PGBR 2005/3 - Energy grants: off-road credits for agriculture

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Product Grant and Benefit Ruling

Energy grants: off-road credits for agriculture

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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 agriculture under the *Energy Grants (Credits) Scheme Act 2003* (the EGCS Act).

2. In particular, the Ruling explains:

- the meaning of each of the activities in the definition of 'agriculture' in subdivision 3C of Part 2 of the EGCS Act;
- the application of those provisions in the meaning of 'agriculture' that require that an activity be 'solely' for a purpose;
- the meaning of the expression 'gathering in of crops' in paragraph 22(1)(b) of the EGCS Act; and
- the effect of the exclusion in subsection 53(2) of the EGCS Act of diesel fuel purchased for use in propelling a road vehicle on a public road, including:
  - the definition of 'road vehicle'; and
  - the definition of a 'public road'.

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

4. 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 person

5. This Ruling applies to the class of persons who purchase or import into Australia, off-road diesel fuel for use in agriculture as defined in section 22.

Date of effect

6. 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 settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 39 and 40 of PGBR 2003/1).

7. 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 *Products 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

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

9. A person who purchases or imports into Australia[5] 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.[6] A person who is entitled to an off-road credit is entitled to an energy grant under the Energy Grants (Credits) Scheme.[7]

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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] The expression 'import into Australia' is defined in section 4. 'Australia' is defined in section 4 as not including the external territories.

[6] Subsection 53(1).

[7] Subsection 56(1).

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

11. 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.[8] The previous off-road scheme and the previous on-road scheme ceased on 1 July 2003.

12. 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 provided limited extension of those schemes in relation to fuel purchased prior to 1 July 2003.[9]

13. The Energy Grants (Credits) Scheme is a self-assessment scheme that requires a person to provide to the Australian Taxation Office (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).[10]

14. The Tax Office may also undertake an audit to verify information provided by a person in relation to a claim for the grant.[11]

15. 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. The Energy Grants (Credits) Scheme provides for off-road credits for diesel fuel that is purchased or imported into Australia and used for certain specified off-road uses.

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[8] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, page 3, (General outline and financial impact).
[9] Item 25, Schedule 3 and Item 18 Schedule 4 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003*.
[10] Section 55, section 20 of the PGBA Act, section 284-75 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) and section 35 of the PGBA Act.
[11] Sections 27, 42 to 45A and 48 of the PGBA Act.

16. Under the off-road credits scheme, a person is entitled to an off-road credit (and therefore, an energy grant)[12] if they purchase off-road diesel fuel for use:

- in mining operations (otherwise than for the purpose of propelling any vehicle on a public road);[13]
- in primary production (agriculture, fishing operations or forestry),[14] (otherwise than for the purpose of propelling a road vehicle on a public road);[15]
- 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;[16]
- in marine transport in the course of carrying on an enterprise;[17]
- at residential premises to generate electricity for use in certain specified activities;[18]
- 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;[19]
- at hospitals, nursing homes or other institutions providing medical or nursing care;[20]
- at a home for aged persons;[21] or
- in specific industrial uses.[22]

17. This Ruling addresses the category of agriculture as an aspect of primary production.

[12] Subject to the registration requirements being met.
[13] Subsection 53(2).
[14] Section 21.
[15] Subsection 53(2).
[16] Subsection 53(3).
[17] Subsection 53(3).
[18] Paragraph 53(4)(b).
[19] Paragraph 53(4)(a).
[20] Paragraph 53(4)(c).
[21] Paragraph 53(4)(d).
[22] Subsections 53(5) and 53(6).

18. Many of the terms and expressions defined in Division 3 of Part 2[23] 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 expressions or definitions in the previous off-road scheme, those considerations or decisions have been taken into account in forming the Commissioner's view on the operation of the off-road credits scheme under the Energy Grants (Credits) Scheme.[24]

19. 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. The Commissioner takes the view that, as for the previous off-road scheme, the entitlement provisions of the Energy Grants (Credits) Scheme are intended to be read in a practical, commonsense manner.[25]

20. In *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (*Abbott Point*),[26] 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.[27]

21. In *Australian National Railways Commission v. Collector of Customs, SA*, [28] (*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.[29]

22. The Commissioner considers that the views expressed by Ryan and Cooper JJ in *Abbott Point* and Davies J in *ANR* are equally applicable to the provisions of the off-road credits scheme.

23. Where there is doubt as to the meaning and application of the qualifying provisions, the Commissioner takes the view that they are

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[23] This Division sets out the definitions that are used only in the off-road credits Part of the EGCS Act (Part 4).

[24] 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 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.'

[25] *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No W84/118; (1985) 8 ALN N288.

[26] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371; (1992) 15 AAR 365.

[27] *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.

[28] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

[29] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at 270; (1985) 69 ALR 367 at 372.

to be liberally construed unless the text or context requires a narrow construction.[30]

The definition of agriculture

24. The activities that fall within the definition of agriculture in Subdivision 3C of Part 2 of the EGCS Act are essentially the same (except for minor changes) as those that were eligible for diesel fuel rebate for agriculture under the previous off-road scheme.[31]

25. However, the definition of agriculture in the EGCS Act is structured differently from the definition under the previous off-road scheme. The restructured definition ensures that activities that were previously set out in paragraphs (e) to (zba) of the definition of 'agriculture' in subsection 164(7) of the Customs Act are included under headings for groupings of similar eligible activities.

26. These are listed in paragraphs 22(1)(e) to 22(1)(i) and are:

- a live-stock activity;
- an agricultural soil/water activity;
- an agricultural construction activity;
- an agricultural waste activity; and
- a sundry agricultural activity.

Each of these is in turn defined in Subdivision 3C of Part 2 of the EGCS Act.

Key concepts and definitions

27. In this Ruling, unless otherwise stated:

- a reference to:
  - a grant is a reference to an energy grant for an off-road credit;
  - fuel or diesel fuel is a reference to off-road diesel fuel as defined in section 4;

[30] See *Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* AATA 657, 5 August 2002 at paragraphs 46 to 50. 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.

[31] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, page 3 (Chapter 1, paragraph 1.24).

- the off-road credits scheme is a reference to the entitlement provisions under Part 4 of the EGCS Act;[32]
- the on-road credits scheme is a reference to the entitlement provisions under Part 3 of the EGCS Act;
- purchase in relation to diesel fuel includes import into Australia;
- an eligible activity or activities is a reference to a use that qualifies;
- a core agricultural activity or activities is a reference to paragraphs (a) to (d) of the definition of agriculture in subsection 22(1);
- a farm is a reference to an agricultural property on which a core agricultural activity is carried on;
- a farmer is a reference to a person who carries on a core agricultural activity;
- horticultural produce is a reference to all or any one of, fruit, vegetables, flowers, herbs, edible fungi, nuts, trees, shrubs, plants, seeds, bulbs, corms, tubers or rhizomes grown, propagated or produced by horticulture; and
- the subsection 53(2) primary production exclusion is a reference to the exclusion, in subsection 53(2) of diesel fuel purchased for the purposes of propelling a road vehicle on a public road.

- it is assumed that:
  - a person who carries on an activity within the meaning of agriculture, does not carry on that activity in fishing operations or in forestry;
  - the requirement to be registered under section 9 of the PGBA Act is met; and
- this Ruling applies to partnerships and unincorporated associations as if they were a person.[33]

[32] 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.

[33] 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).

Core agricultural activity

28. A number of the provisions within the meanings of activities included in the definition of agriculture refer to a person who carries on a core agricultural activity or an agricultural property where a core agricultural activity is carried on.

29. Section 31 defines the expression 'core agricultural activity' as meaning:

> … an activity referred to in paragraph (a), (b), (c) or (d) of the definition of ***agriculture*** in subsection 22(1) if that activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

30. A core agricultural activity is an activity undertaken in:

- the cultivation of the soil;
- the cultivation or gathering in of crops;
- the rearing of live-stock; or
- viticulture, horticulture, pasturage or apiculture,

provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

A person who carries on a core agricultural activity

31. A person carries on a core agricultural activity if they carry on one or more of the activities set out in paragraph 30 of this Ruling provided the activities are carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Agricultural activities

32. Subsection 28(1) defines the term 'agricultural activity' as:

> ... an activity referred to in any one of the paragraphs of the definition of ***agriculture*** in subsection 22(1) (other than an activity referred to in paragraph (i) or (j) of the definition of ***sundry agricultural activity*** in section 27) if that activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

33. The term 'agricultural activity' includes other activities which are discussed in section 23 to section 26 and paragraph 27(a) to paragraph 27(h).

Agricultural property

34. The term 'agricultural property' is used in each of sections 23 to 27. In some sections, reference is made to the 'agricultural property where the core agricultural activity is carried on'. In other sections, reference is made to the 'agricultural property'.

35. The term 'agricultural property' is not defined in the EGCS Act. Whether a property is an agricultural property is a matter of fact and degree having regard to the totality of the activities carried out on the property.

36. In the context of the off-road credits scheme, the Commissioner considers that an agricultural property is a property on which the activities of cultivation of the soil, the growing and gathering in of crops or the rearing of live-stock or a mixture of more than one of these activities are carried out, provided those activities are carried out for the purpose of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[34]

37. The term 'agricultural property' also includes a property on which cultivation of soil or of grapes as part of viticulture or of horticultural produce takes place provided those activities are carried out for the purpose of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

38. It is not expected that every hectare of a farm will be used for a core agricultural activity at any one time. Some paddocks may remain fallow or uncleared, some may be devoted to dams and structures (for example, sheds and stockyards), and some land may be occupied by the owner's residence. The property and activities must be considered as a whole.

39. However, a property will not be an agricultural property, if the only agricultural activities conducted on the property are minor relative to the main use of the land.

40. In *Re Raymond Cedric and Brian Richard Wallace and CEO of Customs*[35] (*Wallace*), the applicant was contracted by a sanctuary to carry out certain earthworks associated with the construction of the first stage of a wetland. Approximately 35 to 40 hectares of the sanctuary was used to grow gum trees, which were sold as koala fodder. The applicant claimed a rebate under the previous off-road scheme, in respect of diesel fuel used in earthworks. To be eligible under the previous off-road scheme the activities had to be conducted on an agricultural property.

41. The AAT held that the growing of eucalyptus leaves was only a small part of the activities carried out within the sanctuary. Therefore, while the cultivation of eucalyptus leaves constituted a core agricultural activity, it was not carried out on an agricultural property.

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[34] *Re Raymond Cedric and Brian Richard Wallace and CEO of Customs* AAT No. 13,015 [1998] AATA 633 (25 June 1998); (1998) 27 AAR 430.
[35] *Re Raymond Cedric and Brian Richard Wallace and CEO of Customs* AAT No. 13,015 [1998] AATA 633 (25 June 1998); (1998) 27 AAR 430.

42. Deputy President Forgie SA said:

> Taking into account the limitations in interpretation imposed by the Customs Act, I have concluded that the expression 'agricultural property' means a property on which there are carried out the activities of the cultivation of soil, the growing and gathering of crops or the rearing of livestock or of a mixture of more than one of these activities provided that those activities are carried out for the purpose of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[36]

43. The Commissioner considers that the comments made by the AAT in Wallace are equally applicable to the meaning of 'agricultural property' for the purposes of the off-road credits scheme.

'At a place adjacent to' an agricultural property

44. The phrase 'at a place adjacent to' an agricultural property is used in paragraphs 24(b), 24(d), 24(e), 25(b) and 27(d).

45. In these paragraphs, the word 'adjacent' takes its ordinary meaning of lying near, close or contiguous.[37]

46. A place is adjacent if it is abutting, close or near, and is not distant or remote from the agricultural property. It is not possible to give precise measurements or distances between places to determine their adjacency. It is a question of fact and impression in each case as to whether a place is adjacent to the agricultural property.

47. In *Federal Commissioner of Taxation v. BHP Minerals Ltd*[38] (*BHP Minerals*), the Court was called upon to decide whether residential accommodation was 'at a place adjacent to the site of prescribed mining operations'. In their majority judgment, Toohey and Lockhart JJ, in relation to the concept of adjacency, said:

> In our view the inquiry as to the definition of the expression 'at a place adjacent to, the site of prescribed mining operations …' calls for a broad approach and not one that is narrow or pedantic. …The expression is not one which is capable of a precise or uniform meaning. …
>
> An ordinary and natural meaning of the word 'adjacent' is 'near' or 'close'. …But to be provided at a place adjacent to the site of mining operations does not require contiguity or abutment. Nor does it necessarily require very close proximity. It is sufficient that it is near or close to the site.[39]

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[36] *Re Raymond Cedric and Brian Richard Wallace and CEO of Customs* AAT No. 13,015 [1998] AATA 633 (25 June 1998) at paragraph 39; (1998) 27 AAR 430 at 439.

[37] This was discussed by the AAT in *Re BHP Petroleum and Collector of Customs* (1987) 11 ALD 413 at 424-425; 6 AAR 245 at 256-258. See also *Federal Commissioner of Taxation v. BHP Minerals Ltd* (1983) 51 ALR 166 at 172-174; 14 ATR 389 at 395-397; 83 ATC 4407 at 4412-4413.

[38] *Federal Commissioner of Taxation v. BHP Minerals Ltd* (1983) 51 ALR 166; 14 ATR 389; 83 ATC 4407.

[39] *Federal Commissioner of Taxation v. BHP Minerals Ltd* (1983) 51 ALR 166 at 172-174; 14 ATR 389 at 396-397; 83 ATC 4407 at 4413.

48. The comments of Toohey and Lockhart JJ in *BHP Minerals* are relevant in determining the meaning of the phrase 'at a place adjacent to' an agricultural property for the purposes of the definition of agriculture in the EGCS Act.

First-mentioned agricultural activity

49. Some of the activities listed in the definition of agriculture are eligible only if they are conducted by 'the person who carries on the first-mentioned agricultural activity or by a person contracted by that person'. Examples include:

- searching for groundwater solely for use in an agricultural activity (paragraph 24(b));
- the pumping of water solely for use in an agricultural activity (paragraph 24(d));
- the supply of water solely for use in an agricultural activity (paragraph 24(e));
- the construction or maintenance of sheds, pens, silos or silage pits for use in an agricultural activity (paragraph 25(c)); and
- the service, maintenance or repair of vehicles or equipment for use in an agricultural activity (paragraph 27(e)).

50. The term 'first-mentioned agricultural activity' is interpreted as meaning the agricultural activity, usually a core agricultural activity, to which the activity outlined in the particular provision relates. For example, searching for groundwater, (this being the activity outlined in paragraph 24(b)), will be eligible if it is solely for use in another agricultural activity, such as rearing of live-stock (this being the 'first-mentioned agricultural activity'), and is undertaken by the person who conducts the rearing of live-stock activity, or a person contracted by them or by a subcontractor.

Ruling

General requirements of the off-road credits scheme

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

- the person is registered with the Tax Office for entitlement to an energy grant when it makes a claim for the grant in respect of the credit (subsection 52(1));
- the threshold provision in section 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

52. 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.

53. A person is entitled to an off-road credit if diesel fuel is purchased for use in an ineligible activity but is subsequently used in an eligible activity.

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

54. 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 for use or 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) (section 55A).

55. A person can not retain a grant paid on fuel that is purchased for use or 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).

56. Grants will not be paid in respect of diesel fuel purchased three 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 agriculture'

57. Under section 56, a person who is entitled to an off-road credit is thereby entitled to an energy grant.

58. 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).

59. Under section 21, the expression 'primary production' means agriculture, or fishing operations, or forestry. Agriculture is defined in section 22. A person is, therefore, entitled to an off-road credit if they purchase diesel fuel for use in any of the activities listed in paragraphs 22(1)(a) to 22(1)(i) provided the activity is not excluded from being agriculture by paragraph 22(2)(a) or 22(2)(b).

60. In the context of the expression 'in agriculture',[40] if an activity takes place 'in the course of' agriculture, it takes place 'in' agriculture.

The form of the definition of 'agriculture': means, includes, does not include

61. The use of the expressions, '*means'*, '*includes*' and '*does not include*' in the definition of 'agriculture' in section 22 means that paragraphs 22(1)(e) to 22(1)(i) do not limit paragraphs 22(1)(a) to 22(1)(d). An activity that does not meet the specific requirements of any of paragraphs 22(1)(e) to 22(1)(i) may still be an activity that satisfies the requirements of one or more of paragraphs 22(1)(a) to 22(1)(d) and, if not excluded by subsection 22(2), may be an eligible activity.

62. An activity mentioned in subsection 22(1) (other than hunting or trapping carried on for the purposes of a business, including the storage of any carcasses from the hunting or trapping) is an eligible activity only if it is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Diesel fuel used by contractors

63. A farmer's entitlement to an off-road credit is not lost if the fuel they purchase for use in agriculture is used by a contractor in carrying out an agricultural activity, as defined in subsection 28(1), on that farmer's farm, provided the activity is for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

64. A contractor is entitled to an off-road credit if they purchase diesel fuel for use in carrying out an agricultural activity as defined in subsection 28(1), provided the activity is for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

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[40] Subsection 53(2) refers to use 'in primary production'. As the definition of 'primary production' in paragraph 21(a) refers to agriculture, the reference to 'in agriculture' is appropriate.

65. A subcontractor is entitled to an off-road credit if they purchase diesel fuel for use in carrying out an activity mentioned in subsection 28(2), provided the activity is for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Apportionment of fuel

66. Where some of the fuel purchased is for a use that qualifies and some not, a person is entitled to an off-road credit for the portion of the fuel that is for a use that qualifies. An apportionment will be necessary to ensure that an entitlement to an off-road credit arises only in respect of the amount of diesel fuel purchased for a use that qualifies.

Activities that are agriculture

Cultivation of the soil

67. A person is entitled to an off-road credit if they purchase diesel fuel for use in the cultivation of the soil provided the cultivation is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Cultivation or gathering in of crops

68. A person is entitled to an off-road credit if they purchase diesel fuel for use in the cultivation or gathering in of crops provided the cultivation or gathering in is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Crop

69. The Commissioner takes the view that a 'crop' is the product of a harvest of cultivated plants, cereals, fruit and the like. The term 'crop' does not include goods produced from those harvested plants.

Gathering in of crops capable of being stored

70. In relation to crops that are capable of being stored, the 'gathering in' of the crop ceases when it is physically collected together for the first time on a farm.

71. If the crop is loaded directly from a harvester into a road vehicle[41] that will take it away for processing or permanent storage, the gathering in ceases once the crop has been fully loaded onto the road vehicle for transport off the farm.

[41] See paragraphs 464 to 469 of this Ruling for a discussion of the meaning of 'road vehicle'.

Gathering in of crops that cannot be stored

72. In relation to crops that are required to be processed soon after harvesting, that is, crops that cannot be stored (for example parsley or sugar cane), the gathering in of the crop ceases when it is physically collected together for the first time on a farm prior to its processing on or off the farm. If a crop is processed on the farm immediately after harvesting, the gathering in ceases when the crop is taken to the site of the processing plant or when it is first stockpiled ready for processing.

73. In some instances, a crop is taken directly by agricultural machinery (for example a tractor and trailer combination) that is used as an integral part of the harvesting process from the field where it is grown to a processing plant or mill, or a central collection area located off the farm. In those cases, the crop is not gathered in until it is taken to the central collection area at the processing plant or mill or to another central collection area off the farm. However, this does not apply if the crop is taken from the farm to the processing plant or mill, or to another collection area off the farm, by road vehicles.

Rearing of live-stock

74. A person is entitled to an off-road credit if they purchase diesel fuel for use in the rearing of live-stock provided the rearing of live-stock is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

75. For the purposes of paragraph 22(1)(c), rearing of live-stock means the breeding or raising of, and caring for, animals for the production of food, fibres, skins, fur or feathers, or for their use in the farming of land.

Viticulture

76. A person is entitled to an off-road credit if they purchase diesel fuel for use in viticulture provided the viticulture is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Horticulture

77. A person is entitled to an off-road credit if they purchase diesel fuel for use in horticulture provided the horticulture is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

78. For the purposes of paragraph 22(1)(d), horticulture has its ordinary meaning, which is illustrated and expanded by section 33.

79. For the purposes of the off-road credits scheme, horticulture does not extend to the commercial manufacture of goods produced for use by others in horticulture.

Gathering in of horticultural produce

80. If the horticultural produce is not transported immediately after picking or harvesting, but is stored on the agricultural property, for the purposes of the off-road credits scheme, the 'gathering in' of the produce ceases when it is physically brought together for the first time. If the horticultural produce is transported immediately after picking or harvesting, the gathering in of the horticulture produce ceases when it is physically collected for the first time on the farm prior to its transport.[42]

Pasturage

81. A person is entitled to an off-road credit if they purchase diesel fuel for use in pasturage provided the pasturage is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Apiculture

82. A person is entitled to an off-road credit if they purchase diesel fuel for use in apiculture provided the apiculture is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

83. For apiculture to qualify as agriculture, it is not necessary that it be carried out on an agricultural property.[43] However, the fact that an activity in apiculture is carried out on a property that is not ordinarily used for an agricultural activity does not have the effect of converting that property into an agricultural property.

