PGBR 2004/1 - Energy Grants: off-road credits for fishing operations

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Generated on: 6 November 2026, 04:58:53 AM

Product Grant and Benefit Ruling

Energy Grants: off-road credits for fishing operations

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Preamble

The number, subject heading, ***What this Ruling is about*** *(including* ***Class of person/arrangement*** *section,* ***Date of effect****, and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of* ***Part IVAAA of the Taxation Administration Act 1953*** *and are legally binding on the Commissioner. Product Grant and Benefit Ruling PGBR 2003/1 explains when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling explains the off-road credit entitlements for fishing operations under the *Energy Grants (Credits) Scheme Act 2003* (the EGCS Act). In particular, the ruling explains:

- the definition of 'fish' in subsection 34(2);
- 'farming of fish' in paragraph 34(1)(b);
- 'construction of ponds, tanks or other structures to contain fish' in paragraph 34(1)(c);
- 'pearling operations' in paragraph 34(1)(e); and
- the operation of the exclusions contained in paragraphs 34(1)(h) and 34(1)(i).

2. This ruling does not deal with the entitlement provisions for on-road credits under Part 3 of the EGCS Act.

3. Unless otherwise stated, all legislative references in this Ruling are to the EGCS Act, and all references to the EGCS regulations are to the Energy Grants (Credits) Scheme Regulations 2003.

Class of Persons

4. This Ruling applies to the class of persons who purchase or import into Australia, off-road diesel fuel for use in fishing operations as defined in subsection 34(1).

Date of effect

5. This Ruling applies from 1 July 2003.[1] However, the Ruling does not apply to claimants to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 39 and 40 of Product Grant and Benefit Ruling PGBR 2003/1).

6. This Ruling does not apply to a person to the extent that it conflicts with another public or private ruling, if that other ruling provides a greater benefit, in respect of a claim period, under the *Product Grants and Benefits Administration Act 2000* (PGBA Act). In instances involving conflicting rulings for the same entity in respect of the same claim period in relation to the same arrangement, there is only one application of the binding ruling provisions and that is the one which provides the person with the highest amount of grant or benefit.[2]

Background

7. The purpose of the Energy Grants (Credits) Scheme[3] is to provide active encouragement for the move to the use of cleaner fuels.[4]

8. A person who purchases or imports into Australia diesel fuel for use in certain eligible off-road activities may be entitled to an off-road credit under the off-road credit entitlement provisions of the EGCS Act.[5] A person who is entitled to an off-road credit is entitled to an energy grant under the Energy Grants (Credits) Scheme.[6]

9. The legislation enabling payment of the grant is contained in the EGCS Act and the PGBA Act. The EGCS Act contains the entitlement provisions of the scheme and the PGBA Act contains the administrative provisions for the scheme. Section 8 of the PGBA Act sets out the grants and benefits that are covered by that Act. It lists at

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[1] The commencement of the EGCS Act, other than sections 1 and 2, is dependent on determinations made under section 7 of the *Motor Vehicle Standards Act 1989* in relation to emission standards and the adoption of specified technical requirements relating to motor vehicle standards – subsection 2(3) of the EGCS Act. On 20 December 1999, the Minister for Transport and Regional Services made a Determination on National Standards for Road Vehicles. The Determination gives effect to the standards specified in the EGCS Act. The EGCS Act in its entirety commenced on 1 July 2003.

[2] Subsection 24D(3) of the PGBA Act; PGBR 2003/1 and PGBR 2003/2.

[3] In this Ruling we refer to the scheme established under the EGCS Act as the Energy Grants (Credits) Scheme.

[4] Section 3A. In the case of diesel fuel, the Government intends to restrict entitlements available under the Energy Grants (Credits) Scheme to ultra low sulphur diesel for purchases from 1 January 2006 – subsection 3A(2).

[5] Subsection 53(1).

[6] Subsection 56(1).

item 3 'energy grants' as a grant that is payable and the EGCS Act as the entitlement Act under which that grant is payable.

10. The Energy Grants (Credits) Scheme was introduced on 1 July 2003 to replace the entitlement provisions of the Diesel Fuel Rebate (off-road) Scheme (the previous off-road scheme) administered under the *Customs Act 1901* (Customs Act) and the *Excise Act 1901* (Excise Act) and the Diesel and Alternative Fuels Grants Scheme (the previous on-road scheme) with a single entitlement.[7] The previous off-road scheme and the previous on-road scheme ceased on 1 July 2003.

11. Schedule 7 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003* extends the application of the EGCS Act to cover off-road diesel fuel purchased or imported into Australia from 1 July 2000 to 30 June 2003 inclusive, provided certain conditions are met. Transitional arrangements for the previous off-road scheme and the previous on-road scheme provide limited extension of those schemes in relation to fuel purchased prior to 1 July 2003.[8]

12. The Energy Grants (Credits) Scheme is a self-assessment scheme that requires a person to provide to the Tax Office sufficient information for the grant to be paid. If a grant is paid for diesel fuel purchased for use or that is used in an activity that is not eligible, the Tax Office will amend the original assessment of the energy grant payable, recover the grant and may impose a penalty and/or General Interest Charge (GIC).[9]

13. The Tax Office may also undertake an audit to verify information provided by a person in relation to a claim for the grant.[10]

14. The Energy Grants (Credits) Scheme provides for both off-road credits and on-road credits payable in the form of an energy grant. There are separate eligibility criteria for off-road credits and for on-road credits.

15. Under the off-road credits scheme, a person is entitled to an off-road credit (and therefore, an energy grant)[11] if they purchase or import off-road diesel fuel for use:

- in mining operations (otherwise than for the purpose of propelling any vehicle on a public road);[12]
- in primary production, (agriculture, forestry or fishing operations),[13] (otherwise than for the purpose of propelling a road vehicle on a public road);[14]

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[7] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, page 3.
[8] Item 25, Schedule 3 and Item 18, Schedule 4 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003*.
[9] Section 55, section 20 of the PGBA Act, section 284-75 of Schedule 1 to the *Taxation Administration Act* 1953 (TAA) and section 35 of the PGBA Act.
[10] Sections 27, 42 to 45A and 48 of the PGBA Act.
[11] Subject to the registration requirements being met.
[12] Subsection 53(2).
[13] Section 21.

