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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EXPORT MARKET DEVELOPMENT GRANTS LEGISLATION AMENDMENT BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Trade, Tourism and Investment, Senator the Hon Simon Birmingham)

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GENERAL OUTLINE

The *Export Market Develop Grants Act 1997* (the EMDG Act) establishes a grant program which is administered by the Australian Trade and Investment Commission (Austrade). The EMDG grant is provided to Australian small and medium enterprise (SME) exporters as a reimbursement for up to 50 per cent of their export-related marketing expenses. All program Rules and administration, such as how applicants must apply and limits for how many grants SMEs can access, are contained in the EMDG Act.

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.

The policy principles described in the Review include that the reoriented EMDG program continue to support promotion activities only, be broad based in application, require at least matching investment from grantees, provide an entitlement over multiple years, and undergo periodic review.

The Review recommends that SMEs be provided more certainty of funding levels. Due to the way EMDG funding is currently administered through the EMDG Act, the level of reimbursement each SME will receive is uncertain and varies from year to year dependent on the demand on the scheme and the size of the appropriation.

The Review also found that an SME's needs vary during the different stages of their export journey, and that funding assistance through EMDG is more effective for those businesses which are ready to start exporting and those who are seeking to expand their export promotion activities, and recommended the EMDG program target this cohort. The Review also recommended that education and training be included as an eligible expense for the EMDG grant, particularly for those smaller SMEs who are too small to promote in their own right and are represented by industry bodies or alliances.

This Bill will implement these recommendations, making amendments to the EMDG Act and consequential amendments to the *Australian Trade and Investment Commission Act 1985* (the Austrade Act) to reorient and simplify the EMDG program.

This Bill will reorient funding assistance under the new EMDG program to provide funding assistance to the cohort of Australian SME exporters identified in the Review through an upfront grant agreement, providing them with funding certainty.

This Bill will remove the program operational rules from the EMDG Act, create a framework Act that contains the policy principles of the EMDG program, and empower the Minister to make program operational rules through a disallowable legislative instrument.

The reoriented EMDG program will continue to provide funding to industry bodies and alliances, previously known as Approved Bodies, and enable their grant funding to extend training for members in marketing and promotion.

Through simplifying the EMDG Act, the EMDG program will rely upon other relevant Commonwealth legal requirements that are already in place where possible and not seek to duplicate them in the EMDG Act. For example, knowingly and recklessly making false statements to a Commonwealth entity or a person performing functions under a law of the Commonwealth, in an application for a benefit is an offence under Chapter 7 of the *Criminal Code Act 1995*. Austrade will rely upon such provisions in managing the EMDG grants process.

The EMDG Act will retain the right of appeal for applicants and grantees. The decisions made by the CEO of Austrade within this reoriented framework will be reviewable in the Administrative Appeals Tribunal.

The Bill also amends the Austrade Act to allow for decision making powers of the CEO provided for under the EMDG Act to be delegated to APS employees of a non-corporate Commonwealth entity.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact on the overall Australian Government Budget. Expenditure under the EMDG Act is capped through annual Appropriation Acts and administration of the program utilises a proportion of this funding for administration in accordance with section 94 of the EMDG Act.

There will be additional administration costs during the transition years, including information technology changes. These additional costs will be funded through the annual EMDG appropriation. This Bill amends section 94 of the EMDG Act to provide the CEO of Austrade with up to an additional 2.5 per cent of the EMDG annual appropriation in financial year 2020-21 (\$3.9 million of the total appropriation of \$157.9 million), and an additional 2 per cent of the EMDG annual appropriation in financial year 2021-22 (\$3.2 million of the total expected appropriation of \$157.9 million) for those implementation costs.

REGULATION IMPACT STATEMENT

The Review undertook a process and analysis equivalent to a Regulation Impact Statement (RIS). The following is a summary of the issues addressed in the Review.

The Review looked at the most effective and efficient way for the Australian Government to provide assistance to SMEs to support SME exporters to generate additional export sales and expand into new markets, delivering strong economic benefits for Australia.

The Australian Government's key support mechanism for SMEs marketing their products overseas is the EMDG funding assistance mechanism provided for in the EMDG Act. The EMDG funding assistance mechanism has been operating for more than 45 years. While its underlying principles remain relevant in today's markets, the Review found the operation of the mechanism should be modernised to address changes in the global economic environment and the way SMEs do business.

The options considered by the Review were:

Option A: To reorient EMDG mechanism to provide upfront grant agreements and target payments towards those SMEs who are able to best able to make use of the funding provided.

