

1994

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

EXPORT MARKET DEVELOPMENT GRANTS
AMENDMENT BILL (NO. 2) 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Trade,
Senator The Hon Bob McMullan)

EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL (NO. 2) 1994

OUTLINE

1. The purpose of this Bill is to amend the Export Market Development Grants Act 1974 (EMDG) to:

- (a) continue the EMDG Scheme up to and including grant year 1998/99.
- (b) provide eligibility to single service tourism providers at a grant rate of 25 cents in the dollar.
- (c) allow departure taxes and visa costs as eligible expenses under the Scheme.
- (d) limit the provision of free technical information and tenders and quotations to the written form.
- (e) limit the totality of grants paid to company groups to \$250,000 in any one grant year.
- (f) render 'projects' in receipt of financial assistance under other schemes of financial assistance administered by Austrade, ineligible to receive EMDG assistance.
- (g) ensure that any apportionment of the overseas visit allowance includes travel undertaken on behalf of persons who are not claimants under the EMDG Scheme.
- (h) provide that approved joint venture and consortium are subject to the EMDG insolvency and convictions provisions.
- (i) allow expenditure to be apportioned to provide eligibility to that portion of expenditure directly related to promotion in "new markets".
- (j) prevent payment of grants to persons where they refuse to allow a search of criminal records for the purposes of the criminal convictions provisions of the EMDG Act.
- (k) remove from eligibility payments of a capital nature where they relate to the promotion of industrial property rights and know how.
- (l) repeal the restrictive provision relating to the Republic of South Africa.
- (m) provide the legislation with more effective penalty provisions where a person provides false or misleading material or statements in support of a claim for grant.
- (n) provide Austrade with more effective powers to prevent abuse where persons buy, sell, transfer, or modify business undertakings, in a manner which would make them eligible for grants in excess of the general eight grant limit.

EXPLANATION OF REASONS FOR INTRODUCTION

2. The Government's May 1994 White Paper, "Working Nation", proposed a number of initiatives with respect to the development of trade. These initiatives included amendments to the Export Market Development Grants Act 1974 (EMDG) related to improving the focus of the Scheme relevant to the emerging industries of the 1990's, and measures to refine the direction of grants whilst containing costs. This Bill includes five amendments to the EMDG Act in support of White Paper initiatives, and nine 'technical' amendments which clarify some existing limiting provisions, and introduce some new limiting and expansionary provisions. Limiting provisions relating to the Republic of South Africa are repealed.
3. This Bill extends the life of the Scheme for a further four years beyond its current 1994/95 expiry date, to grant year 1998/99. This means that expenditure incurred up to and including the 1998/99 grant year will be eligible for EMDG consideration. Recent evaluations of the Scheme have indicated that the Scheme has a significant positive role in encouraging the development of overseas markets, and is effective in developing an 'export culture' in Australian business. These evaluations also reinforced the policy of ensuring that funds enhance the Australian economy and minimise windfall gains to participants.
4. Providers of a package of three or more prescribed tourism "amenities" have been eligible for EMDG assistance commencing the 1990/91 grant year. The intention at that time was to extend eligibility to the inbound package providers of tourism services who achieve bulk arrivals of overseas visitors. This Bill provides for the Scheme to be extended to include the provision of single tourism "amenities", referred to in this Bill as designated tourism services (DTS).
5. The grant rate for the provision of eligible tourism services (three or more eligible amenities provided for an all inclusive price to a non Australian resident) is 50 cents in the dollar. The provision of DTS will attract grants at the rate of 25 cents in the dollar. Promotion by individual operators is interwoven with generic promotion of Australia as a tourist destination and considerable Government funding is already dedicated to this generic promotion through the Australian Tourism Commission. In addition, a substantial level of promotion is considered to result in 'switching' from other service operators, tourists who are already "captive" to Australia as a destination. In the circumstances it is considered that the higher rate of grant of 50 cents in the dollar is not appropriate.
6. Providers of DTS will not be disadvantaged viz a viz providers of eligible tourism services with respect to the range of eligible "amenities". Eligible "amenities" are prescribed by Regulation. Within the Working Nation initiative, a general review of services eligible under EMDG is being conducted with a view to possible expansion of eligible services.
7. Some 'technical' adjustments have been necessary to allow DTS access to the Scheme. Many DTS providers derive a considerable proportion of their income from an Australian inbound operator. Without amendment to the Act, these particular earnings would be ineligible for any purpose under EMDG, as the Act recognises only

those earnings received directly by way of a contract with a non Australian resident. However, many DTS providers expend considerable funds promoting their amenity directly overseas. The application of the export performance test in later years could, therefore, severely limit the grant payable. To minimise this disadvantage to DTS providers, and at the same time prevent the double counting of earnings, this Bill provides for an apportionment of these particular earnings amongst the inbound operator and the DTS provider.