Activities included as agriculture

Solely

84. Some activities included in the definition of agriculture must be **'solely'** for a particular purpose.[44]

85. The Commissioner takes the view that the provisions that contain the 'solely' requirement should not be interpreted so narrowly

[42] This is consistent with our views in relation to the gathering in of crops – see paragraphs 70 to 73 and 171 to 191 of this Ruling.
[43] See paragraphs 34 to 43 of this Ruling for a discussion on the meaning of 'agricultural property'.
[44] The word 'solely' is used in paragraphs 24(b), 24(d) and 24(e) in the definition of agricultural soil/water activity.

as to prevent their application in a practical and commonsense manner.

86. The Commissioner considers that if a person purchases diesel fuel for use in a number of activities, an apportionment can be made as to its intended use in the different activities. If a portion of the fuel is purchased for use in a qualifying activity that has the 'solely' requirement, an entitlement to an off-road credit arises for the portion of the fuel that is purchased for use in the activity that qualifies as agriculture.

Live-stock activity

87. A person is entitled to an off-road credit if they purchase diesel fuel for use in a live-stock[45] activity, as defined in section 23, provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

88. For the purposes of the off-road scheme the Commissioner takes the view that the term live-stock takes on its ordinary meaning, which is affected by the definition of 'live-stock' in subsection 23(2).

Agricultural soil/water activity

89. A person is entitled to an off-road credit if they purchase diesel fuel for use in an agricultural soil or water activity provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Agricultural construction activity

90. A person is entitled to an off-road credit if they purchase diesel fuel for use in an agricultural construction activity provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

Agricultural waste activity

91. A person is entitled to an off-road credit if they purchase diesel fuel for use in an agricultural waste activity, provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

92. For the purposes of section 26, a waste product of an agricultural activity is a by-product of an agricultural activity that is useless, rejected, not wanted or economically unusable and which is to be discarded.

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[45] 'Live-stock' is defined in section 4 as having a meaning that is affected by subsection 23(2). See paragraphs 194 to 204 of this Ruling for a discussion on the meaning of the term live-stock.

Sundry agricultural activity

93. A person is entitled to an off-road credit if they purchase diesel fuel for use in a sundry agricultural activity as defined in section 27 provided the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[46]

Use of diesel fuel 'at' residential premises

94. For the purposes of paragraph 27(j), the use of diesel fuel is 'at' residential premises if the plant or generator in which it is to be used is appurtenant to and coherent with premises sufficient for it to be said that it belongs to the premises.

Activities excluded from the definition of agriculture

Forestry or fishing operations

95. A person is not entitled to an off road credit under the category of agriculture for activities that constitute fishing operations[47] or forestry[48] (paragraph 22(2)(a)).

Activities not undertaken as part of a business to obtain produce for sale

96. A person is not entitled to an off-road credit in respect of diesel fuel purchased for use in an activity mentioned in subsection 22(1), unless the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[49]

97. The exclusion in paragraph 22(2)(b) does not apply to hunting or trapping, including the storage of any carcasses or skins obtained from the hunting or trapping, that is carried out for the purposes of a business.

98. An activity will directly benefit a business undertaken to obtain produce for sale if there is a close and immediate positive effect or benefit from the activity in question to the business.

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[46] The exclusion in paragraph 22(2)(b) does not apply to an activity that is a sundry agricultural activity under paragraph 27(i).
[47] See section 34 for the meaning of 'fishing operations' and related definitions.
[48] See section 35 for the meaning of 'forestry'.
[49] Paragraph 22(2)(b).

The exclusion from the qualifying use 'in primary production' of diesel fuel purchased for use in propelling a road vehicle on a public road

99. A person is not entitled to an off-road credit under the qualifying activity of agriculture for diesel fuel purchased for use in propelling a road vehicle on a public road.

What is a road vehicle?

100. A vehicle is a 'road vehicle' if it is of a kind commonly or regularly used on roads for the transport of persons or goods.[50] The Commissioner considers that tray trucks, dump trucks and truck and trailer combination vehicles, which are vehicles ordinarily used to transport agricultural produce, are road vehicles for the purposes of the subsection 53(2) primary production exclusion.

101. The Commissioner is of the view that tractors, tractor and trailer combinations, fertiliser spreaders, harvesters and sprayers are not vehicles of a kind ordinarily used on roads for the transport of persons or goods. They are not road vehicles for the purposes of the subsection 53(2) primary production exclusion.

Meaning of 'public road'

Roads that are public roads

102. For the purposes of the subsection 53(2) primary production exclusion, the Commissioner considers that a road is a public road if:

- it is opened, declared or dedicated as a public road under a statute;
- it is vested in a government authority having statutory responsibility for the control and management of public road infrastructure; or
- it is dedicated as a public road at common law.

Roads that are not public roads

103. The Commissioner considers that the following are not public roads for the purposes of the subsection 53(2) primary production exclusion:

- a road constructed or maintained under a statutory regime by a public authority that is not an authority responsible for the provision of road transport infrastructure, in circumstances where the statutory regime provides that public use of, or access to, the

[50] Section 4 defines 'road vehicle' to mean: 'a vehicle of a kind ordinarily used on roads for the transport of persons or goods'.

road is subordinate to the primary objects of the statutory regime; or

- a road that has not been dedicated as a public road over privately owned land.

Explanation

General eligibility requirements of the off-road credits scheme

Requirement for registration

104. A person must be registered for energy grants before they can make a claim. Section 9 of the PGBA Act sets out the requirements for registration for energy grants 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.

Threshold and eligibility provisions

105. 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.

106. 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 is still available if diesel fuel is purchased for use in an ineligible activity, and then subsequently shown to be used in an eligible activity.

107. 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[51] and it may be recovered.[52]

108. 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.

[51] Section 55.
[52] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.

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

109. Regardless of whether the threshold and eligibility provisions have been met, a person is not entitled to an off-road credit (and therefore an energy grant), 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).[53]

110. A person is not entitled to retain energy grants paid in the circumstances listed in paragraph 109. Accordingly, grants paid in respect of fuel purchased for use in an eligible activity but which is used in an ineligible activity, or that is sold or otherwise disposed of or lost will be recovered following an amendment to the assessment of the grant payable.[54]

111. 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.[55]

112. Regardless of whether the threshold and eligibility provisions have been met, a person is not entitled to an off-road credit (and therefore an energy grant) if the diesel fuel they purchase 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).[56] 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.[57]

113. A claim for an energy grant must be given to the Tax Office within 3 years after the earliest purchase of the fuel during the claim period. This means that energy grants will not be paid in respect of diesel fuel that was purchased three or more years prior to an application for the energy grant being received by the Tax Office.[58]

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[53] Section 55.
[54] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.
[55] Section 27A of the PGBA Act.
[56] 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.
[57] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.
[58] 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.

Entitlement to off-road credits for diesel fuel purchased for use 'in agriculture'

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

115. 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).

116. Subsection 53(2) states in part that 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).[60]

117. The expression 'primary production' is defined in section 21 as follows:

> The expression ***primary production*** means:
>
> (a) agriculture; or
>
> (b) fishing operations; or
>
> (c) forestry.

Meaning of 'in' agriculture

118. In the context of the expression 'in agriculture' the use of the word 'in' has been determined by the AAT and courts to be restrictive. In *State Rail Authority (NSW) v. Collector of Customs*[61] the full Federal Court found:

> On its face, it appears the object of s.78A of the Act is to allow a rebate in respect of fuel purchased for use 'in mining operations'. Usually the use of the term 'in' in this context is intended to be restrictive (see, e. g., *Robe River Mining Co. Pty Ltd v. Commissioner of Taxation* (1989) 21 FCR 1 at 12).[62]

119. The Customs and Excise Legislation Amendment Bill 1995 further sought to narrow the entitlement to rebate to those engaged in mainstream farming.[63] The Bill amended the definition of 'agriculture' by removing the so called 'sweeper clauses'. This amendment removed any doubt that the rebate of duty in respect of diesel fuel used 'in agriculture' was restricted to those activities that fall fully within the definition of 'agriculture', rather than in respect of activities that may be remotely connected with 'agriculture'.

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[59] Subsection 56(1).
[60] Subsection 53(2).
[61] *State Rail Authority (NSW) v. Collector of Customs* (1991) 33 FCR 211; 14 AAR 307.
[62] *State Rail Authority (NSW) v. Collector of Customs* (1991) 33 FCR 211 at page 214; 14 AAR 307 at paragraph 12.
[63] Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995.

120. 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 'agriculture' is included in the definition of primary production, to be eligible for an off-road credit under the agriculture provisions, a person's activities must take place 'in' agriculture.

121. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)*,[64] Nicholson J stated:

> The word 'in' as it appears in par (a) of the definition of 'mining operations' is to be understood in this context as 'inclusion within, or occurrence during the course of'…[65]

122. The Commissioner considers that the expression 'in agriculture' means inclusion within or during the course of agriculture. The following three criteria are relevant in determining if an activity takes place 'in the course of' agriculture:

- a **causal** link exists – in other words, a certain activity is *functionally integrated* with agriculture, thereby forming an essential part of it;
- a **spatial** link exists – meaning that an activity takes place in an area set aside or occupied for agriculture; and
- a **temporal** link exists – the activity takes place in a timely fashion, not prior to, or after the completion of, the agricultural activity.[66]

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

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[64] *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance*) (1998) 158 ALR 241; (1998) 87 FCR 482. See also *Re Wandoo Alliance Pty Ltd v. CEO of Customs* [2001] AATA 801, paragraph 9; (2001) 34 AAR 98 at 114. 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.

[65] *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.

[66] 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; (1998) 158 ALR 241; *Re Wandoo Alliance Pty Ltd v. 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.

The form of the definition of 'agriculture': means, includes, does not include

124. The definition of 'agriculture' in section 22 consists of three parts:

- **subsection 22(1), paragraphs (a) to (d):** 'agriculture' *means* the cultivation of the soil, the cultivation or gathering in of crops, the rearing of live-stock, viticulture, horticulture, pasturage or apiculture;
- **subsection 22(1), paragraphs (e) to (i):** 'agriculture' *includes* a number of specific activities. Each of these activities is then separately defined in sections 23 to 27; and
- **subsection 22(2), paragraphs (a) and (b):** 'agriculture' *does* ***not*** *include* the specific operations or activities detailed in these paragraphs.

125. The use of the form '*means ... includes ... does not include*' in section 22 means that paragraphs 22(1)(a) to 22(1)(d) contain the central features of 'agriculture', which is then expanded by the specific activities listed in paragraphs 22(1)(e) to 22(1)(i). All activities contained in paragraphs 22(1)(a) to 22(1)(i) are subject to the specific exclusions contained in paragraphs 22(2)(a) and 22(2)(b). If an activity is within one of paragraphs 22(1)(a) to 22(1)(i) and is not excluded by subsection 22(2), a person is entitled to an off-road credit if they purchase diesel fuel for use in that activity.

126. The use of the expressions, '*means'*, '*includes*' and '*does not include*' in the definition of 'agriculture' in section 22 means that activities that are not expressly covered in paragraphs 22(1)(e) to 22(1)(i) may still be eligible if they fit within the broad activities outlined in paragraphs 22(1)(a) to 22(1)(d). Paragraphs 22(1)(e) to 22(1)(i) do not provide an exhaustive list of eligible activities. Rather, they add to the list of eligible activities in paragraphs 22(1)(a) to 22(1)(d).

127. The form of the definition of 'agriculture': ***means***, ***includes, does not include*** is substantially the same as that used for the definition of agriculture in the previous off-road scheme. Previous decisions of the Courts and the AAT are, therefore, relevant to the interpretation of section 22.

128. In the same way that the list of specific activities is not exhaustive in terms of eligibility, an activity does not have to be mentioned in subsection 22(2) to be excluded from the definition of 'agriculture'. This subsection serves merely to exclude particular activities from the definition of 'agriculture', while other activities will be excluded because they do not fall within the meaning of 'agriculture'.

129. In practical terms, in determining whether a certain activity is in 'agriculture' and, therefore, eligible for an off-road credit, it is appropriate to consider:

- firstly, whether the activity falls within one of paragraphs 22(1)(e) to 22(1)(i). If it does and the activity is not excluded by subsection 22(2), it will be 'agriculture' for the purposes of the off-road credits scheme; and
- secondly, if the provisions of paragraphs 22(1)(e) to 22(1)(i) are not met, whether the activity otherwise comes within paragraphs 22(1)(a) to 22(1)(d) of the definition of 'agriculture'. If it does and the activity is not excluded by subsection 22(2), it will be 'agriculture' for the purposes of the off-road credits scheme.

130. This approach ensures that appropriate consideration is given to the specific activities in paragraphs 22(1)(e) to 22(1)(i) in determining whether a particular activity is in 'agriculture' and is a qualifying use under the off-road credits scheme. Appendix 1 sets out the basic decision chart for determining if a purchase of diesel fuel qualifies for an off-road credit under the category of 'agriculture'.

131. The meaning of 'in agriculture' is not restricted to the physical act of cultivation, gathering in of crops, rearing of live-stock, viticulture, horticulture, pasturage or apiculture. In determining whether an activity takes place 'in the course of' agriculture, the three criteria in paragraph 122 of this Ruling should be applied.

132. The manner in which the definition of agriculture in the EGCS Act is structured means that the activities set out in subsection 22(1) are 'in agriculture'.

133. However, paragraph 22(2)(b) has the effect of excluding all the activities set out in subsection 22(1), other than the activity set out in paragraph 27(i),[67] from being within the definition of agriculture unless those activities are carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

134. This means that, for the purposes of the off-road credits scheme, for an activity to be agriculture, it must be carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

[67] The activity referred to in paragraph 27(i) is the activity of hunting or trapping that is carried on for the purposes of a business, including the storage of any carcasses or skins obtained from the hunting or trapping.

135. 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 via a process of evaluation, after weighing all the relevant factors. The courts have held that the following indicators are relevant in determining whether a business is carried on:

- the activity has a significant commercial purpose or character; this indicator comprises many aspects of the other indicators;
- the person has more than just an intention to engage in business;
- the person has a purpose of profit as well as a prospect of profit from the activity;
- there is repetition and regularity of the activity;
- the activity is of the same kind and carried on in a similar manner to that of the ordinary trade in that line of business;
- the activity is planned, organised and carried on in a businesslike manner such that it is directed at making a profit;
- the size, scale and permanency of the activity; and
- the activity is not better described as a hobby, a form of recreation or a sporting activity.[68]

Status of contractors and subcontractors

136. Unless otherwise specified, a person who undertakes an eligible agricultural activity that has the requisite connection to a business undertaken to obtain produce for sale is entitled to an off-road credit.

137. A number of activities that are within the definition of agriculture specifically require the relevant activity to be undertaken by either a farmer,[69] or a person contracted by the farmer. Examples include:

- the mustering of live-stock (paragraph 23(1)(d));
- soil or water conservation activities (paragraphs 24(a) and 24(c));
- the construction of fences (paragraph 25(a));
- the construction of firebreaks (paragraph 25(b));
- the carrying out of earthworks (paragraph 25(e)); and
- firefighting activities (paragraph 27(d)).

[68] For a full explanation of the indicators and relevant court decisions see Taxation Ruling TR 97/11 and TR 97/11ER: Income tax: am I carrying on a business of primary production?

[69] See paragraph 27 of this Ruling for what we mean by the term 'farmer'.

138. The range of persons who are entitled to an off-road credit is expanded by subsection 28(2). This subsection provides that in determining whether an activity is an agricultural activity, each of the activities mentioned in paragraphs 28(2)(a) to 28(2)(d), is also an agricultural activity when it is carried on by a subcontractor. Subject to the exclusion contained in subsection 22(2), a subcontractor is entitled to an off-road credit in respect of diesel fuel they purchase for use in any one of the activities mentioned in paragraphs 28(2)(a) to 28(2)(d).

Example 1: construction of a shed

139. *Zeeland Grazing Enterprises Ltd (Zeeland) contracts Big Sheds Pty Ltd (Big Sheds) to erect a new fodder shed on their farm. Big Sheds in turn engages Boots Concrete Ltd (Boots) to pour the concrete slab for the shed.*

140. *Big Sheds is entitled to an off-road credit for diesel fuel it purchases for use in the construction of the fodder shed.*

141. *Boots is entitled to an off-road credit for diesel fuel it purchases for use in pouring the concrete slab for the shed.*

Replenishment by a farmer of fuel used in a contractor's plant or equipment

142. Under the off-road credits scheme, a contractor is entitled to an off-road credit in respect of diesel fuel they purchase for use in agricultural activities, and a farmer is entitled to an off-road credit in respect of diesel fuel purchased by them for use in agriculture.

143. Where a contractor carries out an activity for a farmer, it is often agreed between the parties that the contractor will be able to replenish their plant or equipment with fuel from the farmer's fuel supply both throughout the activity and upon its completion. This is commonly referred to as a 'full on/full off' arrangement.

144. The Commissioner considers that diesel fuel purchased by a farmer for use in agriculture and used by a contractor in carrying out an eligible agricultural activity for that farmer, under a full on/full off arrangement, is not sold or otherwise disposed of by the farmer. The contractor is not entitled to an off-road credit in respect of this fuel. The farmer provides the fuel for use by a contractor in agriculture. The farmer's entitlement to an off-road credit is not affected by the use of the fuel by the contractor in carrying out eligible activities.[70]

[70] *See Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* AATA 657, 5 August 2002 for a discussion on 'use'.

145. However, the farmer's entitlement to an off-road credit is affected if the fuel used to replenish the contractor's plant or equipment at the end of the particular activity is not used in agriculture. This occurs when the services are performed and the arrangement between the farmer and the contractor ends. In this situation, the farmer uses the fuel for a purpose other than the eligible use for which it was purchased. Under section 55, a person is not entitled to an off-road credit if diesel fuel they purchase is used for a purpose other than the eligible use for which it was purchased, unless that other use is also a qualifying use, or if the fuel is sold or otherwise disposed of.

146. Therefore, under a full on/full off arrangement, a contractor is entitled to an off-road credit in respect of diesel fuel purchased by them for use in an eligible agricultural activity. The farmer is entitled to an off-road credit in respect of diesel fuel purchased for use by that farmer in an eligible agricultural activity and that is used by a contractor in carrying out the agricultural activity on that farmer's agricultural property.

Example 2: 'full-on/full-off' arrangement

147. *Big Diggers Ltd (Big Diggers) agrees to plough a field belonging to Greenfarm Enterprises Ltd (Greenfarm) in preparation for sowing. The agreement specifies that Big Diggers will arrive on Greenfarm's property with a full tank of fuel in their tractor. All additional fuel required for the job will be provided by Greenfarm from the farm tank. At the end of the job, Big Diggers is entitled to refill the tractor's tank prior to leaving the farm.*

148. *Big Diggers is entitled to an off-road credit in respect of the fuel it has purchased and used in ploughing Greenfarm's field. This is the fuel that it brings onto the farm in its tank.*

149. *Greenfarm is entitled to an off-road credit for the fuel that it has purchased for use in agriculture and that is used by Big Diggers in the ploughing activity.*

150. *Neither Greenfarm nor Big Diggers are entitled to an off-road credit in respect of the diesel fuel purchased by Greenfarm that is used to replenish Big Diggers' tractor at the end of the agricultural activity.*

Apportionment of fuel

151. 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.

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

153. There is judicial authority for this view. In *Collector of Customs v. Pozzolanic Enterprises Pty Limited,*[71] 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.[72]

The meaning of 'agriculture'

154. Paragraphs 22(1)(a) to 22(1)(d) contain the central meaning of 'agriculture'. The activities outlined in these paragraphs are referred to as core agricultural activities.[73] These core agricultural activities are:

- the cultivation of the soil;
- the cultivation and gathering in of crops;
- the rearing of live-stock; and
- viticulture, horticulture, pasturage and apiculture.

Cultivation of the soil

155. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (a) the cultivation of the soil.

156. The phrase 'cultivation of the soil' is not defined in the EGCS Act. It therefore takes its ordinary meaning. The term 'cultivate' is defined in *The Australian Oxford Dictionary*[74] as '**1. a** prepare and use (soil etc.) for crops or gardening, **b** break up (the ground) with a cultivator. **2. a** raise or produce (crops)'.

157. The expression 'cultivation of the soil' in paragraph 22(1)(a) means the preparation of the soil for sowing crops or pasture. The activities that constitute 'cultivation of the soil' include:

- the ploughing and turning of soil;
- the spreading of soil conditioners and fertiliser prior to the seeding of a crop;
- any other activities undertaken to treat the soil to make it more friable and readily able to absorb nutrients; and

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[71] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280; (1993) 115 ALR 1.
[72] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280 at 290; (1993) 115 ALR 1 at 12.
[73] Section 31. See paragraphs 28 to 30 of this Ruling for a discussion on 'core agricultural activity'.
[74] *The Australian Oxford Dictionary,* 1999, Oxford University Press, Melbourne.