This option would provide funding certainty to exporters, enabling them to plan their marketing activities with confidence in an uncertain global environment, and better manage the cash flow for their business. Government funding under EMDG would be directed towards those SMEs who are at certain stages in their export activities – new to export and expanding exporters – and who are therefore able to make the best use of funding. Those exporters who are not eligible for the EMDG program would be able to access other services and assistance, including training through member-

based organisations to become ready to export their products, or the provision of targeted information about export opportunities in overseas markets.

Option B: Maintain the status quo.

This option would maintain the current approach of the EMDG Scheme which sees SMEs reimbursed for a percentage of their promotional activity costs in the next financial year after they have undertaken those activities.

Consultation: The Review consulted extensively with past EMDG recipients, EMDG consultants and peak representative bodies. Those consultations involved emails to all EMDG contact lists seeking input, face-to-face focus groups held throughout Australia, and a public online consultation process where anyone interested in the review could provide input. Throughout the process other Australian Government agencies working to support SMEs were consulted, along with State and Territory government bodies. Extensive consultation will also be undertaken in the development of the Rules for the reformed EMDG program.

Option A is considered the best option as it will ensure EMDG funding is provided to those SMEs where it will have the greatest impact. Option B, maintaining the status quo, would continue to provide assistance to a range of exporters, but not necessarily to those who would make the most of it. In addition, the reimbursement funding model does not provide SME exporter with the certainty required for effective forward planning.

Legislative reform, achieved through this Bill, is necessary to reorient the EMDG funding mechanism. The current evaluation mechanism, requiring an independent review of EMDG every five years, has been maintained. Government program reviews will be conducted at an appropriate time to ensure the mechanisms introduced are achieving the goals identified in the Review.

Through its recommendations that the EMDG Scheme be modernised and simplified, the Review expected the regulatory burden to business to be reduced and regulatory savings are expected. Community organisations and individuals who are not operating as an SME are not impacted by this reform.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

This Bill 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*.

NOTES ON CLAUSES

Clause 1: Short title

This Act may be cited as the *Export Market Development Grants Legislation Amendment Act 2020*.

Clause 2: Commencement

Subclause 2(1) provides that each provision of specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table in subclause 2(1) sets out when the amendments made in this Bill will commence. The table provides that sections 1 to 3 and Schedule 2 commence the day this Bill receives Royal Assent.

Schedule 2 amends section 105 of the EMDG Act which deals with the EMDG appropriation and adds a definition for *applicable percentage* to section 107. These amendments provide additional funding to Austrade for administration in financial years 2020/21 and 2021/22. This additional

administration cost reflects the need for Austrade to manage the administrative requirements of the transition to the new EMDG program. These provisions must begin on Royal Assent, prior to the remaining amendments in this Bill, as the implementation costs will start to be incurred in the financial year ending 30 June 2021.

The remaining provisions of this bill commence on the day on a day of Proclamation, or if that does not occur within six months of Royal Assent, they begin on the day after the end of that period.

Clause 3: Schedules

Clause 3 provides that legislation specified in a Schedule to this Bill is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule has effect according to its terms.

There are two Schedules to this Bill. Schedule 1 amends the EMDG Act. Schedule 2 amends both the EMDG Act and the Austrade Act.

SCHEDULE 1 – Amendment of the *Australian Trade and Investment Commission Act 1985*

Item 1:

This item amends subsection 10(3) of the Austrade Act. Section 10 of the Austrade deals with the power of the Minister to give directions. Item 1 amends references to the processes described under the EMDG Act. As the EMDG process will change from a reimbursement model to a legislated model that reflects the processes of a traditional grants program, the references to stages in the grants process will change. The new terms for the different stages in the EMDG process are application, grant agreement and grant.

Item 2:

This item repeals subsection 10(4). It is replaced with a new subsection 10(4) that reflects the new terminology for the EMDG program of application and grant agreement.

This item provides that a direction of the Minister made under section 10 of the Austrade Act will not operate so as to affect prejudicially an application made, or a grant agreement entered into, under the EMDG Act. This requirement was also contained within the reimbursement model for the EMDG program. The Minister will not have the power to direct the CEO of Austrade in relation to individual grants. For example, the Minister cannot direct the CEO of Austrade to enter into a grant agreement with a particular person, or change a particular grant agreement.

Item 3:

This item replaces section 90 of the Austrade Act, which deals with the delegation powers of the Minister and the CEO of Austrade with a revised section. The revised section continues to empower the Minister to delegate the Minister's powers under the Austrade Act to the CEO of Austrade other than the powers under sections 65 and 66.

