


CR 2016/7 - Income tax: treatment of compensation payments received under Division 5 of Part 8 of the Fisheries Act 1995 (Vic) relating to phasing out commercial net fishing in Port Phillip Bay

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Class Ruling

Income tax: treatment of compensation payments received under Division 5 of Part 8 of the *Fisheries Act 1995 (Vic)* relating to phasing out commercial net fishing in Port Phillip Bay

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📌 This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner’s opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions considered in this ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 15-10 of the ITAA 1997
- Subdivision 20-A of the ITAA 1997
- Division 40 of the ITAA 1997
- section 102-20 of the ITAA 1997
- section 104-25 of the ITAA 1997
- section 104-235 of the ITAA 1997

- subsection 110-40(3) of the ITAA 1997
- subsection 110-45(3) of the ITAA 1997
- subsection 110-55(6) of the ITAA 1997
- subsection 116-20(1) of the ITAA 1997
- section 118-20 of the ITAA 1997
- section 118-24 of the ITAA 1997
- Division 152 of the ITAA 1997
- Division 392 of the ITAA 1997.

All references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is commercial fishing licence holders who apply for and receive compensation payments under Division 5 of Part 8 of the *Fisheries Act 1995* (Vic) relating to phasing out commercial net fishing in Port Phillip Bay.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 26 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 April 2016 to 30 June 2022. The Ruling continues to apply after 30 June 2022 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Scheme

8. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- *Fisheries Amendment Act 2015* (Vic)
- Explanatory Memorandum to the Fisheries Amendment Bill 2015 (Vic)
- Second Reading Speech for the Fisheries Amendment Bill 2015 (Vic)
- Frequently asked questions Removal of net fishing from Port Phillip Bay, Fisheries Victoria website, <http://agriculture.vic.gov.au/fisheries/commercial-fishing/removal-of-net-fishing-from-port-phillip-bay/frequently-asked-questions>, accessed 4 December 2015.

9. The Victorian government is committed to removing commercial netting from Port Phillip Bay over seven years as part of its Target One Million election commitment in order to grow recreational fishing in Victoria.

10. There are currently two classes of commercial fishing licences that allow licence holders to undertake net fishing in Port Phillip Bay:

- (i) The Purse Seine (Port Phillip Bay) Fishery Access Licence (Purse Seine Access Licence) – of which there is one licence holder.
- (ii) The Western Port/Port Phillip Bay Fishery Access Licence (WP/PPB Access Licence) – of which there are 42 licence holders.

11. The Purse Seine Access Licence and the WP/PPB Access Licence classes were established by Regulation in 1998. Prior to this:

- The holder of the Purse Seine Access Licence operated under a master fisherman licence which was valid for the use of purse sein nets and lampara nets in Port Phillip Bay.
- Holders of the WP/PPB Access Licence operated under a master fisherman's licence with an endorsement to fish in Port Phillip Bay.

12. Subsection 155A(a) of the *Fisheries Act 1995* (Vic) provides transitional provisions which entitle the holder of a Master Fisherman Licence under the repealed *Fisheries Act 1968* (Vic) to be issued with an access licence under the *Fisheries Act 1995* (Vic) with equivalent entitlements.

13. Under existing licence arrangements the:
- Purse Seine Access Licence authorises the licence holder to use net fishing methods.
 - WP/PPB Access Licence allows the licence holder to use both net and non-net fishing methods.

Election Periods

14. There are six 'Election Periods' during which licence holders can elect to surrender their licence:

- (a) the Initial election period – the period prior to 1 April 2016, and
- (b) each of the following Election periods, being the 12 months period commencing on:
 - (i) 1 April 2016
 - (ii) 1 April 2017
 - (iii) 1 April 2018
 - (iv) 1 April 2019
 - (v) 1 April 2020.

The Purse Sein Access Licence

15. Because the Purse Seine Access Licence only permits net fishing, the licence holder may only elect to surrender their licence. Such election to surrender may be made in the election periods up until 1 April 2021, after which the licence will be cancelled by 1 April 2022.

16. Once their licence is cancelled, the Purse Seine Access Licence holder will have access to a compensation package described as the 'Licence Surrender Package'.

The WP/PPB Access Licences

17. The holder of a WP/PPB Access Licence has the option, in the initial Election Period, to elect to retain their licence after 1 April 2022. If their election is successful, the licence holder, on 1 April 2022, is entitled to a compensation package described as the 'Licence Adjustment Package'.

18. These WP/PPB Access Licence Holders will not be permitted to use nets after 1 April 2022.

19. No more than eight of the 42 WP/PPB Access Licence holders will be able to retain their licence after 1 April 2022.

20. Those WP/PPB Access Licence holders (those who have not successfully elected to retain their licence) have the option to elect to surrender their licence in the Election Periods up until 1 April 2021. After that date their licence will be cancelled by 1 April 2022.

21. WP/PPB Access Licence holders will have access to the Licence Surrender Package once their licence is cancelled.

Licence holder not operating the licence or owning any commercial fishing equipment

22. Some licence holders may not personally operate their licence or own any commercial fishing equipment (such as commercial nets or a fishing vessel). Rather, they may lease their fishing rights to, or employ, an operator who undertakes the fishing operations and may own the fishing equipment.