- land clearing immediately prior to ploughing and turning of soil, provided this is undertaken as part of an agricultural business.[75]

158. 'Cultivation of the soil' includes the felling of trees, clearing of scrub, removal of stones and other actions undertaken in land clearing immediately prior to the ploughing of the soil for the purposes of establishing a farm.[76] The Commissioner considers that these activities are 'in the course of' or 'in the process of' agriculture and are activities 'in' the cultivation of the soil as the causal, spatial and temporal links with an agricultural activity exist.[77]

159. Cultivation of the soil does not include the delivery to,[78] and unloading of,[79] fertiliser on a farm, or the movement of equipment either between agricultural properties or to an agricultural property by a farmer or contractor. These activities take place prior to cultivation of the soil, and are, therefore, not 'in' agriculture.[80]

160. In *ANR*,[81] Davies J dismissed the appeal against the refusal of diesel fuel rebate for fuel used in the transportation of fertiliser. In his decision, he said:

> The diesel fuel rebate looks to operations within a narrower compass than the operations in respect of which the applicant's claims in this respect were made. The rebate for primary production is concerned with production of primary produce, not with the manufacture and wholesale distribution of superphosphate or with the marketing of primary produce once grown and harvested.[82]

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[75] See discussion on 'a business to obtain produce for sale' at paragraphs 135 and 442 to 462 of this Ruling.

[76] The establishment of the farm must be for the purposes of 'a business to obtain produce for sale'. Each case must be considered having regard to its facts and circumstances. See discussion on 'a business to obtain produce for sale' at paragraphs 135 and 442 to 462 of this Ruling.

[77] See paragraphs 118 to 123 for a discussion of the meaning of the expression 'in agriculture'.

[78] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

[79] *Re Rylane Pty Ltd and Collector of Customs* No. W94/26 AAT No. 9692; [1994] AATA 9692.

[80] See paragraphs 118 to 123 of this Ruling for a discussion on the meaning of 'in' agriculture.

[81] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

[82] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at page 271; (1985) 69 ALR 367 at page 373. Although the case was decided in the context of a former definition, in section 164(7) of the Customs Act, of 'agriculture' that contained the 'sweeper clauses' we consider that this applies equally to the definition of agriculture in the EGCS Act.

161. In *Re Rylane Pty Ltd and Collector of Customs*[83] (*Rylane*), the AAT confirmed that the transportation of lime, gypsum and superphosphate by a supply company did not constitute 'cultivation of the soil'. The AAT concluded that:

> The ordinary meaning of the phrase 'the cultivation of the soil' is the tilling of the soil; the bestowing of labour upon the soil in raising crops: see The Macquarie Dictionary. The Tribunal has no doubt that the applicant's operations, being in the nature of transporting, delivering and dumping, cannot sensibly be regarded as themselves part of the process of soil cultivation – notwithstanding that the materials so transported, delivered and dumped are, very soon thereafter, used in that process. The Tribunal finds, therefore, that the applicant's abovementioned operations do not fall within paragraph (a) of the statutory definition of 'agriculture'.[84]

162. The comments made by the AAT in *Rylane* are equally relevant to the meaning of cultivation of the soil in paragraph 22(1)(a).

Cultivation or gathering in of crops

163. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (b) the cultivation or the gathering in of crops.

Cultivation of crops

164. The expression 'cultivation of crops' does not have any particular trade or technical meaning and is not defined in the EGCS Act. It, therefore, takes its ordinary meaning. In the context of paragraph 22(1)(b) the relevant meaning of the term 'cultivate' is 'raise or produce crops'.[85]

165. The expression 'cultivation of crops' in paragraph 22(1)(b) means all the activities necessary for the survival and nurturing of crops. These include:

- cleaning of seed and the application of seed treatments on an agricultural property prior to sowing;
- sowing of seeds or planting;
- fertilising;
- spraying against pests and diseases;
- weeding;
- watering the crop; and
- thinning and pruning.

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[83] *Re Rylane Pty Ltd and Collector of Customs* No. W94/26 AAT No. 9692; [1994] AATA 9692.
[84] *Re Rylane Pty Ltd and Collector of Customs* No. W94/26 AAT No. 9692; [1994] AATA 9692 at paragraph 29.
[85] See paragraph 156 of this Ruling for a discussion of the meaning of 'cultivate'.

Gathering in of crops

166. The expression 'gathering in of crops' is not defined in the EGCS Act. To understand what 'gathering in of crops' means, it is necessary to understand both what the phrase 'gathering in' means and the nature of the 'crop' being gathered in.

The meaning of 'crop'

167. In *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Customs*[86] (*Vicmint*), Deputy President Gerber found that the crop in the harvesting of peppermint plants for the extraction of oil was the peppermint oil. He said:

> In my opinion, although the ordinary meaning of 'crop' may include 'crop of plants', the interpretation 'crop of plant oil [or other ultimate produce of a plant]' does not stretch the ordinary meaning of 'crop' so far as to rebut the presumption.[87]

168. In *Re Day and Deputy Commissioner of Taxation*[88] (*Day*), the AAT considered the meaning of 'crop'. Associate Professor Barton, Member, found that the term 'crop' meant the cultivated produce of the ground, grain, fruit, the annual produce of cultivated plants, whether in the field or gathered, the yield of any natural product which is periodically harvested or a cultivated plant that is grown on a large scale commercially.

169. Associate Professor Barton, Member, held:

> The dictionary meaning of 'crop' in the context of agriculture, is 'the cultivated produce of the ground, as grain or fruit, while growing or when gathered', Third edition of *The Macquarie Dictionary*; 'the annual produce of cultivated plants, esp. the cereals, whether in the field or gathered, the yield of any natural product in a particular season or locality; a plant etc. which is periodically harvested', *The New Shorter Oxford English Dictionary* (1993); a cultivated plant that is grown on a large scale commercially, especially a cereal, fruit or vegetable, an amount of produce harvested at one time', Second edition of the *Oxford Dictionary of English* (2003).[89]

170. The Commissioner takes the view that the definition of the term 'crop' means the product of a harvest of cultivated plants, cereals, fruit and the like. In the Commissioner's view the definition of the term 'crop' does not include goods produced from those harvested plants, for example, sugar produced from sugar cane, juice produced from fruit or oil produced after processing of plant material.

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[86] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Custom*s (1997) 48 ALD 475.
[87] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Custom*s (1997) 48 ALD 475 at paragraph 48.
[88] *Re Day and Deputy Commissioner of Taxation* [2004] AATA 1305 (7 December 2004).
[89] *Re Day and Deputy Commissioner of Taxation* [2004] AATA 1305 (7 December 2004) at paragraph 34.

The meaning of 'gathering in'

171. 'Gathering in' means to physically collect together in one place. 'Gathering in' of a crop ceases when the crop is physically brought together. This will not necessarily be a place of permanent storage. A crop may be gathered in when it is brought together and placed in a temporary storage place from which it is sent off for processing or permanent storage.

172. The time when gathering in of a crop ceases differs from crop to crop and may depend on whether or not the crop is:

- stored or capable of being stored;
- required to undergo some initial processing at the time of picking or reaping before it can be physically collected together;
- collected at a central point for transport to a mill or other processing; and
- transported from the harvester in machinery, plant or equipment which is integral to the harvesting process to a central collection area on or off the farm. However, transport in road vehicles, which are a means of transport for the harvested crop is not an activity in 'gathering in of crops'.

Crops capable of being stored

173. In relation to crops that are capable of being stored, the Commissioner takes the view that the 'gathering in' of the crop ceases when it is physically collected together for the first time on a farm. This may be when it is placed in a storage structure (for example a bin or silo) on a farm even if this is on a temporary basis. Any subsequent storage of the crop on a farm is covered by paragraph 27(f), which deals with the storage of produce of a core agricultural activity on a farm.

174. If the crop is loaded directly from a harvester into a road vehicle[90] that will take it away for processing or longer-term storage, the Commissioner considers that the gathering in ceases once the crop has been fully loaded onto the road vehicle for transport off the farm. The transport of the crop for processing or to a storage facility (for example a silo) is not a qualifying activity as it occurs after the crop has been gathered in.

[90] See paragraphs 464 to 469 of this Ruling for a discussion of the meaning of 'road vehicle'.

Crops that cannot be stored

175. In relation to crops that are required to be processed soon after harvesting, that is, crops that cannot be stored (for example parsley or sugar cane), the Commissioner takes the view that the gathering in of the crop ceases when the crop is physically collected together for the first time on a farm prior to its processing on or off the farm. If a crop is processed on the farm immediately after harvesting, the gathering in of the crop ceases when it is taken to the site of the processing plant.

176. Where the processing takes place off the farm, the transport of the crop from the farm to the processing plant is not ordinarily an activity in gathering in of the crop. If the crop is loaded directly from a harvester into a road vehicle that will take it away for processing, the Commissioner considers that the gathering in of the crop ceases once it has been fully loaded onto the road vehicle for transport off the farm. The transport is an activity that occurs after the crop has been gathered in. This is particularly the case where the crop is taken from a central collection area on the farm to a processing plant off the farm.

177. However, in some circumstances, a crop that cannot be stored may be taken by agricultural machinery,[91] that is used as an integral part of the harvesting process, directly from the field where it is grown to a collection area off the farm (for example, to a collection area or pad at a processing plant or mill or next to a railway siding). The Commissioner accepts that, in these circumstances, the crop is not gathered in until it is taken to the central collection area at the processing plant or mill or to another central collection area off the farm (for example to a railway siding for subsequent transport by rail). Any subsequent transport of the crop from that central collection area is not an activity in gathering in but occurs after the crop is gathered in.

AAT and judicial decisions on gathering in of crops

178. The point at which a crop is said to be 'gathered in' and what the act of 'gathering in' includes has been the subject of AAT and judicial decisions. This has been particularly the case if the crop harvested:

(a) undergoes some treatment or process soon after or in conjunction with the harvesting process in order to obtain the produce for which the crop is grown (for example when parsley is dried); or

(b) leaves the agricultural property without prior storage on the property (for example sugar cane).

[91] Agricultural vehicles such as in-field cane transporters, mechanical grape harvesters and fertiliser spreaders are not vehicles of a kind ordinarily used on roads for the transport of persons or goods. See paragraphs 475 to 486 of this Ruling for a further discussion on the types of vehicles that are not road vehicles for the purposes of the subsection 53(2) primary road exclusion.

179. In *ANR*[92] Sheppard and Burchett JJ affirmed the decision of the AAT that fuel used in the carriage of grain by rail from regional silos to grain ports was not eligible for diesel fuel rebate under the previous off-road scheme. They said:

> In order to succeed, the applicant has to show that, as a matter of law, the carriage of the grain in the circumstances postulated was an operation connected with the gathering in of a crop. In our opinion the carriage is remote from this operation. The operation is connected rather with the distribution of the gathered-in product than with the actual operation of getting it in.[93]

180. In *Vicmint*,[94] Deputy President Dr. Gerber ruled that the distillation of peppermint oil from peppermint plant material (leaves and stalks) did not fall within the ordinary meaning of 'gathering in of crops'. This was despite the fact that, as a matter of commercial necessity, the distillation process had to occur within a short time of mowing and chopping and occurred on the applicant's farm. In his decision, Dr. Gerber said:

> It seems generically that 'gathering in' consists of: the process of plucking plants from the ground, or fruit or other produce from the plant, some initial processing in the immediate vicinity of the place where the plant was, or is, in the ground; and collecting such roughly processed items together in the same place, either on or off the property on which it was growing. In the instant case 'gathering in' is the mowing and windrowing of the peppermint leaves and stalks, the chopping and immediate loading of the leaves and stalks into the mobile tubs, and transporting the leaves and stalks to the site of the steam distillation equipment.[95]

181. In *Day*,[96] Associate Professor Barton also found that the distillation of essential oils from cultivated trees did not fall within the ordinary meaning of the 'gathering in of crops'. In his decision, Associate Professor Barton said:

> …the phrase 'gathering in of crops' as it occurred in sub-para (b) of the definition of 'agriculture' … means the act of severing and collecting plant material from cultivated plants where they stand and does not include any milling, extractive or other process, such as the distillation process, that is applied to the plant material that has been collected. ... The use of 'gathering in of crops' in conjunction with 'cultivation' of crops excludes, in the view of the Tribunal, any

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[92] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

[93] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at 277; (1985) 69 ALR 367 at 380. Although the decision was made in the context of the definition of 'agriculture' in subsection 164(7) of the Customs Act that contained a sweeper clause, we consider that the principle established is equally relevant to the definition of 'agriculture' in the EGCS Act.

[94] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Custom*s (1997) 48 ALD 475.

[95] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Custom*s (1997) 48 ALD 475 at paragraph 51.

[96] *Re Day and Deputy Commissioner of Taxation* [2004] AATA 1305 (7 December 2004).

argument that the legislature intended to include a process such as the distillation process, in that core activity.[97]

182. Deputy President, Dr. Gerber in *Vicmint* identified the 'gathering in' as a process of plucking plants or fruit, with some initial processing while Member, Associate Professor Barton in *Day*, found that the expression meant simply severing and collecting plant material without further processing. The Commissioner takes the view that there is no fundamental conflict between the two findings as neither of the decisions included the distillation process in the definition of 'gathering in'.

183. The approach adopted by the AAT in *Day* is consistent with the approach taken in *Vicmint* in that both decisions recognised the fact that the 'gathering in' of crops ceased when the crop was first physically collected together on a farm. The Commissioner takes the view that the reference to 'initial processing' in the decision of Deputy President Dr. Gerber in *Vicmint* refers to the activities that are an integral part of the harvesting of a crop. Those initial processes include removal of soil or other material which might be collected during harvesting and cleaning or threshing that might occur in a harvester at the time that the crop is severed from the ground. These activities take place in the act of severing and collecting plant material from cultivated plants and, as acknowledged by Member Barton in *Day*, does not extend to include any milling, extractive or other processes after the plant material has been collected together in one place.

184. In *Re LM & TMR Quinlivan and the Quinlivan Family Trust and the Chief Executive Officer of Customs*[98] (*Quinlivan*), the AAT affirmed the decision of the Chief Executive Officer of Customs that fuel used in the operation of a grain dryer some distance away from a farm to artificially dry grain was not eligible for diesel fuel rebate. The AAT took the view that the artificial drying of the crop occurred after it had been gathered in. However, the AAT did not specify the point at which the particular crop was 'gathered in', although it commented that the drying of the crop using windrows was a natural method of drying and was carried out before the crop was gathered in.[99]

185. While the AAT did not identify the actual point at which the gathering in of the grain crop had ceased, it can be concluded that it must have been 'gathered in' before the drying of the grain off the farm. The Commissioner takes the view that the 'gathering in' was

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[97] *Re Day and Deputy Commissioner of Taxation* [2004] AATA 1305 (7 December 2004) at paragraph 40.

[98] *Re LM & TMR Quinlivan and the Quinlivan Family Trust and the Chief Executive Officer of Customs* Case [1997] AATA 11810; (1997) 25 AAR 142.

[99] If the grain requires further drying prior to storage on the farm or transport from the farm to the silos, only drying on the farm by the windrow method would, in line with the decision in *Re LM & TMR Quinlivan and the Quinlivan Family Trust and the Chief Executive Officer of Customs* Case [1997] AATA 11810; (1997) 25 AAR 142, be accepted as an activity in 'gathering in' of the crop. The drying of grain on a farm by any other means may, however, qualify for an off-road credit as a 'sundry agricultural activity' under paragraph 27(g).

most likely completed when the crop was first transferred from the harvester to a field bin or a truck for transport to the dryer.

186. In *Case 21/98*; *AAT No. 13,430*,[100] (*Case 13,430*), the taxpayer was involved in the transportation industry and sought a refund of sales tax on the purchase of particular vehicles and parts on the basis that the vehicles were used to transport harvested sugar cane from farms to sugar mills. The relevant sales tax legislation contained an exemption for machinery, implements and apparatus used in an agricultural activity. Agriculture for the purposes of that legislation included operations connected with the cultivation of the soil, the gathering in of crops and the rearing of live-stock.

187. Senior Member KL Beddoe ruled that the exemption did not apply, as the transporting of the sugar cane was after it had been gathered in. In his view, the 'gathering in' of sugar cane ceased when it was delivered to 23.6 tonne canetainers, which were placed at delivery pads located on or adjacent to the farmer's property. In reaching his conclusion, he said:

> There is thus a clear contractual distinction between the delivery of the crop to a central collection area of the pads as once delivered to the pads, the transport agreement then takes effect. It is at this point that the balance tips as the crop ceases to be gathered in and is accepted by the purchaser Co-op… being an entity who's operations are concerned with milling and production of sugar being distinct from the growing and harvesting of a crop. It is immediately prior to the Transport Agreement taking effect that the crop has been gathered into one mass as discussed in *Vicmint*.[101]

188. In *Proserpine Co-operative Sugar Milling Association v. Commissioner of Taxation*[102] (*Proserpine*), the Federal Court was required to consider whether a cane inspector's vehicle attracted a sales tax exemption. The principal issue was whether the vehicle was regarded as 'mainly carrying out activities in agricultural industry'. The main use of the vehicle was to transport cane inspectors to farm properties to ensure the smooth transport of cane to the mill, the management of cane bin delivery and collection by cane locomotives. The term 'agriculture' for the purposes of sales tax legislation included operations connected with cultivation of soil, the gathering in of crops and the rearing of livestock. In considering whether the transfer of sugar cane to the mill had the relevant connection to agriculture, Keifel J found that:

> From a practical viewpoint those operations connected with the harvest, the 'gathering in of crops' as distinct from its following manufacture, do not extend to the transport of the cane and the organisation of that transportation to the mill. Those activities are, as

[100] Case 21/98 (1998) ATC 263; (1998) 40 ATR 1166; AAT No. 13,430 [1998] AATA 874.
[101] Case 21/98 (1998) ATC 263 at 277; (1998) 40 ATR 1166 at 1183; AAT No, 13,430 [1998] AATA 874 at paragraph 76.
[102] *Proserpine Co-operative Sugar Milling Association v. Commissioner of Taxation* (1996) ATC 5016; (1996) 34 ATR 129.

the Tribunal found, properly seen as connected with the mill's processing.[103]

189. The Commissioner considers that the views expressed in *ANR*, *Vicmint*, *Quinlivan*, *Day* and, although decided in a different legislative context, *Case 13,430* and *Proserpine*, are relevant to the interpretation of the expression 'gathering in of crops' in paragraph 22(1)(b) of the EGCS Act.[104]

Some common crops and when they are gathered in

190. The following table lists some common crops and when they are 'gathered in':

Crop	**When the crop is gathered in**
Broadacre grain and seed crops, for example wheat, barley and canola	When each of these crops is transferred from the harvester to temporary storage bins on the agricultural property. In instances where they are transferred directly from the harvester to a truck for transport to silos off the farm for permanent storage, once the crop has been fully loaded into the truck.
Citrus	When the citrus fruit is placed into crates in the orchard from the pickers' bins.
Cotton	When the cotton seeds are cut and removed from the cotton bolls in a ginning plant or stand.
Grapes	When the grapes are placed into bins in the vineyard where they are picked.
Peppermint leaves and stalks for the extraction of oil	When tubs of chopped peppermint leaves and stalks are transported to the site of steam distillation plant located on the farm before the steam distillation takes place. Gathering in includes the mowing and windrowing of the peppermint leaves and stalks, the chopping and immediate loading of the leaves and stalks into mobile tubs, and transport of the tubs to the site of the steam

[103] *Proserpine Co-operative Sugar Milling Association v. Commissioner of Taxation* (1996) ATC 5016 at 5019; (1996) 34 ATR 129 at 133.
[104] See *Re McDermott Industries and Chief Executive Officer of Customs* (1997) 47 ALD 134 at paragraph 23 where the Tribunal had found it is appropriate to have regard to cases dealing with sales tax legislation.

	distillation plant located on the farm.
Sugar cane	When the sugar cane is gathered into one mass by the farmer at a central collection area either on or adjacent to the farm ready for transport to the mill. Where the farmer takes the sugar cane from the cane field directly to the mill by a tractor and trailer, when the cane is so delivered to the collection pad at the mill.

191. The Commissioner takes the view that once a crop is 'gathered in', the transportation of the crop by any vehicle from the farm or a central collection point is not a qualifying use for an off-road credit as 'gathering in of crops'.[105]

Rearing of live-stock

192. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (c) the rearing of live-stock.

193. The term 'rearing' is not defined in the EGCS Act and takes its ordinary meaning. The relevant definition of 'rear' in *The Australian Oxford Dictionary*[106] is 'breed and care for (animals)'.

The meaning of 'live-stock'

194. The term 'live-stock' is defined in section 4 as having a meaning 'affected by subsection 23(2)'.

195. Subsection 23(2) defines live-stock in the following terms:

> The expression ***live-stock*** includes any animal reared for the production of food, fibres, skins, fur or feathers, or for its use in the farming of land.

[105] However, the transport of a crop by a vehicle having a gross vehicle mass of 4.5 tonnes or more may qualify for an on-road credit.
[106] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

196. The word *includes,* used in the definition of live-stock in subsection 23(2), has been considered in numerous cases.[107] In some instances, the word is used as an extension of the thing defined or described and at other times to provide clarification. In the definition of agriculture in the EGCS Act, the expression is used in a variety of constructions, and each activity in which it is used must be examined separately to see the sense in which it is used. It is often used to simply make clear what the particular activity or definition intends to cover. In the Commissioner's view, in the context of subsection 23(2), the term 'includes' is used to both expand and clarify the meaning of 'live-stock'.

197. The ordinary meaning of the term live-stock, is 'animals, esp. on a farm, regarded as an asset'.[108]

198. The Commissioner considers that subsection 23(2) affects the ordinary meaning of live-stock in two ways. Firstly, it expands the term to include *any* animal.