This item removes reference to the Minister's power to delegate being either general or as otherwise provided in the instrument of delegation and removes reference to the Minister not being able to delegate this power to delegate. It is not necessary to say this as the *Acts Interpretation Act 1901* deals with these matters at section 34AB(1)(a) and (b) of that Act.

This item removes the Minister's powers of delegation in relation to the EMDG Act. The only powers of the Minister under the amended EMDG Act will be the power to make Rules. Such powers should not be delegable.

This item maintains the current delegation powers of the CEO of Austrade contained in the Austrade Act. That is, the CEO of Austrade is able to delegate any function under the Austrade Act and the EMDG Act to a staff member of the Commission.

This item also adds to the CEO's power to delegate powers under the EMDG Act to include APS employees who work for a non-corporate Commonwealth entity at Executive Level 1 or above. This expansion of the delegations power empowers the CEO of Austrade to seek other entities to administer the EMDG program, should it prove cost effective to do so.

Amendment of the *Export Market Development Grants Act 1985*

Item 4:

This item replaces section 3 of the EMDG Act with a new object, inserts a new outline for the Act and moves the amended definitions section to the front of the Act.

Changes to the object of the Act describe the underlying purpose of the EMDG Act, which is to bring benefits to Australia by encouraging the creation, development and expansion of foreign markets for Australian products. This purpose is achieved by providing financial assistance to Australian Small and Medium Enterprises and their representative organisations for promotional activities and marketing skills development.

The new section 4 outlines the structure of the reoriented EMDG Act. The CEO of Austrade is empowered to make grants to eligible persons for eligible expenses in relation to eligible products. Eligible persons must be Australian. Eligible persons must also be either ready to export or already exporting eligible products unless the Rules provide otherwise. Eligible products must be of substantially Australian origin. An EMDG grantee must also meet any other requirements or conditions specified in the Rules.

A grant agreement between the Commonwealth and the EMDG grantee will be entered into under the EMDG Act. That grant agreement will describe how the grant will be paid to the grantee. The grantee is required to spend the grant money. Grantees are also required to spend an amount of their money on eligible expenses in relation to eligible activities that at least matches the amount of the grant.

The CEO of Austrade can require information and documents from persons applying for an EMDG grant, EMDG grantees and others.

Grant payments are made out of money appropriated annually to the EMDG program.

The new section 5 provides the definitions for the EMDG Act. This amendment moves the definitions provision to the front of the Act, reflecting modern drafting practices.

Many definitions have been made redundant through the reorientation and simplification of the EMDG Act.

Those definitions that remain the same are:

- a) *Austrade***
- b) *Australian law***
- c) *CEO of Austrade***
- d) *export***

Those definitions that have changed are:

- a) **eligible expense** which now has the meaning given by section 18.
- b) **eligible product** which now has the meaning given by subsection 17(1).
- c) **grant** which means a grant made under the EMDG Act, with the nature of the grant being changed from a reimbursement to an upfront agreement model

New definitions are:

- a) **applicable percentage** has the meaning given by subsection 105(3).
- b) **eligible for a grant** means eligible under Division 3 of Part 2.
- c) **grant agreement** has the meaning given by subsection 9(1). This grant agreement is a core element of the new EMDG program.
- d) **grantee** means a person who is party to a grant agreement (other than the CEO of Austrade on behalf of the Commonwealth).
- e) **ready to export** has the meaning given by the Rules.
- f) **relevant matter** has the meaning given by subsection 102(7).
- g) **reviewable decision** has the meaning given by section 97.
- h) **Rules** means Rules made under section 105A.

Item 5:

The following Parts of the EMDG Act are replaced in their entirety:

Part 2 Entitlement to grant

Part 3 Persons eligible for a grant

Part 4 Eligible products

Part 5 Eligible expenses

Part 6 Amount of grant

Part 7 Application for, and payment of, grant

Parts 2 through to Part 7 have provided the framework for the reimbursement model, along with the administrative detail. In order to implement this reform, these provisions are removed.

Parts 2 to 7 are replaced with a framework that reorients the EMDG grant from a reimbursement to an upfront grant, and removes administrative processes from the Act. This Bill creates a grants program where the Rules of the program are contained in a disallowable instrument made by the Minister and subject to disallowance. Administrative processes are removed from legislation.

The new Part 2 provides the framework for the reoriented grants process.