Licence Surrender Package

23. The Licence Surrender Package includes three components:

- (i) A fixed amount of \$310,000 representing compensation for the market value of the fishing licence based on an assessment made by the Victorian Valuer General (Surrender Package Licence Component).
- (ii) A fixed amount of \$75,000 representing an allowance for the reduced market value of specialised commercial fishing equipment such as vessels and nets (Surrender Package Fishing Equipment Component). Any entitlement is not dependent on ownership of any fishing equipment, and no fishing equipment is required to be surrendered if any is owned.
- (iii) An amount representing compensation for loss of income based on three times the total average annual catch value taken over the five years from 1 April 2009 to 31 March 2014 under the licence (Surrender Package Loss of Income Component).

24. The Licence Surrender Package will reduce by 10% of the total package for each Election Period after 1 April 2016 and up to 1 April 2022.

Licence Adjustment Package

25. The Licence Adjustment Package includes two components:
- (i) A fixed amount of \$155,000 representing the reduced market value of the fishing licence, recognising the reduced utility and earning capacity of the licence without the authority to use nets (Adjustment Package Licence Component).
 - (ii) A fixed amount of \$50,000 representing an allowance for the reduced market value of specialised commercial fishing equipment due to the prohibition on netting (Adjustment Package Fishing Equipment Component). Any entitlement is not dependent on ownership of any fishing equipment, and no fishing equipment is required to be surrendered if any is owned.
26. Entitlement to the Licence Adjustment Package arises on 1 April 2022, when affected licence holders must cease commercial net fishing in Port Phillip Bay.

Ruling

1. Licence Surrender Package

Surrender Package Licence Component

Section 6-5 – income according to ordinary concepts

27. The Surrender Package Licence Component is an amount received for the cancellation of the fishing licence, and is not income according to ordinary concepts. The receipt of the Surrender Package Licence Component is not assessable income under section 6-5.

Section 15-10 – bounty or subsidy received in relation to carrying on a business

28. In the present circumstances, the amount received for the cancellation of the fishing licence is not a bounty or subsidy that is received in relation to carrying on a business. Therefore, the receipt of the Surrender Package Licence Component is not assessable income under section 15-10.

Capital gains tax

29. An amount received for the cancellation of a fishing licence is subject to the capital gains tax (CGT) provisions in Parts 3-1 and 3-3. In the present circumstances, CGT event C2 happens under section 104-25 when the licence is cancelled. The amount determined by the Valuer-General of Victoria represents the capital proceeds for the CGT event under subsection 116-20(1).

30. A licence that is used in carrying on a commercial fishing operation may be an active asset within the meaning of subsection 152-40(1) for the purpose of the small business concessions in Division 152.

31. If the Purse Seine Access Licence or the WP/PPB Access Licence was issued to the licence holder as a result of the transition from a master fisherman licence in 1998, and that earlier licence was acquired before 20 September 1985, provided the terms and conditions of the fresh licence are not substantially different and the underlying activity authorised by the licence has not changed (based on the individual circumstances of the licence holder), the licence holder may be able to disregard the capital gain or loss, under paragraph 104-25(5)(a) as a pre-CGT asset, by virtue of a replacement asset roll-over under Subdivision 124-C.

Primary production income

32. The Surrender Package Licence Component received as compensation for the cancellation of the fishing licence is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

Surrender Package Fishing Equipment Component

Section 6-5 – income according to ordinary concepts

33. The Surrender Package Fishing Equipment Component is not income according to ordinary concepts and is therefore not assessable under section 6-5.

Section 15-10 – bounty or subsidy

34. The Surrender Package Fishing Equipment Component is not a bounty or subsidy received in relation to carrying on a business and is therefore not assessable under section 15-10.

Subdivision 20-A – assessable recoupment

35. The Surrender Package Fishing Equipment Component is not an assessable recoupment of a loss or outgoing under Subdivision 20-A.

Capital allowances – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

36. In circumstances where the licence holder owns the commercial fishing equipment and operates the licence, or leases fishing equipment to an operator of the licence, the fishing equipment, including the fishing vessel, are depreciating assets held by the licence holder for the purposes of Division 40. A balancing adjustment event occurs for each asset where the licence holder either:

- (i) disposes of the asset, or
- (ii) still holds the asset, but stops using it, and expects never to use it again.

37. The Surrender Package Fishing Equipment Component is not included in the termination value of the asset for the purposes of calculating any balancing adjustment income or balancing adjustment deduction.

Capital allowances – Where the licence holder does not own any fishing equipment used in operating the licence

38. In circumstances where the licence holder does not own any fishing equipment used to operate their licence (for instance where the holder of the licence leases their licence to an operator and the operator uses their own equipment), the licence holder will not have any fishing equipment that is a depreciating asset within the meaning of that term in section 40-30 used for an income producing purpose.

Capital gains tax – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

39. No CGT event happens as a result of receiving the Surrender Package Fishing Equipment Component. Therefore, as provided by section 102-20, there is no capital gain or loss.

Capital gains tax – Where the licence holder does not own any fishing equipment used in operating the licence

40. In circumstances where the licence holder does not own the commercial fishing equipment used by the licence holder or another operator, the licence holder is receiving an amount of compensation for fishing equipment which they do hold for use in operating the fishing licence. This compensation, representing an amount for the probable reduced market value of commercial fishing equipment, will be subject to the CGT provisions in Parts 3-1 and 3-3. CGT event C2 happens under section 104-25 when the asset ends in accordance with paragraph 104-25(2)(b). The amount of the allowance represents the capital proceeds for the CGT event under subsection 116-20(1).

Primary production income

41. The Surrender Package Fishing Equipment Component is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

Surrender Package Loss of Income Component*Section 6-5 – income according to ordinary concepts*

42. The Surrender Package Loss of Income Component is ordinary income in the hands of the recipient and assessable under section 6-5 in the income year in which it is derived.