199. Secondly, subsection 23(2) clarifies the definition by requiring that the animal be reared for the production of food, fibres, skins, fur or feathers, or for its use in the farming of the land.

200. The decision in *Hemens (Valuation Officer) v. Whitsbury Farm and Stud Ltd and other appeals*[109] (*Hemens*) supports the Commissioner's view. In *Hemens*, a definition of 'live-stock' similar to the definition of 'live-stock' in the EGCS Act was considered. Balcombe LJ stated that the definition of live-stock, in the context of the provision being discussed, did not include racehorses.[110] He further stated:

> In *Belmont Farm v. Minister of Housing and Local Government* (1962) 13 P & CR 417 a Divisional Court of the Queen's Bench Division held that the breeding and keeping of horses, not intended for use in the farming of land, did not amount to 'the breeding and keeping of 'livestock' and so was not a use of the land for the purposes of agriculture within the definition of 'agriculture' contained in subsection 119(1) of the *Town and Country Planning Act 1947*. We are not, of course, bound to follow this decision, and I accept that it is a decision on a different definition of 'livestock' in a different Act. However, I find the reasoning of Lord Parker CJ in that case relevant to the question we have to answer. There 'livestock' was defined as 'including any creature kept for the production of food,

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[107] *Re Proprietary Articles Trade Association of South Australia Inc*. [1949] SASR 88; *Lippett v. Robertson* [1953] SASR 13; *In the Estate of Nicholas* [1955] VLR 291; [1955] ALR 817; *Cuisenaire v. Reed* (1962) 5 FLR 180; [1963] VR 719; *YZ Finance Co. Pty Ltd v. Cummings* (1963-1964) 109 CLR 395; *Cohns Industries Pty Ltd v. Deputy Federal Commissioner of Taxation (Cth)* (1979) 37 FLR 508 at 511 and (1979) 24 ALR 658 at 660 per Young CJ, Starke and Gray JJ; *Marsal Pty Ltd & Ors v. Comptroller of Stamps (Vic)* (1982) 82 ATC 4536.

[108] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne. Note: *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW defines live-stock as 'the horses, cattle, sheep, and other useful animals kept or bred on a farm or ranch'.

[109] *Hemens (Valuation Officer) v. Whitsbury Farm and Stud Ltd and other appeals* [1987] 1 All ER 430.

[110] *Hemens (Valuation Officer) v. Whitsbury Farm and Stud Ltd and other appeals* [1987] 1 All ER 430 at 449 to 450.

wool, skins or fur, or for the purpose of its use in the farming of land'. Lord Parker CJ said (at 421-422):

> Granting that the word 'including' has been used in an extensive sense, it seems to me nonsense for the draftsman to use those words 'any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land', if the word 'livestock' was intended to cover the keeping of any creature whether for its use in farming land or not. It seems to me that these words show a clear intention that 'livestock,' however it is interpreted, does not extend to the breeding and keeping of horses unless it is for the purpose of their use in the farming of land.

201. The Commissioner considers that the comments made by Balcombe LJ in *Hemens* apply equally to the definition of 'live-stock' in subsection 23(2).

202. In the context of section 23, the term 'live-stock' means any animal kept for the production of food, wool, skins or fur, or for its use in the farming of land. The term live-stock, therefore, includes animals such as sheepdogs, stock horses, and other working animals that are used as a resource in farming.

203. In the Commissioner's view, the term 'live-stock' also includes animals bred on agricultural stud farms, for example, merino sheep stud farms and cattle stud farms. This is because such animals are reared for the ultimate production (through their progeny) of food, fibres, skins, fur or feathers.

204. Animals that are not reared for the production of food, fibres, skins, fur or feathers, or for their use in the farming of land are not within the meaning of live-stock for the purposes of the off-road credits scheme. This means that the rearing of racehorses or showjumping horses, or animals bred as pets are not live-stock as defined in subsection 23(2).

Rearing of live-stock

205. Rearing of live-stock includes all activities required to breed, raise and care for the animals for the specified purposes in accordance with accepted commercial animal husbandry and management practices. The feeding of animals and the basic milling of stock feed by a farmer for their own use and any off-road transport of the live-stock for agistment during the rearing process are activities in rearing of live-stock.

206. Rearing of live-stock ends when the purpose for which the animals are reared is complete. Practically, this is either when an animal dies or leaves the agricultural property following a sale or other disposal.

207. The breeding of and caring for animals other than for the production of food, fibres, skins, fur or feathers, or for their use other than in the farming of land is not rearing of live-stock under paragraph 22(1)(c) as such animals are not live-stock.

208. The transportation and unloading of feed from a delivery truck into a storage structure on a farm[111] and the loading, and transportation to an abattoir, a slaughtering point or to a port for export of live-stock are not activities in the rearing of live-stock.[112] Nor does rearing of live-stock include the transport of live-stock to a sale yard for auction, sale or other disposal.

209. Any further care for the live-stock (for example during transport, or in lairage yards or on wharves prior to export) is also not rearing of live-stock.[113]

Viticulture

210. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (d) viticulture.

211. For the purposes of paragraph 22(1)(d), viticulture is the growing of grapes through the cultivation of grape vines and includes:

- the planting, tending and maintaining of vines;
- the erection of trellises in a vineyard;
- the harvesting of grapes; and
- clearing land on an agricultural property where a viticultural business is being carried on providing the land clearing occurs immediately prior to the activities, of erecting trellises and planting vines.[114]

212. Once grapes have been harvested, diesel fuel purchased for use in agricultural activities undertaken until the grapes are collected into one mass at a central collection area on the farm qualifies for an off-road credit. If, in the vineyard, grapes are loaded immediately onto a truck for transport away from the agricultural property, the loading of the truck at the agricultural property is an activity in viticulture.

213. For the purposes of paragraph 22(1)(d), viticulture does not include:

- activities that take place after the grapes are collected into one mass at a central collection area on the farm; or

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[111] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280; (1993) 115 ALR 1.

[112] *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367; *Re Impast Pty Ltd and Collector of Customs* No. W91/290 AAT No. 8355; *Re French Island Barge Pty Ltd and Collector of Customs* No. V92/255 AAT No 8625.

[113] *Re Reg Russell and Sons Pty Ltd and Collector of Customs* Nos. W93/218 and W94/16 AAT No. 9635; *Collector of Customs v. Reg Russell and Sons Pty Ltd* No. WAG 95 of 1994 FED No. 421/95.

[114] See discussion on 'a business to obtain produce for sale' at paragraphs 135 and 442 to 462 of this Ruling.

- the transport of grapes away from the agricultural property for processing of any kind.

214. Activities such as the drying of grapes to produce dried fruit[115] or the crushing of grapes, either to produce grape juice or wine, are not 'viticulture' as they occur after the grapes have been harvested and gathered in. These activities are undertaken in the production of wine, juice or dried fruit. No entitlement to an off-road credit arises under section 22 in respect of diesel fuel purchased for use in these activities.

Horticulture

215. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (d) horticulture.

216. Section 33 defines horticulture in the following terms:

> The expression ***horticulture*** includes:
>
> (a) the cultivation or gathering in of fruit, vegetables, herbs, edible fungi, nuts, flowers, trees, shrubs or plants; or
>
> (b) the propagation of trees, shrubs or plants; or
>
> (c) the production of seeds, bulbs, corms, tubers or rhizomes.

217. *The Australian Oxford Dictionary*[116] defines the term 'horticulture' as being 'the art of garden cultivation'. *The Macquarie Dictionary* defines the term 'horticulture' as:

> **1.** commercial cultivation of fruit, vegetables, and flowers, including berries, grapes, vines and nuts. **2.** the science or art of growing fruit, vegetables, flowers or ornamental plants. **3.** the cultivation of a garden.[117]

218. The definition of horticulture in section 33 takes the ordinary meaning of the term and expands that ordinary meaning by including activities in 'gathering in' of horticultural produce. An activity can be considered 'horticulture' if it falls within the ordinary meaning of horticulture or it falls within the expanded definition in section 33, and is carried out for the purpose of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

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[115] However, the drying of fruit may be eligible as a paragraph 27(g) sundry agricultural activity. See discussion on the prevention or deterioration of produce at paragraphs 396 to 411 of this Ruling.
[116] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[117] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

219. The cultivation of horticultural produce means to bestow labour on the land in raising the produce as part of a business and includes the activities of:

- sowing of seeds or planting;
- fertilising;
- spraying against pests and diseases;
- weeding;
- watering the crop; and
- thinning and pruning.

220. Horticulture also includes the production of potting mix by a horticulturalist for use in their business of horticulture.[118]

221. The 'cultivation … of fruit, vegetables, herbs, edible fungi, nuts, flowers, trees, shrubs or plants' means to bestow labour on the land in raising this produce; to till or improve by husbandry. It includes turning the soil and adding fertiliser in order to grow the particular produce.

222. The gathering in of horticultural produce means to pick or harvest from the place of growth and physically collect together in one place for the first time. Gathering in of horticultural produce includes the process of plucking plants from the ground, or fruit or other produce from the plant, some initial processing in the vicinity of the place where the plant was, or is, in the ground and physically bringing together the crop.

223. For the purposes of paragraph 22(1)(d), gathering in of horticultural produce does not include:

- any further processing necessary for the recovery of the produce after it has been gathered in;
- further processing undertaken on the produce for the extraction of another product or in refining the produce; or
- transport of the produce after it has been gathered in.

224. When a horticultural produce is gathered in and not immediately transported or processed, but is stored on the property, the Commissioner considers that the 'gathering in' ceases when the crop is brought together for the first time. Any subsequent storage is covered by paragraph 27(f), which deals with the storage of produce of a core agricultural activity on a farm.

[118] *Australian Native Landscapes Pty Ltd v. Collector of Customs* [1997] 81 FCA (21 February 1997); (1997) 24 AAR 353; (1997) 44 ALD 531.

225. Horticulture does not extend to the commercial manufacture of goods produced for sale to others for use in horticulture. For example, a person who manufactures potting mix or mushroom substrate for commercial sale does not undertake the business of horticulture.[119] The manufacturers are not making potting mix/substrate as part of their own production of plants/mushrooms. However, a commercial horticulturalist who purchases diesel fuel for use in making potting mix or substrate for their own use in the production of plants or mushrooms is entitled to an off-road credit.

226. A horticultural activity that does not constitute a business undertaken to obtain produce for sale is not 'agriculture'.

227. In *Re City of Nunawading and Comptroller-General of Customs*[120] (City of Nunawading), the AAT held that the development and care of reserves, parks, bushland and gardens did not constitute horticulture for the purposes of the Customs Act. The AAT stated that to come within the meaning of horticulture in subsection 164(7) of the Customs Act, an activity must relate in some way to an aspect of primary production conducted as a commercial or business enterprise. The AAT allowed a rebate only to the extent to which the City used diesel fuel in propagating plants for sale.

228. The Commissioner considers that the decision of the AAT in City of Nunawading applies equally to the meaning of horticulture in subdivision 3C of Part 2 of the EGCS Act. The principle applied in City of Nunawading is broadly reflected in the EGCS Act by excluding, from the meaning of agriculture, activities that are not carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[121]

Pasturage

229. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (d) pasturage.

230. The term 'pasturage' is not defined in the EGCS Act and therefore takes its ordinary meaning of:

> **1.** land for pasture. **2.** the process of pasturing cattle etc.[122]

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[119] *Australian Native Landscapes Pty Ltd v. Collector of Customs* [1997] 81 FCA (21 February 1997); (1997) 24 AAR 353; (1997) 44 ALD 531. See also *Re Elf Farm Supplies Pty Ltd and Chief Executive Officer of Customs* [1998] AATA 929; (1998) 28 AAR 485.

[120] *Re City of Nunawading and Comptroller-General of Customs* No V93/540 AAT No 9758; (1994) 36 ALD 628.

[121] Paragraph 22(2)(b) EGCS Act.

[122] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

231. The term 'pasturage' in paragraph 22(1)(d) means the growing of grass or herbage for live-stock to graze upon, or the act of releasing live-stock for feeding upon land on which this grass has been grown. It includes agistment.

232. Pasturage encompasses all activities involved in the growing of this grass or herbage, including watering, feeding the grass with nutrients, and the undertaking of weed control.[123]

Agistment activities

233. The Commissioner considers that pasturage includes agistment activities. Agistment is a form of pasturage for payment.

234. The term 'agist' is defined in *The Australian Oxford Dictionary*[124] as 'take in and feed (livestock) for payment'. While the terms 'agist' and 'agistment' are not used in paragraph 22(1)(d), they are similar in meaning to the term 'pasturage', which is expressly included in the meaning of the term 'agriculture'.

235. Agistment activities are 'agriculture' for the purposes of the off-road credits scheme, provided they are carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[125] This requirement is satisfied if:

- the agistment activities are undertaken as one element of an agricultural business; or
- a person conducts agistment activities on a scale that amounts to a business.

Example 3: pasturage – agistment carried on as part of a farming business

236. *Shep Herd Enterprises Ltd (Shep Herd) runs a sheep station in northern New South Wales. Shep Herd has a number of paddocks that are superfluous to its current requirements. Shep Herd, for a fee, allows Baa Bar Ltd, a neighbouring sheep farmer affected by drought, to graze sheep on its paddocks.*

237. *Shep Herd is entitled to an off-road credit for diesel fuel it purchases for use in pasturage activities it undertakes. The agistment activity that it undertakes is pasturage for the purposes of the off-road credits scheme.*

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[123] *Re Raymond Cedric and Brian Richard Wallace and CEO of Customs* [1998] AAT No 13,015; [1998] AATA 633 (25 June 1998) at paragraphs 25 to 29; (1998) 27 AAR 430.
[124] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[125] See paragraph 22(2)(b).

Example 4: not pasturage – agistment that does not directly benefit a business undertaken to obtain produce for sale

238. *Clover Land Enterprises Ltd (Clover Land) has ten acres of fallow land outside a major rural town. It acquired the land for future housing development. Clover Land, for a small fee, allows Tony and Tania, who operate a horse-riding business to graze their horses on its land. Clover Land uses diesel fuel in the maintenance of fencing to prevent the horses from straying.*

239. *The agistment fee Clover Land receives is very small, and there is no prospect of profit from these activities in the future. Clover Land's agistment activities do not amount to a business. As Tony and Tania are not undertaking a business to obtain produce for sale, Clover Land's agistment activities are excluded from being agricultural activities. The activity is neither for the purposes of, nor for purposes that will directly benefit, a business undertaken to obtain produce for sale.*

240. *Clover Land is not entitled to an off-road credit in respect of the diesel fuel that it purchases for use in the agistment activities.*

Apiculture

241. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** means:
>
> (d) apiculture.

242. The term 'apiculture' in paragraph 22(1)(d) means the breeding and care of bees for the production of honey and/or beeswax.[126] It includes activities such as the transportation of hives (excluding transport on public roads), and the extraction of honey from the honeycomb by methods such as heat extraction or use of a centrifuge.

243. To qualify as agriculture, it is not necessary that apicultural activities be carried out on an agricultural property. Apiculture may be undertaken on crown land, state forests, and other public land or on farms owned or operated by others.

244. Apicultural activities carried out on crown land, state forests, and other public land does not have the effect of converting these properties or land into an agricultural property.[127]

245. Apiculture does not include the manufacture of honey and/or beeswax. Activities such as blending or bottling are not apiculture for the purposes of the off-road credits scheme.

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[126] *Re City of Nunawading and Comptroller-General of Customs* No V93/540 AAT No 9758; (1994) 36 ALD 628.

[127] See paragraphs 34 to 43 of this Ruling for a discussion on what is an agricultural property.

Activities included as 'agriculture'

246. Paragraphs 22(1)(e) to 22(1)(i) set out the activities that are included within the definition of agriculture. Sections 23 to 27 set out the meanings of each of these activities.

247. To qualify as agriculture for the purposes of the off-road credits scheme, some activities included in the definition of agriculture must be '**solely**' for a particular purpose.[128] For example, paragraph 24(b) refers to 'searching for ground water solely for use in an agricultural activity...'.

248. In addition, some activities must be undertaken 'by a person who carries on a core agricultural activity.'[129] A number of the activities included within the definition of agriculture also require an activity to be undertaken 'on an agricultural property where a core agricultural activity is carried on' or 'at a place adjacent to that property'.

249. Paragraphs 28 to 30 of this Ruling explain the meaning of 'core agricultural activity'. The expression 'an agricultural property where a core agricultural activity is carried on' is discussed at paragraphs 34 to 43 and the expression 'at a place adjacent to that property' is explained at paragraphs 44 to 48 of this Ruling.

Solely

250. The interpretation of the provisions that contain the 'solely' requirement, in the definition of 'agriculture', in the previous off-road scheme has been a contentious issue.

251. The word 'solely', in the context of the paragraphs in which it is used, takes on its ordinary meaning of 'only' or 'exclusively'. For an activity to be solely for a particular purpose, it must be only and exclusively for that purpose and for no other purpose. Where a specified activity is required to be solely for a particular purpose for it to be agriculture, an activity that is for a dual purpose will not qualify as agriculture.

252. In *Randwick Municipal Council v. Rutledge*[130] (*Randwick Council*), Windeyer J in relation to the use of the words 'exclusively' or 'solely' stated:

> The words 'exclusively' and 'solely' are familiar in fiscal and rating law. Where an exemption from rating depends upon the use of land exclusively for a particular stated purpose, then the use must be for that purpose only. … such words confine the use of the property to the purpose stipulated and prevent any use of it for any purpose, however minor in importance, which is collateral or independent, as distinguished from incidental to the stipulated use.[131]

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[128] The word 'solely' is used in paragraphs 24(b), 24(d) and 24(e) in the definition of agricultural soil/water activity.
[129] In this Ruling, we refer to this person as a farmer.
[130] *Randwick Municipal Council v. Rutledge* (1959) 102 CLR 54.
[131] *Randwick Municipal Council v. Rutledge* (1959) 102 CLR 54 at 93 to 94.

253. A strict and narrow interpretation of the provisions of the definition of agriculture in the EGCS Act that contain the 'solely' requirement would mean that a person may not be entitled to an off-road credit for diesel fuel purchased for use in a core agricultural activity.

254. For example, paragraph 24(d) provides that an agricultural soil/water activity includes the pumping of water solely for use in an agricultural activity. If a farmer pumps water on their farm only or exclusively for use in the irrigation of their crop, the pumping of the water is within the meaning of 'agriculture'. The farmer is entitled to an off-road credit for diesel fuel purchased for use in the pumping of water.

255. If, however, the bulk of the water is for use in irrigation, and a small quantity is for use in raising showjumping horses, then, on a strict and narrow reading of paragraph 24(d), the activity is not an agricultural soil/water activity as the pumping of the water is not solely for use in an agricultural activity. No entitlement to an off-road credit will arise even though the bulk of the water is for use in the relevant agricultural activity.

256. The above approach does not accord with the legislative intent to maintain entitlement to off-road credits for those that engage in mainstream agriculture.

257. The Commissioner takes the view that the provisions that contain the 'solely' requirement should not be interpreted so narrowly as to prevent their application in a practical and commonsense manner.

258. The Commissioner considers that where a person who carries on agriculture purchases diesel fuel for use in a number of activities, an apportionment can be made as to its intended use in the different activities.[132] If a portion of the fuel is purchased for use in a qualifying activity that has the 'solely' requirement, an entitlement to an off-road credit arises for the portion of the fuel that is purchased for use in the activity that qualifies as 'agriculture'.

259. The Commissioner's views accord with the legislative intent in relation to the introduction of the 'solely' requirement in a number of specified eligible activities in the definition of agriculture in the previous off-road scheme. The Commissioner's views are also supported by some AAT and judicial decisions.[133]

Legislative intent

260. Prior to the 1995 amendments to the Customs Act and the Excise Act, the eligibility criteria for the agriculture category of the previous off-road scheme contained two broad eligibility criteria known

[132] Or, in relation to those activities where the 'solely' requirement is present (being searching for ground water, pumping of water and supply of water), by a contractor contracted by that person.
[133] See paragraphs 265 to 274 of this ruling.

as the 'sweeper clauses'.[134] The so called 'sweeper clauses' provided that operations 'connected with' agriculture were eligible activities.

261. The 1995 amendments sought to narrow the eligibility criteria by replacing the broad and ambiguous 'sweeper clauses' with an objective list of eligible activities.

