstrate that they have successfully completed export training activities and/or a test recognised and approved by the CEO of Austrade to ensure they are ready and best able to make good use of the grant funds.

The Amendment Rules 2024 specify how many years a grantee can access a grant for each Tier. While the overall entitlement for a grantee remains at eight years, the Amendment Rules 2024 change the method of calculating eligible grant years. Grant years will be calculated based on entering into a grant agreement, rather than on grants payable. This is to incentivise use of EMDG by businesses which are confident they can use the grant and to reduce the risk of grant underspends. The underspend rate across the three rounds of the program, since it was reformed, is approximately 18 per cent. Underspends are higher among grantees with lower turnovers, with approximately 49 per cent of grant underspends occurring in the cohort of grantees with turnover of less than \$250,000. Reducing the rate of underspend will assist in improving the sustainability of the program, while also improving certainty for future grant applicants.

Conditions for applicants that are representative bodies

Representative bodies remain an important part of the program, extending the value of a grant beyond a single entity to benefit a number of businesses.

Representative bodies will be supported for new marketing and promotional activities. The requirement that activities supported by EMDG must be new, aims to minimise the use of the grant for business-as-usual expenses of representative bodies.

Representative bodies will be required to have unique, high-quality plans for proposed new marketing and promotional activities that support both members becoming export ready or members who are exporting eligible products.

If representative bodies are seeking to undertake training activities to support members, they will need to provide a training plan that includes information showing how they will deliver the training and benefits to members.

These changes will not prevent representative bodies from hosting or attending annual events, as long as there is an element of new activities or new materials provided that

demonstrate consideration of Government trade priorities.

Fitness for grants

Provisions related to fitness for a grant have been brought together in the Amendment Rules 2024. This includes existing requirements that applicants and grantees do not have any disqualifying convictions and if the person is not a representative body, they are not under insolvency administration.

New requirements have been added. A person receiving a grant must be compliant with Australian taxation obligations and must conduct their business in a professional and ethical manner. This will increase probity and accountability, ensuring government funding goes to businesses which are meeting Australian Taxation Office requirements.

There will be a new role for the CEO of Austrade in assessing the fitness of each applicant by reference to whether the CEO reasonably believes that (a) the applicant is not conducting their business in a professional or ethical manner, or (b) dealing with the applicant might have a detrimental impact on Australia's trade reputation. These are questions of judgement that it is necessary for the CEO to evaluate on a case-by-case basis, having regard to all the circumstances. A decision by the Austrade CEO of this kind must be made on an objectively reasonable basis.

A decision by the CEO of Austrade that an applicant is unfit for either or both of those reasons will be subject to both merits review and judicial review. The availability of merits review will be provided for in the EMDG Rules made for the purposes of paragraph 97(d) of the EMDG Act, which provides that decisions prescribed in the EMDG Rules for the purposes of that paragraph are reviewable decisions that are subject to both internal review and independent merits review in the Administrative Appeals Tribunal. In this way, paragraph 97 of the EMDG Act expressly provides for the availability of merits review to be determined in the EMDG Rules.

CEO decisions

Additional aspects of the EMDG Rules will now depend on decisions made by the Austrade CEO from time to time. It is appropriate that the CEO has the power to determine these subsidiary aspects of how each grant round is run. This follows from section 7 of the EMDG Act, which provides as follows:

The CEO of Austrade may, from time to time, invite persons to apply for grants of money under this Act for the purposes of meeting eligible expenses in relation to eligible products.

The exercise of the power conferred by section 7 is not subject to merits review or parliamentary scrutiny. This indicates that Parliament considered it to be appropriate that the Austrade CEO should have considerable power to make decisions in respect of the practical management of different rounds of the grant program.

Given that the EMDG Act directly confers powers on the Austrade CEO, it is appropriate that the EMDG Rules should also provide for the CEO to have the power to determine matters that are subsidiary to the more significant decision of whether or not to issue an invitation in the first place. Every aspect of the EMDG Rules that will now depend on decisions made by the Austrade CEO is a subsidiary matter of this kind, as outlined in relation to each clause below.

From a practical perspective, it is also necessary that this power is conferred on the Austrade CEO to ensure that the program can continue to be effectively managed as circumstances change without the need for repeated amendments to the relevant aspects of the EMDG Rules.