Capital gains tax

43. Any capital gain made as a result of receiving the Surrender Package Loss of Income Component is reduced to nil under section 118-20.

Primary production income

44. The Surrender Package Loss of Income Component is 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

2. Licence Adjustment Package***Adjustment Package Licence Component****Section 6-5 – income according to ordinary concepts*

45. The Adjustment Package Licence Component is an amount received for the reduced earning capacity of the fishing licence it is not income according to ordinary concepts. The receipt of the Adjustment Package Licence Component is not assessable income under section 6-5.

Section 15-10 – bounty or subsidy received in relation to carrying on a business

46. The Adjustment Package Licence Component is also not a bounty or subsidy that is received in relation to carrying on a business. Therefore, the receipt of the Adjustment Package Licence Component is not assessable income under section 15-10.

Capital gains tax

47. In this situation, the licence holder will retain their licence and the Adjustment Package Licence Component represents compensation for a permanent reduction in the value of the fishing licence due to its reduced earning capacity. Thus, the Adjustment Package Licence Component represents compensation in respect of a permanent reduction in the value of a CGT asset and will represent a recoupment of the acquisition cost of the fishing licence.

48. The cost base or reduced cost base of the fishing licence will be reduced by the Adjustment Package Licence Component.

49. If the Adjustment Package Licence Component exceeds the total acquisition costs of the fishing licence, the cost base of the licence will be reduced to nil and there will be no CGT consequences in respect of the excess compensation amount.

50. If at a later date the fishing licence is disposed of by the licence holder, the reduction in the cost base or reduced cost base due to the Adjustment Package Licence Component will be taken into account in calculating the capital gain or loss arising in respect of the disposal.

51. If the WP/PPB Access Licence was issued to the licence holder as a result of the transition from a Master Fisherman Licence in 1998, and that earlier licence was acquired before 20 September 1985, provided the terms and conditions of the fresh licence are not substantially different and the underlying activity authorised by the licence has not changed (based on the individual circumstances of the licence holder), the licence holder may be able to disregard the capital gain or loss, under paragraph 104-25(5)(a) as a pre-CGT asset, by virtue of a replacement asset roll-over under Subdivision 124-C.

Primary production income

52. The Adjustment Package Licence Component is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

Adjustment Package Fishing Equipment Component

Section 6-5 – income according to ordinary concepts

53. The Adjustment Package Fishing Equipment Component is not income according to ordinary concepts and is, therefore, not assessable under section 6-5.

Section 15-10 – bounty or subsidy

54. The Adjustment Package Fishing Equipment Component is not a bounty or subsidy received in relation to carrying on a business and is, therefore, not assessable under section 6-5.

Subdivision 20-A – assessable recoupment

55. The Adjustment Package Fishing Equipment Component is not an assessable recoupment of a loss or outgoing under Subdivision 20-A.

Capital allowances – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

56. The fishing equipment, including the fishing vessel, are depreciating assets held by the licence holder for the purposes of Division 40. Under Division 40, a balancing adjustment event occurs for each asset where licence holder either:

- (i) disposes of the asset, or
- (ii) still holds the asset, but stops using it, and expects never to use it again.

The Adjustment Package Fishing Equipment Component is not included in the termination value of the asset for the purposes of calculating any balancing adjustment income or balancing adjustment deduction.

Capital allowances – Where the licence holder does not own any fishing equipment used in operating the licence

57. In circumstances where the licence holder does not own any fishing equipment used to operate their licence (for instance where the holder of the licence leases their licence to an operator and the operator uses their own equipment), the licence holder will not hold any fishing equipment, including a fishing vessel, which are depreciating assets within the meaning of that term in section 40-30.

Capital gains tax– Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

58. No CGT event happens as a result of receiving the Adjustment Package Fishing Equipment Component. Therefore, as provided by section 102-20, there is no capital gain or loss.

Capital gains tax – Where the licence holder does not own any fishing equipment used in operating the licence

59. The Adjustment Package Fishing Equipment Component is compensation for the probable reduced market value of commercial fishing equipment which, in this instance, is not held for use in operating the fishing licence. As such, the Adjustment Package Fishing Equipment Component will be subject to the CGT provisions in Parts 3-1 and 3-3. Accordingly, CGT event C2 will happen under section 104-25 upon receipt of the Adjustment Package Fishing Equipment Component; which is when the asset, being the right to the payment, ends in accordance with paragraph 104-25(2)(b).

Primary production income

60. The Adjustment Package Fishing Equipment Component is not treated as 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

Commissioner of Taxation

3 February 2016

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

1. Licence Surrender Package

Surrender Package Licence Component

Section 6-5 – income according to ordinary concepts

61. Subsection 6-5(1) provides that assessable income includes income according to ordinary concepts (ordinary income). Taxation legislation does not provide a statutory definition of 'ordinary income'.

62. The characteristics of ordinary income have been developed by case law and generally fall into three categories:

- income from providing personal services,
- income from property, or
- income from carrying on a business.

63. Paragraphs 85 of TR 2006/3¹ provides guidelines to aid determining the nature of a receipt. Including, of relevance here:

- Whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient
- Regard must be given to all facts, as such a broad view must be taken of a taxpayer's situation and it is necessary to consider the total situation of the taxpayer
- A payment that is provided for a purpose which is not part of the recipient's business will not be income in nature
- A payment to compensate for the restriction of a person's capacity to perform services or to carry on a business may be a capital payment
- A payment for surrender of part of the profit earning structure is a capital receipt

64. The profit earning structure of a business represents the property or assets used by the business to enable the production of income; it is generally of an enduring nature. The fishing licence enables the income producing activities of a licence holder and, as such, forms part of property or assets used by the licence holder to generate income. It is therefore part of their profit-earning structure.