- in rail transport (otherwise than for the purpose of propelling a road vehicle on a public road) in the course of carrying on an enterprise;[15]
- in marine transport in the course of carrying on an enterprise;[16]
- at residential premises to generate electricity for use in certain specified activities;[17]
- at particular premises to generate electricity for use in the course of carrying on at those premises an enterprise that does not have at those premises ready access to a commercial supply of electricity and that has, as its principal purpose, the retail sale of goods or services (other than electricity) or the provision of hospitality;[18]
- at hospitals, nursing homes or other institutions providing medical or nursing care;[19]
- at a home for aged persons;[20] or
- specific industrial uses.[21]

16. This Ruling addresses the category of fishing operations.

17. Many of the terms and expressions defined in Division 3 of Part 2[22] of the EGCS Act are identical to those in the previous off-road scheme. Where the Courts or the Administrative Appeals Tribunal (the AAT) have considered or made decisions about those terms or expressions in the previous off-road scheme, those considerations or decisions have been taken into account in forming our views on the operation of the off-road credits scheme under the Energy Grants (Credits) Scheme.[23]

18. Similar to the previous off-road scheme, the Energy Grants (Credits) Scheme is a beneficial scheme that confers benefits on persons that undertake certain activities. We take the view that, as for the previous off-road scheme, the entitlement provisions of the

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[14] Subsection 53(2).
[15] Subsection 53(3).
[16] Subsection 53(3).
[17] Paragraph 53(4)(b).
[18] Paragraph 53(4)(a).
[19] Paragraph 53(4)(c).
[20] Paragraph 53(4)(d).
[21] Subsections 53(5) and 53(6).
[22] This Division sets out the definitions that are used only in the off-road credits part of the EGCS Act (Part 4).
[23] The basis of the position was stated by Kirby P in *Public Service Association of NSW v. Industrial Commission of NSW* (1985) 1 NSWLR 627 at page 640: 'There is a presumption, useful in statutory interpretation, that where a provision of legislation has been passed upon by authoritative decisions of the courts and is later re-enacted, Parliament can be taken, in the absence of a clear intention to the contrary, to know and accept the interpretations given to the legislation.'

Energy Grants (Credits) Scheme are intended to be read in a practical, commonsense manner.[24]

19. In *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (Abbott Point),[25] Ryan and Cooper JJ stated:

> Whether an activity falls within the definition of 'mining operations' as defined in s 164(7) of the *Customs Act* is a question of fact. So too is the question of when recovery is complete. In each case a commonsense and commercial approach has to be taken to the question having regard to the evident purpose of the legislation, to make rebates available to promote the exploitation of mineral deposits in Australia.[26]

20. In *Australian National Railways Commission v. Collector of Customs, SA*,[27] (ANR) Davies J stated:

> Although the diesel fuel rebate provisions use simple language, they are intended to be applied in a practical, commonsense manner to commercial operations.[28]

21. We consider that the views expressed by Ryan and Cooper JJ in Abbott Point and by Davies J in ANR are equally applicable to the provisions of the off-road credits scheme.

22. Where there is doubt as to the meaning and application of the qualifying provisions, we take the view that they are to be liberally construed unless the text or context requires a narrow construction.[29]

23. In this Ruling, unless otherwise stated:

- a reference to the grant is a reference to an energy grant for an off-road credit;
- a reference to fuel or diesel fuel is a reference to off-road diesel fuel as defined in section 4;
- a reference to the off-road credits scheme is a reference to the off-road credit entitlement provisions under Part 4 of the ECGS Act;[30]

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[24] *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No W84/118; (1985) 8 ALN N288.
[25] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371; (1992) 15 AAR 365.
[26] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371 at page 378; (1992) 15 AAR 365 at page 372.
[27] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.
[28] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at page 270; 69 ALR 367 at page 372.
[29] See *Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* AATA 657, 5 August 2002 at paragraphs 46 to 50; (2002) 68 ALD 581 at pages 592-593. See also *Re Brymay Forests Pty. Limited and Collector Of Customs Victoria* No. V85/305 AAT No. 2496; (1985) 9 ALN N177; *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271; (1985) 7 ALN N269a; *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No W84/118; (1985) 8 ALN N288; and, *Re Tas Island Shipping Pty Ltd and Collector of Customs* (1989) 11 AAR 121.

- a reference to the on-road credits scheme is a reference to the entitlement provisions under Part 3 of the ECGS Act;
- a reference to purchase in relation to diesel fuel includes purchase or import into Australia;
- it is assumed that the requirement to be registered under section 9 of the PGBA Act is met;
- a reference to an eligible activity or activities is a reference to a use that qualifies; and
- this Ruling applies to partnerships and unincorporated associations as if they were a person.[31]

Ruling

General requirements of the off-road credits scheme

24. A person is entitled to an off-road credit under the off-road credits scheme if:

- the applicant for the grant is registered with the Tax Office for entitlement to an energy grant when it makes a claim (subsection 52(1));
- the threshold provision in subsection 53(1) applies and at least one of the eligibility provisions in subsections 53(2) to 53(7) is satisfied; and
- the activity/operation is not excluded by either the general or specific provisions of the EGCS Act.

Threshold and eligibility requirements

25. Under section 53, a person satisfies the threshold and eligibility provisions when they purchase diesel fuel on which customs duty or excise duty has been paid, for a use that qualifies for an off-road credit.

[30] The note to Part 4 of the EGCS Act provides that the credits concerned in Part 4 relate predominantly to off-road activities although in some cases arise for on-road activities. For the purposes of this Ruling, a reference to the entitlements in Part 4 is only in respect of entitlements for off-road credits under that Part.

[31] Section 51 and 52 of the PGBA Act. In respect of partnerships, a partner may apply for a private ruling on the partnership's behalf (Product Grant and Benefit Ruling PGBR 2003/2 paragraph 21).

Activities/operations excluded by the general off-road credits scheme provisions

26. Regardless of whether the threshold and eligibility provisions have been met, an energy grant is not payable if:

- the fuel is used for a purpose other than the eligible use for which it was purchased, unless that other use is also eligible for an off-road credit;
- the fuel is sold or otherwise disposed of;
- the fuel is lost (whether because of accident, theft or any other reason) (section 55); or
- the fuel is used in an action which is one to which a subdivision of Division 1, Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999*, applies (unless an approval required under that Division was in operation) (section 55A).

27. A person can not retain a grant paid on fuel that is subsequently used in a manner that is not eligible for an off-road credit, or is sold, or is otherwise disposed of, or is lost or is used in an action that is excluded under section 55A. In these circumstances, the grant is recoverable under section 20 of the PGBA Act and section 255-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

28. Grants will not be paid in respect of diesel fuel purchased 3 or more years prior to an application for the grant being received by the Tax Office.

Entitlement to off-road credits for fuel purchased for use 'in fishing operations'

29. Under subsection 56(1), a person who is entitled to an off-road credit is thereby entitled to an energy grant.

30. Under subsection 53(2), a person is entitled to an off-road credit if they purchase diesel fuel for use in primary production (otherwise than for the purpose of propelling a road vehicle on a public road[32]).