8. Companies have been able to access EMDG without regard to their collective ability to attract funds. The grant maximum of \$250,000 per year could be paid to any number of individual companies within a group of companies, thereby not limiting the amount of EMDG funding a company group can receive. Groups generally have access to more flexible funding arrangements than individuals, and, therefore, experience less urgency or need for reimbursement of expenditure. A limitation of \$250,000 per company group per grant year is considered appropriate. It is recognised that the provisions associated with this amendment may delay payments to groups, but they are considered more appropriate than alternate possible mechanisms. Delays in payment for grants can be limited if all members of a group coordinate early lodgement. Group companies will remain free to pursue approved joint venture and consortium without these activities being attributed to the group.
9. White Paper initiatives included also the extension of the Scheme to include the costs of departure taxes and visas as a legitimate component of overseas travel, and provisions to close a developing 'loophole' with respect to the interpretation of costs eligible in relation to "free technical information". The evolution of some technically oriented industries, such as those related to information technology, which were not of major consideration in 1974 when the EMDG Scheme was devised, has required the rewording of the Act to prevent these industries taking an unintended advantage of the "free technical information" provision. The nature of a product is a determining factor in the general level and type of promotion required. Where a product is intrinsically technical, it follows that its general ongoing level of promotion will be technical, and, therefore, cannot be said to fit the special case of "free technical information". The free technical information provision covers situations where additional and special effort over and above 'normal' effort is applied. The current situation has evolved to provide a benefit in excess of that received by less technical industries. The provision is being amended to ensure equitable treatment across industries, and not allow technical industries to include Australian based salaries to be reimbursed for general promotional activities including that time taken overseas.
10. A number of 'technical' amendments made by this Bill clarify the intent of existing provisions of the Act. The Bill ensures that approved joint venture and consortium are subject to EMDG insolvency and convictions provisions in the same way as all other claimants under the Scheme. The Bill ensures that expenditure incurred in relation to "new markets" can be separated from other expenditure, and be fully eligible under the Scheme. In addition, it ensures that the costs of travel undertaken on behalf of several individuals may be fully distributed across all beneficiaries to provide a true reading of the grant payable. The Bill removes also an unintended and discriminatory benefit in relation to capital expenditure currently available to persons promoting industrial property rights and know how. Capital expenditure is EMDG eligible in only very

limited situations. It was never intended that general capital costs which may be associated with the promotion of industrial property rights and know how should be eligible under this Scheme.

11. The Australian Trade Commission administers a number of financial assistance schemes all of which are fundamentally directed at the development of overseas markets. Currently, it is possible for an exporter to obtain concurrent benefit under several of the Commission's financial assistance schemes in relation to the same project. This has the potential effect of significantly reducing the exporter's financial commitment, and possibly dedication, to the project, by passing the burden to the taxpayer. This Bill limits an exporter's financial access in respect of a particular project to either EMDG or other Commission financial assistance schemes.
12. Persons convicted of certain prescribed offences have limitations placed on their access to grants under the EMDG Act. Within specified time frames, grants are not payable to "convicted" persons. To fulfil requirements relevant to these provisions, the Commission must be in a position to verify whether or not a claimant or relevant related person has been convicted of a specified offence. This requires the written permission of the claimant or person. Should this be refused, the Commission currently has no power to discontinue investigation of a claim and not pay a grant. This Bill provides this fundamental power.
13. Persons who make false or misleading statements, or produce false or misleading documents to obtain a grant must be discouraged to the fullest possible extent. Provisions currently in place require that the Commission prove that a person had certain knowledge that the statement or document was false or misleading. This severely limits the effectiveness of the provision. This Bill widens the scope of the penalty provision to include situations where a person ought reasonably to have known, having regard to their abilities, experience, qualifications and other attributes.
14. With the exception of approved bodies and approved trading house, there is a general eight grant limit applicable to EMDG claimants. Section 19 of the Act provides the Commission with a discretion to credit a business activity with the EMDG history of its predecessor. It is designed to prevent claimants circumventing the limitations on entitlements under the Scheme, particularly the eight grant limit. Apart from its contribution to cost containment, section 19 is designed to achieve an equitable distribution of funding across a broad base of the exporting community with fair but not unlimited assistance. The operation of the section requires that a discretion be exercised by the Commission. This, and a lack of guidance provided by the section as to when it should be applied, has significantly reduced its effectiveness for decision making. The Commission's experience is that in the majority of cases where the section could apply, it should apply. However, the appeals process has suggested that the section can only apply in the most exceptional cases. This Bill provides for a greater objectivity of application through the use of tighter terminology, altering the section's effect from one of restricting access to one of providing additional access, and stipulating that the Commission must formulate "decision making principles" which must be complied with when making section 19 decisions.