¹ Taxation Ruling TR 2006/3 *Income tax: government payments to industry to assist entities (including individuals) to continue, commence or cease business.*

65. The loss of the fishing licence is a restriction of the capacity of the licence holder to produce income by fishing in Port Phillip Bay; it is a loss of an asset used by the licence holder to produce income and as such represents a loss of their profit earning structure.

66. The loss of the asset and resultant compensation is also outside normal income producing activities of the licence holder.

67. Therefore the Surrender Package Licence Component is a capital receipt and will not be ordinary income of the licence holder assessable under section 6-5.

Section 15-10 – bounty or subsidy received in relation to carrying on a business

68. Section 15-10 provides that an amount is included in assessable income if it is:

- a bounty or subsidy
- received in relation to carrying on a business, and
- not assessable as ordinary income under section 6-5.

69. The meaning of 'bounty' or 'subsidy' is explained in paragraphs 93 to 98 of TR 2006/3, of importance, paragraph 97 states:

Not all government grants are bounties or subsidies for the purposes of section 15-10. It is essential to determine what the grant is actually for. The question as to the nature and quality of any payment must be determined by reference to the agreement or the terms which created in the recipient the right to the government grant. Any factors used to calculate the amount of payment are of marginal, if any, assistance in determining what the payment is for.

70. Paragraph 96 of TR 2006/3 clarifies the meaning of grant:

'Grant' is defined to include 'that which is granted, as a privilege or right, a sum of money, as for a student's maintenance, or a tract of land'. A reference to 'bounty or subsidy' includes a grant that encourages business or trade and also a grant to address a detrimental effect on a business or trade.

71. Thus, a payment of a grant from government to address a detrimental effect on a business or trade would be a bounty or subsidy in accordance with section 15-10.

72. The Surrender Package Licence Component represents a grant from the Victorian state government for the cancellation of the fishing licence, which is to compensate the licence holder for the market value of the licence. The cancellation of a fishing licence would be detrimental to any fishing business of the licence holder so the payment will be a bounty or subsidy in accordance with section 15-10.

73. For a bounty or subsidy to be assessable under section 15-10 it must be received in relation to carrying on a business. Paragraphs 104 to 106 of TR 2006/3 make it clear that a payment received from a

government that is received merely in relation to giving up or selling part of the profit earning structure of the business will not be in relation to carrying on a business. Rather the payment will relate to the cessation of the business or part of the business operations.

74. As the Surrender Package Licence Component is in relation to the cancellation of part of the profit earning structure of the licence holder, it will not be a bounty or subsidy received in relation to carrying on a business for the purposes of section 15-10.

Capital gains tax

75. A fishing licence is a CGT asset under section 108-5. When the licence is cancelled, CGT event C2 happens under section 104-25. This CGT event happens when ownership of an intangible CGT asset ends. The time of the event under subsection 104-25(2) is the effective date of the cancellation of the licence provided to the licence holder in the notification of successful election.

76. A capital gain is made if the capital proceeds exceed the cost base of the licence, and a capital loss is made if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

77. The capital proceeds under subsection 116-20(1) for the cancellation of the licence is the amount of the Surrender Package Licence Component as determined by the Valuer-General of Victoria.

78. The cost base and reduced cost base of the licence is calculated under Divisions 110 and 112. It includes the costs of applying for the Surrender Package Licence Component. The cost base or reduced cost base is reduced by any amount that is a deductible expense in accordance with subsection 110-45(1B), 110-45(2) or 110-55(4). In accordance with subsection 110-40(2), if the licence was acquired before 7.30pm on 13 May 1997, any expenditure relating to the asset cannot form part of the second and third elements of the cost base if it is deductible.

79. For the 2005/06 and earlier income years CGT rollover for statutory licences, such as a fishing licence, was provided by former section 124-140 (or former section 160ZZPE of the *Income Tax Assessment Act 1936* (ITAA 1936) for income years prior to 1997/98). Under former section 124-140 (or former 160ZZPE) a replacement asset rollover was available when the terms and conditions of the fresh licence were not substantially different to the original licence and the underlying activity authorised by the original licence had not changed.² Under section 124-160 (or former paragraph 160ZZPE(2)(a)), if the original licence was acquired prior

² Effective from the from the 2006/07 income year, section 124-140 now provides replacement asset rollover for a statutory licence where the new licence authorises substantially similar activity as that authorised by the original licence.

to 20 September 1985, the fresh licence is also taken to be acquired before 20 September 1985³.

80. Section 155A of the *Fisheries Act 1995 (Vic)* entitles the holder of a master fisherman's licence under section 13 of the *Fisheries Act 1968 (Vic)* to be issued with an access licence that has entitlements equivalent to those that applied to the master fisherman's licence. By regulations issued in 1998 the master fisherman's licences previously issued under the *Fisheries Act 1968 (Vic)* were transitioned to equivalent access licences under the *Fisheries Act 1995 (Vic)*. As a consequence of this transition the Purse Seine Access Licence or the WP/PPB Access Licences may have originated prior to 1998 as a master fisherman's licence with equivalent fishing rights.