Consistently with the broad power conferred by section 7, section 106(2) of the EMDG Act expressly permits the EMDG Rules to make provision for matters by reference to a decision of the CEO of Austrade in this way. Moreover, the CEO is an appropriate repository for this power. They are a statutory officeholder appointed by the Minister, whose remuneration is determined by the Remuneration Tribunal: see ss 51 and 54 of the *Australian Trade and Investment Commission Act 1985*. Their exercise of powers is constrained by the need to perform their statutory functions in accordance with certain requirements set out in s 9 of the *Australian Trade and Investment Commission Act 1985*. For example, the CEO must exercise their functions having regard to the desirability of improving and extending the range of financial support available to persons involved in trade: see s 9(2)(c)(i).

Where the CEO determines an aspect of the EMDG Rules, that decision will be subject to judicial review: even if the decision is legislative in nature (although in that case the grounds for review are more limited). Any decision by the CEO made under the EMDG Rules must be consistent with the subject matter, scope and purpose of the EMDG Act. In particular, decisions by the Austrade CEO determining aspects of the eligibility conditions will need to be consistent with the object of the EMDG Act as articulated in section 3. Such decisions would also be reviewable on other administrative law grounds.

Decisions by the CEO to determine aspects of the eligibility conditions from time to time will not be subject to merits review. That is because they are not suitable for merits review, as they set eligibility conditions for all applicants. The decisions are based on matters uniquely within the CEO's expertise.

Part 2—Eligible expenses relating to representative bodies

Amendments have been made in relation to eligible expenses for representative bodies. Changes to Section 37, clarify that training activities must now be approved at the time of application. This aims to ensure that representative bodies are utilising the funding to support export marketing training activities in line with the intention of the Act.

Provision has also been made to exclude expenses of representative bodies if the expense is also incurred by a member of that body.

Part 3—Grant agreements

The sections related to Grant Agreements have been simplified. For the purpose of paragraph 9(2)(b) of the Act, grant agreements will be offered to eligible applicants for up to 2 years. The ability to offer multi-year grant agreements will be retained.

Part 4—Other amendments

Section 17(3) of the EMDG Act requires the prescribed conditions for a product must include conditions that have the effect of requiring the product to be of substantially Australian origin. To achieve this, Austrade needs to ensure that there is rigour on the assessment of eligibility of goods made outside of Australia to ensure that EMDG objectives are met. The current Rules allow eligibility for businesses whose products are not of substantially Australian origin, or of significant net benefit to Australia. Amendments will address this by specifying that businesses that make goods outside of Australia meet all specified conditions.

Section 28 relates to expenses related to maintaining a representative in a foreign country. It has been amended to omit “in a financial year” as it leads to unintended consequences when the representative is in a foreign country for more than six months straddling consecutive financial years.

Part 5—Application of amendments

Amendments are made to reflect how the Amendment Rules 2024 will be applied.

Regulation Impact Statement

The Office of Impact Analysis (OIA) advised that a Regulation Impact Statement is not required for the amendments to the Rules, as the changes are unlikely to have a more than minor impact (Reference Number: *OIA23-05779*).

Consultations

Austrade undertook extensive consultation of the EMDG program between 2022 and 2024 which has informed the Amendment Rules 2024.

Operational Review consultations

To inform the findings of the Operational Review, Austrade consulted with businesses, exporters, industry bodies, grant agents, and across government over four weeks during August and September 2022. The consultations explored EMDG policy settings, systems, and processes to improve delivery of the program. Austrade undertook 53

external interviews (through an independent facilitator), further internal (within Austrade) interviews and a survey of stakeholders with 452 responses.

On 16 February 2023, Austrade released the Operational Review report, and the Minister for Trade and Tourism announced Austrade will undertake further stakeholder consultation to strategically refocus EMDG, through improvements which would balance interest in the program and support Australian export businesses to grow and expand.

Strategic refocus of EMDG consultations

The EMDG Refocus consultation ran for six weeks during July and August 2023. Feedback was received via workshops, a survey, submissions, and meetings with key peaks and government stakeholders, including 52 individuals and organisations who attended workshops; 437 survey responses; and 49 written submissions. Feedback received during these consultations is published on the Austrade website.