FINANCIAL IMPACT

15. The estimated cost of the amended EMDG Scheme beyond the current expiry year of 1994/95 is \$246 million in 1995/96, \$267 million in 1996/97, \$289 million in 1997/98 and \$ 313 million in 1998/99.
16. The balance of the "Working Nation" initiatives effect estimated savings of \$3.8 million in 1994/95. These comprise additional costs of \$5 million and \$0.2 million with respect to tourism and departure taxes and visa costs respectively, offset by estimated savings of \$4.5 million each in respect of changes to the eligibility of free technical information and tenders and quotations, and group company grants.
17. Overall savings effected by the "technical" amendments total an estimated \$2.9 million in 1994/95, primarily achieved through a tightening of the anti abuse and penalty provisions, \$2 million and \$1 million respectively in the first year. The major additional cost item is the opening of the Republic of South Africa market estimated at \$1 million in 1994/95.

ABBREVIATIONS

18. The following abbreviations are used in this explanatory memorandum:

EMDG Act: Export Market Development Grants Act 1974.

DTS: designated tourism services.

The Commission: Australian Trade Commission.

NOTES ON CLAUSES

Clause 1. Short title

19. This clause provides for the Act to be cited as the Export Market Development Grants Amendment Act (No. 2) 1994.

Clause 2. Commencement

20. This clause provides that the Act commences on the day on which it receives the Royal Assent.

Clause 3. Amendments

21. Specifies that the Export Market Development Grants Act 1974 is amended as set out in the Schedule.

Clause 4. Application

Clause 4(1). 22. Specifies that amendments under Parts 2 to 12 of the Schedule relate to claims in respect of the 1994/95 and subsequent grant (expenditure) years.

Clause 4(2). 23. Provides that first time tourism claimants, and to the extent that they incur eligible expenditure in respect of two or less tourism "amenities", the eligibility for which commences with the passage of this Bill, may not aggregate two years expenditure until the 1995/96 or subsequent grant years. (Refer to comment at paragraph 36, Notes On Clauses).

Clause 4(3). 24. Specifies that amendments under Part 6 of the Schedule relate only to contracts signed between Austrade and other persons after the date of the Royal Assent.

Clause 4(4). 25. Provides that amendments under Part 14 of the Schedule relevant to section 19 of the Act have no effect until the day on which the Commission formulates "decision making principles" as provided for under new section 19A.

SCHEDULE

PART 1 - 4 YEAR EXTENSION OF THE EMDG SCHEME

Amended section 3

26. This Part extends the operation of the EMDG Scheme to the 1998/99 grant year. That is, grants will be paid on expenditure incurred up to and including 1998/99. (Item 1)

PART 2 - TOURISM

Overview

27. The object of this Part is to extend the EMDG Scheme to provide eligibility for the provision of single tourism amenities (tourism services are referred to as "amenities"). The Act currently provides eligibility for the provision only of prescribed amenities where not less than three amenities are provided for an all inclusive price to a non resident of Australia. The current provision was in response to a desire in 1990 to provide eligibility to inbound (package) tourism operators. There being no ready made definition of an inbound operator available, the foregoing provision was devised.