81. It is for individual licence holders to determine, based on their individual circumstances, whether the terms and conditions of and the activity authorised by their current access licence meet the statutory licence rollover provisions in Subdivision 124-C. However, based on the terms of section 155A of the *Fisheries Act 1995 (Vic)* the transition from a master fisherman's licence to an access licence would not in itself prevent the statutory licence rollover from applying.

82. As such, if the current access licence was issued to the licence holder as a result of the transition from a master fisherman licence acquired before 20 September 1985, provided the terms and conditions of the current access licence are not substantially different and the underlying activity authorised by the current access licence have not changed (as determined by the individual licence holder based on their circumstances) the current access licence may be taken to have been acquired before 20 September 1985.

83. Any capital gain or loss which results from the surrender of a licence taken to be acquired before 20 September 1985, as described in paragraphs 79 to 82 of this ruling, is disregarded under paragraph 104-25(5)(a).

84. If a fishing licence is taken to be acquired before 20 September 1985 and an additional licence was acquired on or after that date, the new licence is not a capital improvement to the original pre-CGT fishing licence. The capital gain or loss on the surrender of the new licence is to be worked out separately.

85. A capital gain can be reduced by the general CGT discount if the relevant requirements of Subdivisions 115-A, 115-B and 115-C are met.

86. A capital gain can be reduced or deferred by the small business CGT concessions if the licence is an active asset and the other requirements of Division 152 are met. The concessions potentially available are:

- small business 15-year exemption
- small business 50% active asset reduction

³ The relevant rollover consequences for a fresh licence where the original licence was acquired after 20 September 1985 are found in section 124-155.

- small business retirement exemption, and
- small business roll-over.

Primary production income

87. Subsection 392-80(2) provides that a taxpayer's 'assessable primary production income' for the current year is the amount of that taxpayer's basic assessable income for the current year that was derived from, or resulted from, their carrying on a primary production business.

88. A taxpayer's basic assessable income for an income year is defined in subsection 392-45(2) as their assessable income for the income year less, among other things, any net capital gains included in their assessable income under Division 102.

89. Accordingly, a payment received for the cancellation of the fishing licence is not 'assessable primary production income' for the purposes of subsection 392-80(2) because it is capital in nature and any amount included in assessable income as a net capital gain is excluded under subsection 392-80(2).

Surrender Package Fishing Equipment Component

Section 6-5 – income according to ordinary concepts

90. The Surrender Package Fishing Equipment Component is not provided for a purpose which is part of the licence holder's business or income producing activities, but rather it is made for the purpose of recognising the probable loss in value of capital assets used by the licence holder to derive income as a result of the prohibition on commercial netting in Port Phillip Bay. The allowance is capital in nature and is not assessable as ordinary income under section 6-5.

Section 15-10 – bounty or subsidy

91. The Surrender Package Fishing Equipment Component is made for the purpose of recognising the probable loss in value of capital assets as a result of the prohibition on commercial netting in Port Phillip Bay. It is provided as part of an exit package that cancels fishing licences from holders who will exit the fishery. It is received in relation to cessation of business, or a distinct part of the business. Accordingly, the allowance is not assessable under section 15-10.

Subdivision 20-A – assessable recoupment

92. Under Subdivision 20-A, a taxpayer's assessable income may include an amount received as recoupment of a loss or outgoing if an amount is deductible for the loss or outgoing and the amount received is not otherwise assessable income.

93. The Surrender Package Fishing Equipment Component is made for the purpose of recognising the probable loss in value of capital assets as a result of the cessation of netting in Port Phillip Bay. The payment is not made in respect of any outgoing for which the recipient can claim a deduction under a provision listed under section 20-30 (for example, the cost of the asset). The payment is also not made in respect of any loss for which the recipient can claim a deduction under a provision listed in section 20-30.

94. Accordingly, the Surrender Package Fishing Equipment Component is not an assessable recoupment of a loss or outgoing under Subdivision 20-A.

Capital allowances – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

95. The fishing vessel and equipment are depreciating assets within the meaning of that term in section 40-30. As such the capital allowances provisions in Division 40 apply to each of these assets.

96. Under the scheme the assets remain the property of the recipient licence holder. Accordingly, the Surrender Package Fishing Equipment Component is not received for the sale of the asset or for the loss or destruction of the asset. The recipient licence holder may choose to retain and continue to use the asset, hold the asset but stop using it and never expect to use it again, or dispose of the asset.

97. Where the recipient taxpayer retains and continues to use the asset, it continues to decline in value for the purposes of the capital allowances provisions of Division 40. As no balancing adjustment event for the asset occurs, the Surrender Package Fishing Equipment Component is not taken into account in working out a balancing adjustment amount for the asset as provided for under Subdivision 40-D.

98. Where the recipient taxpayer still holds the asset but stops using it and expects never to use it again, a balancing adjustment event under paragraph 40-295(1)(b) occurs. Under section 40-300 the termination value of the asset is its market value at the time the recipient taxpayer stops using it. Accordingly, the Surrender Package Fishing Equipment Component is not included in the termination value for the asset.

99. Where the recipient taxpayer disposes of the asset, a balancing adjustment event under paragraph 40-295(1)(a) occurs and the termination value for the asset under this event will be the sale proceeds received. The Surrender Package Fishing Equipment Component is not included in the termination value for the asset as the right to receive the payment is not for or in relation to the sale or disposal of the asset.

Capital allowances – Where the licence holder does not own any fishing equipment used in operating the licence

100. In circumstances where the licence holder does not own any fishing equipment used to operate their licence (for instance where the holder of the licence leases their licence to an operator and the operator uses their own equipment), the licence holder will not hold any fishing equipment, including a fishing vessel, which are depreciating assets within the meaning of that term in section 40-30 used for an income producing purpose.