Stakeholders agreed that EMDG needs a return on investment. Overall, 84 per cent of survey respondents agreed that one or more eligibility criteria would be useful. Survey respondents were most in favour of the introduction of thresholds for minimum spend, minimum years in businesses, and export readiness eligibility criteria.

Peak groups were generally supportive of some changes to the eligibility requirements for applicants to better reflect characteristics that are typical of successful exporting businesses.

Austrade also consulted relevant Government agencies, including the Australian Government Solicitor; Attorney General's Department; Climate Change, Energy, the Environment and Water; the Department of Foreign Affairs and Trade; Industry; Export Finance Australia; Finance; National Indigenous Australians Agency; Prime Minister and Cabinet; and Treasury.

Consultation on the Amendment Rules 2024

In the preparation of the Amendment Rules 2024 Austrade consulted across government with the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, Office of International Law, Attorney General's Department, Department of Finance, and the Australian Taxation Office. Austrade also invited feedback from 23 key representative and industry bodies on a limited circulation draft of the draft *Export Market Development Grants Amendment Rules 2024*.

Note that following advice from the Information Law Unit of the Attorney General's Department Austrade undertook an initial Privacy Information Assessment which indicated there is no change in how Austrade handle information as a result of the proposed changes.

Details of the *Export Market Development Grants Rules 2024*

Section 1 – Name

Section 1 provides that the name of the instrument is the *Export Market Development Grants Amendment Rules 2024*.

Section 2 – Commencement

The table in this section sets out when the provisions of the instrument commence. The instrument commences on the day after registration on the Federal Register of Legislation.

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 – Schedules

This section provides that each instrument specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Part 1—Eligibility conditions

Export Market Development Grant Rules 2021

Item 1 – Section 4

Item 1 adds:

An **ABN** has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999*.

A **category of grant agreement** means a grant agreement of a kind referred to in a subsection of section 49.

Item 2 – Section 4

Item 2 adds:

A **disqualifying conviction** of a person has the meaning in subsection 13(4).

Item 3 – Section 4 (definition of disqualifying conviction of a grantee)

Item 3 repeals the definition of disqualifying conviction of a grantee.

Item 4 – Section 4 (definition of outstanding)

Item 4 amends the definition of outstanding by omitting 15(3) and substituting 13(3).

Item 5 – Section 4 (definition of under insolvency administration)

Item 5 amends the definition of under insolvency administration by omitting 16(3) and substituting 13(5).

Item 6 – Paragraph 5(b)

Section 5 of the Amendment Rules 2024 provides the definition of ready to export under paragraph 16(2)(a) of the Act.

Item 6 makes amendments to the requirements that a person has to demonstrate they are export ready. Subsection 5(b) will be repealed, and the definition amended to include that the person has successfully completed either or both of the following:

- export training activities that are recognised by the CEO of Austrade as developing skills in marketing eligible products in a foreign country
- a test that is approved by the CEO of Austrade for assessing export capability and knowledge.

The definition of export readiness previously allowed an applicant to submit a declaration that they believe they are ready to export. This self-declaration requirement is replaced with more substantive requirements to demonstrate that a business has developed the export knowledge and skills to recognise the full benefits of receiving the grant.

The new definition will allow the CEO of Austrade to recognise export training activities, or approve tests of export capability and knowledge, from time to time. This is necessary to ensure that the training and tests can be adapted where required without the need to further amend the Rules. Guidance will be provided in EMDG program materials to ensure that applicants know what requirements they will need to meet ahead of a particular round.

Item 7 – Part 1A—Applications for grants

Item 7 includes a new section outlining requirements for applications (Section 6A) at the end of Part 1.

Section 6A relates to managing the receipt of grant applications. It enables opening a round for applications and managing the numbers by closing the round when funding is fully allocated, with applications assessed in the order they are received.

This approach conforms with other Commonwealth grant programs, as per the Commonwealth Grants Rules Guidelines. This method of program management will ensure impactful grant amounts and clarity on what support is available for SMEs and representative bodies.