28. This Bill allows the providers of less than three amenities to access the Scheme.

Amendments to the Act

Amended sections 3, 3A, 11C, 11E, 11Z, 11ZA, 11ZE, 15, and 43

29. Where a claimant provides less than three tourism amenities in a 'package', those services are to be termed "designated tourism services". As is currently the case with "eligible tourism services" (three or more amenities), these will be established under Regulations to the Act. DTS providers will not be disadvantaged with respect to the range of amenities available to them viz a viz eligible tourism services. (Items 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 and 22)

Amended section 16

30. The EMDG Act pays grants to a "person" in circumstances where, amongst other considerations, that person is an Australian resident who 'owns' an eligible (amenity), and who expends their own funds promoting that (amenity) overseas. Many tourism providers derive a considerable proportion of their income, not direct from overseas, but from an Australian inbound

operator who includes that amenity in a 'package' of multiple tourism amenities drawn from a number of providers.

31. Although single service providers often expend considerable sums of money promoting their service overseas, where income is derived from an inbound operator, that income is not EMDG eligible income in the hands of the single service provider. This is because the EMDG Act defines the 'owner' of a service to be the 'person' who has a contract to supply with a person resident outside Australia.

32. The EMDG Act provides two grants to an individual claimant without reference to the level of export earnings achieved. However, for the third and subsequent grants, the grant paid is a declining percentage against actual export earnings achieved. As such, any single service provider who receives a significant proportion of income from an inbound operator, may have their ability to benefit under the EMDG Scheme greatly reduced.

33. To overcome this limitation, and at the same time maintain the integrity of the Scheme by eliminating the possibility of 'double counting' export earnings, earnings are to be apportioned between the eligible tourism service provider and the DTS provider. Eighty percent of eligible export earnings received by an eligible tourism service provider will be allowed for the purpose of the grant calculation. Of the amount passed to the DTS provider by the eligible tourism service provider, twenty percent will be allowed to the DTS provider. The full one hundred percent of earnings received direct from overseas will be allowed where that income is received and retained by a DTS provider. These arrangements have been formulated after extensive consultation with industry. The provision allows for the proportions to be varied by Regulation should it be subsequently considered necessary to alter them. **(Item 21)**

Amended section 14B

34. The EMDG Act excludes from the Scheme, with the exception of approved bodies and approved trading houses, all claimants with export earnings in excess of \$25 million in the grant year. Given the focus of the EMDG Scheme on small to medium exporters, and the principle that no industry should have an advantage over another industry with regard to this limit, the full value of all "eligible" income received in respect of DTS or eligible tourism services is to count towards the \$25 million limit. **(Item 17)**

Amended section 16

35. The provision of DTS is to be given access to EMD grants at the rate of 25 cents in the dollar. Promotion by individual operators is interwoven with generic promotion of Australia as a tourist destination and considerable Government funding is already dedicated to this generic promotion through the Australian Tourism Commission. In addition, a substantial level of promotion is considered to result in 'switching' from other service operators, tourists who

are already “captive” to Australia as a destination. In the circumstances it is considered that the higher rate of grant of 50 cents in the dollar is not appropriate. **(Item 20)**

36. First time claimants are eligible to claim expenditure incurred in the year previous to their first year of claim, ie claim two consecutive years of expenditure. In these circumstances grants are calculated on the basis of 50 cents in the dollar for all eligible expenditure in excess of \$30,000. (For claimants not electing to include the previous years expenditure, grants are calculated on the basis of 50 cents in the dollar for all eligible expenditure in excess of \$15,000). This provision is intended to provide start up assistance to claimants who might have difficulty in meeting the minimum expenditure threshold of \$30,000 in their first grant year. Given that the tourism industry has been operating for a long period, and that many of its DTS operators are very well established, this provision is not to be extended to them until grant year 1995/96 to avoid windfall gains. **(Item 20)**

PART 3 - DEPARTURE TAX AND VISA COSTS

Amended sections 11S and 11V

37. Currently under the Act, Austrade is obliged to deduct from the transportation component of travel, the cost of departure taxes and visa costs. This entails a disproportionate allocation of the Commission’s administrative resources. These costs are an unavoidable cost of travel, and where related to overseas promotion, should be eligible for grants consideration. **(Items 23, 24 and 25)**

PART 4 - SAMPLES, TECHNICAL INFORMATION, TENDERS AND QUOTATIONS

Amended section 11D

38. The Act allows that where a person provides “free samples or technical information”, that person may claim “directly attributable” costs such as ‘in house’ labour costs incurred by them. Where promotional activities are those of general solicitation of business, ‘in house’ costs may not be claimed as eligible expenditure. The Act strictly limits the occasions where ‘in house’ costs may be claimed, the only other circumstances being in respect of tenders and quotations and certain expenses related to packaging and labelling of goods.