Capital gains tax– Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

101. The fishing equipment is a CGT asset under section 108-5. The right to receive the Surrender Package Fishing Equipment Component for the loss in value of this asset is also a CGT asset. However, as the payment relates most directly to the asset that has suffered the loss in value, the fishing equipment is considered to be the 'relevant asset' for which the payment is received (see TR 95/35⁴ at paragraphs 69 to 82).

102. For CGT purposes, the amount of the Surrender Package Fishing Equipment Component representing the loss in value of the fishing equipment represents a recoupment of all or part of the acquisition costs of this asset where the asset is still owned at the time of receipt of the payment. The cost base or reduced cost base of each CGT asset comprising the fishing equipment is reduced to the extent that the Surrender Package Fishing Equipment Component relates to a permanent reduction in the value of the fishing equipment, in accordance with subsection 110-40(3), 110-45(3) or 110-55(6).

103. If the fishing equipment were later disposed of by the owner, triggering a CGT event, the reduction in its cost base or reduced cost base as a result of the earlier receipt of the Surrender Package Fishing Equipment Component would be taken into account upon disposal of the CGT asset in determining any capital gain or loss.

104. However, as the fishing vessel and equipment are also depreciating assets, any capital gain or loss arising from a CGT event (other than CGT event K7) that is also a balancing adjustment event will be disregarded under section 118-24.

105. If the asset was used (or installed ready for use) for a non-taxable purpose, the balancing adjustment event will cause CGT event K7 under section 104-235 to happen (subject to exceptions in subsection 104-235(1A)). A capital gain or capital loss from CGT event K7 is not disregarded (paragraph 118-24(2)(a)).

⁴ Taxation Ruling TR 95/35 *Income tax: capital gains: treatment of compensation payments*

106. A capital gain which results from CGT event K7 can be reduced by the general CGT discount if the relevant requirements of Subdivisions 115-A, 115-B and 115-C are met.

107. The small business CGT concessions in Division 152 do not apply to a capital gain under CGT event K7 (subsection 152-10(1)). Essentially those concessions relate to the use of an asset in a small business and a capital gain from CGT event K7 arises from the use of an asset for a non-taxable purpose.

Capital gains tax – Where the licence holder does not own any fishing equipment used in operating the licence

108. The right to receive the Surrender Package Fishing Equipment Component is an amount representing the probable loss in value of commercial fishing equipment; this right to receive a payment is a CGT asset. There is nothing in the *Fisheries Act 1995* (Vic) which requires the recipient of this component of the compensation to actually hold any fishing equipment. Rather as a licence holder they have a right to receive compensation for a probable loss in value of commercial fishing equipment. In this instance, as there is no fishing equipment there are no depreciating assets which have suffered a loss in value. As such paragraph 82 of TR 95/35 would apply, meaning the most relevant asset would be the right to receive the compensation.

109. CGT event C2 happens under section 104-25 when ownership of an intangible CGT asset ends. Up and till the payment of the Surrender Package Fishing Equipment Component the right to receive payment remains, after receipt of the payment the right to payment ends which is the CGT asset representing that right. Thus CGT event C2 happens under subsection 104-25(2) when the Surrender Package Fishing Equipment Component is received as this is when the CGT asset ends. The capital proceeds for the CGT event under subsection 116-20(1) will be the amount of the Surrender Package Fishing Equipment Component.

110. As this right to compensation occurs after 20 September 1985 it will be a post-CGT asset.

111. In this instance as no fishing equipment is owned by the licence holder or used in in their business operations, the right to receive compensation will not be an active asset for the purposes of Division 152. This is because the right to receive compensation will not be inherently connected with a business that is carried on (whether alone or in partnership) by you, your affiliate, or another entity that is connected with you (refer to paragraph 152-40(1)(b)).

Primary production income

112. Subsection 392-80(2) provides that a taxpayer's 'assessable primary production income' for the current year is the amount of that taxpayer's 'basic assessable income' for the current year that was derived from, or resulted from, their carrying on a primary production business.

113. Subsection 392-45(2) defines 'basic assessable income' as assessable income less among other things any net capital gains.

114. As explained above, there is no amount relating to the Surrender Package Fishing Equipment Component included in assessable income under:

- section 6-5 as ordinary income
- section 15-10 as a bounty or subsidy
- Subdivision 20-A as an assessable recoupment nor
- Division 40 as a balancing adjustment.

115. If a net capital gain were included in assessable income as a result of CGT event C2 relating to compensation or event K7 relating to the use of the asset for a non-taxable purpose, it would be excluded from basic assessable income under subsection 392-45(2).

116. As such there is no assessable income relating to the Surrender Package Fishing Equipment Component, included in 'basic assessable income' under subsection 392-45(2).

Surrender Loss of Income Component*Section 6-5 – income according to ordinary concepts*

117. A compensation receipt generally takes the character of the item it replaces⁵. Paragraph 85 of TR 2006/3 provides additional factors to be considered, of relevance:

- The nature of a payment is determined by examining the character of the payment in the hands of the recipient.
- A payment in a lump sum does not require a conclusion that the payment is capital.
- The calculation of a payment by reference to expected profits made, or not made by the recipient but that would ordinarily expected to have been made, is a factor supporting the conclusion of income.

118. Paragraph 11 of TR 2006/3 makes it clear that a government payment to provide income support because of an actual or expected reduction in business income is ordinary income in the hands of the recipient and assessable under section 6-5.