Maximum grant amounts will be known ahead of each round so businesses will know how much they are applying for and what they may receive (based on their marketing expenditure) if they are successful. Applications will be assessed in order of receipt with grant agreements issued after assessment is completed for each applicant, rather than after the total number of applicants have been assessed, as has been the case. This approach gives earlier advice and certainty to individual grant recipients and enables them to plan and commence export work quickly.

Section 6A allows this approach to be implemented flexibly by conferring power on the Austrade CEO to set a time before which applications must be received, including by reference to an event or circumstance in relation to the making of the grants or the funding available to make the grants. This is necessary to ensure that in managing different rounds the grant program the Austrade CEO can impose different time limits that respond to changing

circumstances, or impose no time limit if that is more appropriate at a particular time, without the need to amend the Rules. The CEO could do this in any event by exercising their power under section 7 of the EMDG Act, but it is more transparent that the EMDG Rules refer to the CEO's power to impose time limits.

Clear guidance will be provided in EMDG program materials to ensure that applicants know what requirements they will need to meet ahead of a particular round.

Item 8 – Part 2 (heading)

Item 8 amends the heading for Part 2 from **Eligible kinds of persons** to **Eligibility for grant**. The revised heading better reflects the purpose of the Part of the Rules.

Part 2 will include 2 Divisions: Division 1 – Eligible kinds of persons and Division 2 – Eligibility conditions.

Item 9 – Sections 10 to 16

Item 9 repeals sections 10 to 16 and substitutes them with Sections outlining:

- Eligibility conditions for applicants that are not representative bodies
- Eligibility conditions for applicants that are representative bodies
- Eligibility conditions for grantees
- Fitness for grant

This brings like-requirements together to help to improve navigability of the instrument.

Section 10 - Eligibility conditions for applicants that are not 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. Section 10 of the Amendment Rules 2024 provides conditions that must be satisfied for a person to be eligible at the time they apply for a grant.

Section 10 brings all the eligibility conditions for SME applicants together for ease of navigability of the Rules. Some of the conditions remain unchanged. There are also new conditions that help to ensure that the grants will be provided to SMEs that are export ready and well positioned to export in line with the intention of the Act.

A number of the individual eligibility conditions may be adjusted by the Austrade CEO from time to time. As discussed above, given that s7 of the EMDG Act confers on the CEO a broad power in respect of the issuing of invitations, it is appropriate that the CEO should also have the power to make decisions in relation to the specified individual eligibility conditions.

That is because setting eligibility conditions for a particular round of this grant program is subsidiary to the more significant decision in respect of whether an invitation to apply for a particular round is issued at all. More specifically:

- The CEO's power to determine an eligible category of grant funding (para (a)) and to determine a priority market (para (d)), simply allows the CEO, after exercising their power to open an invitation for a round, to ensure that funding available for that round is allocated consistently with trade priorities and other relevant policy considerations.
- The CEO's power to determine the minimum spend threshold (para (c)), minimum number of years in trade (para (e)), and minimum turnover (para (f)), simply allows the

CEO, after exercising their power to open an invitation for a round, to ensure that funding available for that round is directed where it will be most effective.

Indeed, each of the powers that section 10 would confer on the Austrade CEO is expressed as a power to be exercised by the CEO *at the time* the relevant applicant applies for a grant, in response to a particular invitation that the CEO has chosen to issue under section 7. This reinforces that these powers are subsidiary to the broader power that section 7 of the EMDG Act confers on the CEO.

From a practical perspective, conferring each of these powers on the Austrade CEO is necessary to ensure that these aspects of the eligibility conditions can be adjusted from time to time without the need to amend the EMDG Rules repeatedly when circumstances change. Those circumstances range from trade priorities to changing information in relation to the business characteristics that align with export goals and success factors for one or more of the grant categories.

Where eligibility conditions may be determined by the Austrade CEO from time to time, clear guidance will be provided in EMDG program materials to ensure that applicants know what requirements they will need to meet ahead of a particular round.

The eligibility conditions that section 10 would impose are as follows.