The new section 6 provides a simplified outline of Part 2. This Part describes the process involved in seeking and entering into grant agreements. This process reflects well-known grant processes. The CEO of Austrade may invite persons to apply for grants. This means the CEO of Austrade will be able to seek applications for an EMDG grant for a particular period of time. If the CEO of Austrade is

satisfied that an applicant is an eligible person and that they will have eligible expenses in relation to eligible products, the CEO of Austrade is able to enter into a grant agreement with that eligible person. The grantee will be paid under the grant agreement.

Eligible persons must be Australian. Eligible persons must also be either ready to export or already exporting eligible products unless the Rules provide otherwise. Eligible products must be of substantially Australian origin. Other conditions for eligible persons are specified in the Rules.

A grantee must spend the grant money on eligible expenses for eligible products. The grantee must also spend, at a minimum, a matching amount of their own money on those eligible expenses for eligible products.

The Rules will specify what eligible expenses are. These Rules will reflect the principle that eligible expenses must be in respect of promotional activities to market eligible products in foreign countries, or in relation to training activities aimed at developing skills in marketing products to foreign countries.

Grantees must comply with the Act and Rules, as well as the terms and conditions of their grant agreement.

The Rules will provide a method for determining the amount of a grant to be made to a grantee.

Certain decisions of the CEO of Austrade are reviewable by the Administrative Appeals Tribunal (AAT).

This item also creates a new Division 2 – Grants, comprising sections 7 through to 14.

The new section 7, Invitation to apply for grant, empowers the CEO of Austrade to invite persons, from time to time, to apply for grants of money under the EMDG program.

The new section 8, Application for grant, requires the applicant to apply in writing in response to an invitation under section 7. Under subsection 8(2) Rules can be made, but are not required to be made, by the Minister to prescribe further requirements for an application.

The new section 9, Grant agreement, provides for the conditions that allow the CEO of Austrade to enter into a grant agreement with a grantee. A grant agreement must be for the purposes of meeting eligible expenses of the person in relation to eligible products.

Those conditions are that:

- The person must apply for the grant in accordance with section 8 as specified under subsection 9(1)(a).
- The CEO of Austrade must also be satisfied of the conditions set out at subsection 9(1)(b) in order to enter into a grant agreement. The CEO of Austrade must decide whether the person is
 - eligible for a grant (subsection 9(1)(b)(i))
 - will have eligible expenses in relation to eligible products during the term of the agreement (subsection 9(1)(b)(ii)), and
 - has met any other requirements prescribed by the Rules made for the purposes of subsection 9(1)(b)(iii)

Rules prescribed under subsection 9(2)(b)(iii) may include requirements such as the grantee must spend a minimum of \$15,000 in order to be eligible for a grant.

A decision made by the CEO of Austrade to not enter into a grant agreement is reviewable under the *Administrative Appeals Tribunal Act 1975* (AAT Act) (see section 97). As a result of these rights of appeal the CEO of Austrade is required under the AAT Act to notify the person of their decision and of their rights to seek review. The person is entitled to seek reasons from the CEO of Austrade.

The new subsection 9(2) sets out what must be contained in the grant agreement.

The new subsection 9(2)(a) allows, but does not require, the Minister to make Rules about the form of the grant agreement.

The new 9(2)(b) allows the Minister to make Rules about the period of the grant agreement. This allows for multiyear agreements to be made with EMDG grantees. The length of a grant agreement may be varied for classes of applicants. For example, grant agreements with grantees who are new to export, as defined in the Rules, may be prescribed in the Rules as being for two years in length, and grant agreements with grantees who have previously exported may be prescribed as being for three years in length.

Subsection 9(2)(c) allows, but does not require, the Minister to make other Rules about the grant agreement.

The new section 10 deals with the terms and conditions of the grant.

Subsection 10(1) requires the grantee to comply with the EMDG Act and Rules, as well as the terms of the grant agreement.

Under subsection 10(2) the terms and conditions of the grant agreement must include Rules that require the grantee to use the grant for the purpose for which it is intended and to provide at least matching amount of their own money for eligible expenses of the grantee in relation to eligible products.

Subsection 10(2)(b)(i) requires the terms and conditions of the grant agreement to provide for the circumstances in which a grant must be repaid to the Commonwealth. When an amount becomes repayable it is a debt due to the Commonwealth.

In addition, under 10(2)(b)(ii) the Minister is empowered to make Rules that provide for other matters that can or must be included in the terms and conditions of a grant agreement. For example, the Rules may require standard Commonwealth grant conditions like that specify circumstances which trigger repayment of the grant be included in every grant agreement.