31. Under section 21, the expression 'primary production' means agriculture, or fishing operations, or forestry. A person is, therefore, entitled to an off-road credit if they purchase diesel fuel for use 'in fishing operations'.

[32] This Ruling does not discuss the exclusion in subsection 53(2) from use in primary production of diesel fuel purchased for the purpose of propelling a road vehicle on a public road as the propulsion of a road vehicle on a public road does not commonly occur in the activities that are 'fishing operations' as defined in subsection 34(1).

32. In the context of the phrase 'in primary production', if an activity takes place 'in the course of' fishing operations, it takes place 'in' fishing operations.

The form of the definition of 'fishing operations'

33. The use of the expressions '*means'* and '*does not include*' in the definition of 'fishing operations' in section 34 means that the definition is an exhaustive definition. Activities that are not within any one of paragraphs 34(1)(a) to 34(1)(g) are not activities in fishing operations.

34. The application of the exclusions contained in paragraphs 34(1)(h) and 34(1)(i) means that an activity that is within paragraphs 34(1)(a) to 34(1)(g) is in fishing operations only if it is conducted for the purposes of a business and is not for business purposes connected with recreation, sport or tourism.

Apportionment of fuel

35. Where some of the fuel purchased is for a use that qualifies as fishing operations and some not, claims can only be made in relation to that portion of the fuel that is for a use that qualifies. An apportionment will be necessary to ensure that a claim for the grant is made only in respect of the amount of diesel fuel that is purchased for a use that qualifies.

Status of contractors and subcontractors

36. A contractor or sub-contactor is entitled to an off-road credit for diesel fuel purchased for use in any one of the activities listed in paragraphs 34(1)(a) to 34(1)(g) provided the activity is carried out for the purposes of a business but not for business purposes connected with recreation, sport or tourism.

The meaning of 'fish'

37. We consider that the definition of 'fish' in subsection 34(2) includes all living organisms of the sea, the sea-bed or of freshwater or the bed below freshwater, that can be utilised as a resource. The inclusion of 'any living resources, whether of the sea or sea-bed or of freshwater or the bed below freshwater' in the definition means that both marine animal and plant life are within the meaning of 'fish' for the purposes of the off-roads credits scheme.

Farming of fish

38. In paragraph 34(1)(b), the phrase 'farming of fish' means the propagating or raising of stocks of fish for the purpose of a business otherwise than for business purposes connected with recreation, sport or tourism.

Construction of ponds, tanks or other structures to contain fish that are to be farmed

39. For the purposes of paragraph 34(1)(c), the construction of 'ponds, tanks or other structures' qualifies as fishing operations only if the construction is of structures to contain fish for the purpose of their farming.

Pearling operations

40. An activity that is undertaken in the taking or farming of pearl oysters may be within paragraph 34(1)(e) as well as one or more of paragraphs 34(1)(a) to 34(1)(d).

41. We take the view that these activities are to be considered for eligibility firstly under paragraph 34(1)(e). If the activity is not an eligible activity under that paragraph, it can be considered for eligibility under any one or more of paragraphs 34(1)(a) to 34(1)(d).

Activities excluded from fishing operations

42. A person is not entitled to an off-road credit if they purchase diesel fuel for use in an activity that is excluded from the definition of 'fishing operations' by paragraphs 34(1)(h) and 34(1)(i).

43. The exclusion contained in paragraph 34(1)(h) means that an activity mentioned in paragraphs 34(1)(a) to 34(1)(g) is in fishing operations only if the activity is conducted or carried out for the purposes of a business.

44. The exclusion contained in paragraph 34(1)(i) means that an activity mentioned in paragraphs 34(1)(a) to 34(1)(g) is not a qualifying use if it is conducted wholly or in part for business purposes connected with recreation, sport or tourism.

45. We consider that the expression in *whole or in part*, in the exclusion in subsection 34(1), is to be interpreted in a practical and commonsense manner, and in the context of the Energy Grants (Credits) Scheme being a beneficial scheme.[33]

46. Where a person conducts activities that are for the purposes of a business as well as for other purposes (for example, private purposes) we take the view that the person conducts separate activities, being those that are for business purposes and those that

[33] See discussion at paragraphs 18 to 22 of this Ruling.

are not. To the extent to which they are for business purposes they are eligible activities. To the extent to which activities are otherwise than for business purposes, they are separate activities that are excluded from being in fishing operations by paragraph 34(1)(h).

47. We take a similar approach to the exclusion contained in paragraph 34(1)(i). Where a person conducts activities mentioned in paragraphs 34(1)(a) to 34(1)(g) for business purposes not connected with recreation or tourism as well as for business purposes that have that connection, the person conducts separate activities. To the extent that the activities are not so connected they are eligible activities. To the extent to which the activities are for business purposes connected with recreation, sport or tourism, they are separate activities that are excluded from being in fishing operations by paragraph 34(1)(i).

48. In the context of the exclusion contained in paragraph 34(1)(i), a business purpose is connected with recreation, sport or tourism if there is a substantial and discernible association between the purpose and any one of recreation, sport or tourism.

Explanation

General requirements of the off-road credits scheme

Requirement for registration

49. A person must be registered for energy grants before they can make a claim. Section 9 of the PGBA Act sets out the requirements that have to be met for a person to be registered for energy grants. The specific requirement for registration for an energy grant is that the person notifies the Commissioner that they are purchasing fuel for use or uses that will entitle them to a grant once they are registered.[34]

The threshold and eligibility provisions

50. Under section 53, a person satisfies the threshold and eligibility provisions when they purchase diesel fuel on which customs duty or excise duty has been paid, for a use that qualifies for an off-road credit. The question of whether diesel fuel has been purchased for a use that qualifies is to be determined at the time the diesel fuel is purchased.

51. Actual use may be evidence of its intended use, but does not necessarily override clear evidence of contrary intention at the time of purchase. Nevertheless, an off-road credit would still be available if diesel fuel was purchased for use in an ineligible activity, and then subsequently shown to be used in an eligible activity.

[34] Subsection 9(4) of the PGBA Act.

52. If the grant is paid on the basis of intended use, but the diesel fuel is subsequently used in a manner that does not qualify, there is no entitlement to the grant[35] and it may be recovered.[36]

53. In some cases, bulk quantities of diesel fuel may be paid for but only delivered as needed. This is referred to as 'prepayment'. Prepaid diesel fuel is deemed to have been purchased (and thus an application for a grant can be made) when it is ascertained. This is usually when the diesel fuel is delivered, collected, or stored separately by the seller in such a manner that it can be clearly identified as belonging to the purchaser.