262. In introducing the amendments, the then Minister for Industry Science and Technology said:

> In the existing legislation, both the definition of 'agriculture' and the definition of 'mining operations' employ what are known as 'sweeper clauses', which have the effect of making other operations connected with agriculture or mining eligible for the payment of rebate. The interpretation of these 'sweeper clauses' has been a source of contention over the years, and has generated most of the litigation in the lifetime of the scheme. …
>
> The intention of these amendments is to put beyond doubt that the Scheme is not meant to provide rebate eligibility for activities which are not sufficiently connected with mining or agriculture; for instance, the provision of a service or utility to a farmer or miner, such as electricity through a grid, …
>
> Because claims of these kinds have sought to broaden the scheme well beyond what it should be, the Government is proposing that these amendments be made retrospective to 1 August 1986 to protect the revenue.[135]

263. The Customs and Excise Legislation Amendment Bill 1995 was subject to further amendments in the Senate prior to being enacted. Those further amendments introduced the 'solely' requirement into a number of specified activities. In explaining the further amendments, the Supplementary Explanatory Memorandum states:

> The stated intention of the Bill is not to affect the eligibility of rebate of persons engaged in mainstream farming and mining. … The schedule of amendments to the Bill is a direct response to these representations and proposes to expand the list of eligible activities under both the definitions of 'agriculture' and 'mining operations'. It is considered that the expanded list will maintain the integrity of the Scheme in assisting persons engaged in mainstream… mining operations while excluding from eligibility activities that can only be regarded as being remotely connected with agriculture or mining.[136]

264. The introduction of the 'solely' requirement in a number of activities in the previous off-road scheme was not, therefore, to deny rebate to those that engaged in mainstream farming (or mining) activities but was intended to deny rebate to those that provide services, or goods to farmers (or miners) as part of a supply of services or goods to the public at large. As the Energy Grants (Credits) Scheme adopts essentially the same definition of 'agriculture' and maintains the entitlements equivalent to those available under the previous off-road

[134] Paragraphs 164(7)(c) and 164(7)(ca) of the Customs Act.
[135] Second Reading Speech, Customs and Excise Legislation Amendment Bill 1995.
[136] Supplementary Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995.

scheme, this applies equally to the entitlement provisions of the off-road credits scheme.

AAT and judicial decisions

265. Further, the Commissioner's view on the interpretation of the provisions that have the 'solely' requirement takes into account the views expressed in AAT and Court decisions.

266. *Re Central Norseman Gold Corporation Limited and Collector of Customs*[137] (Central Norseman), although decided in the context of the 'sweeper clauses', is instructive as to how the AAT or the Courts may interpret the provisions that have the 'solely' requirement. In its decision, the AAT stated:

> These provisions are intended to apply to commercial operations and are therefore to be read in a practical, commonsense manner. They therefore permit the apportionment of a bulk purchase of fuel whenever it can be shown that there is an appropriate basis upon which the apportionment should be made. Although the matter was not argued before the Tribunal, we would accept that a case for apportionment may in a proper case be made out in relation to the purchase of fuel for the operation of a powerhouse which produces electricity for use partly in the course of a mining operation as defined and partly not in the course of such an operation.
>
> That is not to say, however, that the rebate is to be determined simply by apportioning the use to which electricity from a multi-purpose powerhouse is actually used or is intended to be used. The applicant is not entitled to a rebate unless it demonstrates that it purchased diesel fuel for use in a mining operation as defined. If it is established that it has done so, the applicant will not lose its entitlement to rebate simply because some of the electricity produced is in fact used for a purpose which, looked at on its own, does not form part of a mining operation as defined.[138]

267. In *Randwick Council*, Windeyer J, in relation to land, accepted that questions may arise when part of the land is used for the relevant purpose and another part for a different purpose. He referred to the decision of the High Court in *Sisters of Mercy Property Association v. Newtown and Chilwell*[139] (*Sisters of Mercy*).

268. In *Sisters of Mercy*, the High Court examined subsection 249(5) of the *Local Government Act 1928-1941* (Victoria) which stated:

> Land in the occupation of or under the management and control of any religious body and upon which is situated any hall or other building used in connection with any church exclusively for any purposes connected with or in support of the objects of such religious body shall not be rateable property.

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[137] *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No W84/118; (1985) 8 ALN N288.
[138] *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No W84/118 at paragraphs 13 and 14; (1985) 8 ALN N288 at 1.
[139] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369.

269. In that case, on the relevant land there was a convent for nuns of the order, a convent chapel, a college and a small building used exclusively for the preparation of altar bread and for mending church vestments for the religious purposes of the convent chapel.

270. The court adopted an apportionment approach and held that the land actually occupied by the 'altar-bread building' with its curtilage (if any) was exempt from rates, but that this did not bring about the exemption of any other part of the land.[140]

271. The above decisions indicate that, in appropriate circumstances, an apportionment can be made to determine the extent to which an activity or thing is 'solely' or 'exclusively' for a particular purpose.[141] The Commissioner considers that, in relation to those activities in the definition of 'agriculture' in section 22 that have the 'solely' requirement, it is open and appropriate for the Commissioner to take the apportionment approach in determining whether or not an activity is solely for the relevant purpose. The provisions are capable of this interpretation, which gives a reasonable result that accords with the legislative intent.[142]

272. As previously indicated, the Energy Grants (Credits) Scheme is a beneficial scheme that confers benefits on persons that undertake certain activities. In that context, and having regard to the legislative intent, and to the comments made in AAT and judicial decisions, for example, in Central Norseman, to the effect that a commonsense and commercial approach is to be taken to the interpretation of the entitlement provisions of the previous off-road scheme, the Commissioner considers that an AAT or a Court is likely to take a similar interpretative approach to the provisions that contain the 'solely' requirement in the definition of 'agriculture' in the EGCS Act.

273. The apportionment must be made on a reasonable basis. In determining whether an activity is 'solely' for a particular 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. For example, in relation to the supply or pumping of water solely for use in agriculture, the appropriate records include:

- the quantity (in litres or tonnes) of water supplied to an agricultural property and any other property;
- if meters are installed, meter readings of the quantity of water supplied to the agricultural property and other properties; and

[140] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369, Latham CJ at page 376.
[141] See paragraphs 251 to 255 of this Ruling for an alternative narrow interpretation of 'solely' and its effect.
[142] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369, Latham CJ at page 376.

- the total number of hours and fuel consumption rate for the equipment used to pump water to an agricultural property.

274. If an activity fails to meet the provisions of one of the paragraphs where the 'solely' requirement is present, its eligibility as agriculture under paragraphs 22(1)(a) to 22(1)(d) can be considered.[143]

The meaning of agricultural activities in sections 23 to 27

Live-stock activity

275. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** includes:
>
> (e) a live-stock activity.

276. The term 'live-stock' is defined in section 4 of the EGCS Act as having a meaning affected by subsection 23(2). The meaning of 'live-stock' is discussed in paragraphs 194 to 204 of this Ruling.

277. The expression 'live-stock activity' is defined in subsection 23(1). Activities that constitute live-stock activities can broadly be described as:

- shearing and milking;
- transporting of live-stock;
- return journeys after transporting live-stock; and
- mustering of live-stock.

Shearing and milking

278. Paragraph 23(1)(a) provides:

> The expression ***live-stock activity*** means:
>
> (a) the shearing or cutting of hair or fleece of live-stock, or the milking of live-stock, carried out on an agricultural property.

279. The activities of shearing, cutting of hair or fleece, or milking of live-stock qualify as live-stock activities under paragraph 23(1)(a), if they are carried out on an agricultural property.[144] It does not matter who carries out the activities mentioned.

280. The 'shearing or cutting of hair or fleece of live-stock'[145] is considered to extend beyond the shearing of sheep. It includes the removal of hair or fleece from other animals, for example, goats, alpacas and llamas.

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[143] See paragraph 129 of this Ruling.
[144] See paragraphs 34 to 43 of this Ruling for a discussion on the meaning of the expression agricultural property.
[145] For a discussion of the term 'live-stock' see paragraphs 194 to 204 of this Ruling.

281. The phrase 'the milking of live-stock' extends to all activities involved in the obtaining of milk from any animal that may be considered live-stock.

Transporting of live-stock

282. Paragraph 23(1)(b) provides:

> The expression ***live-stock activity*** means:
>
> (b) the transporting of live-stock to an agricultural property:
>
> (i) for the purpose of rearing; or
>
> (ii) for the purpose of agistment.

283. For the transport of live-stock to be a live-stock activity, the off-road transportation[146] of live-stock must be to an agricultural property[147] and it must be for the purpose of either rearing or agistment of the live-stock.[148]

284. If the live-stock is moved from one vehicle to another whilst being transported for an eligible purpose, the transport undertaken by each vehicle qualifies as a live-stock activity.

285. The off-road transport of live-stock to a place other than an agricultural property (for example to a sale yard), or to an agricultural property for a reason other than that of rearing or agistment is not a live-stock activity under paragraph 23(1)(b).

286. Only the actual transport of live-stock for an eligible purpose qualifies as a live-stock activity. Travel prior to the transport of live-stock for the requisite purpose or the movement of a vehicle from a depot to a place at which live-stock are loaded is not a live-stock activity under paragraph 23(1)(b).

Return journeys after transporting live-stock

287. Paragraph 23(1)(c) provides:

> The expression ***live-stock activity*** means:
>
> (c) the return journey from a place referred to in paragraph (b) of the vehicles or equipment used in transporting the live-stock, if that journey is for the purpose of later carrying out the transportation referred to in paragraph (b) or for the backloading of

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[146] No entitlement to an off-road credit arises in relation to diesel fuel purchased for use or used in propelling a road vehicle on a public road. However, transport, on a public road, of live-stock by a road vehicle having a gross vehicle mass of 4.5 tonnes or more may qualify for an on-road credit.

[147] The expression 'agricultural property' is discussed at paragraphs 34 to 43 of this Ruling.

[148] The term 'live-stock' is discussed at paragraphs 194 to 204 of this Ruling, the term 'rearing' is discussed at paragraphs 205 to 209 of this Ruling, and the term 'agistment' is discussed at paragraphs 233 to 240 of this Ruling.

raw materials or consumables for use in a core agricultural activity.

288. Under paragraph 23(1)(c), a return journey of vehicles or equipment, used in transporting live-stock, from an agricultural property, to which live-stock has been transported for the purpose of rearing or agistment, is a live-stock activity provided:

- the return journey is for the backloading of raw materials or consumables, for example, fertiliser or stockfeed, for use in a core agricultural activity; or
- the return journey is undertaken in order to repeat the transporting of live-stock for rearing or agistment to an agricultural property.

289. For the purposes of paragraph 23(1)(c), a return journey is a journey from an agricultural property at which live-stock for rearing or agistment have been unloaded back to the place from which the live-stock were first transported.

290. A return journey qualifies as a live-stock activity only if the forward journey qualifies as a live-stock activity under paragraph 23(1)(b). The return journey does not have to be undertaken immediately, but must be sufficiently associated with the initial journey to be regarded as a 'return journey', rather than as independent transport.

291. There is no requirement that the return journey be undertaken without a break. It must, however, be possible to view the broken journey as a return journey. This will be determined on a case by case basis having regard to the facts and circumstances of each case.

292. If a vehicle transports live-stock from more than one place, there is no requirement that it return to all of those places. If it returns to only one of those places, that journey qualifies as a return journey.

293. If the return journey is for the purposes of backloading raw materials, there is no requirement that it take place without a break. The return journey may, for example, include short detours to load the raw materials or consumables in question. These detours, however, must be of such a nature that the entire trip can be identifiable as a return journey. The materials backloaded must be for use in a core agricultural activity.

Mustering of live-stock

294. Paragraph 23(1)(d) provides:

> The expression ***live-stock activity*** means:
>
> (d) the mustering of live-stock undertaken:
>
> (i) by a person who carries on a core agricultural activity; or
>
> (ii) by a person contracted by that person to carry out the mustering;

on the agricultural property where the core agricultural activity is carried on.

295. The mustering of live-stock is a live-stock activity under paragraph 23(1)(d) if it is undertaken on a farm[149] by a farmer[150] or a person contracted by that farmer, or a subcontractor.[151] If mustering of live-stock is undertaken on public or common land, it is not an eligible live-stock activity.

296. The 'mustering of live-stock' means the physical act of rounding up live-stock for purposes such as shearing, branding, dipping, moving them from one paddock to another, any other activity necessary for the care and management of the live-stock, or for their transport away from the agricultural property.

297. Mustering of live-stock involves the use of four wheel drive vehicles, motor cycles, aircraft or animals for the purposes of rounding up live-stock.

Agricultural soil/water activity

298. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** includes:
>
> (f) an agricultural soil/water activity.

299. Agricultural soil/water activity is defined in section 24. Activities that constitute agricultural soil/water activities can broadly be described as:

- soil or water conservation on an agricultural property;
- searching for ground water;
- soil or water conservation within an approved catchment area;
- pumping of water; and
- supply of water.

Soil or water conservation on an agricultural property

300. Paragraph 24(a) provides:

> The expression ***agricultural soil/water activity*** means:
>
> (a) any activity undertaken for the purpose of soil or water conservation:
>
> (i) by a person who carries on a core agricultural activity; or
>
> (ii) by a person contracted by that person to carry out the first-mentioned activity;

[149] See paragraph 27 of this Ruling for what we mean by a farm.
[150] See paragraph 27 of this Ruling for what we mean by a farmer.
[151] Subsection 28(2) extends the entitlement to an off-road credit for diesel fuel purchased for use in mustering undertaken by a subcontractor.

on the agricultural property where the core agricultural activity is carried on.

301. For the purposes of paragraph 24(a), a soil or water conservation activity is any activity undertaken to preserve the soil or water and the quality thereof upon a property.

302. A soil or water conservation activity is an agricultural soil or water conservation activity under paragraph 24(a) if the activity is carried out on a farm by a farmer, a person contracted by the farmer, or by a subcontractor.

303. There is no single factor that is conclusive in identifying whether an activity is undertaken for the purposes of soil or water conservation. Each case must be decided having regard to the relevant facts and circumstances.

304. The Commissioner considers that soil or water conservation activities on an agricultural property include:

- repairs to the banks of a creek which have suffered erosion;
- planting grasses to prevent erosion;
- ripping steep areas across slopes to help slow down the erosion action of wind and rain after a fire; and
- planting water plants to improve the quality of water in a creek on a farm.

Searching for groundwater

305. Paragraph 24(b) provides:

> The expression ***agricultural soil/water activity*** means:
>
> (b) searching for ground water solely for use in an agricultural activity, or the construction or maintenance of facilities for the extraction of such water, solely for that use, if the searching, construction or maintenance:
>
> (i) is carried out on an agricultural property where a core agricultural activity is carried on, or at a place adjacent to that property; and
>
> (ii) is carried out by the person who carries on the first-mentioned agricultural activity or by a person contracted by that person to carry out the searching, construction or maintenance.

306. Searching for ground water is an agricultural water activity under paragraph 24(b) if:

- the water is solely, that is, only or exclusively for use in an agricultural activity;

- the search is carried out on a farm[152] or at a place adjacent to the farm; and
- the search is carried out by the farmer, a contractor to that farmer or by a subcontractor.

307. The construction or maintenance of facilities for the extraction of water is an agricultural water activity under paragraph 24(b) if:

- the facility is for the extraction of ground water only;
- the water is solely, that is, only or exclusively for use in an agricultural activity;
- the construction or maintenance is carried out on a farm or at a place adjacent[153] to the farm; and
- the construction or maintenance is carried out by the farmer,[154] a contractor to that farmer or a subcontractor.

308. Searching for ground water does not include the relocation of equipment between different farms or between places that are not adjacent to those farms. The construction or maintenance of facilities for the extraction of water does not include:

- an activity that occurs prior to construction of facilities for the extraction of the water; or
- an activity that is not directly concerned with the actual construction or maintenance of those facilities.

309. As explained at paragraphs 250 to 274 of this Ruling, the expression 'solely' in paragraph 24(b) takes its ordinary meaning of 'only' or 'exclusively'. Therefore, the water, the subject of the search, or the construction or maintenance of the facilities for the extraction of the ground water, must be only or exclusively for use in an agricultural activity.

310. Paragraph 24(b) is limited in its application to searching for *ground water*. This is different from paragraphs 24(d) and 24(e), which are not limited in their application to the pumping or supply of *ground water* but which refer to the pumping or supply of *any water* solely for use in the relevant agricultural activity.

311. Ground water is water that lies beneath the surface of the ground, usually in aquifers. Searching for ground water includes the repositioning or relocation within a farm of equipment used in searching for ground water.

312. Searching for ground water is an agricultural water activity, even if the search results in no ground water being found.

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[152] See paragraph 27 of this Ruling for what we mean by a farm.
[153] See paragraphs 44 to 48 of this Ruling what we mean by the term 'adjacent'.
[154] See paragraph 27 of this Ruling for what we mean by a farmer.

Soil or water conservation in an approved catchment area

313. Paragraph 24(c) provides:

> The expression ***agricultural soil/water activity*** means:
>
> (c) any activity undertaken for the purposes of soil or water conservation:
>
> (i) by a person who carries on a core agricultural activity within an approved catchment area; or
>
> (ii) by a person contracted by that person to carry out the first-mentioned activity;
>
> within the approved catchment area.

314. The phrase '***approved catchment area***' is defined in section 30 to mean an area:

> (a) in respect of which a soil or water conservation plan has been adopted by the persons who carry on core agricultural activities within that area; or
>
> (b) in respect of which a soil or water conservation agreement has been made between the persons who carry on core agricultural activities within that area.

315. For an activity to be an agricultural soil/water activity under paragraph 24(c), it must be for the purposes of soil or water conservation in an approved catchment area.

316. In the context of paragraph 24(c), a soil or water conservation activity is any activity undertaken to preserve the soil or water and the quality thereof within an approved catchment area.

317. Activities covered by paragraph 24(c) can be carried out on any part of the approved catchment area. A qualifying use under this paragraph is not limited to activities within the area on which a core agricultural activity is carried on.

318. An approved catchment area is an area for which a soil or water conservation plan or agreement exists. The soil or water conservation plan must have been adopted by farmers who carry on core agricultural activities within the area covered by the plan. Alternatively, the soil or water conservation agreement must have been made between farmers who carry on core agricultural activities within the area covered by the agreement. Paragraph 24(c) does not exclude other persons from being parties to the agreement.

Pumping of water

319. Paragraph 24(d) provides:

> The expression ***agricultural soil/water activity*** means:
>
> (d) the pumping of water solely for use in an agricultural activity if the pumping:
>
> (i) is carried out on an agricultural property where a core agricultural activity[155] is carried on, or at a place adjacent to that property; and
>
> (ii) is carried out by the person who carries on the first-mentioned agricultural activity or by a person contracted by that person to carry out the pumping, other than a person so contracted that is a Commonwealth authority or a State or Territory authority.

320. Under paragraph 24(d), the pumping of any water qualifies as an agricultural water activity if:

- the water is solely, that is, only or exclusively for use in an agricultural activity;
- the pumping is carried out on a farm or at a place adjacent to the farm; and
- the pumping is carried out by the farmer, a contractor to that farmer or by a subcontractor, other than a Commonwealth, State or Territory authority.

321. To qualify as an agricultural water activity under paragraph 24(d), the water being pumped must be solely, that is, exclusively or only, for use in an agricultural activity.[156]

322. The pumping of water is not restricted to ground water. Paragraph 24(d) applies to the pumping of any water solely, that is, only or exclusively for use in the relevant agricultural activity.

323. The pumping of water by a State or Territory authority (usually carried out by a water authority) does not qualify as an agricultural water activity under paragraph 24(d).

324. A State or Territory authority is defined in section 4 as:

> (a) an instrumentality of a State or Territory; or
>
> (b) an authority or body established for the purpose of a State or Territory by or under a law of the State or Territory.

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[155] See paragraphs 28 to 30 of this Ruling for what we mean by a core agricultural activity.

[156] See paragraphs 250 to 274 of this Ruling for a discussion on the 'solely' requirement.

325. The construction or maintenance of facilities for the pumping, or the maintenance of infrastructure, including the laying of supply pipes, does not qualify as an agricultural water activity under paragraph 24(d).

Supply of water

326. Paragraph 24(e) provides:

> The expression ***agricultural soil/water activity*** means:
>
> (e) the supply of water solely for use in an agricultural activity if:
>
> (i) the supply is to an agricultural property where a core agricultural activity is carried on; and
>
> (ii) the water comes from that property or a place adjacent to that property; and
>
> (iii) the supply is carried out by the person who carries on the first-mentioned agricultural activity or by a person contracted by that person to carry out the supply, other than a person so contracted that is a Commonwealth authority or a State or Territory authority.

327. Under paragraph 24(e), the supply of any water qualifies as an agricultural water activity if:

- the water is solely, that is, only or exclusively for use in an agricultural activity;
- the supply is to a farm;
- the water comes from that farm or from a place adjacent to that farm; and
- the supply is carried out by the farmer, a contractor to that farmer or by a subcontractor, other than a Commonwealth, State or Territory authority.

328. To qualify as an agricultural water activity under paragraph 24(e), the water being supplied must be solely, that is, exclusively or only, for use in an agricultural activity.[157]

329. The supply of water is not restricted to ground water. Paragraph 24(e) applies to the supply of any water solely, that is, only or exclusively for use in the relevant agricultural activity.

330. The supply of water can include all off-road modes of supplying water, such as transportation by tanker.

331. The supply of water by a State or Territory authority (usually a water authority) does not qualify as an agricultural water activity.

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[157] See paragraphs 250 to 274 of this Ruling for a discussion on the 'solely' requirement.

332. The construction or maintenance of facilities for the supply, or the maintenance of infrastructure, including the laying of supply pipes, does not qualify as an agricultural water activity under this paragraph.

Agricultural construction activity

333. The definition of 'agriculture' in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** includes:
>
> (g) an agricultural construction activity.