Subsection 10(2) does not operate so as to limit other terms and conditions that may be specified in the grant agreement.

The new section 11 describes when a grant, or an instalment of a grant, must be paid to the person who has entered into a grant agreement under the EMDG Act.

Under subsection 11(2) the CEO of Austrade must make the payment for the amount agreed through the grant agreement if the CEO of Austrade is satisfied of the requirements in subsection 11(1).

Under subsection 11(1)(a) the grant agreement must provide for the payment of the grant at the time or for the period of time for which the CEO of Austrade is making the decision to make the payment. For example, payments in a grant agreement may be agreed to be an upfront payment made prior to the grantee undertaking any activities, or may be agreed to be one or more milestone payments throughout the life of the grant agreement that cover certain periods of time during which activities are to be or have been undertaken.

Under subsection 11(1)(b)(i), the CEO of Austrade must be satisfied at the time of making the payment that the person is eligible for the grant. If the person's status changes during the life of the agreement, the CEO of Austrade may not be able to make the relevant grant payment provided for in the grant agreement. For example, should the Rules made under section 16 prescribe a condition that an eligible person must not be under insolvency administration, and during the life of a grant agreement the person enters insolvency administration, they may be no longer eligible for the grant under the grant agreement. This is because if the person enters insolvency administration, the CEO of

Austrade may not be able to be satisfied that the person is eligible for the grant and the person may not receive the grant amount agreed under their grant agreement.

In addition, under subsection 10(1)(b)(ii) the CEO of Austrade must be satisfied that the person has had or will have eligible expenses in relation to eligible products at the time the payment is made. Where the person's expenses have not met this condition, a payment may not be made.

Subsection 10(1)(c) allows for the Rules to prescribe other conditions that must be satisfied for the grant or instalment of a grant to be payable to a person. For example, the Rules may prescribe that funding stops in certain circumstances, such as where there is a risk to Australia's trade reputation. This can occur for example, where a person is receiving EMDG funding but has been found to be involved in corruption activities overseas. If this involvement has led, or could lead to damage to Australia's trade reputation, the Rules may specify that grant payments should not be made..

Subsection 10(3) specifies that subsection 10(1) is subject to the Act and the Rules as well as terms and conditions in the grant agreement. This means, for example, that concerns about Australia's trade reputation can also be managed through the terms and conditions of the grant agreement. The terms and conditions of the grant agreement may also specify that funding will stop in specified circumstances such as risk to Australia's trade reputation. The terms and conditions of the grant can also specify expenses that the grant monies are not to be used for, such as the making of a cash payment above \$10,000.

The new section 12 empowers the CEO of Austrade to act on behalf of the Commonwealth in making and managing EMDG grants, including paying a grant and taking action to recover a debt due to the Commonwealth resulting from an EMDG grant.

The new section 13 provides that the CEO of Austrade may exercise a power conferred on the CEO of Austrade by a grant agreement.

The new section 14 clarifies that Part 2 - Grants does not limit the executive power of the Commonwealth.

This item also creates a new Part 2 Division 2 – Eligibility for grant, comprising sections 15 and 16.

The new section 15 describes the kinds of people who can be eligible persons. Those kinds of people must also satisfy the conditions set out in section 16 or the Rules made under section 16 in order to be eligible persons.

The new section 15 provides a list of legal persons who are the kinds of persons that can be eligible for a grant. Section 15 requires they must be Australian as described either in section 15 or under the Rules made under section 15, reflecting the object of the Act found at section 3.

Subsection 15(g) empowers the Minister to prescribe other kinds of persons to be eligible kinds of persons. For example, the Minister may prescribe representative bodies who are organisations that represent Australian small and medium enterprises to be eligible kinds of persons.

The new section 16 describes the conditions the eligible kinds of persons must satisfy in order to be an eligible person.

Under subsection 16(1)(a) the person must satisfy the conditions set out at subsection (2) in order to be eligible for a grant. Subsection 16(1)(b) provides that other conditions that must be satisfied in order for a person to be eligible for a grant can be prescribed under the Rules. For example, the Rules may prescribe the condition that eligible persons must have an Australian Business Number, or that eligible persons must not be under insolvency administration, or that the person must not have received an EMDG grant for a total of eight or more years.

The Rules will provide the meaning of ‘ready to export’. The Rules may prescribe that participation in one of the export readiness programs offered by the States and Territories can be one way of providing evidence that an SME is ready to export.