Activities/operations excluded by the general off-road credits scheme provisions

54. Regardless of whether the threshold and eligibility provisions have been met, a person is not entitled to an off-road credit if:

- the fuel is used for a purpose other than the eligible use for which it was purchased, unless that other use is also eligible for an off-road credit;
- the fuel is sold or otherwise disposed of; or
- the fuel is lost (whether because of accident, theft or any other reason).[37]

55. Accordingly, grants paid in respect of fuel that is sold or otherwise disposed of will be recovered. If grants are paid on diesel fuel that is subsequently used in a manner that is not eligible for an off-road credit, or is sold or otherwise disposed of, or is lost, the person who received the grant must advise the Tax Office of this in writing within 90 days, or such longer period as the Commissioner allows.[38] A person is not entitled to retain the grants in these circumstances. The grants will be recovered by the Tax Office following an amendment to the assessment of the grant payable.[39]

56. Regardless of whether the threshold and eligibility provisions have been met, a person is not entitled to an off-road credit if fuel is used in an action which is one to which a subdivision of Division 1, Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* would apply (unless an approval required under that Division was in operation).[40] Accordingly, grants paid in respect of fuel purchased for use in such an action will be recovered following an amendment to the assessment of the grant payable.[41]

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[35] Section 55.
[36] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA.
[37] Section 55.
[38] Section 27A of the PGBA Act.
[39] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA.
[40] Section 55A. Examples of disqualifying activities would include unauthorised actions that have a significant impact on the world heritage value of a World Heritage property or a significant impact on a listed threatened species.
[41] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA.

57. A claim for a grant or benefit must be given to the Tax Office within 3 years after the earliest purchase of the fuel during the claim period.[42] This means that grants will not be paid in respect of diesel fuel that was purchased three or more years prior to an application for the grant being received by the Tax Office.

58. Apart from the activities excluded by the general exclusions, each category of qualifying use under the off-road credits scheme has its own specific exclusions. The specific exclusions of activities from the category of fishing operations will be dealt with later in this Ruling.

Entitlement to off-road credits for fuel purchased for use 'in fishing operations'

59. A person who is entitled to an off-road credit is thereby entitled to an energy grant.[43]

60. Subsection 53(1) contains the provision under which a person is eligible for an off-road credit. That subsection states:

> (1) Subject to such conditions and restrictions as are specified in the regulations, you are entitled to an off-road credit if you purchase or import into Australia off-road diesel fuel for a use by you that qualifies (see the following subsections).

61. A person is entitled to an off-road credit if they purchase diesel fuel for use in primary production (otherwise than for the purpose of propelling a road vehicle on a public road).[44]

62. 'Primary production' is defined in section 21 as meaning:

> (a) agriculture; or
>
> (b) fishing operations; or
>
> (c) forestry.

63. The expression 'fishing operations' is defined in subsection 34(1).

64. The activities that fall within the definition of fishing operations in subdivision 3C of Part 2 of the EGCS Act are essentially the same (except for the inclusion of paragraph 34(1)(c)) as those that were eligible for diesel fuel rebate for fishing operations under the previous off-road scheme.[45] Paragraph 34(1)(c) has been included to clarify

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[42] Paragraph 15(2)(e) of the PGBA Act. See also the Explanatory Memorandum to the Energy Grants (Credits) Scheme (Consequential Amendments) Bill 2003 paragraph 3.14.
[43] Section 56.
[44] Subsection 53(2). This Ruling does not discuss the exclusion in subsection 53(2) from use in primary production of diesel fuel purchased for the purpose of propelling a road vehicle on a public road as propulsion of a road vehicle on a public road does not commonly occur in the activities that are 'fishing operations' as defined in subsection 34(1).
[45] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, items 1.34 and 1.35 pages 3 and 4.

the eligibility of activities undertaken in the construction of ponds, tanks or other structures for the purposes of containing fish to be farmed.

65. In the context of the phrase 'in primary production' in subsection 53(2), the preposition 'in' means 'in the course of' or 'in the process or act of'. Therefore, if an activity can be said to have taken place 'in the course of' primary production, whether that primary production is agriculture, fishing operations or forestry, it can be concluded that it takes place 'in' primary production. As 'fishing operations' is included in the definition of primary production, to be eligible for an off-road credit under fishing operations, a person's activities must take place 'in' fishing operations.

66. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance),*[46] Nicholson J, stated:

> The word 'in' as it appears in para (a) of the definition of 'mining operations' is to be understood in this context as 'inclusion within, or occurrence during the course of…'

67. We consider that the following three criteria are relevant in determining if an activity takes place 'in the course of' a fishing operation.[47] These are:

- a **causal** link exists - in other words, a certain activity is *functionally integrated* with a fishing operation, thereby forming an essential part of it;
- a **spatial** link exists - meaning that an activity takes place in an area set aside or utilised for a fishing operation; and
- a **temporal** link exists - the activity takes place in a timely fashion, not prior to, or after the completion of, the fishing operation.

68. The relevance or weighting afforded to these criteria will vary depending on the facts in each case.

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[46] *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 158 ALR 241 at page 259; (1998) 87 FCR 482 at page 501; see also *Re Wandoo Alliance Pty Ltd v. Chief Executive Officer of Customs* [2001] AATA 801, paragraph 9; (2001) 34 AAR 98 at 114. Note that the wording of the primary production eligibility provision 'use in primary production (otherwise than for the purpose of propelling a road vehicle on a public road)' is unchanged from the provision that existed in the previous off-road scheme.

[47] In *Federal Commissioner of Taxation v. Payne* (2001) HCA 3; 46 ATR 228; 2001 ATC 4027; (2001) 202 CLR 93; (2001) 177 ALR 270; (2001) 75 ALJR 442; *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482; 158 ALR 241; *Re Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* (2001) 34 AAR 98; [2001] AATA 801, amongst others, it was deemed pertinent to consider one or all of these factors when determining whether an activity or activities were undertaken 'in the course of' something.

69. Accordingly, the meaning of 'in fishing operations' is not restricted to merely the physical acts of fishing. In determining whether an activity takes place 'in the course of' fishing operations, the three criteria above should be applied.

The form of the definition of 'fishing operations': means, does not include

70. The definition of 'fishing operations' in subsection 34(1) consists of two parts:

- Paragraphs 34(1)(a) to 34(1)(g): 'fishing operations' means …
- Paragraphs 34(1)(h) and 34(1)(i): 'fishing operations' does not include ...

71. The use of the form 'means ... does not include', denotes that the definition of 'fishing operations' is exhaustive. Only those activities that fall within any one or more of paragraphs 34(1)(a) to 34(1)(g) and which are not excluded by paragraphs 34(1)(h) or 34(1)(i) are eligible activities under 'fishing operations'.

72. Paragraphs 34(1)(h) and 34(1)(i) serve to further restrict the definition of fishing operations. Regardless of whether or not diesel fuel is purchased for use in an activity described in paragraphs 34(1)(a) to 34(1)(g), a person is not entitled to an off-road credit if the activity is excluded from being in fishing operations by the operation of paragraph 34(1)(h) or 34(1)(i).