⁵ *Commissioners of Taxation (NSW) v. Meeks* (1915) 19 CLR 568; [1915] HCA 34, per Griffith CJ at CLR 580.

119. The Surrender Loss of income Component is a payment to compensate the licence holder for loss of income that could have been earned from fishing in Port Phillip Bay. The amount of the Surrender Loss of income Component is determined by using the total average annual catch value taken over the five years from 1 April 2009 to 31 March 2014 under the licence. In this instance calculation of a payment by reference to profits that would ordinarily have been expected to have been made, due to reduced income from the licence, leads to the conclusion that the Surrender Loss of income Component constitutes assessable income under section 6-5.

Capital gains tax

120. CGT event C2 happens under section 104-25 when the right to receive the Surrender Loss of income Component ends, this happens at the time the payment is made in accordance with paragraph 104-25(2)(b), because in this instance there has been no contract entered into resulting in the asset ending (in accordance with paragraph 104-25(2)(a)).

121. As the Surrender Loss of income Component is included in assessable income under section 6-5, any capital gain made from the CGT event C2 is reduced to nil under section 118-20.

Primary production income

122. Relevantly, 'primary production business' is defined in section 995-1 to mean carrying on a business of 'conducting operations relating directly to taking or catching fish'.

123. Subsection 392-80(2) provides that a taxpayer's assessable primary production income for an income year is the amount of their basic assessable income for the income year that 'was derived from, or resulted from, carrying on a primary production business'.

124. Income Tax legislation does not provide guidance as to when an amount was derived from, or results from, your carrying on a primary production business. However, the Explanatory Memorandum to the Income Tax Assessment Amendment Bill (No. 2) 1978, which first used the words 'assessable primary production income' in the corresponding provision in the ITAA 1936, indicates that the relationship between the income and the primary production business is to be close and direct rather than indirect or remote.

125. The definition of 'assessable primary production income' in the corresponding provision in the ITAA 1936 uses the phrase 'in consequence of the carrying on of a business of primary production'. In AAT Case 6254, AAT Case X82⁶, Dr Gerber observed:

The term 'in consequence of' connotes causality – in this case whether the interest was 'caused' to be derived as the 'predominant' or 'proximate' or 'direct' result of the carrying on of the business of primary production. This is a question of fact.

126. In circumstances where a licence holder is conducting fishing operations in Port Phillip Bay they would be carrying on a primary production business and any ordinary income from that business would be 'assessable primary production income'.

127. Because the income support payment is to compensate for loss of ordinary income that could have been earned by the licence holder from fishing in Port Phillip Bay, there is a causal link between the receipt of the compensation and the carrying on of a primary production business. Without the fishing business there would be no entitlement to compensation. As such it is accepted that the loss of income compensation will be 'assessable primary production income' for the purposes of calculating the 'averaging' adjustment available under Division 392.

2. Licence Adjustment Package

Adjustment Package Licence Component

Section 6-5 – income according to ordinary concepts

128. The explanation at paragraphs 61 to 67 of this Ruling also applies here.

129. The Adjustment Package Licence Component of the package represents the reduced earning capacity of the commercial fishing licence due to the prohibition of the use of nets in Port Phillip Bay. This is neither a normal incident of the recipient's income producing activities or business nor is it provided for a purpose to compensate for loss of income or for which the recipient's business was carried on. The receipt is for the permanent reduction in the earning capacity of the licence. The licence is part of the profit earning structure of the licensed fishing operation. A compensation receipt generally takes the character of the item it replaces. Compensation for the loss of a capital asset or an enduring part of a taxpayer's profit earning structure will be capital in nature. Accordingly, an amount received for the reduced utility and earning capacity of the fishing licence is capital in nature and does not constitute assessable income under section 6-5.

⁶ 90 ATC 599; (1990) 21 ATR 3708.

Section 15-10 – bounty or subsidy received in relation to carrying on a business

130. The explanation at paragraphs 68 to 74 of this Ruling also applies here.

131. This component of the compensation represents a government payment for the cessation of a substantial part of the profit earning structure of the business of the licence holder in that they will no longer be able to use nets to catch fish in Port Phillip Bay.

132. As such compensation for the reduced utility and earning capacity of the fishing licence is not a bounty or subsidy in relation to the carrying on of a business for the purposes of section 15-10.

Capital gains tax

133. The Fishing licence is a CGT asset under section 108-5. The right to receive compensation for the loss in value of this asset is also a CGT asset. However, as the payment relates most directly to the asset that has suffered the loss in value, the fishing licence is considered to be the 'relevant asset' for which the payment is received (see TR 95/35 at paragraphs 69 to 82).

134. Where the CGT asset is still owned at the time of receipt of the payment, the compensation for the loss in value of the fishing licence represents a recoupment of all or part of the acquisition costs of this asset. The cost base or reduced cost base of the CGT asset is reduced to the extent that the allowance relates to a permanent reduction in its value (subsection 110-40(3), 110-45(3) or 110-55(6)).

135. In this instance the licence will not be cancelled, rather the holder will still be able to fish in Port Phillip Bay using non-netting methods. As the licence holder will still own their licence, the cost base or reduced cost base of the fishing licence will be reduced by the amount of the recouped expenditure, or compensation.

136. If the compensation amount exceeds the total acquisition costs of the fishing licence, the cost base of the licence will be reduced to nil and there will be no CGT consequences in respect of the excess compensation amount (see TR 95/35 at paragraph 133).