334. Agricultural construction activity is defined in section 25. Activities that constitute agricultural construction activities can broadly be described as:

- construction or maintenance of fences;
- construction or maintenance of firebreaks;
- construction or maintenance of sheds, pens, silos or silage pits;
- construction or maintenance of dams, water tanks and certain other water related systems; and
- carrying out of earthworks for use in a core agricultural activity.

Construction or maintenance of fences

335. Paragraph 25(a) provides:

> The expression ***agricultural construction activity*** means:
>
> (a) the construction or maintenance of fences undertaken:
>
> (i) by a person who carries on a core agricultural activity; or
>
> (ii) by a person contracted by that person to carry out the construction or maintenance;
>
> on the agricultural property where the core agricultural activity is carried on.

336. The construction or maintenance of fences is an agricultural construction activity under paragraph 25(a) if:

- the construction or maintenance takes place on a farm; and
- it is undertaken by the farmer, a contractor of that farmer or a subcontractor.

337. The construction or maintenance of fences includes the sinking of fence posts, the running of wire between posts and the replacement and repair of parts of a fence.

338. The transportation of fencing materials to an agricultural property for use in the construction of a fence is not an eligible activity under paragraph 25(a).

Construction or maintenance of firebreaks

339. Paragraph 25(b) provides:

> The expression ***agricultural construction activity*** means:
>
> (b) the construction or maintenance of firebreaks undertaken:
>
> (ii) by a person who carries on a core agricultural activity; or
>
> (iii) by a person contracted by that person to carry out the construction or maintenance;
>
> on the agricultural property where the core agricultural activity is carried on or at a place adjacent to that place.

340. The construction or maintenance of firebreaks is an agricultural construction activity under paragraph 25(b) if:

- the construction or maintenance takes place on a farm or at a place adjacent to that farm; and
- it is undertaken by the farmer, a contractor of that farmer or a subcontractor.

341. The Commissioner considers that a firebreak is a clearing or open space created or maintained in order to provide an obstacle to fire and to reduce or prevent damage or destruction of property by fire. The firebreak may be constructed within the property boundary, or around the property.

342. The construction or maintenance of a firebreak involves the clearing of trees, scrub, or other vegetation within the firebreak area by bulldozing, ploughing, grading or burning.

343. The construction or maintenance of a firebreak by a local council or shire authority under a statutory power or local government by-law is not eligible as an agricultural construction activity under paragraph 25(b). In this case, the council or authority does not carry out the construction or maintenance as a contractor to a farmer.

Construction or maintenance of sheds, pens, silos or silage pits (sundry farm structures)

344. Paragraph 25(c) provides:

> The expression ***agricultural construction activity*** means:
>
> (c) the construction or maintenance of sheds, pens, silos or silage pits for use in an agricultural activity if the construction or maintenance:
>
> (i) is carried out on an agricultural property where a core agricultural activity is carried on; and
>
> (ii) is carried out by the person who carries on the first-mentioned agricultural activity or by a person contracted by that person to carry out the construction or maintenance.

345. The construction or maintenance of these sundry farm structures is an agricultural construction activity under paragraph 25(c) if:

- the construction or maintenance takes place on a farm;
- the sundry farm structures are for use in an agricultural activity; and
- the construction or maintenance is carried out by the farmer, a contractor of that farmer or a subcontractor.

346. Activities that occur prior to construction of these sundry farm structures, for example, the transport of materials or plant and equipment to a farm for the purposes of carrying out the construction or maintenance, are not agricultural construction activities under paragraph 25(c).

347. The construction or maintenance of buildings such as administration offices and domestic premises are also not agricultural construction activities under paragraph 25(c). However, the construction or maintenance of an administration building for use in a core agricultural activity may be eligible for an off-road credit under the provisions of paragraph 22(1)(a) to 22(1)(d).[158]

[158] See discussion on the form of the definition of 'agriculture' at paragraphs 124 to 135 of this Ruling.

Construction or maintenance of dams, water tanks, water troughs, water channels, irrigation systems or drainage systems (relevant water structures)

348. Paragraph 25(d) provides:

> The expression ***agricultural construction activity*** means:
>
> (d) the construction or maintenance of dams, water tanks, water troughs, water channels, irrigation systems or drainage systems including, without limiting the generality of the foregoing, water pipes and water piping for use in a core agricultural activity if the construction or maintenance:
>
> (i) is carried out on the agricultural property where the core agricultural activity is carried on; and
>
> (ii) is carried out by the person who carries on the core agricultural activity or by a person contracted by that person to carry out the construction or maintenance.

349. The construction or maintenance of relevant water structures is an agricultural construction activity under paragraph 25(d) if:

- the construction or maintenance takes place on a farm;
- the relevant water structures are for use in a core agricultural activity; and
- the construction or maintenance is carried out by the farmer, a contractor of that farmer or a subcontractor.

350. The Commissioner considers that an irrigation system includes all parts of that system, and can comprise a series of channels, associated pumping stations, pipes, water piping, sprinklers and spray systems. Similarly, the Commissioner considers a drainage system to include all parts of a system used to drain water from land. This includes artificial channels.

351. Activities that occur prior to the construction or maintenance, for example, the transport of materials or equipment to the agricultural property for use in the construction of the relevant water structures or systems, are not agricultural construction activities under paragraph 25(d).

Carrying out of earthworks for use in a core agricultural activity

352. Paragraph 25(e) provides:

> The expression ***agricultural construction activity*** means:
>
> (e) the carrying out of earthworks for use in a core agricultural activity if the earthworks:
>
> (i) are carried out on the agricultural property where the core agricultural activity is carried on; and

(ii) are carried out by the person who carries on the core agricultural activity or by a person contracted by that person to carry out the earthworks.

353. The term ***earthworks*** is defined in section 32 to mean:

(a) the forming or maintenance of levee banks or windbreaks; or

(b) contour banking; or

(c) land levelling or land grading.

354. The carrying out of earthworks is an agricultural construction activity under paragraph 25(e) if:

- the earthworks are for use in a core agricultural activity;
- the earthworks are carried out on the farm where that agricultural activity is carried on; and
- they are carried out by the farmer, a contractor of that farmer or a subcontractor.

355. In the context of paragraph 25(e):

- levee banks are man-made embankments put in place to prevent the overflow of a river or other water source, or small ridges surrounding fields to be irrigated;
- The term 'windbreak' is commonly used to describe a specifically grown line of trees or a structure used to shelter crops or live-stock from the wind. In the context of the definition of 'earthworks' in section 32 the term has a more limited meaning. The Commissioner takes the view that it means an earth wall or an earth wall-like or levee-like structure which provides shelter for crops or live-stock.
- contour banking is the practice of creating a system of banks across sloping ground to minimise soil erosion of topsoil by rain; and
- land levelling or grading is the laying, spreading or compacting of earth, gravel or sand.

356. The activity of carrying out earthworks does not include activities undertaken to construct a road or to seal a road that is constructed through grading and levelling. An activity of this kind is considered road works, rather than earthworks.

Agricultural waste activity

357. The definition of agriculture in subsection 22(1) states in part:

Subject to subsection (2), the expression ***agriculture*** includes:

(h) an agricultural waste activity.

Removal or disposal of waste

358. Agricultural waste activity is defined in section 26 to mean:

(a) the removal of waste products of an agricultural activity from the agricultural property where the activity is carried on; or

(b) the disposal of waste products of an agricultural activity on the agricultural property where the activity is carried on.

359. A waste product can be described as something that is an excess material, or is unproductive and superfluous.[159] The concept of waste embraces all unwanted and economically unusable or rejected by-products at any given place and time, and any other matter which may be discharged, accidentally or otherwise, to the environment.

360. The Administrative Appeals Tribunal in *Esso Australia Ltd v. Chief Executive Officer of Customs*[160] (*Esso Australia*) found that, for the purposes of the previous off-road Scheme 'waste' should not be confined to naturally occurring materials such as tailings or gangue. The Tribunal said that such a reading would adopt too narrow an approach to the interpretation of the legislation. The AAT found that domestic and industrial waste removed from offshore oil production platforms qualifies as 'a waste product of a mining operation'.

> In the Tribunal's view the evidence clearly establishes that this waste is produced as a consequence of a mining operation and is, therefore, a waste product of a mining operation. It follows, and the Tribunal so finds, that the removal of this waste clearly falls within the ambit of s.164(7)(s) and is included in the definition of 'mining operation'. The waste products referred to in s.164(7)(s) are not to be read as being confined to naturally occurring materials such as tailings or gangue.[161]

361. In *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs*[162] (*BHP Billiton*), the Tribunal affirmed the respondent's decision as to what constituted waste. The list of goods identified by the respondent included:

- Used and recovered used equipment for scrapping as unrepairable, for example, steel casing, steel tubing, drill bits, well heads and associated equipment.
- General waste from the galley, for example, packaging, empty tins, off cuts in steel and other consumables, old gloves, scrapped wooden pallets, household type refuse from quarters.

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[159] See *Re Water Administration Ministerial Corporation and Chief Executive Officer of Customs* (13 August 1997) N96/1212 AAT No 12,111, in which the AAT considered that the term 'waste' could encompass these concepts.
[160] *Esso Australia Ltd v. Chief Executive Officer of Customs* [1998] AATA 366.
[161] *Esso Australia Ltd v. Chief Executive Officer of Customs* 1998] AATA 366 at paragraph 20.
[162] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* [2002] AATA 705.

- Hazardous refuse (for example paint, acids, used battery cases).

362. While these cases deal with waste in the context of mining operations, they expand the meaning of 'waste products' to domestic and industrial waste in addition to tailings and gangue. Domestic waste is not a product of the actual extraction of the mineral but is still covered by the definition of a mining operation. Similarly, waste products of an agricultural activity may not be restricted to those products that are derived directly from a core agricultural activity.

363. In *BHP Billiton*,[163] the AAT refined the definition of 'waste given in *Esso Australia*.[164] The AAT said:

> It does not seem to us that definitions of 'waste' are helpful. The phrase presently under consideration is 'waste products of a mining operation'. To the extent that dictionary definitions assist it is our opinion that the Macquarie Dictionary definition of 'waste product' is of the greatest assistance. In the present case the words 'as manufacture' in that definition can be replaced with 'as mining operations'.[165]

364. In light of the comments made in *Esso Australia* and *BHP Billiton*, the Commissioner considers that an appropriate definition of waste for the purposes of the definition of 'agriculture' to be 'material produced in a process, as agriculture, and discarded as useless when the process is completed'.

365. Examples of waste products of an agricultural activity include animal manures, wheat stubble, grape or plant prunings, and animals that have died of natural causes on the agricultural property and which are not used as pet food. However, they do not include excess irrigation water drained from an irrigated farm.[166] In determining whether something is a waste product of an agricultural activity, the facts and circumstances of each case must be considered.

366. The fact that someone other than the farmer may at some later time reuse a product discarded as waste by the farmer does not necessarily preclude it from being waste. For example, vine prunings discarded by the farmer and removed as waste from the agricultural property, but subsequently used to make a mulch or compost for sale, would still be regarded as the waste product of an agricultural activity.

367. For the purposes of paragraphs 26(a) and 26(b), the waste products removed or disposed of must be the waste products of an agricultural activity.

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[163] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* [2002] AATA 705.
[164] *Esso Australia Ltd v. Chief Executive Officer of Customs* [1998] AATA 366.
[165] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* [2002] AATA 705 at paragraph 76.
[166] *Re Water Administration Ministerial Corporation and Chief Executive Officer of Customs* (13 August 1997) N96/1212 AAT No 12,111.

368. Under section 26, an agricultural waste activity is the removal from or disposal on an agricultural property of the waste products of an agricultural activity.

369. Removal in the context of paragraph 26(a) means the taking away, or the movement of the waste product from the agricultural property. Accordingly, the movement of waste from one part of the agricultural property to another part of the same property does not qualify as an agricultural waste activity under paragraph 26(a).

370. Disposal of waste products of an agricultural activity on the agricultural property means the elimination, destruction or, in any other manner, getting rid of a waste product within the confines of the agricultural property where the particular activity is carried on. This includes disposal by burying or incineration.

371. Under paragraph 26(b), the disposal of waste products of an agricultural activity must occur on the agricultural property where the agricultural activity that produced the waste is carried on.

Sundry agricultural activity

372. The definition of agriculture in subsection 22(1) states in part:

> Subject to subsection (2), the expression ***agriculture*** includes:
>
> (i) a sundry agricultural activity.

373. Sundry agricultural activity is defined in section 27. Activities that constitute sundry agricultural activities can be broadly described as:

- frost abatement;
- hay baling;
- planting and tending of trees;
- firefighting activities;
- service, maintenance or repair of vehicles or equipment;
- storage of produce of a core agricultural activity;
- packing or prevention of deterioration of the produce of a core agricultural activity;
- weed, pest or disease control;
- hunting or trapping for the purposes of a business; and
- use of fuel at residential premises for specified purposes.

Frost abatement

374. Paragraph 27(a) provides:

> The expression ***sundry agricultural activity*** means:

(a) frost abatement carried out on an agricultural property.

375. Frost abatement is the mitigation or alleviation of the potential for damage to crops by frost. Frost abatement activities include the use of overhead sprinkler systems, orchard heaters, wind machines and frost alarms.

376. For a frost abatement activity to be a sundry agricultural activity under paragraph 27(a), the activity must be carried out on an agricultural property.

Hay baling

377. Paragraph 27(b) provides:

The expression ***sundry agricultural activity*** means:

(b) hay baling on the agricultural property where the hay was cultivated.

378. Hay baling involves the packing of hay or straw into bales or bundles in paddocks for storage or transportation and any subsequent pressing and re-baling of that hay.

379. For a hay baling activity to be a sundry agricultural activity, the activity must be carried out on the same agricultural property on which the hay was grown. It is not necessary that the hay is baled by the farmer. Provided the hay is baled on the agricultural property where it was grown, it does not matter who actually performs the baling.

Planting or tending of trees

380. Paragraph 27(c) provides:

The expression ***sundry agricultural activity*** means:

(c) the planting or tending of trees on an agricultural property otherwise than for the purpose of felling.

381. Planting of trees is the act of putting or setting seeds or young trees into the ground. Tending of trees means the undertaking of activities to ensure the survival of the trees or to enhance their growth, quality and vigour, for example, fertilising after planting, spraying trees against pests and diseases, eliminating weeds, fire protection measures and watering.

382. The planting and tending of trees is a sundry agricultural activity under paragraph 27(c) if the planting or tending of trees is carried out on an agricultural property and the trees are not planted or tended for the purpose of felling.

383. The planting or tending of trees on an agricultural property for use in the prevention of soil erosion, as windbreaks or for providing shade for live-stock is a sundry agricultural activity under paragraph 27(c).

Firefighting activities

384. Paragraph 27(d) provides:

> The expression ***sundry agricultural activity*** means:
>
> (d) the carrying out of firefighting activities:
>
> (i) by a person who carries on a core agricultural activity; or
>
> (ii) by a person contracted by that person to carry out the first mentioned activity;
>
> on the agricultural property where the core agricultural activity is carried on or at a place adjacent to that place.

385. A firefighting activity is a sundry agricultural activity under paragraph 27(d) if:

- the activity is carried out on a farm or at a place adjacent to that farm; and
- the activity is carried out by a farmer, or by a contractor of that farmer or a subcontractor.

386. A firefighting activity is an activity undertaken to suppress a fire, or to prevent its spreading in order to preserve life and property.

387. Firefighting activities carried out on a farm or at a place adjacent to that farm by a volunteer fire brigade or country fire service do not qualify as a sundry agricultural activity under paragraph 27(d).[167]

Service, maintenance or repair of vehicles or equipment

388. Paragraph 27(e) provides:

> The expression ***sundry agricultural activity*** means:
>
> (e) the service, maintenance or repair of vehicles or equipment for use in an agricultural activity if the service, maintenance or repair:
>
> (i) is carried out on an agricultural property where a core agricultural activity is carried on; and
>
> (ii) is carried out by the person who carries on the first-mentioned agricultural activity or by a person contracted by that person to carry out the service, maintenance or repair.

[167] However, emergency vehicles having a gross vehicle mass of 4.5 tonnes or more may qualify for an on-road credit under the on-road credits scheme – see section 47.

389. The service, maintenance or repair of vehicles or equipment is a sundry agricultural activity under paragraph 27(e) if the service, maintenance or repair:

- is of vehicles or equipment for use in an agricultural activity;
- is carried out on a farm; and
- is carried out by the person that carries on the agricultural activity in which the vehicle or equipment is used, or by a contractor of that person or a subcontractor.

390. The transport of vehicles or equipment away from the farm for service, maintenance or repair elsewhere is not an eligible activity under paragraph 27(e).

Storage of produce

391. Paragraph 27(f) provides:

> The expression ***sundry agricultural activity*** means:
>
> (f) the storage of produce of a core agricultural activity on an agricultural property where a core agricultural activity is carried on.

392. Storage of produce is a sundry agricultural activity under paragraph 27(f) if the storage is:

- of produce of a core agricultural activity; and
- on a farm.

393. For the storage of produce to qualify as a sundry agricultural activity under paragraph 27(f), it is not necessary that the produce be from plants or animals grown or reared on the same farm on which it is stored.

Example 5: potatoes stored on a neighbouring farm

394. *Sweet Potatoes Ltd (Sweet Potatoes) is a potato farmer. The current crop has been very successful, and all storage facilities on the farm are full. A neighbouring farmer, Cool Corn Ltd (Cool Corn) allows Sweet Potatoes to store their excess produce in bins on Cool Corn's farm.*

395. *The potatoes are the produce of a core agricultural activity and are being stored on a farm. The storage of potatoes on Cool Corn's farm by Sweet Potatoes constitutes a sundry agricultural activity under paragraph 27(f).*

Packing or prevention of deterioration of produce

396. Paragraph 27(g) provides:

> The expression ***sundry agricultural activity*** means:
>
> (g) the packing, or the prevention of deterioration, of the produce of a core agricultural activity if:
>
> (i) the packing, or the prevention of deterioration, of the produce is carried out on an agricultural property where a core agricultural activity is carried on; and
>
> (ii) there is no physical change to the produce; and
>
> (iii) the packing, or the prevention of deterioration, of the produce does not constitute a processing of the produce.

397. The packing or prevention of deterioration of produce is a sundry agricultural activity under paragraph 27(g) if the packing or prevention of deterioration is:

- of produce of a core agricultural activity;
- carried out on a farm;
- does not result in any physical change to the produce; and
- does not constitute a processing of the produce.

398. For the packing or prevention of deterioration of produce to qualify as a sundry agricultural activity, it is not necessary that the produce be from plants or animals grown or reared on the same farm on which it is stored. The activity carried out on another farm qualifies as a sundry agricultural activity under paragraph 27(g), provided the other requirements of the paragraph are met.

399. The term 'physical change' is not defined in the EGCS Act and takes on its ordinary meaning. The term 'physical change' means a change in the physical nature or appearance of a substance which occurs with no change in chemical composition, as when water freezes as ice'.[168]

400. In the *Collector of Customs (Tas) v. Davis*,[169] the Federal Court considered whether the drying of parsley on the farm on which it was grown was eligible for diesel fuel rebate under the previous off-road scheme. Beaumont J quoted from an earlier decision of the AAT, which stated:

> The fact that the parsley undergoes no physical change other than the removal of moisture further demonstrates a close relationship between the product before and after the process.[170]

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[168] *The Macquarie Dictionary, 2001*, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[169] *Collector of Customs (Tas) v. Davis* (1989) 23 FCR 378, (1989) 10 AAR 439.
[170] *Collector of Customs (Tas) v. Davis (*1989) 23 FCR 378 at 380*;* (1989) 10 AAR 439 at 441.

401. Beaumont J held that:

> The activity in question is, first, necessary for the preservation of the crop: and secondly, both temporally and physically proximate to the primary activity of harvesting the crop.[171]

402. Hence, the Federal Court found that the drying of parsley on the farm where it was grown was considered to be necessary for the preservation of the crop and did not constitute a physical change (other than the removal of moisture) in the produce.

403. In *Vicmint*,[172] the AAT considered whether the distillation of peppermint oil by a farmer constituted a physical change. The AAT accepted that the 'crop' was the peppermint oil and that the oil, following distillation, was chemically and physically the same as it was before distillation. However, during the distillation process, there was a change in the oil from a liquid (within the leaf and stalk) to vapour, and then back to a liquid. This constituted two physical changes.

404. The AAT ruled that the extraction of peppermint oil from peppermint herbage by a process of distillation constituted a physical change, notwithstanding that the end product was a natural oil with the same physical characteristics as the oil that enters that process within or on the leaf and stalk or in separate form.

405. The Commissioner considers that the expression 'physical change', in the context of subparagraph 27(g)(ii), refers to a significant alteration in the physical appearance or physical composition of the produce, so that the produce is not recognisable as such. The Commissioner does not consider the dehydration (that is removal of water) of produce constitutes a physical change for the purposes of subparagraph 27(g)(ii).

406. In determining whether a physical change has occurred in a product the facts and circumstances of each case must be considered. It is important to consider the nature of the produce and the similarities between the agricultural produce and the product before and after the process.