73. The manner in which the definition of fishing operations is structured means that the activities set out in paragraph 34(1)(a) to 34(1)(g) are 'in fishing operations'. However, paragraph 34(1)(h) has the effect of excluding all the activities set out in paragraphs 34(1)(a) to 34(1)(g) from being within the definition of fishing operations unless those activities are carried out for the purposes of a business.

74. Paragraph 34(1)(i) has the effect of excluding any activity referred to in paragraphs 34(1)(a) to 34(1)(g) that is carried out for business purposes connected with recreation, sport or tourism. An activity mentioned in paragraphs 34(1)(a) to 34(1)(g) may be conducted for the purposes of a business (and, therefore, not excluded by paragraph 34(1)(h)), but would be excluded under paragraph 34(1)(i) if it is conducted for business purposes connected with recreation, sport or tourism.

75. An activity does not have to be mentioned in paragraphs 34(1)(h) or 34(1)(i) to be excluded from the definition of 'fishing operations'. These paragraphs serve merely to exclude particular activities from the definition of 'fishing operations', while other activities will be excluded because they do not fall within the meaning of paragraphs 34(1)(a) to 34(1)(g).

76. The form of the definition of '**fishing operations**': ***means***, ***does not include*** is substantially the same form of the definition of fishing operations as existed in the previous off-road scheme. Previous decisions of the Courts and the AAT are, in our view, relevant to the interpretation of section 34.

Apportionment of fuel

77. Where some of the fuel purchased is for a use that qualifies and some not, claims can only be made in relation to that portion of the fuel that is for a use that qualifies. An apportionment will be necessary to ensure that a claim for the grant is made only in respect of the amount of diesel fuel that is purchased for a use that qualifies.

78. The apportionment must be made on a reasonable basis. In calculating the extent that an activity is for a qualifying purpose, reference can be made to appropriate records that substantiate the quantity of fuel that a person proposes to use or actually uses in a qualifying use.

79. An apportionment can be made on the basis of an intended use even if precise quantification cannot be made at the time of purchase.

80. There is judicial authority for this view. In *Collector of Customs v. Pozzolanic Enterprises Pty Limited,*[48] in relation to the facts of that case, the Court stated:

> The fact that only a proportion of the fuel so purchased was intended for that use and the fact that it might not be precisely quantified at the point of sale does not take the purchase outside the rebate provisions. So long as there is some means of establishing that a proportion of the fuel is to be used for an exempt purpose, the precise quantification can await the actual use.[49]

Status of contractors and sub-contractors

81. For the purposes of the off-road credits scheme, activity determines eligibility, rather than whether the person's principal business is fishing operations.[50]

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[48] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280; (1993) 115 ALR 1.
[49] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280 at page 290; (1993) 115 ALR 1 at page 12.
[50] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

82. There are seven eligible activities within the definition of 'fishing operations' in subsection 34(1). The activity mentioned in paragraph 34(1)(c) specifically provides for it to be an eligible activity if it is carried out by contactors or subcontractors. That paragraph states:

> (c) the construction of ponds, tanks or other structures to contain fish that are to be farmed, where the construction is carried out by:
>
> (i) the person who will do the farming;
>
> (ii) a person contracted by that person to undertake the construction; or
>
> (iii) a subcontractor of a person so contracted;…

83. We consider that the specific mention of contractors (and subcontractors) in paragraph 34(1)(c) does not limit the entitlement of contractors to an off-road credit for diesel fuel purchased for use only in the activity mentioned in that paragraph. Contractors may be entitled to an off-road credit for diesel fuel purchased for use in the activities mentioned in the other paragraphs if they undertake any one of those activities for the purposes of a business and the activity is not for business purposes connected with recreation, sport or tourism.

84. The specific inclusion of contractors and subcontractors in paragraph 34(1)(c) is for clarification and in recognition that the construction of the kind mentioned in the paragraph is often carried out by contractors or subcontractors rather than by the person who carries on a business of farming of fish. Unlike the other activities listed in subsection 34(1), it would not be immediately evident that a contractor or subcontractor engaged to build a tank or excavate a pond is engaged in an activity that is essential to the carrying on of a business involving the farming of fish. The specific inclusion of the construction by contractors and subcontractors of ponds, tanks or other structures to contain fish that are to be farmed as an eligible activity puts the issue beyond any doubt.

The meaning of 'fish'

85. A central concept of the meaning of 'fishing operations' is the definition of fish.

86. Subsection 34(2) defines 'fish' as meaning:

> freshwater or salt-water fish, and includes crustacea, molluscs or any other living resources, whether of the sea or sea-bed or of freshwater or the bed below freshwater.

87. The noun 'fish' is defined by the Macquarie Dictionary[51] as meaning '**1.** any of various cold-blooded, completely aquatic vertebrates, having gills, fins, and typically an elongated body usually covered with scales', or '**2.** any of various other aquatic animals'.

[51] *Macquarie Dictionary*, Revised Third Edition.

88. The definition provided by subsection 34(2), is an exhaustive definition that adopts the ordinary meaning of the noun 'fish' and extends that meaning by including crustacea, molluscs or any other living resources of the sea or sea-bed or of freshwater or the bed below freshwater.

89. The expression 'any other living resources' in the definition of fish extends the ordinary meaning of fish to cover all living things, including animal and plant life, of the sea or sea-bed or of freshwater or the bed below freshwater, that can be utilised as a resource.

90. We consider that the *ejusdem generis* rule of statutory interpretation does not apply to the meaning of the expression 'any other living resources' in the definition of 'fish' in subsection 34(2). The application of this rule would have meant that the words 'any other living resources' are restricted to the same class of things as freshwater or salt-water fish, crustacea and molluscs. These specific things are all descriptions of marine or aquatic animal life. This would have meant that the term 'fish' is limited to animal life and does not include marine plant life.

91. The *ejusdem generis* rule of statutory interpretation was discussed in *Canwan Coals Pty Ltd v. Federal Commissioner of Taxation*[52] in which the Court dealt with the scope of the words 'a railway, road, pipe-line or other facility'. Sheppard J referred to the decision of Latham CJ in *R v. Regos*[53] in which, in relation to the *ejusdem generis* rule, he said:

> The rule is that general words may be restricted to the same *genus* as the specific words that precede them … Before the rule can be applied it is obviously necessary to identify some *genus* which comprehends the specific cases for which provision is made. … where it is sought to apply the rule to a case where an enumeration of specific things is followed by general words it must appear that the specified things 'possess some common and dominant feature' so that they can be described as constituting a *genus* distinguished by that feature.[54]

92. We consider that the primary and natural significance of the words 'any other living resources whether of the sea or sea-bed or of freshwater or the bed below freshwater' clearly includes marine plants within the scope of that general expression.