39. The intention of the “free technical information” provision, as included in the Act from its commencement in 1974, is taken to cover expenses where the person is put to effort additional to that which would normally be undertaken during the course of promoting and selling a product. For example, the provision of an ‘off the shelf’ sales brochure or technical sheet would not fall under the special provisions of “free technical information”.

40. Developments in certain industries since 1974, for example Information Technology, has necessitated a requirement for more involved and technical sales techniques by those particular industries. That considerable technical information is conveyed to potential purchasers in this process does not alter the fact that this activity is essentially and simply part of the normal sales process for the particular product. As such, these activities fall under the general provisions of the Act, and not the special provisions under free technical information.

41. The current situation has evolved to provide a benefit in excess of that received by less technical industries. The provision is being amended to ensure equitable treatment across industries, and not to allow technical industries to include Australian based salaries to be reimbursed for general promotional activities. Limiting the provision of "free technical information" to the written form largely closes this loophole. **(Items 26 and 27)**

42. The effectiveness of the foregoing measure would be reduced were the claimant able to physically 'deliver' the "free technical information". This provision limits delivery (and only delivery) to postage or freight costs. The inclusion of "free samples" within this limitation is necessary to prevent avoidance of Government intention which is possible due to overlap between technical information and samples in certain industries. **(Item 28)**

Amended section 11E.

43. Should a deliberate effort be mounted to confuse interpretation, there is a degree of practical difficulty in differentiating between "free technical information" and "tenders and quotations". Possible overlap between these two areas necessitates that "tenders and quotations" be similarly restricted to the written form. This provision has no limiting effect on the eligibility of costs currently eligible in the preparation of a tender or quotation. **(Items 29, 30 and 31)**

44. This provision limits the costs of delivery of tenders and quotations to those of postage or freight. Reasoning is similar to that provided in respect of Item 15. **(Item 32)**

PART 5 - SPECIAL GRANT CEILING FOR MEMBERS OF COMPANY GROUPS

Overview

45. The object of this Part is to limit company groups to a maximum grant of \$250, 000 in any one grant year. The Act currently provides grants to individual companies regardless of whether the company is alone or is a member of a group. At present, therefore, company groups may receive multiples of grants. Individual claimants may receive up to \$250,000 in any one grant year, and as such, it is theoretically possible for a group to receive several millions of dollars per year in EMDG assistance. Company groups are

considered to have greater access to funds than individual companies, and limiting their grants to the single claimant maximum is considered appropriate.

Amendments to the Act

Amended section 3

46. For the purposes of this Act, a company group is determined by reference to the Corporations Law, sections 46 and 50. The determination of an individual company's group status, therefore, is based on another person's ability to control that company, and is not, therefore, necessarily limited to the ownership of share capital in that company. **(Items 33 and 34)**

New sections 21, 22, and 23

Approved joint venture and consortium - New section and subsection 21(2)

47. Company activities and grants approved under the EMDG Scheme's joint venture and consortium provisions are excluded from the group company provisions.

No first half claims - New section 22

48. Companies whose membership of a company group commenced in the first half of a grant year may not lodge claims in respect of the first six months of a grant year. This restriction is necessary to allow all companies in the group which expended promotional funds, the opportunity to receive their proportional share of the maximum \$250,000 payable to the group. As this Bill cannot become an Act until a considerable time after the 1 January 1995 commencement date for the lodgement of 1994/95 "first half" claims, and, therefore, raises the issue of the recovery of grants which were previously legally paid, this provision will not apply to the 1994/95 grant year **(Items 35 and 37)**

When the group grant provision applies - New section and subsection 23(1)

49. The company group provisions limit grants only where the combined grants of all claimant companies in a group at the end of a grant year exceed \$250,000. **(Items 36 and 37)**

Pro-rating and group's gross grants - New section and subsections 23(2) and (7)

50. A group's gross grants is the total of the grant amounts calculated on the basis of the expenditure and export earnings of each individual group claimant company in that grant year. The grant actually received by each group company will be the ratio of its individual grant to the group gross grant, as a factor of \$250,000. The calculation will exclude any "first half" grant paid or payable to a company where that company was not a member of the group in

the first half of that grant year. Any “balance year” claim by that company will be taken into account in the group calculation. **(Item 37)**