- Subsection 10(2)(a) provides the ability, if required, for Austrade's CEO to make a decision about which grant categories will be eligible for grants in a specific round.
- The condition set out in subsection 10(2)(b) is that the person must have a high-quality plan to market eligible products that is unique to and tailored to the business.
- The new condition in subsection 10(2)(c) is that the person has the capacity to spend \$20,000 on marketing or promoting those eligible products in the foreign country. The previous EMDG reimbursement scheme had a minimum spend and the 2021 Fisher Review recommended that a minimum spend continue. The CEO of Austrade may decide a different spend amount.
- The new condition in subsection 10(2)(d) is that if the CEO of Austrade decides that grants under that category of grant agreement are only to be payable in relation to particular markets then the person intends to market or promote eligible products in one of those markets. The purpose of subsection 10(2)(d) is to allow EMDG to be used to incentivise exporters to target priority markets and take on broader opportunities for market diversification in line with trade diversification priorities. For example, *Invested: Australia's Southeast Asia Economic Strategy to 2040* highlights the opportunities for Australian exporters in the Southeast Asian region. Recommendation 22 says the Australian Government should 'strengthen efforts to support SMEs to trade with Southeast Asia, including through greater emphasis on the region in the Export Market Development Grants program'.
- The new condition in subsection 10(2)(e) introduces a requirement that the person is conducting a business of providing those eligible products under an ABN for at least 2 years. There is a direct correlation between the number of years in business and the probability of export success. EMDG is not intended to support applicants to establish a business, but to establish foreign export markets. This condition will ensure that applicants can maximise the grant and will address criticism that the program provides

funding to businesses that are not export ready. The CEO of Austrade may decide a higher number of years for a category of grant agreement.

- The condition set out in subsection 10(2)(f) is that the person's turnover must be less than \$20,000,000. The new condition set out in subsection 10(2)(f) introduces a minimum business annual financial turnover requirement of more than \$100,000. This eligibility condition brings EMDG into alignment with other domestic and international grant programs, including Export Finance Australia loans. The CEO of Austrade may decide a higher amount minimum turnover.
- It is a condition (subsection 10(2)(g)) that a person is fit to receive a grant at the time of application for a grant and at all times while a person is a grantee (see section 13).
- The condition set out in subsection 10(2)(h) is that the person cannot enter into a grant agreement if doing so would lead to the person receiving EMDG grants or entering into grant agreements for more than 8 financial years. It also provides specific yearly limits for tiers 1, 2 and 3 grant agreements. This is in line with the Fisher Review and the intention that the program supports SMEs across different parts of their export journey.

The amendments introduce a change to the method of calculating eligible grant years. Grant years will be calculated based on a business entering into a grant agreement, rather than on grants payable.

In reference to subparagraph 10(2)(h), subsection 10(3) provides clarification as to how the category of grant agreements will be calculated.

A category of agreement includes any equivalent category of agreement entered under the Act as in force at any time or the *Export Market Development Grants Act 1974* as in force at any time on or after 1 July 1990.

A grant includes a grant within the meaning of the Act as in force at any time or the *Export Market Development Grants Act 1974* as in force at any time on or after 1 July 1990.

Subsection 10(3)(c) 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.

When determining whether a person has received more than 8 financial years of a grant or grant agreements, the CEO of Austrade is able to include the grants or grant agreements 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:

- the nature and assets of the businesses conducted by the grantee and the other person (paragraph 10(3)(c)(i)), and
- the individuals controlling or constituting the grantee and the other person (paragraph 10(3)(c)(ii)), and
- any other matters the CEO considers relevant (paragraph 10(3)(c)(iii)).

The decision made by the CEO under paragraph 10(3)(c) is clearly not legislation-like in nature and is reviewable by the Administrative Appeals Tribunal, as provided for under section 55 of the EMDG Rules (which the Amendment Rules 2024 will amend so that decisions under paragraph 10(3)(c) are prescribed as decisions that are subject to independent merits review for the purpose of paragraph 97(d) of the EMDG Act). Paragraph 97 of the EMDG Act expressly provides for the availability of merits review to be determined in the EMDG Rules in this way.

Section 11 – Eligibility conditions for applicants that are representative bodies

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

Section 11 brings all the eligibility conditions for representative body applicants together for ease of navigability. Some of the conditions remain unchanged.