Subsection 16(2) provides that to be eligible for a grant, a person must be ready to export eligible products or already exporting eligible products and seeking to expand their export promotion activity, unless the Rules provide otherwise. This condition reflects the object of the EMDG Act at section 3.

The Rules may exclude persons from this requirement described at subsection 16(2). For example, representative bodies do not export products. Rather, they assist their members to become export ready and promote the products of their members to foreign markets. As a result, they will be excluded from this requirement through the Rules

If the Rules exclude a person from the operation of subsection 16(2), under subsection 16(3) the Rules must prescribe conditions for those persons that require a connection between the person and the marketing of eligible products in a foreign country. For example, the Rules may prescribe that representative bodies must be a representative of businesses that are marketing or are seeking to market, their products to a foreign market.

Under subsection 16(4) the Rules can prescribe particular conditions for different kinds of persons. For example, the Rules may prescribe that all eligible persons except representative bodies, must not have a turnover of \$20 million or more in the financial year before they apply.

This item also creates a new Division 4 – Eligible products, comprising section 17.

The new section 17 outlines what eligible products are under the EMDG program.

Subsection 17(1) empowers the Minister to make Rules describing eligible products and Rules prescribing conditions for those eligible products.

Under subsection 17(2) these products described in the Rules can be, but are not required to be and are not limited to, goods, services, events, intellectual property, software and know-how. The list of eligible products can be expanded so that any kind of product that can be exported can be added to the list of eligible products.

Under subsection 17(3) the Rules prescribing conditions that must be satisfied in order for a product to be an eligible product must define what it means to be of substantially Australian origin. This reflects the object of the EMDG Act at section 3 and is a principle contained in the reimbursement model of the EMDG funding. While the principle of a product being of substantially Australian origin is the same for all products, how that is determined operationally will vary for each product.

This item also creates a new Division 5 – Eligible expenses, comprising sections 18 through to 20.

The new section 18 outlines what eligible expenses are under the EMDG program.

Subsection 18(1) empowers the Minister to make Rules prescribing what eligible expenses are.

Under subsection 18(2) these prescribed expenses must be in respect of promotional activities undertaken for the purpose of marketing eligible products in foreign countries, or for training activities undertaken for the purpose of developing skills in marketing eligible products in foreign countries. This reflects the object of the EMDG Act at section 3.

For example, the Minister may prescribe that certain expenses associated with maintaining an overseas representative to undertake marketing activities are eligible expenses for those persons who own an eligible product; or the Rules may prescribe that certain costs associated with registration of intellectual property for the person who owns the intellectual property is an eligible expense.

The new sections 18(3), 19 and 20 provide for expenses that are not eligible expenses

Subsection 18(3) empowers the Minister to make Rules prescribing expenses that will not be an eligible expense. For example, the Rules may prescribe that that expenses of a capital nature are not eligible expenses.

Subsection 18(3) also empowers the Minister to prescribe a part of an expense is not an eligible expense. For example, the Minister may prescribe that the part of the expenses for travel to an overseas trade fair does not include the cost of the airfare above economy class air travel.

The new section 19 provides that grantees of EMDG grants should not receive grant funding where they have received other financial assistance from the Commonwealth or a State or Territory for the same activities. Eligible persons are able to choose the financial assistance that most suits their circumstances, and they are not required to access other available funding mechanisms before accessing EMDG.

If, after a grant is paid to a person in respect of an eligible expense, the person receives financial assistance that covers the expense from another Commonwealth, State or Territory funding mechanism, the person may be required by the Rules or by their grant agreement to repay that part of the grant.

The new section 20 describes the principle that EMDG funding will not be provided for promotion of products that cannot be sold or exported under the laws of the Commonwealth, a State or territory. This section is one of the provisions that assists in protecting Australia's trade reputation. For example, if Australian laws prohibit the export of particular goods to a particular market due to a sanctions regime, EMDG will not be able to provide funding for the marketing of those products to that foreign market.

This item also creates a new Division 6 – Amount of grant, comprising section 21.

The new section 21 outlines methods to be used for managing the amount of a grant.

Subsection 21(1) requires the CEO of Austrade to determine the amount of a grant in accordance with the method prescribed in the Rules. Under subsection 21(2) the Rules made for the purposes of this section may prescribe different methods for different circumstances. For example, the Rules may prescribe a particular method for determining the maximum amount for new to export applicants and a different method for those applicants who have already exported their products.