Notification of group, recovery of overpayments, knowledge, - New section and subsections 23(3), (4), (5) and (6)

51. Group company claimants must list, at the time of claiming, the names, addresses and company numbers of companies which, to the best of their knowledge, form part of their company group. Where a company totally fails to identify as part of a company group, any grant paid or payable is forfeit. There is no penalty for an incorrect attempt to identify with a group where, in the circumstances, the claimant could not reasonably have known that another company was a member of the group. **(Item 37)**

PART 6 - NON-EMDG ASSISTANCE SCHEMES ADMINISTERED BY THE COMMISSION

Amended section 11P

52. The Australian Trade Commission administers a number of financial schemes which specifically assist export. It is currently possible for an individual “person” to claim assistance under a number of schemes in respect of the same project. Where this occurs, there is potential for the applicant to derive a considerably increased benefit at taxpayer’s expense, thereby reducing not only financial commitment to the project, but possibly dedication to the task as well. This amendment means that applicants benefiting under other Austrade schemes of financial assistance, cannot also access EMDG with respect to that particular project. This provision does not prevent applicants from accessing multiple Commission assistance schemes where different projects are involved. **(Item 38)**

PART 7 - OVERSEAS VISIT ALLOWANCE

Amended section 11L

53. Claimable expenditure under the EMDG Scheme may include certain costs of overseas travel. This travel may be undertaken by any person who promotes the claimant’s eligible product. Where that promotion is undertaken on behalf of a number of individuals, the totality of eligible expenditure incurred by the traveller should be apportioned amongst all of those individuals in proportion to the effort undertaken on behalf of each individual or organisation. There is a possibility that the current wording of section 11L does not provide for the calculation to take account of expenditure where it was incurred on behalf of persons who are non claimants under the EMDG Scheme. The result of this is the attributing of ineligible expenditure to the claimants and payment of inflated grants. The amendment to section 11L clarifies eligibility. **(Items 39, 40, 41, 42, 43, 44 and 45)**

PART 8 - INSOLVENCY AND CONVICTIONS OF MEMBERS OF APPROVED JOINT VENTURES OR CONSORTIA

Amended sections 11UA, 11UB, and 11YA

54. Parliament recently amended the EMDG Act to prevent insolvent “persons”, and “persons” convicted of specified offences, from being eligible to receive grants under the Scheme (Act No 108 of 1993). These provisions were intended to include all claimants, but inadvertently failed to include “approved joint venture and consortium” with respect to the insolvency provisions under sections 11UA and 11UB, and the convictions provisions under section 11YA. That is, grants are currently payable to approved joint venture and consortium regardless of their, or related persons, solvency, and in certain circumstances where convicted of a specified offence. This amendment makes approved joint venture and consortium subject to all of the insolvency and convictions provisions of the EMDG Act. (Items 46, 47, 48, 49 and 50)

PART 9 - GRANTS IN RELATION TO “NEW MARKETS”

Amended section 15

55. Claimants may receive a maximum of eight grants under the Scheme. In certain circumstances, as provided for under section 15, those same claimants may receive additional grants where they are incurring promotional expenditure in pursuing “new markets”. The wording of section 15 is considered to be too restrictive in that it may be interpreted to require that the totality of an expenditure item be incurred on “new market” promotion alone. This interpretation of the section, for example, would result in the total disallowance of an airfare where the traveller visited one established market, regardless of the fact that the traveller visited several “new markets”. This amendment allows expenditure to be apportioned between established and “new markets” and a grant paid on the amount relevant to “new market” promotion. (Item 51)

PART 10 - CRIMINAL RECORDS

Amended section 13

56. As indicated in comment under Part 8 to this Amendment Bill, Act No 108 of 1993 amended the EMDG Act to prevent payment of grants to persons” convicted of specified offences. To fulfil the requirements of the Act, the Commission must be in a position to verify the criminal status of the relevant parties to a claim, and this verification cannot be achieved without obtaining written consent. Should written consent be refused, the EMDG Act does not provide the power to discontinue investigation of a claim and not pay a grant. Should that claimant or relevant related person be convicted of a specified

offence, the payment of a grant would be in contravention of the intention of the Act. This amendment provides the Commission with the power to discontinue investigation of a claim and not pay a grant where written consent to a search of criminal records is not provided. Searches of criminal records are undertaken by the Australian Federal Police and not by officers of the Commission. **(Item 52)**