- Subsection 11(2)(a) provides the ability, if required, for Austrade’s CEO to make a decision about which grant categories will open for a specific round, including for representative bodies. The CEO as decision-maker may choose to run one or more category of grant in any round, in line with Government trade priorities or the EMDG appropriation.
- The condition set out in subsection 11(2)(b) is that the representative body has an ABN.
- It is a condition (subsection 11(2)(c)) that a representative body is fit to receive a grant at the time of application for a grant and at all times while a grantee (see section 13).
- The condition set out in subsection 11(2)(d) is that if the application is for a grant to meet eligible expenses in respect of proposed promotional activities, that the representative body has a unique, high-quality plan for the proposed activities, and the activities are new. The proposed promotional activities to be undertaken by a representative body are covered if they support members to become ready to export or support members that have a designated connection to eligible products to export those products in a foreign country or, if the CEO of Austrade decides that grants to representative bodies are only payable in relation to particular markets, in those markets (subsection 11(3)). As with subsection 10(2)(d), conferring this power on the Austrade CEO in relation to this subsidiary matter is appropriate in view of the CEO’s considerable power in respect of the issuing of invitations under section 7 of the EMDG Act, and is in practice necessary to ensure that the program can target different markets from time to time to reflect changes in trade priorities or the EMDG appropriation, without the need to amend the EMDG Rules.
- The condition set out in subsection 11(2)(e) is that if the application is for a grant to meet eligible expenses in respect of proposed export training activities, the representative body has a unique, high-quality plan for the training activities. The representative body must have the skills and experience necessary to deliver, or arrange the delivery of, the proposed export training activities. The proposed export training activities to be delivered are covered if they support members to become ready to export or support members that have a designated connection to eligible products to export those products in a foreign country or, if the CEO of Austrade decides that grants to representative bodies are only payable in relation to particular markets, in those markets (subsection 11(4)). As with subsection 10(2)(d), conferring

power on the Austrade CEO in relation to this subsidiary matter is appropriate in view of the CEO's considerable power in respect of the issuing of invitations under section 7 of the EMDG Act, and is in practice necessary to ensure that the program can target different markets from time to time to reflect changes in trade priorities or the EMDG appropriation, without the need to amend the EMDG Rules.

Section 12 – Eligibility conditions for grantees

This section prescribes the conditions which must be satisfied by a person, including a representative body, at all times which the person is a grantee. Section 12 brings all the eligibility conditions for grantees together for ease of navigability. Some of the conditions remain unchanged.

- The condition set out in subsection 12(2)(a) is that the person has an ABN.
- The condition set out in subsection 12(2)(b) is that the person is fit to receive a grant (see section 13).
- The new condition set out in subsection 12(2)(c) is that if the CEO of Austrade has specified particular markets, grants will only be paid in respect of marketing and promotional activities for those markets, if applicable. As with subsection s 10(2)(d), conferring this power on the Austrade CEO in relation to this subsidiary matter is appropriate in view of the considerable power that section 7 of the EMDG Act confers on the Austrade CEO, and is necessary to ensure that the program can target different markets from time to time to reflect changes in trade priorities or the EMDG appropriation, without the need to amend the EMDG Rules.
- The condition set out in subsection 12(2)(d) is that the representative body has the skills and experience necessary to deliver, or arrange for the delivery, of approved export training.

Section 13 – Fitness for grant

Section 13 determines conditions at application for a grant and at all times while a person is a grantee that the person be fit to receive a grant. It includes new and existing requirements. In respect of fitness to receive a grant, paragraphs 10(2)(g), 11(2)(b) and 12(2)(b) refer.

Section 13(1)(a) prescribes a new condition that applicants must be tax compliant at the time of application; and for the duration of being a grant recipient. The rationale is to increase the probity and accountability of government funding to EMDG grantees and ameliorate the need for debt recovery.

Section 13 (2) allows the CEO of Austrade to decide that a person is unfit to receive a grant if the CEO reasonably believes that:

- The person is not conducting their business in a professional or ethical manner, or
- Austrade dealing with the person might have a detrimental impact on Australia's trade reputation.

The power provided by this provision is necessary to assist the CEO in managing Austrade's reputational risk by ensuring a level of control in ruling out persons due to reputation concerns. This rule provides the ability to reject applications or not enter into grant agreements if the applicant or business proves unethical or poses a reputational risk. These are questions of judgement that it is necessary for the CEO to evaluate on a case-by-case basis, having regard to all the circumstances.