Subsection 20(3) allows the Rules made under section 20 to apply to a grant agreement that was entered into prior to Rules being made under section 20. For example the Rules may prescribe that those grantees who are new to export receive a maximum of \$40,000 per annum. If the Rules are then changed to prescribe that those who are new to export receive a maximum grant of \$50,000 per annum, the Rules may also prescribe that grant agreements already entered into for those who are new to export can be changed to the new maximum amount of \$50,000 per annum.

Item 6:

This item repeals the heading.

Item 7:

This item repeals Divisions 1, 2 and 3 of Part 8

Item 8:

This item repeals the heading Division 4 of Part 8 and replaces it with Division 7—Review of decisions.

Item 9:

This item repeals section 97 and replaces it with a revised list of decisions that are reviewable by the Administrative Appeals Tribunal (AAT). The decision of the CEO of Austrade about whether to enter into a grant agreement with the person at 9(1), and the decision of the CEO of Austrade about whether to the person is eligible for a grant or has not had or will not have eligible expenses in relation to eligible products at 11(1)(b), and a decision made under 11(1)(c) as to whether, in relation to the payment of a grant or an instalment, a requirement prescribed by the Rules under that paragraph has been met are reviewable in the AAT.

This item also allows for further decisions of the CEO of Austrade that may be prescribed in the Rules to be prescribed as reviewable decisions.

Item 10:

This item repeals the Divisions 5, 6 and 8 of Part 8 and substitutes Part 3 – Information gathering, comprising sections 100 through to 103.

The new section 100 describes the outline of Part 3 – Information gathering powers. Part 3 describes the circumstances in which the CEO can seek information from the applicant or grantee, and the consequences of not providing that information for the applicant or the grantee.

Under section 101 the CEO of Austrade is able provide a written notice to an applicant for a grant requiring them to provide certain information or documents for the purposes of the CEO of Austrade determining whether to enter into a grant agreement with the applicant.

Under subsection 101(3) if the person does not provide the information requested by the date specified in the notice, the CEO of Austrade is not required to deal with the person's application.

Under the new section 102 grantees may also be required from time to time to provide certain information to the CEO of Austrade in relation to the grant. This requirement is necessary to manage the payment of the grant because, under subsection 21 the CEO must be satisfied each time a payment is made under a grant agreement that the person is remains eligible for the payment. While a person may be eligible for a grant at the time they enter into a grant agreement with the Commonwealth, their circumstances may change during the period of the grant agreement.

The new 102 empowers the CEO of Austrade to require statements from grantees where the grantee's circumstances relevant to the grant have changed or about any other matter that might affect the payment of a grant. For example, an Australian company which is a grantee may be have decided it will withdraw its eligible product from a market. This means that company will no longer be marketing the eligible product as provided for in the grant agreement.

The CEO of Austrade can decide not to pay a grant to a person if they do not provide the information within the timeframes outlined in 102. If the person fails to comply with the notice, then the CEO must not pay them but the CEO can vary the notice or extend the time.

However, the CEO of Austrade is able to exercise some discretion in this decision. Such a discretion might be exercised in changed circumstances beyond the control of the person, or where the person has a reasonable excuse for not providing the information within the time frame and the information is subsequently provided. In exercising the discretion, the CEO of Austrade will be balancing a variety of factors, including the overall management of the EMDG program.

Item 11:

This item repeals the heading for Division 9 of Part 8 and substitutes the heading Part 4 – Miscellaneous.

This item inserts the new section 104 which provides an outline of Part 4, and which deals with miscellaneous matters, including use of the EMDG appropriation for administration of the EMDG program, the treatment of partnerships and trusts, the making of Rules and regular reviews of this Act.

Item 12:

This item repeals section 106 and substitutes the new section 105A which describes how partnerships are to be treated, and the new section 105B which describes how trusts are to be treated under the EMDG Act.

This item also inserts the new section 106 which empowers the Minister to make Rules as prescribed throughout the Bill and for those matters that are necessary and convenient to give effect to the Act as passed. These Rules are a disallowable legislative instrument.

This clause enables Rules to be made which will provide the program administration Rules that are consistent with the principles of the EMDG program described in the Bill.

Dealing with these matters in Rules rather than regulations accords with the Office of Parliamentary Counsel's Drafting Direction No. 3.8 – Subordinate legislation. That Drafting Direction states that 'OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so'.

Consistent with the Drafting Direction, the approach of dealing with these matters in Rules (rather than regulations) has a number of advantages including:

- (a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being required for the Act. This is in contrast to the current EMDG scheme where the Rules and administration of the program were contained in the Act, regulations, legislative instruments and program guidelines; and
- (b) it enables the number and content of the legislative instruments under the Act to be rationalised; and
- (c) it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments; and
- (d) it shortens the Act.

