Export Market Development Grants Amendment Bill 2014

Portfolio: Trade and Investment
Introduced: House of Representatives, 6 March 2014

Purpose

2.21 The Export Market Development Grants Amendment Bill 2014 sought to amend the *Export Market Development Grants Act 1997* to:

- align the Export Market Development Grants (EMDG) scheme rules with a revised level of scheme funding;
- increase the number of grants able to be received by an applicant from seven to eight;
- reduce the minimum expenses threshold required to be incurred by an applicant from $20 000 to $15 000;
- reduce the current $5000 deduction from the applicant's provisional grant amount to $2500;
- prevent the payment of grants to applicants engaging an EMDG consultant assessed to be a not fit and proper person; and
- enable a grant to be paid more quickly where a grant is determined before the 1 July following the balance distribution date.

Background

2.22 The committee reported on the bill in its *Fourth Report of the 44th Parliament*.

2.23 The bill was subsequently passed by both Houses and received Royal Asset on 9 April 2014.

Committee view on compatibility

Right to privacy and reputation

Protection of the professional and business reputation of a person

2.24 The committee intends to write to the Minister for Trade and Investment to seek further information on the compatibility of the bill with the right to privacy and reputation, particularly the justification for the fit and proper person measure, including:

- whether it is to be imposed in pursuit of a legitimate objective;
- whether it is both necessary and proportionate to achieving that objective, including all relevant procedural and other safeguards; and
- details of any less intrusive policy measures that may have been available or were considered in the development of this measure.

Minister's response

Objective of the provision

The EMDG scheme is the only significant financial assistance program for Australian small exporters. The total amount payable under the scheme is capped. Any grant that is paid on the basis of false information reduces the amount available to other applicants. Also, the amounts spent on monitoring and investigating claims reduces the overall amount available. It is not feasible for Austrade to fully verify every application (approximately 3000 applications each year). It is important that the EMDG scheme be able to operate on the basis that applications are honest.

EMDG consultants advise applicants on claims under the EMDG scheme. These consultants usually work on a success fee basis, essentially a 1O per cent commission on grants obtained for their clients, which can be a very substantial amount. Approximately 50 per cent to 60 per cent of claims are prepared by consultants.

The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This public support depends upon public confidence in the probity of the scheme. EMDG consultants are a significant part of the scheme. They are publically linked to the scheme, undertake significant promotion of the scheme, manage the majority of applications to the scheme, and earn fees from the scheme, usually on a commission basis. The probity and good public image of EMDG consultants therefore has a significant impact on public perception of the EMDG scheme and the Government's management of it. It is therefore appropriate that just as applicants are required to be fit and proper to receive a grant, so should consultants meet a similar standard. If the scheme were to be withdrawn due to negative public perception it would cause disruption and damage to thousands of businesses.

Connection between the limitation and its objective

The "fit and proper person" test for applicants, that has been in place since 2004, provides an incentive for them to act honestly. The new provisions appropriately extend this requirement to consultants who prepare applications, often for applicants who themselves have little or no knowledge or experience of the scheme requirements. Because consultants' fees are a percentage of the grant received, there is an incentive for consultants to maximise the amount claimed. The current Bill is intended to provide a further incentive to consultants not to make false claims, and an incidental incentive to applicants not to use consultants with a poor record for financial probity.

EMDG consultants are not subject to the disciplinary rules of any professional or industrial body. The only control the government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims,

as proposed in the Bill. If a criminal offence (such as fraud or attempted fraud) can be proved in a particular case, a criminal prosecution can be brought, and in that case they will be automatically disqualified under s78 of the EMDG Act from preparing applications for a period of at least 5 years. However, this will occur after the claim has been lodged, possibly after a grant has been paid and certainly after damage to the public reputation of the export grants scheme and the government's management of the scheme.

The proposed provisions will therefore protect taxpayers' funds from fraudulent or excessive claims, ensure the proper operation of the scheme and, importantly, maintain public confidence in the scheme.

Limitation proportionate to its objective

I recognise that the making of a finding that a consultant is a not fit and proper person is significant and therefore it is appropriate that such a finding should be subject to administrative law. Consultants will therefore have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under s79A. In addition, consultants would be entitled to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under the common law. Judicial review would consider the lawfulness of a decision under s79A of the EMDG Act, in particular, in relation to whether the decision complied with the rules of administrative law. It is also important to note that s79A operates in relation to each individual application lodged by the consultant.

If, in relation to one application, Austrade's CEO forms the opinion that the consultant who prepared it is not a fit and proper person, the application in question is taken not to have been made. However, it does not automatically affect other applications. If the same consultant later prepares a new application, that new application will be taken not to have been made only if the CEO again forms the opinion that the consultant is not a fit and proper person. In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event.

Consultants will be permitted to continue to lodge claims on behalf of their clients whilst being investigated, and only when a not fit and proper determination has been made and communicated to the consultant will they be precluded from lodging further applications. There will therefore be no disadvantage to consultants when a not fit and proper decision is delayed, as they will be permitted to continue to lodge grant applications on behalf of their clients until an adverse decision is determined.

It is important to note that a decision by the CEO that a consultant is not a fit and proper person does not operate indefinitely into the future. An excluded consultant may apply in writing to the CEO of Austrade for the CEO to revoke a not fit and proper determination and the CEO must revoke such a determination if the excluded consultant has made this

application and the CEO is satisfied that the circumstances that resulted in the determination no longer exist, and the CEO is not aware of any other reason for the determination to remain in force.

I consider that, in light of these various safeguards, s79A and the related provisions proposed in the Bill are a reasonable and appropriate measure to give effect to the aim pursued. Moreover, I do not consider that they breach, or limit, a consultant's right to be protected from unlawful attacks on their reputation.[1]

Committee response

2.25 The committee thanks the Minister for Trade and Investment for his response and has concluded its examination of this bill.

1 See Appendix 2, Letter from The Hon Andrew Robb MP, Minister for Trade and Investment, to Senator Dean Smith, 1 May 2014, pp 1-3.