The CEO's exercise of the power in s 13(2) must be based on a *reasonable* belief, which constrains the scope of the CEO's power. The Amendment Rules 2024 will ensure that decisions made under s 13(2) are reviewable decisions under paragraph 97(d) of the Act: see item 14 below. This will mean that independent merits review in the Administrative Appeals Tribunal will be available. Decisions made under s 13(2) will also be subject to judicial review.

Under subsection 13(1)(b) of the Amendment Rules 2024 an applicant and 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:

- if the convicted person is sentenced to a term of imprisonment – five years after the earlier of the end of the term of imprisonment and the person's release from (paragraph 13(3)(a)), or
- otherwise - five years after the day the conviction was recorded (paragraph 13(3)(b)).

Nothing in subsection 13(3) affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

Disqualifying convictions are convictions of the person for an offence described at subsection 13(4) of the Amendment Rules 2024. 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)
 - o the offence in section 6 of the *Crimes Act 1914*, which relates to a person being an accessory after the fact
 - o 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
 - o 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).

If the person is under insolvency administration, they are not an eligible person (subsection 13(1)(c)). 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 13(5). A grantee is under insolvency administration when any of the following apply:

- if the grantee is an individual and
 - o they are an undischarged bankrupt (paragraph 13(5)(a)(i))
 - o a composition, deed of arrangement or deed of assignment is in operation with the grantee’s creditors under a law relating to bankruptcy (paragraph 13(5)(a)(ii))
 - o a final judgment for a debt has been made against the grantee (paragraph 13(5)(a)(iii))
- if the grantee is an incorporated body as described paragraph 15(b) or (c) of the Act and any of the following is appointed under the *Corporations Act 2001*
 - o a receiver of property of the grantee (paragraph 13(5)(b)(i))
 - o a receiver and manager of property of the grantee (paragraph 13(5)(b)(i))
 - o an administrator of the grantee (paragraph 13(5)(b)(ii))
 - o an administrator of a deed of company arrangement executed by the grantee (paragraph 13(5)(b)(ii))
 - o a liquidator of the grantee (paragraph 13(5)(b)(iii))
 - o any other controller of the grantee (paragraph 13(5)(b)(iv))
- if the grantee is an incorporated body referred to in paragraph 15(b) or (c) of the Act and
 - o 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
 - o a partner in the partnership is under insolvency administration as described in paragraph 13(5)(a), 13(5)(b) or 13(5)(c)
- if the grantee is a trust and
 - o a trustee of the trust is under insolvency administration within the meaning of paragraph 13(5)(a), 13(5)(b) or 13(5)(c).

Item 10 – After paragraph 17(2)(b)

Item 10 includes a new subsection at Section 17(2)(ba) which provides further clarification for representative bodies that the number of members in the represented group is a substantial proportion of the members of that industry, that part of an industry or those industries.

Item 11 – Subparagraph 17(2)(c)(i)

Item 11 amends subparagraph 17(2)(c)(i) as follows: Before “exporting”, insert “are ready to export eligible products, or”.

Item 12 – Paragraph 17(2)(d)

Item 12 repeals the paragraph.

Item 13 - Subsection 17(3)

Item 13 repeals the subsection.

Item 14 - Subsection 55(1)

Item 14 amends subsection 55(1) by omitting “paragraph 13(5)(b) or 48(5)(b)”, and substituting “paragraph 10(3)(c)”.

Item 15 - After subsection 55(1)

Item 14 prescribes¹⁵ allows, for the purposes of paragraph 97(d) of the Act, a decision of the CEO of Austrade under subsection 13(2) that a person is unfit to receive a grant.

This amendment makes the CEO’s decision on fitness to receive a grant under 13(2) a reviewable decision under paragraph 97(d) of the Act, in respect of which both internal review and independent merits review in the Administrative Appeals Tribunal are available.

Part 2 – Eligible expenses relating to representative bodies

Export Market Development Grant Rules 2021

Item 16 – Section 4

Item 16 adds:

Approved export training by a person that is representative body means export training activities delivered by, or on behalf of, the representative body that are activities in respect of which the representative body is a grantee.