407. The term 'processing' in subparagraph 27(g)(iii) is not defined in the EGCS Act and takes its ordinary meaning, which refers to the doing of 'a systematic series of actions directed to some end'.[173]

408. The Commissioner considers that the term 'processing' in paragraph 27(g) has a narrow meaning and refers to the doing of something to the produce that changes its nature, form or condition into another product. A wider meaning of the term 'processing', in the context of paragraph 27(g) would mean that the simple drying of a crop by a farmer could constitute processing.

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[171] *Collector of Customs (Tas) v. Davis* (1989) 23 FCR 378 at 386; (1989) 10 AAR 439 at 448.
[172] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Customs* (1997) 48 ALD 475.
[173] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

409. In *Vicmint*,[174] the AAT also considered whether the distillation of peppermint oil constituted a processing of the crop. The AAT referred to *Federal Commissioner of Taxation v. Hammersley Iron Pty Ltd*[175] in which Gobbo J examined various dictionaries and identified a general trend toward 'processing' constituting a change in nature, form or condition. The AAT held that the separation of the oil from the leaves and stalks constituted a processing of the oil.

410. The Commissioner takes the view that a crop is processed only if it undergoes a fundamental change in its nature, form or condition. Examples include the milling of grain, the extraction of juice from sugar cane or fruit and the canning of produce. The Commissioner considers that in each of these examples, there is a physical change to the produce as a result of the processing, which occurs after the produce is harvested or gathered in. The cutting of fruit and removal of its stone or kernel to aid dehydration does not constitute processing for the purposes of subparagraph 27(g)(iii).

411. The packing or prevention of deterioration of produce would include dehydration such as the drying of grains, tobacco leaves, herbs (for example parsley) and fruits (for example apricots) as well as humidity control and refrigeration of produce whilst awaiting transport.

Weed, pest or disease control

412. Paragraph 27(h) provides:

> The expression ***sundry agricultural activity*** means:
>
> (h) weed, pest or disease control undertaken:
>
> (i) by a person who carries on a core agricultural activity; or
>
> (ii) by a person contracted by that person to carry out the weed, pest or disease control;
>
> on the agricultural property where the core agricultural activity is carried on.

413. Weed, pest or disease control is a sundry agricultural activity under paragraph 27(h) if it is carried out on a farm by a farmer, or by a contractor of that farmer, or a subcontractor.

414. A weed, pest or disease eradication program undertaken by a Commonwealth, State or Territory authority or by a local council is not a sundry agricultural activity under paragraph 27(h) unless the authority or council is specifically contracted by a farmer to carry out the activity.

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[174] *Re Vicmint Partners Pty Ltd and Chief Executive Officer of Customs* (1997) 48 ALD 475.
[175] *Federal Commissioner of Taxation v. Hammersley Iron Pty Ltd* (1980) 33 ALR 251 at 268 to 269.

415. A weed is 'a wild plant growing where it is not wanted'.[176] Weed control involves activities undertaken to inhibit and eradicate weed growth, such as spraying, scarifying, ploughing or scraping of agricultural land.

416. A pest is 'a destructive animal, esp. an insect which attacks crops, live-stock, etc'.[177] Pest control involves activities undertaken to inhibit or eradicate pests, including the spraying of crops or pasture and trapping or shooting vermin.

417. A disease is '**1.** an unhealthy condition of the body (or a part of it) or the mind; illness, sickness. **2.** a corresponding physical condition of plants'.[178] Disease control involves activities to inhibit disease in live-stock or crops, for example, the spraying of crops or spreading of disease inhibiting agents on crops, such as fungicides, or the drenching of live-stock.

418. Where a pest control activity involves the hunting or trapping of foxes, rabbits and other vermin, the entitlement to an off-road credit for diesel fuel purchased for use in the activity depends on the status of the person who purchases the fuel. A farmer carrying out such an activity on their own farm, or a person contracted by that farmer to carry out the activity on a farm carries on a sundry agricultural activity under paragraph 27(h).

419. A person who carries on a business of hunting or trapping is entitled to an off-road credit for diesel fuel that they purchase for use in these activities as they constitute sundry agricultural activities in their own right under paragraph 27(i) of the Act.

Hunting or trapping

420. Paragraph 27(i) provides:

> The expression ***sundry agricultural activity*** means:
>
> (i) hunting or trapping that is carried on for the purposes of a business, including the storage of any carcasses or skins obtained from the hunting or trapping.

421. Hunting or trapping, including the storage of carcasses or skins obtained from these activities (hunting or trapping), are sundry agricultural activities under paragraph 27(i) if they are carried on for the purposes of a business.

422. Hunting or trapping, are not agricultural activities as defined in subsection 28(1), nor are the activities excluded from being in agriculture by paragraph 22(2)(b). Hunting or trapping is a specific activity that is included in the definition of agriculture for the purposes of the off-road credits scheme but which is not an agricultural activity.

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[176] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[177] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[178] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

423. The ordinary meaning of the term 'hunting' is 'the practice of pursuing and killing wild animals, esp. for sport'.[179] An example of hunting is kangaroo shooting for the purposes of obtaining meat and/or skins. The ordinary meaning of the term 'trapping' is 'to catch (an animal) in a trap'.[180] Trapping refers to the setting and use of mechanical or other contrivances for the purposes of catching or killing game and other animals.

424. Under paragraph 27(i) the storage of any carcasses or skins obtained from hunting or trapping are also sundry agricultural activities. This often involves the use of mobile or fixed refrigeration equipment and the use of vehicles off-road to tow refrigeration equipment, mobile cages or other plant or equipment while hunting or trapping is taking place. Storage of carcasses or skins ends when they are removed from storage for sale or processing.

425. There is no locational requirement for the purposes of paragraph 27(i). Hunting and trapping can therefore occur at any place at which a person has an entitlement to engage in these activities. However, the hunting and trapping must be carried out by a person for the purposes of a business.

Use of diesel fuel at residential premises for specified purposes

426. Paragraph 27(j) provides:

> The expression ***sundry agricultural activity*** means:
>
> (j) the use of off-road diesel fuel at residential premises in:
>
> (i) providing food and drink for; or
>
> (ii) providing lighting, heating, air-conditioning, hot water or similar amenities for; or
>
> (iii) meeting other domestic requirements of;
>
> residents of the premises if:
>
> (iv) the use is by a person who carries on a core agricultural activity; and
>
> (v) the residential premises are situated on the agricultural property where that activity is carried on.

[179] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[180] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

427. The expression 'residential premises' is defined in section 4 to mean:

(a) premises used as a house; or

(b) other premises at which at least one person resides;

but does not include:

(c) premises used in the business of a hotel, motel or boarding house or a similar business; or

(d) premises used as a hospital or nursing home or as any other institution providing medical or nursing care; or

(e) premises used as a home for aged persons; or

(f) premises used as a boarding school.

428. The use of diesel fuel is a sundry agricultural activity under paragraph 27(j) if:

- the use of the diesel fuel is at residential premises;
- the use of the fuel is in:

  (i) providing food and drink for; or

  (ii) providing lighting, heating, air-conditioning, hot water or similar amenities for; or

  (iii) meeting other domestic requirements of;

  residents of the premises;
- the use of the fuel is by a farmer;[181] and
- the residential premises are situated on a farm.[182]

429. The activity covered by paragraph 27(j) is not an agricultural activity as defined in subsection 28(1) but a specific activity that is included as a sundry agricultural activity within the meaning of agriculture.

430. There is no restriction on the way in which diesel fuel may be used in meeting the domestic requirements of residents of the premises. For example, the diesel fuel may be used as a burner fuel to provide heating, or in a generator to provide electricity.

431. To be eligible for an off-road credit, diesel fuel purchased for use at residential premises must meet a dual locational test.

[181] See paragraph 27 of this Ruling for what we mean by a farmer.
[182] See paragraph 27 of this Ruling for what we mean by a farm.

432. The first part of this test is to determine whether the diesel fuel is purchased for use 'at' residential premises. When considering this issue, the Courts have taken the view that the diesel fuel must be purchased for use at a place that may be reasonably identified with the premises.[183] The plant or generator in which the diesel fuel is to be used should thus be appurtenant to the premises and coherent with them, and it should be able to be said that it 'belongs' to the premises.

433. In *Collector of Customs, Tasmania v. Flinders Island Community Association*,[184] the Association operated a generator, which supplied electricity to nearby houses located on a housing estate. In relation to the meaning of 'at' residential premises under the previous off-road scheme, the Court found that the word 'at' required:

> …a close connection between the use and the residential premises but not use within the residential premises. What is a sufficiently close connection must depend on the circumstances of the particular case… In this regard it appears that the Parliament intended to give a rebate in respect of use of diesel fuel for what might be called home generation of electricity for domestic purposes… It is consistent with that policy, and the use of the word 'at', that the generation takes place in physical proximity to the supplied houses and that the resultant electricity be used only at premises falling within the definition of 'residential premises'.[185]

434. In *Collector of Customs v. Rottnest Island Authority*[186] the Authority was responsible for generating all electricity for use on the island. Electricity was generated for use in a number of residential premises, in a shopping complex, other shops, a garden golf complex, street lighting and other commercial venues.

435. The Court considered that:

> …the section requires that, because the existence of some appropriate heating or generating plant is clearly contemplated, the location of such a plant be in sufficient proximity to the premises as to enable it reasonably to be identified with the premises. It must be appurtenant to the premises and coherent with them. It must be able to be said of the plant using the fuel that it belongs to the premises even though it be not a part of them.[187]

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[183] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406 at 421; (1994) 48 FCR 177.
[184] *Collector of Customs, Tasmania v. Flinders Island Community Association* (1985) 7 FCR 205; 60 ALR 717.
[185] *Collector of Customs, Tasmania v. Flinders Island Community Association* (1985) 7 FCR 205 at 213; 60 ALR 717 at 724.
[186] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406; (1994) 48 FCR 177.
[187] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406 at 422; (1994) 48 FCR 177 at 193.

436. Although the above decisions were in respect of a separate category of eligible activities (diesel fuel purchased for use 'at residential premises') for the purposes of the previous off-road scheme, the Commissioner considers that that the principles established in them are relevant in determining whether the use of diesel fuel is 'at residential premises' under paragraph 27(j) of the definition of sundry agricultural activity.[188]

437. The second part of the locational test is to determine whether the premises themselves are on a farm.[189]

438. Diesel fuel purchased for use in the relevant activity must be purchased by a farmer. However, there is no requirement that the farmer be the resident of the premises. The use of diesel fuel at residential premises on a farm in providing for food, drinks, lighting, heating, air-conditioning, hot water or to meet the other domestic needs of itinerant workers, for example, shearers or drovers, working on the farm qualifies as sundry agricultural activities under paragraph 27(j).

Activities excluded from the definition of agriculture

439. Paragraphs 22(2)(a) and 22(2)(b) set out the activities or operations that are excluded in the definition of 'agriculture' in the EGCS Act.

Forestry or fishing operations

440. Paragraph 22(2)(a) provides:

> The expression ***agriculture*** does not include:
>
> (a) fishing operations or forestry.

441. Activities in fishing operations or forestry do not qualify for an off-road credit under the agriculture category. However, separate entitlement categories exist for fishing operations[190] and forestry[191] as these are within the definition of primary production in section 21.

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[188] See paragraph 18 of this Ruling for a discussion on why cases relating to the previous off-road scheme are relevant.

[189] See paragraph 27 of this Ruling for what we mean by a farm.

[190] See section 34 for the meaning of 'fishing operations' and related definitions. PGBR 2004/1 Energy Grants: off-road credits for fishing operations sets out the Commissioners view on what constitutes 'fishing operations'.

[191] See section 35 for the meaning of 'forestry'. PGBR 2005/1 Energy Grants: off-road credits for forestry sets out the Commissioners view on what constitutes 'forestry'.

Activities not undertaken as part of a business to obtain produce for sale

442. Paragraph 22(2)(b) provides:

> The expression ***agriculture*** does not include:
>
> (b) an activity referred to in subsection (1) (other than hunting or trapping that is carried out for the purposes of a business, including the storage of any carcasses or skins obtained from the hunting or trapping) unless the activity is carried out for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

443. An activity is not excluded under paragraph 22(2)(b) if the activity is for purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale. The exception to this is hunting or trapping, including the storage of any carcasses or skins obtained from the hunting or trapping, that is carried out for the purposes of a business.

444. An activity will directly benefit a business undertaken to obtain produce for sale if there is a close and immediate benefit (that is, a positive effect) to the business arising from the activity in question. This will be the case, for example, for contract harvesters. Whilst their own business is not for the purposes of obtaining produce for sale for themselves, the activities of contract harvesters in harvesting a crop for a farmer who carries on a business of obtaining produce for sale will directly benefit the business of the farmer.

445. The use of the word 'business' in paragraph 22(2)(b) denotes a commercial concern carried on with the aim of making a profit. Paragraph 135 of this Ruling sets out the indicia of when a person carries on a business.

446. The exclusion from eligibility under the agriculture category of activities that are not carried on as part of a 'farming' business is to ensure that persons engaged in so-called 'amenity agriculture', for example, hobby farms or agricultural colleges or persons growing flowers for public presentation[192] are not entitled to off-road credits.

447. Activities such as growing flowers and plants for pleasure or presentation, or developing and maintaining parks, gardens, recreation reserves or similar areas, whilst exhibiting some of the characteristics of agriculture are excluded from the definition of agriculture by paragraph 22(2)(b). These activities are not undertaken for the purposes of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.

[192] Explanatory Memorandum to Customs and Excise Amendment Bill 1995.

448. Where a person makes an overall loss from their activities and this loss is quarantined under the non-commercial losses rules,[193] they will still be entitled to an off-road credit if they purchase diesel fuel for a qualifying use. This is because only persons who are in business are entitled to quarantine their losses and ultimately claim them against their future profits.

Example 6: activity not excluded from agriculture – vineyard

449. *Marcwines Ltd (Marcwines) has 50 acres of land in the Adelaide Hills and has erected trellises and planted pinot noir grapevines on five acres of the property. Marcwines, through its managing director, has grape growing expertise, and has undertaken a scientific study to ensure the suitability of the land for the intended activity. A business plan has been prepared, which allows for gradual expansion of the area under vine, and should result in profitability being achieved within five years.*

450. *Marcwines has obtained an ABN and has been accepted as carrying on a business for income tax purposes. It is carrying on a business for the purpose of obtaining produce for sale. Marcwines would be eligible for energy grants in respect of its agricultural activities.*

Example 7: activity excluded from agriculture – hobby farm

451. *Jo, a retired accountant, owns 2 acres of land at Clare in South Australia's mid north. Jo has no experience in relation to farming. She grazes 6 ewes on the property. She uses diesel fuel for pumping water on the property, and cultivating pasture for the sheep. She plans to increase the size of the flock, and believes her operations will be profitable once she has a flock of 300 sheep. A contract shearer is hired each year to shear the sheep.*

452. *The Department of Agriculture has advised that the carrying capacity of the land is only 20 sheep. Jo's current and prospective operations will not be capable of achieving profitability.*

453. *Jo is not carrying on a business. Jo's activities on the property are not for the purpose of a business or for purposes that will directly benefit a business undertaken to obtain produce for sale.*

454. *Jo is not entitled to an off-road credit under the agriculture category in respect of diesel fuel purchased for use in any of the activities she carries on.*

[193] Division 35 of the *Income Tax Assessment Act 1997* sets out the rules for the deferral of losses from non-commercial business activities.

Status of non-profit bodies

455. The fact that an entity that is carrying on agricultural activities may be a non-profit body will not, in itself, prohibit the entity from satisfying the requirement that its activities are carried on for the purpose of, or for purposes that will directly benefit, a business undertaken to obtain produce for sale.[194]

456. Therefore, provided the agricultural activities conducted by a non-profit body are carried on in a commercial manner, and would meet the standard business tests if the body were not non-profit, it is entitled to an off-road credit if it purchases diesel fuel for use in an activity that qualifies as agriculture.

457. However, where an agricultural activity conducted by a non-profit body would not meet the normal business tests – for example where the present and prospective cash flows from the sale of produce are nominal in relation to expenditure – the non-profit body is not entitled to an off-road credit if it purchases diesel fuel for use in the activity. The activity is excluded from the definition of agriculture by paragraph 22(2)(b).

Example 8: activities not excluded from agriculture – church owned farm

458. *The Welcome Church owns 2,000 acres of prime grazing land, and runs three hundred head of cattle on the property. The Church's farming activities are very profitable. The Church puts some of the profit toward the development of the farm, and the remaining profit is used to fund the Church's outreach programme.*

459. *Given the scale and profitability of the Church's agricultural activities, the Church is conducting a business undertaken to obtain produce for sale. The agricultural activities that it carries out on the farm are not excluded from the definition of agriculture by paragraph 22(2)(b).*

Example 9: activities excluded from agriculture – agricultural college

460. *Agricola College (Agricola), an agricultural college, runs horticulture courses. The majority of its expenditure is directed toward providing education. However, some plants are propagated by the college in the course of the educational activities, and are sold at its annual open day.*

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[194] Section 52 of the PGBA Act provides that that Act and the entitlement Acts apply to an unincorporated association or body of persons as if the association or body were a person.

461. *Agricola is not concerned with making a profit from the sale, which improves attendances at its open day and offsets some of the expenses of propagation. The college does not sell the plants at any other time of the year and the potential revenue from the sale of the plants is minimal relative to the expense of the propagation of the plants.*

462. *Agricola's agricultural activities would not be considered a business to obtain produce for sale. The agricultural activities of the college are excluded from the definition of agriculture by paragraph 22(2)(b).*

The exclusion from the qualifying use of 'in primary production' of diesel fuel purchased for use in propelling a road vehicle on a public road

463. Subsection 53(2) excludes from the qualifying use 'in primary production' (and, therefore, 'in agriculture'), diesel fuel purchased for use in propelling a road vehicle on a public road. In this Ruling the Commissioner refers to this exclusion as 'the subsection 53(2) primary production exclusion'. For the purposes of the exclusion it is necessary to determine what a road vehicle is and what a public road is.

Meaning of 'road vehicle'

464. A 'road vehicle' is a vehicle of a kind ordinarily used on roads for the transport of persons or goods.[195]

465. The meaning of the phrase 'of a kind ordinarily used' was considered in *Clean Investments Pty Ltd v. Commissioner of Taxation*.[196] The full Federal Court reviewed the authorities[197] in relation to the question whether coin-operated washing machines were goods of a kind ordinarily used for household purposes. The full Federal Court concluded:

> The statutory question is not whether those goods of the taxpayer will in fact be used for household purposes but whether they are goods 'of a kind ordinarily used for household purposes' …
>
> …it is preferable to pose the statutory question as a single composite question.

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[195] The definition of 'road vehicle' is set out in section 4.

[196] *Clean Investments Pty Ltd v. Commissioner of Taxation* [2001] FCA 80, 14 February 2001; (2001) 105 FCR 248; (2001) 184 ALR 314; (2001) 46 ATR 248.

[197] *Deputy Commissioner of Taxation (NSW) v. Newbound & Co Pty Ltd* (1952) 26 ALJR 386; (1952) 10 ATD 59; *Deputy Commissioner of Taxation v. Stewart* (1984) 154 CLR 385; (1984) 52 ALR 253; *Commissioner of Taxation v. Sherwood Overseas Pty Ltd* (1985) 85 ATC 4267; (1985) 75 FLR 474; *Kentucky Fried Chicken Pty Ltd v. Federal Commissioner of Taxation* (1986) 86 ATC 4701; (1986) 17 ATR 1039; *Hygienic Lily Ltd v. Deputy Commissioner of Taxation* (1987) 71 ALR 441; (1987) 13 FCR 396; *O R Cormack Pty Ltd v. Federal Commissioner of Taxation* (1992) 23 ATR 151; (1992) 92 ATC 4121; *Diethelm Manufacturing Pty Ltd v. Commissioner of Taxation* (1993) 44 FCR 450; (1993) 116 ALR 420; (1993) 93 ATC 4703; (1993) 26 ATR 465; *Commissioner of Taxation v. Chubb Australia Ltd* (1995) 128 ALR 489; (1995) 56 FCR 557; (1995) 95 ATC 4186; (1995) 30 ATR 285.

> In some cases it may be misleading to address separately the question of identification of the 'genus' to which the particular goods in question belong …
>
> Goods and purposes can be equally correctly described in different ways, in particular, broadly or narrowly, yet the description selected may dictate the answer to the statutory question. For example, an architect's stool, an office chair and a kitchen stool or chair may be described as 'stools' or 'chairs' and their purpose as being 'to provide seating'. Yet it would be wrong to conclude that the architect's stool or the office chair is of a kind ordinarily used for household purposes for no other reason that, like the kitchen chair, it is ordinarily used for the purpose of seating …
>
> If, in the present case, one were to define the genus of which the relevant machines are members as 'machines designed to wash fabrics', apparently even industrial washing machines would qualify as goods ordinarily used for household purposes.
>
> I accept that 'ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly' …[198]

466. *The Macquarie Dictionary*[199] defines a 'vehicle' as '**1**. any receptacle, or means of transport, in which something is carried or conveyed, or travels. **2.** a carriage or conveyance moving on wheels or runners'.

467. It defines a 'road' as '**1**. a way, usually open to the public for the passage of vehicles, persons and animals. **2.** any street so called. **3.** The track on which vehicles etc pass, as opposed to the pavement'.