93. The construction of the definition of fish using the terms 'means'… and 'includes' indicates that the normal and ordinary meaning of 'fish' is expanded to 'include' other living things that are not normally or ordinarily considered to be fish. Those additional 'included' things are crustacea, molluscs or *any* other living resources

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[52] *Canwan Coals Pty Ltd v. Federal Commissioner of Taxation* (1974) 4 ALR 223 at page 228; (1974) 1 NSWLR 728 at page 734; (1974) 4 ATR 669 at page 673; 74 ATC 4231 at page 4235. See also *Attorney-General v. Brown* [1920] 1 K.B. 773 and *Re Latham (Dec)* [1962] Ch 616 for further discussion on the application of the *ejusdem generis* rule.

[53] *R v. Regos and Morgan* (1947) 74 CLR 613; (1947) 21 ALJ 110.

[54] *R v. Regos and Morgan* (1947) 74 CLR 613, Latham CJ, at pages 623 to 624; (1947) 21 ALJ 110 at pages 111 to 112.

whether of the sea or sea-bed or of freshwater or the bed below freshwater. The use of the word '*any'* indicates a legislative intent that the expression 'other living resources' is not to be read restrictively, and that the natural and ordinary meaning of 'fish' is expanded to include living resources both plant and animal.

94. The meaning of 'fish' encompasses a wide range of aquatic organisms, including (but not limited to):

- all species of bony fish, sharks and rays;
- octopuses, cuttlefish and squid;
- lobsters, crabs, prawns, scallops, abalone, mussels, and oysters;
- sponges, worms and living coral;
- all fresh-water fish, yabbies and marron;
- the eggs, spat or spawn, or the body, or part of the body (including the shell) of marine and fresh-water organisms; and
- seagrasses, kelp and fresh-water aquatic plants.

95. The sea-bed includes intertidal areas that are covered by the sea at high tide.

96. The meaning of fish is not restricted to fish ordinarily used for human consumption. For example, ornamental fish are also included in the definition.

Activities that are 'fishing operations'

97. We consider that the meaning of each of the activities mentioned in paragraphs 34(1)(a), 34(1)(d), 34(1)(f) and 34(1)(g) are clear. This Ruling, therefore, does not discuss those paragraphs.

Farming of fish

98. The definition of 'fishing operations' in subsection 34(1) states in part:

> The expression ***fishing operations*** means:
>
> (b) the farming of fish.

99. The term 'farming of fish' is not defined in the EGCS Act. Therefore, the term takes its ordinary meaning.

100. The Macquarie Dictionary[55] defines 'farming' to mean '**1.** the business of operating a farm'. It defines 'farm' to mean '**1.** a tract of land devoted to agriculture; or '**2.** a tract of land or water devoted to

[55] *Macquarie Dictionary* Revised Third Edition.

some other industry, especially the raising of livestock, fish, etc: *a chicken farm; an oyster farm*'.

101. We consider that, in the context of the definition of 'fishing operations', farming of fish means the propagating, breeding or raising of stocks of fish for the purpose of a business.

102. The term 'farming of fish' within the definition of fishing operations was introduced in an amendment to the previous off-road scheme in 1989. The Explanatory Memorandum to that amendment stated:

> …paragraph 5(1)(e) provides that outward voyages by dedicated mother ships, gear trials, voyages to and from a port and fish farming i.e. operations pertinent to the operation of fishing as a primary industry, are uses that attract rebate of customs duty under the DFRS.[56]

103. In *Re City of Nunawading and Comptroller General of Customs*[57] the AAT stated:

> Clearly, the activities must be for the purposes of a business if they are to be regarded as fishing operations. Apart from this, we do not wish to attempt a comprehensive interpretation of 'fishing operations' but it does seem to us that it is concerned with gathering a product. Broadly speaking, it is concerned with the gathering of pearls or with the gathering fish either by taking them from the water where they have bred naturally or by farming them.[58]

104. Diesel fuel purchased for use in the farming of fish does not qualify for an off-road credit unless the activity is undertaken for the purpose of obtaining primary produce, that is, to obtain fish for sale or trade.

105. Where fish farming for research purposes is undertaken within a business involving the farming of fish to produce fish for sale or trade, diesel fuel purchased for use in that research activity qualifies for an off-road credit. We consider that the research activity in this case is an activity conducted 'in the course of' the farming of fish. It is, therefore, 'in' fishing operations.

106. However, fish farming undertaken within a research or educational institution, where the purpose of that activity is research or education rather than producing fish for sale or trade, is not eligible for an off-road credit. We take the view that the research activity in this case is not in 'primary production'.

107. It is a question of fact whether the sale of fish is incidental to research, or a joint objective with research, or whether the research is merely part of the business of farming fish to obtain produce for sale.

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[56] Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill (No. 3) 1989 page 2.
[57] *Re City of Nunawading and Comptroller General of Customs* No. V93/540 AAT No. 9758; (1994) 36 ALD 628.
[58] *Re City of Nunawading and Comptroller General of Customs* No. V93/540 AAT No. 9758 at paragraph 87; (1994) 36 ALD 628 at page 643.

108. Farming of fish includes the propagation, raising and harvesting of:

- fish eggs;
- spat of oyster or similar shellfish;
- oysters;
- prawns, marron or other crustaceans;
- tuna, kingfish or other edible species; or
- ornamental fish such as goldfish and carp;

for sale or trade.

109. We take the view that the catching and transporting of live fish (for example, tuna) from the wild for stocking fish farms is a qualifying use for an off-road credit under paragraph 34(1)(a).

110. Activities that are considered to be 'farming of fish' include:

- cleaning, maintenance of, and repairs or modifications to ponds, tanks or other structures that contain fish;
- pumping and filtering of water; and
- aeration of ponds, tanks or other structures containing fish.

111. The transportation of personnel, equipment and other materials by vessel to or from fish farms located at sea is an eligible activity under paragraph 34(1)(b) if the personnel, equipment or other materials are for the purposes of carrying out the farming activities.

112. There is no requirement that a fish farm be located in a particular place. It can be located in the sea, a river, a lake, a dam, or comprise artificially constructed ponds, tanks or other structures containing fish.

113. We consider that the farming of fish ceases when the fish are finally removed from the seawater or fresh water or the pond, tank or other structures containing fish at the farm for processing or sale.

114. Diesel fuel purchased for use in further processing is not eligible for an off-road credit unless the processing takes place on board a vessel.[59] Processing includes activities that occur after the taking, catching or capturing of fish such as scaling, gutting, filleting, skinning, shelling, sorting, freezing or packing.[60]

[59] Processing of fish on board vessels is a qualifying activity under paragraph 34(1)(d).
[60] Subsection 34(4) defines the term 'processing' in relation to fish.