Item 17 – Section 37 (heading)

Item 17 amends Section 37 to omit “training activities”, and substitute “export training”.

Item 18 – Paragraph 37(1)(b)

Item 18 repeals the paragraph and substitutes: (b) the expense is in respect of approved export training by the person.

This reflects that export training activities will be reviewed before being approved for grant funding.

Item 19 – Paragraph 37(2)(b)

Item 19 omits “training”, and substitutes “export training”.

Item 20 – Paragraph 37(3)

Item 20 omits “particular training”, and substitutes “particular approved export training by a representative body”.

Item 21 – Subsection 37(3)

Item 21 omits “a representative body”, and substitutes “the representative body”.

Item 22 – At the end of Part 4

Item 22 adds an excluded expense for representative bodies at the end of Part 4.

The excluded expense (subsection 47A) is an expense of a person that is a representative body if the expense is incurred for a member of the representative body that is a grantee at a time.

Part 3 – Grant Agreements

Export Market Development Grant Rules 2021

Item 23 – Sections 48 to 52

Item 23 repeals the sections and substitutes them with:

- Requirements for grant agreements

Section 48(1) requires, for the purposes of paragraph 9(2)(b) of the Act, a grant agreement must not be for a period longer than 2 years. This is for all categories of grant agreements.

Information on maximum grant amounts payable per financial year and to a grantee over multiple grants has been omitted. Maximum grant amounts will be outlined ahead of each round.

- Limit of total grant amounts

Under subsection 48(2) 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 10(h) 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(2) does not apply to representative bodies.

- Categories of grant agreements.

Section 49 relates to the categories of grant agreements. There is no change to the substance of the previous Rules sections s49, s50, s51 and s52, which explain the eligibility Tiers, however these sections have now all been integrated into s49. The heading for this section has been changed to “Categories” so that it is inclusive of the Representative Body category (which is not a tier).

This consolidation aims to improve readability and navigability of the instrument and allows for more specific maximum grant amounts for each round.

Item 24 – Subsections 53(2) and (3)

Item 24 repeals the subsections, and substitutes:

- (2) Subject to subsection (3), the total amount of the instalments payable under the agreement in respect of a financial year is half of the total amount of the grantee’s agreed eligible expenses in relation to eligible products for the financial year.
- (3) The amount of an instalment is reduced as needed to give effect to section 54 (failure to spend agreed amount).

Part 4 – Other amendments

Export Market Development Grant Rules 2021

Item 25 – Paragraph 19(1)(d)

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

Item 25 amends paragraph 19(1)(d) to omit “at least 3”, and substitute “all”. Applicants that are exporting goods, must now meet all four of the requirements in that section, rather than three. This is amended to better ensure that products are of substantially Australian origin.

Item 26 – Subparagraph 19(1)(d)(iv)

Item 26 omits ‘significant’ from subparagraph 19(1)(d)(iv). This relates to the change at Item 24 and ensures that by requiring relevant applicants to meet all four criteria, the substantive burden is less.

Item 27 – Section 28

Item 27 omits “in a financial year” from Section 28, which relates to expenses related to maintaining a representative in a foreign country. It has been amended to omit “in a financial year” as it leads to unintended consequences when the representative is in a foreign country for more than six months straddling consecutive financial years.

Part 5—Application of amendments*Export Market Development Grant Rules 2021***Item 28 – Sections 56 and 57**

Item 28 repeals sections 56 and 57 and substitutes this with applications of amendments made by the *Export Market Development Grants Amendment Rules 2024*.

This provides that the amendments made will apply in relation to applications made in response to an invitation issued on or after the commencement of that instrument.

A reference in the definition of disqualifying conviction in subsection 13(4) to a conviction of a person includes a reference to a conviction of the person before or after the commencement of that instrument.

A reference in paragraph 13(4)(b) to an offence that relates to a grant (including an application for a grant) includes a reference to an offence that relates to a grant (including an application for a grant) under the Act as in force at any time before or after the commencement of that instrument.

Statement of Compatibility with Human Rights

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

Export Market Development Grants Amendment Rules 2024

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 legislative instrument establishes operating principles for Export Market Development Grants processes including eligible persons, eligible products, eligible expenses and the types of grants available. 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.