468. The term 'road vehicle' refers to the class of vehicle, not to the actual use to which a particular vehicle may be put. A vehicle is a road vehicle if it is of a class of vehicles that are designed for use on roads for the transport of persons or goods even if it is never used or registered for use on roads.

469. By way of contrast, a vehicle in a class that can clearly be seen to have been designed for use off-road, with only limited design features enabling its use on public roads, is not a road vehicle. This is so even though, with significant restrictions in relation to matters such as speed and load, the vehicle may be used on public roads in particular and limited circumstances, or may be required to be registered for use on public for those circumstances. Examples of this type of vehicle are grain harvesters, mechanical grape harvesters and fertiliser spreaders.

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[198] *Clean Investments Pty Ltd v. Commissioner of Taxation* [2001] FCA 80, 14 February 2001; (2001) 105 FCR 248; (2001) 184 ALR 314; (2001) 46 ATR 248; per Lingren J, with whom Cooper and Lee JJ agreed.

[199] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

Meaning of 'a vehicle of a kind ordinarily used on roads for the transport of persons or goods'

470. The definition requires the vehicle to be of a class of road vehicle commonly or routinely used on roads in the transport of persons or goods. The decision to be made is not whether a particular road vehicle is actually used for this purpose but whether it belongs to a class of road vehicles that is commonly used for this purpose.[200] Some typical examples where the purpose and customary use is to transport persons or goods include cars, buses, utility trucks, pantechnicons and articulated vehicles such as semi-trailers and road trains.

471. In *ICI Australia Operations Pty Ltd v. Deputy Commissioner of Taxation (Vic)*[201] (*ICI Operations*), the full Supreme Court of Victoria dealt with the question of whether a mobile manufacturing unit (MMU) was a road vehicle for the purposes of Item 14 of the First Schedule to the *Sales Tax (Exemptions and Classifications) Act 1935*. Excluded from the exemption were 'road vehicles of the kinds ordinarily used for the transport or delivery of goods, or parts of those road vehicles'.

472. In dealing with the exclusion from the exemption Gray J stated:

> The expression 'road vehicles of the kinds ordinarily used etc.' is to my mind perfectly apt to define a category which might be described as conventional road vehicles whose purpose and customary use is to transport persons or goods, for example cars, buses and goods carrying vehicles of various types.
>
> The exception presupposes that there is more than one kind of road vehicle which is 'ordinarily used etc.' The expression 'of the kinds' indicates classes of vehicles the functions of which make it necessary to classify them in terms of transportation of persons or goods.
>
> It is next necessary to identify 'the kinds' of road vehicles which fall within the genus 'ordinarily used etc.'. In this category are cars, buses, utility trucks, tray-bodied trucks, dumptrucks, road trains and the like. The test for inclusion in this category is that one can stipulate that the primary purpose of the vehicle and its customary use is to transport goods or persons in the course of commercial activity. In applying this test, the concept of 'ordinarily used for' equals 'whose primary but not necessarily exclusive purpose and customary use is'. I say that because in my view the expression 'ordinarily used' in the present context cannot be divorced from the concept of the primary purpose for which the vehicle is intended to be used and is in fact customarily used.[202]

---

[200] See decisions of the courts that have considered the meaning of the phrase 'of a kind ordinarily used' including *Hygienic Lily Ltd v. Deputy Commissioner of Taxation* (1987) 71 ALR 441; (1987) 13 FCR 396; *OR Cormack Pty Ltd v. Federal Commissioner of Taxation* (1992) 92 ATC 4121; (1992) 23 ATR 151; *Diethelm Manufacturing Pty Ltd v. Commissioner of Taxation* (1993) 44 FCR 450; (1993) 116 ALR 420; (1993) 93 ATC 4703; (1993) 26 ATR 465 and *Commissioner of Taxation v. Chubb Australia Ltd* (1995) 128 ALR 489; (1995) 56 FCR 557; (1995) 95 ATC 4186; (1995) 30 ATR 285.

[201] *ICI Australia Operations Pty Ltd v. Deputy Commissioner of Taxation (Vic)* (1987) 87 ATC 5110; (1987) 19 ATR 647.

[202] *ICI Australia Operations Pty Ltd v. Deputy Commissioner of Taxation (Vic)* (1987) 87 ATC 5110 at 5112; (1987) 19 ATR 647 at 649.

473. The Commissioner considers that the comments made by Gray J in *ICI Operations*[203] are relevant in determining the meaning of a road vehicle in the subsection 53(2) primary production exclusion.

474. Vehicles that are not characterised as of a kind that are ordinarily used for the transport of persons, or the transport or delivery of goods or other property, are those where:

(a) the transport or delivery use is incidental, subordinate or secondary to the use of the road vehicle, as a class of goods, for another purpose; and

(b) their primary use, as a class of goods, is for that other purpose.[204]

475. The Commissioner is of the view that tractors, tractor/trailer combinations, fertiliser spreaders, harvesters and sprayers are not road vehicles for the purposes of the subsection 53(2) primary production exclusion. These vehicles are not primarily for the purpose of, nor are they customarily used for, the transport of goods or persons.

Example 10: transportation of sugar cane from a farm to a collection pad next to a railway siding by a tractor/trailer combination

476. *Abel and Kane are sugar cane farmers. Abel and Kane's farm adjoins a public road and is located a short distance (two kilometres) from a cane railway siding. Abel and Kane deliver their sugar cane directly to a collection pad next to the railway siding. They use their own tractor and trailer combination to transport the sugar cane from the cane field to the collection pad. The sugar cane is subsequently hauled by rail to the sugar cane mill.*

477. *The tractor and trailer combination is an integral part of the harvesting equipment, and is not a road vehicle, as it is not a vehicle of a kind ordinarily used on roads for the transport of goods.*

478. *Diesel fuel purchased for use in propelling the tractor and trailer combination on a public road to take the sugar cane to the railway siding is not excluded from being use in primary production by the subsection 53(2) primary production exclusion. As this transport is prior to the completion of the gathering in of the crop, Abel and Kane are entitled to an off-road credit in respect of this diesel fuel.*

---

[203] *ICI Australia Operations Pty Ltd v. Deputy Commissioner of Taxation (Vic)* (1987) 87 ATC 5110; (1987) 19 ATR 647.
[204] *ICI Australia Operations Pty Ltd v. Deputy Commissioner of Taxation (Vic)* (1987) 87 ATC 5110; (1987) 19 ATR 647.

Example 11: transportation of sugar cane from a farm to a collection pad next to a railway siding by a road vehicle

479. *Drawing on the facts in Example 10, Abel and Kane decide to use the services of transport contractor, George Transport Enterprises Ltd (George Transport) to transport, via the public road, the harvested sugar cane from a central collection area on the farm to the collection pad next to the railway siding.*

480. *Abel and Kane deliver the harvested sugar cane to the central collection area on the farm by their tractor and trailer combination. George Transport uses a prime mover and trailer to transport the harvested sugar cane from the central collection area on the farm to the collection pad next to the railway siding. The prime mover and trailer is modified to transport the harvested sugar cane in canetainers.*

481. *The prime mover and trailer used by George Transport is a vehicle of a kind ordinarily used in transporting of goods. It is a road vehicle. As the transport of sugar cane by George Transport involves travel on a public road, diesel fuel purchased for use in propelling the prime mover and trailer is excluded from being use in primary production by the subsection 53(2) primary production exclusion.*[205]

482. *If the exclusion did not apply in relation to the use of the prime mover and trailer, the transport of sugar cane undertaken by George Transport would still not be an eligible activity as the transport from farm to the collection pad next to the railway siding is after the crop has been gathered in.*

483. *Abel and Kane are entitled to an off-road credit for diesel fuel purchased for use in propelling the tractor and trailer combination as the diesel fuel is used in the gathering in of the crop.*

Example 12: travel of a self-propelled mechanical grape harvester on a public road between two vineyards

484. *Jake is a grape grower. Jake has two parcels of land a kilometre apart under vines. The two vineyards adjoin a public road. Jake contracts the harvesting of his grapes to Fine Vine Harvesters (Fine Vine).*

485. *Fine Vine picks the grapes by use of a self-propelled mechanical grape harvester. The harvester travels as required between the two vineyards to harvest the different grape varieties in a continuous process.*

486. *Diesel fuel purchased for use in propelling the mechanical grape harvester on the public road is a qualifying use for an off-road credit under paragraph 22(1)(d). The grape harvester is not a 'road vehicle' for the purposes of the subsection 53(2) primary production exclusion and the travel is undertaken in carrying out an agricultural activity, being the gathering in of crops.*

---

[205] Transportation of goods for a primary producer by a road vehicle may be a qualifying use for an on-road credit.

Meaning of 'public road'

487. The operation of the subsection 53(2) primary production exclusion means that the transportation of agricultural produce by a road vehicle on roads that are not public roads qualifies as an eligible use under subsection 22(1). For the purposes of the subsection 53(2) primary production exclusion, it is, therefore, important to define 'public road'.

Roads that are public roads

488. A 'road' is defined in common law as a way from one place to another which enables passage between the two. It is well established that, under the common law, a 'road' becomes a 'public road' when the owner of the land has unequivocally indicated an intention to dedicate the road for public use, and the public has accepted the proffered dedication.[206]

489. However, in Australia the vast majority of public roads are constructed by government. In *Brodie and Anor v. Singleton Shire Council*,[207] Kirby J observed:

> …. from the start, the building of public highways and roads in Australia was a responsibility of government, and eventually of statutory bodies (and not parishes and men thereof as in England…)[208]

490. There are statutory authorities in each state and territory which are responsible for the construction, management and maintenance of the public road transport infrastructure within their own jurisdictions. Roads which are constructed, managed or maintained by these authorities are public roads. These roads fall into three main categories, being:

- national highways;
- state and territory highways and main roads; and
- local roads and streets.

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[206] *Permanent Trustee Company of New South Wales Ltd v. Campbelltown Municipal Council* (1960) 105 CLR 401 at pages 420 to 426; [1961] ALR 164 at page 174; (1960) 6 LGRA 340 at page 353. However, there is a question whether land which is owned by the Crown may be dedicated as a public road by dedication alone without acceptance by the public - see *Attorney-General for the Northern Territory v. Minister for Aboriginal Affairs* (NSW G 235 of 1988) unreported decision of Wilcox J, 3 August 1988 at pages 18 to 21.

[207] *Brodie and Anor v. Singleton Shire Council* (2001) 206 CLR 512; (2001) 180 ALR 145.

[208] *Brodie and Anor v. Singleton Shire Council* (2001) 206 CLR 512 at page 588; (2001) 180 ALR 145 at page 198.

National highways

491. The roads making up the national highways network are constructed and maintained by the states and territories out of funding provided by the Federal Government. These major highways are easily identifiable. They are public roads for the purposes of the subsection 53(2) primary production exclusion.

State and territory highways and main roads

492. Each state or territory has a statutory authority[209] which is responsible for the construction of highways and main roads within the state or territory. State and territory highways and main roads are the major connecting roads between towns.

493. It is usually the case that the governing statute provides for the formal declaration, proclamation or dedication of the highways and main roads for which the particular state or territory statutory authority is responsible.[210]

494. The Commissioner considers that, in each state or territory, the roads which are constructed and maintained by the state or territory authority which has the primary responsibility for highways and main roads, are public roads for the purposes of the subsection 53(2) primary production exclusion.

Local roads

495. Within each state and the Northern Territory there are numerous local government authorities with statutory responsibility for the construction and maintenance of local roads within their own areas.

496. Local roads are the smaller connecting roads and suburban streets within the boundaries of a local government area.

497. The powers of local government authorities in each state and the Northern Territory are enumerated in a statute which creates local government in that state or territory. The legislative powers and responsibilities in each statute apply to each individual local government area within the same state or territory. However, the statutes are not identical and this gives rise to variations according to the state or territory in which a particular local government area is located.

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[209] For example, the Road Transport Authority of NSW; the Queensland Department of Main Roads; Main Roads WA; VicRoads; and the Tasmanian Department of Industry, Energy and Resources.

[210] For example, section 13 of *Roads Act 1993* (NSW); section 23 of *Transport Infrastructure Act 1994* (Qld); Schedule 2 of *Transport Act 1983* (Vic); section 7 of *Roads and Jetties Act 1935* (Tas); section 13 of *Main Roads Act 1930* (WA).

498. Although local government statutes do not always provide for dedication or declaration of roads as public roads, such statutes normally vest the ownership of local roads in a local government authority.[211] In Australia, the vesting by statute in local government authorities of fee simple in land over which there are public streets leaves the streets dedicated to the public.[212] As noted by Murray CJ in *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide*:[213]

> … although the fee simple of all public streets within a municipality is vested in the Corporation of that Municipality, I think it is clear that the Corporation has not an unencumbered estate in the land, and an unrestricted right to use it in any manner it pleases. The surface is a street dedicated to the public, and it is as a street that the Corporation acquires its title to the land … It holds, therefore, subject to the rights of the public to use the street for passing and re-passing, except in so far as those rights may be taken away or limited by statute.[214]

499. The Commissioner considers that, in each local government area, those roads and streets which are vested in, constructed or maintained by a local government authority for general public usage are public roads for the purposes of the subsection 53(2) primary production exclusion.

Public roads under the common law

500. If a road is not under the control and management of a state or territory authority which is responsible for the provision of road infrastructure to the public, then whether the road is a 'public road' under the common law is a question of fact.

501. In order to establish that a road has been dedicated as a public road at common law, there must be established an 'unequivocal indication of the intention of the owner of the land to dedicate it to the public as a road'.[215]

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[211] For example, subsection 208(1) of the *Local Government Act 1999 (SA)* provides that 'All public roads in the area of a council are vested in the council in fee simple under the *Real Property Act 1886* (and any land so vested that has not been previously brought under that Act is automatically brought under that Act without further application).'

[212] This may be so even in respect of land held under Torrens title: *Vickery v. Municipality of Strathfield* (1911) 11 SR (NSW) 354 at pages 363 to 364; (1911) 28 WN (NSW) 107 – NSWSC – 31/08/1911 at pages 110 to 111.

[213] *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide* [1931] SASR 217.

[214] *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide* [1931] SASR 217 at page 229; followed by Bray CJ in *Kiosses v. Corporation of the City of Henley and Grange* (1971) 6 SASR 186 at pages 192 to 193; (1971) 33 LGRA 286 at page 292.

[215] *Attorney-General for the Northern Territory of Australia v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536 at page 542.

502. To establish whether a land owner has dedicated a road as a public road under the common law, some of the matters to be considered are:

- whether there has been a declaration of an intention to dedicate;
- delineation on maps or plans of roads set apart for public use;
- use by the public;
- whether vehicles must be registered to use the road and state or territory traffic laws are applicable while the vehicles use the road; or
- the expenditure of money by public bodies in forming or maintaining the land as a road.

503. When considered with all the relevant evidence, the above matters may amount to an unequivocal indication of the intention of the owner of the land to dedicate it to the public as a road. Where that dedication is accepted by the members of the public as such, the road is a public road.

504. However, the courts have indicated that caution is necessary in determining whether a dedication of a road has been made. In *President of the Shire of Narracan v. Leviston*,[216] Barton J said:

> … by placing too liberal a construction in favour of the public and against the landowner upon acts of passage which are tolerated by him, there is a danger lest, in the sparsely settled districts of a country like this, where roads are few and unmade, and mutual concessions on the part of the land owners and the public are necessary, land owners should be put upon the defensive, and be forced to set obstructions in the way of every act which, in a long course of time, might be construed as the assertion of a right of public highway.[217]

505. The comments of Barton J were referred to with approval by Lockhart J in *Attorney-General for the Northern Territory of Australia v. Minister for Aboriginal Affairs and Others*.[218]

[216] *President of the Shire of Narracan v. Leviston* (1906) 3 CLR 846; (1906) 12 ALR 294.
[217] *President of the Shire of Narracan v. Leviston* (1906) 3 CLR 846 at page 871; (1906) 12 ALR 294 at page 301.
[218] *Attorney-General for the Northern Territory of Australia v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536.

Roads that are not public roads

Roads managed by statutory authorities not having responsibility for highways, main roads and local roads

506. Where a road is constructed or maintained by a statutory authority principally and primarily for the purposes of carrying out the statutory objects of the authority, and any public use of the road is subordinate to those statutory objects, then the road is not a public road.

507. Where such a statutory scheme confers a limited right of public access, which is subordinate to the main objects of the statute, then members of the public have a lesser entitlement to that access than the entitlement they have to use public highways, main roads, local roads and suburban streets. The Commissioner considers that where the public does not have a plenary right of access and use, a road cannot be characterised as a public road.

508. Similar principles apply where a statute confers upon an authority the responsibility for control and management of land on which a forest or plantation exists. The authority may make and maintain roads to have access within the forest or plantation for their forestry management purposes. Whilst members of the public may use these roads, their use is subordinate to the use of the authority, which may deny, without any notice, access to the road by members of the public. These roads are not public roads.

Roads over privately owned land

509. An owner of private property may permit members of the public to pass over the property. A person may lawfully enter private land where the person has an express or implied invitation, licence, permission, lawful authority or consent of the person in possession of the land.[219] A person who initially enters land with lawful authority becomes a trespasser if the consent of the owner is revoked.[220]

510. The use of a road over private land by members of the public does not create a public road, notwithstanding that the owner of the land does not hinder the use of the road by the public. Private land cannot become a public road without an effective act of dedication by the owner.[221]

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[219] *Lincoln Hunt Australia Pty Ltd v. Willesee* (1986) 4 NSWLR 457 – NSWSC – 13/02/1986.
[220] *Cowell v. Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; [1937] ALR 273; (1937) 11 ALJR 32 – HCA – 22/04/1937; *Barker v. R* (1983) 153 CLR 338; (1983) 47 ALR 1; (1983) 57 ALJR 426.
[221] *Attorney-General for the Northern Territory v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536 at page 542.

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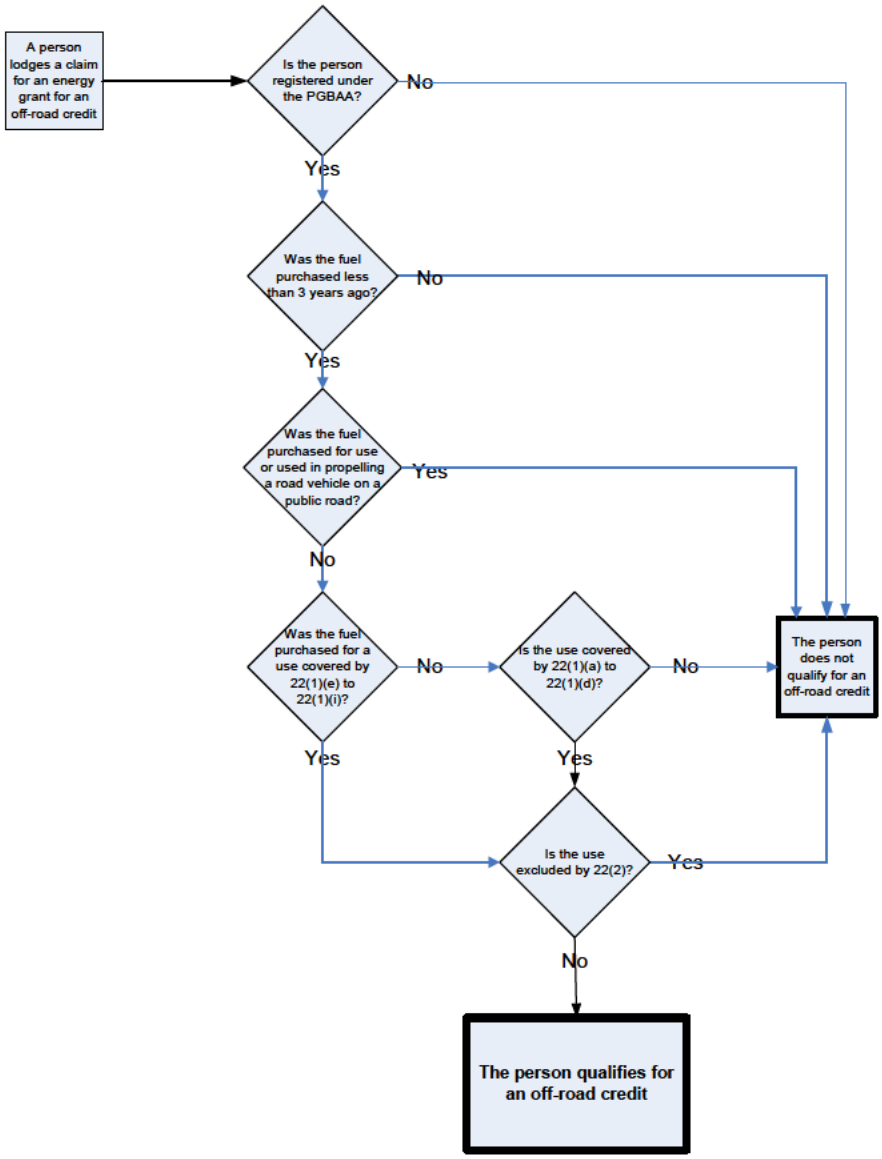
Appendix 1

Basic decision chart for qualification for an off-road credit for claims made under the category of 'agriculture' - paragraphs 129 to 130 of this Ruling