137. If at a later date the fishing licence is disposed of by the licence holder, the reduction in the cost base or reduced cost base due to the compensation will be taken into account in calculating the capital gain or loss arising in respect of the disposal.

138. Where the terms and conditions of the licence currently held are not substantially different and the underlying activity authorised by the licence has not changed, compared to the licence held prior to 20 September 1985 (based on the circumstances of the individual licence holder), any capital gain or loss which results from the disposal of the current access licence (as described in paragraphs 79 to 83 of this ruling) may be disregarded under paragraph 104-25(5)(a).

Primary production income

139. The explanation at paragraphs 87 to 89 of this Ruling also applies here.

140. Because the payment relates to the reduced earning capacity of the fishing licence it is considered capital in nature, representing recouped capital expenditure.

141. Accordingly, a payment received for the reduced utility and earning capacity of the fishing licence is not 'assessable primary production income' for the purposes of subsection 392-80(2) because it is capital in nature and any amount included in assessable income will be a net capital gain which is excluded under subsection 392-80(2).

Adjustment Package Fishing Equipment Component*Section 6-5 – income according to ordinary concepts*

142. The Adjustment Package Fishing Equipment Component is not provided for a purpose which is part of the recipient's business or income earning capacity, but rather it is made for the purpose of recognising the probable loss in value of capital assets in the recipient's business as a result of the prohibition on commercial netting in Port Phillip Bay.

Section 15-10 – bounty or subsidy

143. The Adjustment Package Fishing Equipment Component is made for the purpose of recognising the probable loss in value of capital assets of the recipient as a result of the prohibition on commercial netting in Port Phillip Bay. It is provided as part of a package that reduces the rights of licence holders to fish. It is received in relation to cessation of business, or a distinct part of the business. Accordingly, the allowance is not assessable under section 15-10.

Subdivision 20-A – assessable recoupment

144. Under Subdivision 20-A, a taxpayer's assessable income may include an amount received as recoupment of a loss or outgoing if an amount is deductible for the loss or outgoing and the amount received is not otherwise assessable income.

145. The Adjustment Package Fishing Equipment Component is made for the purpose of recognising the probable loss in value of capital assets as a result of the cessation of netting in Port Phillip Bay. The Adjustment Package Fishing Equipment Component is not made in respect of any outgoing for which the recipient can claim a deduction under a provision listed under section 20-30 (for example, the cost of the asset). The Adjustment Package Fishing Equipment Component is also not made in respect of any loss for which the recipient can claim a deduction under a provision listed in section 20-30.

146. Accordingly, the Adjustment Package Fishing Equipment Component is not an assessable recoupment of a loss or outgoing under Subdivision 20-A.

Capital allowances – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

147. The explanation at paragraphs 95 to 99 of this Ruling also applies here. Under the Adjustment Package Fishing Equipment Component there is no obligation for the licence holder to surrender any fishing equipment. As such, any equipment they hold which is used to operate the fishing licence will remain their property.

148. The recipient may decide to:

- Retain and continue to use the fishing equipment (in another fishery where net fishing is permitted) – in this instance the fishing equipment will continue to decline in value in accordance with Division 40.
- Hold the fishing equipment but stop using it and never expect to use it again – in this instance there will be a balancing event under paragraph 40-295(1)(b) and the termination value of the fishing equipment will be its market value when the licence holder stops using them.
- Dispose of the fishing equipment – in this instance there will be a balancing event under paragraph 40-295(1)(a) and the termination value will be the sale proceeds received.

149. In all of the above instances the Adjustment Package Fishing Equipment Component will not be included in the termination value for the fishing equipment because the right to receive the Adjustment Package Fishing Equipment Component is not for or in relation to the sale or disposal of the fishing equipment

Capital allowances – Where the licence holder does not own any fishing equipment used in operating the licence

150. The explanation at paragraph 100 of this Ruling also applies here. In this instance the licence holder does not own any fishing equipment used to operate the licence, which are depreciating assets for the purpose of section 40-30 used for an income producing purpose.

Capital gains tax – Where the licence holder operates their fishing licence or leases fishing equipment to an operator of the licence

151. The explanation at paragraphs 101 to 107 of this Ruling also applies here.

152. In short because the fishing equipment is a depreciating asset under Division 40 any capital gain or loss associated with its disposal will be disregarded, provided it is used solely for a taxable purpose.

153. If the fishing equipment is used partly for a non-taxable purpose, then CGT event K7 will happen (subject to exceptions in subsection 104-235(1A)), resulting in a capital gain or loss. The amount of any capital gain can be reduced by the general CGT discount if it meets the other requirements. The small business CGT concessions will not be available to reduce the gain any further.

Capital gains tax – Where the licence holder does not own any fishing equipment used in operating the licence

154. The explanation at paragraphs 108 to 111 of this Ruling also applies here.

155. In short because the licence holder does not own any fishing equipment, CGT event C2 will happen relating to the right to receive compensation. This right will be a post-CGT asset because it happens after 20 September 1985 and it will not be an active asset for the purposes of Division 152.

Primary production income

156. The explanation at paragraphs 112 to 116 of this Ruling also applies here.

157. In short, because no amount is included in assessable income due to section 6-5, 15-10, subdivision 20-A or Division 40, there will be no assessable income included in basic assessable income under subsection 392-45(2).

158. In the event that an amount is included in assessable income because of CGT event C2 or CGT event K7 any net capital gain will be excluded from 'basic assessable income' under subsection 392-45(2).

159. As such, the Adjustment Package Fishing Equipment Component is not 'assessable primary production income' for the purposes of subsection 392-80(2).

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