Construction of ponds, tanks or other structures to contain fish that are to be farmed

115. The definition of 'fishing operations' in section 34(1) states in part:

> (c) the construction of ponds, tanks or other structures to contain fish that are to be farmed, where construction is carried out by:
>
> (i) the person who will do the farming; or
>
> (ii) a person contracted by that person to undertake the construction; or
>
> (iii) a subcontractor of a person so contracted;…

116. We take the view that the words 'other structures to contain fish that are to be farmed' are restricted to the same class of the words as ponds or tanks.[61] It is considered that these specific words are all descriptions of the types of enclosures excavated or built to keep in fish for the purpose of propagating or rearing of fish. The type of enclosure used is dependent on the type of fish to be farmed, physical factors of the site and size of the operation.

117. Examples of 'other structures to contain fish that are to be farmed' include:

- sea cage pens for use in finfish (for example, tuna and kingfish) aquaculture;
- a permanent system of uprights and a net or nets stretched across a river, stream or creek to contain fish;
- intertidal racks and baskets; and
- intertidal long-lines and bags.

118. However, the expression 'other structures to contain fish that are to be farmed' does not include structures such as open racks and lines or predator control nets for sharks and seals. These structures are not constructed to contain fish that are to be farmed.

119. Where the farming of fish is to be carried out in ponds, tanks or other structures constructed on land, the construction of 'ponds, tanks or other structures' commences when any vegetation and soil are removed in order to provide a flat bench and root-free site at which:

- excavation can commence; and/or
- footings can be prepared,

for the construction of a structure to contain fish.

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[61] See paragraphs 90 to 91 of this Ruling for a discussion on the *ejusdem generis* rule.

120. Where structures to contain fish are constructed or pre-fabricated at a site other than the place where the farming of fish is or will be carried on, diesel fuel purchased for use in that construction or pre-fabrication qualifies for an off-road credit.

121. We consider that the term 'construction of ponds, tanks or other structures' does not include the transportation of the constructed structure. Construction ordinarily refers to the activities in building, erecting or putting together of the particular structure. We consider the transport of such structures from a site where they are constructed or pre-fabricated to a site where they are to be used for the farming of fish is not a qualifying use for an off-road credit under fishing operations.[62]

122. The transportation of materials and equipment used in the construction of ponds, tanks or other structures to contain fish to the place where the farming of fish will be carried on, is also not an eligible activity under paragraph 34(1)(c).

Pearling operations

123. The definition of 'fishing operations' in subsection 34(1) states in part:

> The expression ***fishing operations*** means:
>
> (e) pearling operations.

124. The expression 'pearling operations' is defined in subsection 34(3) to mean:

> (a) the taking of pearl shell; or
>
> (b) the culture of pearls or pearl shell;

and includes the taking or capturing of trochus, beche-de-mer or green snails.

125. The use of the form 'means ... and includes', denotes that the definition of 'pearling operations' is exhaustive.

126. Pearl oysters are molluscs, and are within the definition of 'fish' in subsection 34(2). Activities undertaken in the taking or farming of pearl oysters, may be activities within fishing operations under paragraphs 34(1)(a) to 34(1)(d). This includes the gathering of pearl shell and the growing and maintaining of pearl oysters. Some of these activities are within the definition of 'pearling operations' in subsection 34(3) and may be eligible activities under paragraph 34(1)(e).

---

[62] Diesel fuel purchased for the transport of structures to contain fish may qualify for an on-road credit if transported by road or for an off-road credit under the category of 'marine transport' if transported by a vessel.

127. An activity undertaken in the course of taking or farming of pearl oysters is to be considered for eligibility, firstly, under the qualifying criteria for pearling operations under paragraph 34(1)(e). If the activity does not qualify as pearling operations under paragraph 34(1)(e), it can be considered for eligibility under paragraphs 34(1)(a) to 34(1)(d).

Activities excluded from 'fishing operations'

128. A person is not entitled to an off-road credit if they purchase diesel fuel for use in an activity that is excluded from the definition of 'fishing operations' by paragraph 34(1)(h) or 34(1)(i).

129. The exclusions are for any activity referred to in paragraphs 34(1)(a) to 34(1)(g) that is conducted in whole or in part:

(a) otherwise than for the purposes of a business (paragraph 34(1)(h)); or

(b) for business purposes connected with recreation, sport or tourism (paragraph 34(1)(i)).

In whole or in part

130. The exclusion contained in subsection 34(1) states that fishing operations does not include any activity referred to in any of paragraphs 34(1)(a) to 34(1)(g) conducted, '*in whole or in part*' otherwise than for the purposes of a business or for business purposes connected with recreation, sport or tourism.

131. In some instances, a person who carries on a business that involves activities in fishing operations may conduct some activities that are for the purposes of recreation or involve the provision of facilities for tourists. For example, a person who carries on a business of farming of fish may permit, for a fee, tourists to visit the farm and, as part of that, allow them to undertake some recreational angling and to take their catch with them.

132. The words '*in whole or in part*' in the exclusion in subsection 34(1), if interpreted strictly would mean that a person would not be entitled to an off-road credit for diesel fuel purchased for use in an activity mentioned in any one of paragraph 34(1)(a) to 34(1)(g) if the activity was conducted principally for the purposes of a business but also conducted for business purposes connected with recreation, sport or tourism.

133. We take the view that the expression 'in part' in the exclusion should not be interpreted so narrowly as to prevent the application of the qualifying provisions in a practical and commonsense manner.[63]

[63] See discussion at paragraphs 18 to 22 of this Ruling.

134. We consider that where a person conducts activities that are for the purposes of a business as well as for other purposes (for example, private purposes), the person conducts separate activities, being those that are for business purposes and those that are not. The person needs to determine the extent to which the activities are for business purposes. To the extent to which they are for business purposes, they are eligible activities. To the extent to which activities are otherwise than for business purposes, they are separate activities that are excluded from being in fishing operations by paragraph 34(1)(h).

135. We take a similar approach to the exclusion contained in paragraph 34(1)(i). Where a person conducts activities mentioned in paragraphs 34(1)(a) to 34(1)(g) for business purposes not connected with recreation or tourism as well as for business purposes that have that connection, the person conducts separate activities. The person needs to determine the extent to which the activities have business purposes not connected with recreation, sport or tourism. To the extent that the activities are not so connected, they are eligible activities. To the extent to which the activities are for business purposes connected with recreation, sport or tourism, they are separate activities that are excluded from being in fishing operations by paragraph 34(1)(i).