PART 11 - CAPITAL EXPENDITURE

Substituted section 11N

57. Section 11N renders expenditure of a capital nature ineligible, except in certain circumstances. Amongst other activities, subsection 11N(a) provides for the eligibility of expenditure of a kind referred to in section 11F, the foreign registration of eligible industrial property rights. These expenses are generally capitalised, and are not generally accepted as being of a promotional nature. They are, however, seen to be important in assisting exporters' penetration of overseas markets, hence the need for this specific exclusion affording eligibility. On the other hand, subsection 11N(b) provides eligibility to expenditure incurred in relation to disposals of the kind referred to in subsections 11Z(8) and (9), 11ZA(5), 11ZB(4) and (5) and (6), and 11ZC(7) and (8). These provisions cover the wide range of intrinsically and directly promotional expenditures which could be expected to be incurred in the overseas promotion of eligible industrial property rights (and know how). This amendment removes this discriminatory and unintended advantage to the promoters of industrial property rights and know how. **(Item 53)**

PART 12 - REPUBLIC OF SOUTH AFRICA

Repeal section 10

58. Section 10 of the EMDG Act provides for the Republic of South Africa to be a proscribed country for the purposes of the Act. The responsible Minister may make a determination in writing published in the Australian Government Gazette which revokes proscribed country status. The Minister for Trade revoked proscribed country status in respect of the Republic effective 7 October 1993. The section no longer has a purpose and is consequently repealed. **(Item 54)**

PART 13 - FRAUD AND FALSE OR MISLEADING STATEMENTS

Repealed section 39

59. Section 39 of the EMDG Act provides that a person shall not knowingly obtain or attempt to obtain a grant that is not payable, or obtain or attempt to obtain a grant by means of a statement that the person knows to be

false or misleading or by means of a book, record or document which to the person's knowledge contains false or misleading information, or make a statement to specified persons which is false or misleading. The requirement that the Commission must prove that a person had certain knowledge greatly restricts the effectiveness of the provision. As the principal penalty provision of the EMDG Act, it is important that persons cannot take advantage of weaknesses to obtain unwarranted grants. Amendment of the section to allow the courts to take account of a person's abilities, experience, qualifications and other attributes in coming to a decision as to whether a person ought reasonably to have known, will provide adequate strength to the section. (Items 55, 56, 57 and 58)

CHANGE IN OWNERSHIP OF BUSINESS ETC.

Amended section 19 and new section 19A

60. Section 19 of the EMDG Act provides the Commission with a discretion to credit a claimant with the EMDG history of its predecessor where the business activity carried on is "substantially similar". It is designed to ensure that business activities do not receive the benefit of more than the usual limit of eight grants per claimant simply because of a change in the status of ownership. This limitation is based on an assessment of the length of time that support is required to develop self sustaining export businesses. As such, the section is designed to provide for an equitable distribution of limited grants funds between business activities for the maximum number of claimants. However, the section provides little guidance to either decision makers or claimants on when the section should apply which reduces certainty in the scheme for claimants. It results also in a lack of objectivity in the decision making process due to the lack of rules on which to base decision making.

61. Austrade's experience is that in only extreme circumstances will the exercise of the discretion under this section be likely to be upheld through the appeal process. Yet Austrade's experience is that in the vast majority of cases, the business activity benefits significantly from the eligible promotion of the previous business if the business activities are in any way similar. For example, Austrade has had several recent cases where a manufacturer, who had received eight grants, has restructured the business, commenced manufacture of product only slightly different from previous production, and sought an EMD grant as a 'new' claimant. Independent legal advice suggested that using the discretion to apply section 19 in this case would be unlikely to be upheld in an appeal process. This has rendered the section virtually inoperable. Amendments made by this Bill provides that where the activities are similar, the EMDG history of the predecessor will apply to the new claimant unless Austrade grants an exemption. Austrade must consider decision making principles established under the new section 19A in determining whether an exemption should be granted. Austrade will formulate these principles in consultation with industry. The new sections establish a framework for a clear and objective decision

making process that will be responsive and flexible to deal with a dynamic industrial environment. (Items 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68)



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