Given these advantages, the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

The Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. This Bill does not require provision for any of these matters. This is clarified by the subclause that specifically prevents Rules from including these types of matters.

This clause also clarifies that the Rules made under the clause are a legislative instrument for the purposes of the *Legislation Act 2003*. Under that Act, legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the Rules will be subject to the same level of parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee for the Scrutiny of Delegated Legislation), and a motion to disallow the Rules may be moved in either House of the Parliament within 15 sitting days of the date the Rules are tabled.

Item 13:

This item repeals Subsections 106A(1), (1A) and (1B) and substitutes new requirements for the independent review of the EMDG Act. Subsection 106A(1A) states that the first independent review of the EMDG Act after this Bill enters into force must be completed within five years. Subsection 106A(1B) states that after the first review provided for in subsection 106A(1A) an independent review must be conducted every five years.

Item 14:

This item repeals Part 9. This Part contained the definitions for the EMDG Act. These definitions included:

- a) Section 107 which is now provided for at the new section 5 at the front of the EMDG Act;
- b) Section 108 concerning the definition of conviction, which will be moved to the Rules and changed to take account of the reorientation of the EMDG program and the simplification of processes under the EMDG program.
- c) Section 109 defining what it means to sell eligible goods. This concept will no longer be needed in the reoriented EMDG program. If an eligible person sells the eligible goods in relation to which they are undertaking eligible promotional activities they will be required to notify the CEO of Austrade of their change of circumstances under the new section 102. The sale of eligible goods may mean that the person is no longer eligible for funding assistance under the EMDG program as they may not be complying with the provisions of the Act and Rules requiring they own the product in order for it to be an eligible product.
- d) Section 111 dealing with the disposal of eligible intellectual property or eligible know how. This concept is similar to that provided for in section 109, also removed, and will no longer be needed in the reoriented EMDG program. The disposal of eligible intellectual property or eligible know how will be a change in circumstances that may affect the payment of a grant and a grantee will be required to notify the CEO of Austrade of this matter under the new section 102.
- e) Section 112 deals with when a joint venture is taken to be a partnership. This definition is no longer relevant to the EMDG program as joint ventures are not eligible persons listed at the new section 15. Should joint ventures be prescribed in the Rules as eligible persons made under the new section 16 the Rules will define the condition for that person to be eligible.
- f) Section 114 defines resident of Australia. This concept is incorporated into the new section 15 where it provides that an eligible person who is an individual who is Australian as defined by the Act or the Rules is an eligible kind of person.

Part 2—Application and transitional provisions**Item 15:**

This item provides for application and transitional provisions. When this Act enters into force the CEO of Austrade will be empowered to manage the reoriented EMDG program and the reimbursement model will continue in force in relation to grants for grant year ending 30 June 2021.

These provisions ensure that those persons who intended to apply for an EMDG reimbursement for the grant year 2020-21 will be able to apply under the previous provisions for the EMDG program. In effect this means that in the financial year 2021-22 EMDG applicants will be able to apply under the reimbursement model for expenses incurred in financial year 2020-21, and for new entrants for financial year 2019-20 should they choose to do so, as well as applying for an upfront grant for funding that applies for financial year 2021-22.

Item 16:

This item is a savings provision that ensures that the delegations made under the Austrade Act for the purposes of administering the EMDG Act prior to the amendments made through this Act continue after this Act enters into force.

Schedule 2 – Administration costs

Schedule 2 deals with the costs implementing the reoriented EMDG program described under this Bill.

Item 1:

This item amends section 107(1) of the EMDG Act which deals with the definitions of the EMDG Act. It adds a definition for *applicable percentage* to section 107. This phrase is used in section 105 as amended under this Act.

Item 2:

This item amends section 105 which deals with the use of the EMDG appropriation for administration of the EMDG program.

Section 94 of the EMDG Act is also amended, providing the CEO of Austrade with an additional 2.5 per cent of the EMDG annual appropriation in financial year 2020-21 (\$3.9 million of the total expected appropriation of \$157.9 million), and an additional 2 per cent of the EMDG annual appropriation in financial year 2021-22 21 (\$3.2 million of the total expected appropriation of \$157.9 million). These changes provide additional funding to Austrade for administration during financial years 2020/21 and 2021/22 to meet the implementation costs of the new program, including information technology changes. These provisions will begin on Royal Assent, prior to the remaining amendments in this Act.