136. Our views are supported by the explanatory memorandum to the Customs and Excise Legislation Amendment Bill (No. 3) 1989. The amendments to the Customs Act and the Excise Act introduced by the *Customs and Excise Legislation Amendment Act (No.3) 1989* were introduced to, amongst other things, clarify the eligibility criteria for the 'fishing operations' category of the previous off-road scheme. The change ensured that rebate was not available for activities that were undertaken for recreation, sport or tourism purposes. The change was not intended to affect any entitlements for activities to the extent that those activities were in fishing operations and were carried out for the purposes of a business and were not for business purposes connected with recreation, sport or tourism.

137. In explaining the changes, the explanatory memorandum stated:

> The Principal amendments in the Bill relate to the Diesel Fuel Rebate Scheme, and implement the changes to that Scheme to improve its administration and correct some anomalies in the coverage of activities eligible for rebate announced by the Government on 3 March 1989.
>
> In brief, the changes to the diesel fuel rebate scheme will:
>
> - …remove some anomalies in the coverage of off-road operations eligible for rebate; in particular, fishing, forestry and certain mining operations (Clause 5);
>
> …

> Clause 5 amends section 164 of the Principal Act to clarify certain off-road uses of diesel fuel which are eligible to receive assistance under the diesel fuel rebate scheme (the 'DFRS') as follows:
>
> …
>
> paragraph 5(1)(e) provides that outward voyages by dedicated mother ships, gear trials, voyages to and from a port and fish farming i.e. operations pertinent to the operation of fishing as primary production, are uses that attract rebate of customs duty under the DFRS. The changes clarify however that rebate is not available for recreational, sporting or tourist fishing operations.[64]

Activities conducted otherwise than for the purposes of a business

138. The use of the word 'business' denotes a commercial concern carried on with the aim of making a profit.

139. In determining whether a business is carried on, no one factor is conclusive. Each case must turn on its own particular facts and be determined after weighing up of a combination of factors in the context of the facts of each case. Factors that may be taken into account include whether:

- the activity has a significant commercial purpose or character;
- the person has more than a mere intention to engage in business;
- there is an intention to make a profit from the activity or a genuine belief that profit will be made;
- the activity is planned, organised and carried on in business-like manner;
- the activity is profitable or is likely to be profitable;
- the activity is repetitive and regular;
- the activity is carried on in a manner similar to others who engage in the same trade;
- the size and scale of the activity; or
- the activity is better described as a hobby, a form of recreation or a sporting activity.[65]

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[64] Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill (No.3) 1989.

[65] Taxation Ruling TR 97/11 and TR 97/11ER '*Income Tax: am I carrying on a business of primary production?*'

140. In some cases, it has been held that a person's activities do not amount to carrying on a primary production business but are merely preparatory to engaging in such a business. For example, in *Dalton v. Deputy Federal Commissioner of Taxation*[66] steps taken by a person to clear weeds and put the land into a state of readiness are no more than preparatory to establishing an orchard. On the other hand, in *Ferguson v. Federal Commissioner of Taxation* (Ferguson)[67] it was held that the person's preliminary activities in building up a herd of cattle through a leasing arrangement had sufficient commercial character to amount to a business.

141. In Ferguson, Fisher J said:

> It is necessary to give consideration to the essential nature of the activity, and the question whether it has the characteristics of a business is primarily a matter of general impression and degree.[68]

142. The principles mentioned in these cases are equally relevant to the determination of whether the activities mentioned in paragraphs 34(1)(a) to 34(1)(g) are carried out for the purposes of a business and, therefore, are eligible activities.

Activities conducted for business purposes connected with recreation, sport or tourism

143. The definition of 'fishing operations' in subsection 34(1) provides that the expression fishing operations does not include:

> ... any activity referred to in any of the preceding paragraphs that is conducted, in whole or in part:
>
> ...
>
> (i) for business purposes connected with recreation, sport or tourism.

144. Where an activity mentioned in paragraphs 34(1)(a) to 34(1)(g) is conducted wholly for business purposes connected with recreation, sport or tourism, the activity is not in fishing operations for the purposes of the off-road credits scheme.

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[66] *Dalton v. Deputy Federal Commissioner of Taxation* AAT Case 12,533; (1998) 98 ATC 2025; (1998) 37 ATR 1243.
[67] *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261; (1979) 9 ATR 873; (1979) 26 ALR 307.
[68] *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261 at page 4271; (1979) 9 ATR 873 at page 884; (1979) 26 ALR 307 at page 320.

145. The expression 'connected with'[69] has a wide meaning and refers to any activity that has a real, substantial and discernible association or involvement with something else. In the context of the exclusion contained in paragraph 34(1)(i), a business purpose is connected with recreation, sport or tourism if there is a substantial and discernible association between the purpose and any one of recreation, sport or tourism.

Example: A fish farming business engaged in the propagation of fish for commercial sale and conducts activities for business purposes connected with recreation, sport or tourism

146. *Trout About Pty Ltd (Trout About) operates a trout farm as a business. They propagate and raise trout. Mature trout are processed and sold as fresh or smoked trout. They also sell immature trout as live fingerlings.*

147. *Trout About also provides, for a set fee, facilities for recreational anglers and tourists to catch trout from the farm dams. Trout About also operates a restaurant at the farm site.*

148. *Trout About carries on activities on its farm that are partly in carrying on a business of farming of fish and partly for business purposes connected with recreation and tourism.*

149. *Trout About needs to distinguish between activities conducted in the farming of fish and activities conducted for business purposes connected with recreational fishing and tourism.*

150. *Trout About is entitled to an off-road credit for diesel fuel that it purchases for use in the activities conducted in the farming of fish. These activities, mentioned in paragraph 34(1)(c) are not excluded from being in fishing operations by paragraph 34(1)(i).*

151. *However, Trout About is not entitled to an off-diesel credit for diesel fuel purchased for use in providing and maintaining facilities for recreational angling and tourists or for use in the restaurant.[70] These activities are conducted for business purposes connected with recreation or tourism and are excluded from being in fishing operations by paragraph 34(1)(i).*

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[69] See *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271; (1985) 7 ALN N269a; *Collector of Customs v. Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; 115 ALR 1; *District Council of Coober Pedy and Cowell Electric Supply Company Ltd v. Collector of Customs* (1993) 42 FCR 127; (1993) 17 AAR 369; *Collector of Customs v. The Western Australian Government Railways Commission (Westrail)* (1995) 39 ALD 21, amongst others for the meaning of 'connected with'. The Courts have found that to be 'connected with' an activity must be *'bound up with and involved'* or *'real and substantial and not tenuous and remote.'*

[70] Fuel purchased for use in generating electricity for the restaurant may be eligible under paragraph 53(4)(a).

Detailed contents list

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NO: 2003/8357
ISSN: 1449-1583