


# ***PGBR 2004/D2 - Energy Grants: off-road credits for forestry***

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There is an Erratum notice for this document.

This document has been finalised by PGR 2005/1.



## Draft Product Grant and Benefit Ruling

### Energy Grants: off-road credits for forestry

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#### **Preamble**

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Product Grant and Benefit Rulings that represent authoritative statements by the Australian Taxation Office.*

### What this Ruling is about

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

- forestry as an aspect of primary production;
- the meaning of each of the activities in the definition of 'forestry' in section 35 of the EGCS Act;
- 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 a 'road vehicle'; and
  - the definition of a 'public road'.

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

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

#### **Class of person**

4. This Ruling applies to the class of persons who purchase or import into Australia, off-road diesel fuel for use in forestry as defined in section 35.

## Date of effect

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5. It is proposed that when the final Ruling is issued, it will apply from 1 July 2003.<sup>1</sup> However, the final Ruling will not apply to taxpayers 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).

## Background

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6. The purpose of the Energy Grants (Credits) Scheme<sup>2</sup> is to provide active encouragement for the move to the use of cleaner fuels.<sup>3</sup>

7. A person who purchases or imports into Australia diesel fuel for use in certain eligible off-road activities may be entitled to an off-road credit under the off-road credit entitlement provisions of the EGCS Act.<sup>4</sup> A person who is entitled to an off-road credit is entitled to an energy grant under the Energy Grants (Credits) Scheme.<sup>5</sup>

8. The legislation enabling payment of the grant is contained in the EGCS Act and *Product Grant and Benefits Administration Act 2000* (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.

9. 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

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<sup>1</sup> 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.

<sup>2</sup> In this Ruling we refer to the scheme established under the EGCS Act as the Energy Grants (Credits) Scheme.

<sup>3</sup> 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).

<sup>4</sup> Subsection 53(1).

<sup>5</sup> Subsection 56(1).

entitlement.<sup>6</sup> The previous off-road scheme and the previous on-road scheme ceased on 1 July 2003.

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

11. The Energy Grants (Credits) Scheme is a self-assessment scheme that requires a person to provide to the Tax Office sufficient information for the grant to be paid. If a grant is paid for diesel fuel purchased for use or that is used in an activity that is not eligible, the Tax Office will amend the original assessment of the energy grant payable, recover the grant and may impose a penalty and/or General Interest Charge (GIC).<sup>8</sup>

12. The Tax Office may also undertake an audit to verify information provided by a person in relation to a claim for the grant.<sup>9</sup>

13. 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.

14. Under the off-road credits scheme, a person is entitled to an off-road credit (and therefore, an energy grant)<sup>10</sup> 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);<sup>11</sup>
- in primary production (agriculture, fishing operations or forestry),<sup>12</sup> (otherwise than for the purpose of propelling a road vehicle on a public road);<sup>13</sup>
- 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;<sup>14</sup>

<sup>6</sup> Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, page 3.

<sup>7</sup> See Item 25, Schedule 3 and Item 18 schedule 4 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003*.

<sup>8</sup> Section 55, section 20 of the PGBA Act, section 284-75 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and section 35 of the PGBA Act.

<sup>9</sup> Sections 27, 42 to 45A and 48 of the PGBA Act.

<sup>10</sup> Subject to the registration requirements being met.

<sup>11</sup> Subsection 53(2).

<sup>12</sup> Section 21.

<sup>13</sup> Subsection 53(2).

<sup>14</sup> Subsection 53(3).

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- in marine transport in the course of carrying on an enterprise;<sup>15</sup>
- at residential premises to generate electricity for use in certain specified activities;<sup>16</sup>
- 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;<sup>17</sup>
- at hospitals, nursing homes or other institutions providing medical or nursing care;<sup>18</sup>
- at a home for aged persons;<sup>19</sup> or
- specific industrial uses.<sup>20</sup>

15. This Ruling addresses the category of forestry.

16. Many of the terms and expressions defined in Division 3 of Part 2<sup>21</sup> 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 our views on the operation of the off-road credits scheme under the Energy Grants (Credits) Scheme.<sup>22</sup>

17. Similar to the previous off-road scheme, the Energy Grants (Credits) Scheme is a beneficial scheme that confers benefits on persons that undertake certain activities. We take the view that, as for the previous off-road scheme, the entitlement provisions of the Scheme are intended to be read in a practical, commonsense manner.<sup>23</sup>

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<sup>15</sup> Subsection 53(3).

<sup>16</sup> Paragraph 53(4)(b).

<sup>17</sup> Paragraph 53(4)(a).

<sup>18</sup> Paragraph 53(4)(c).

<sup>19</sup> Paragraph 53(4)(d).

<sup>20</sup> Subsections 53(5) and 53(6).

<sup>21</sup> This Division sets out the definitions that are used only in the off-road credits part (Part 4) of the EGCS Act.

<sup>22</sup> The basis of the position was stated by Kirby P in *Public Service Association of NSW v. Industrial Commission of NSW* (1985) 11 IR 420; (1985) 1 NSWLR 627 at page 640: 'There is a presumption, useful in statutory interpretation, that where a provision of legislation has been passed upon by authoritative decisions of the courts and is later re-enacted, Parliament can be taken, in the absence of a clear intention to the contrary, to know and accept the interpretations given to the legislation'.

<sup>23</sup> *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No. W84/118; (1985) 8 ALN N288.

18. In *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (Abbott Point),<sup>24</sup> 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.<sup>25</sup>

19. In *Australian National Railways Commission v. Collector of Customs, SA*,<sup>26</sup> (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.<sup>27</sup>

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

21. Where there is doubt as to the meaning and application of the qualifying provisions, we take the view that they are to be liberally construed unless the text or context requires a narrow construction.<sup>28</sup>

22. In this Ruling, unless otherwise stated:

- a reference to the grant is a reference to an energy grant for an off-road credit;
- a reference to fuel or diesel fuel is a reference to off-road diesel fuel as defined in section 4;
- a reference to the off-road credits scheme is a reference to the off-road credit entitlement provisions under Part 4 of the ECGS Act;<sup>29</sup>

<sup>24</sup> *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371; (1992) 15 AAR 365.

<sup>25</sup> *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.

<sup>26</sup> *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264; 69 ALR 367.

<sup>27</sup> *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at page 270; 69 ALR 367 at page 372.

<sup>28</sup> See *Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* AATA 657, 5 August 2002 at paragraphs 46 to 50; (2002) 68 ALD 581 at pages 592-593. See also *Re Brymay Forests Pty. Limited and Collector of Customs Victoria* No. V85/305 AAT No. 2496 24 December 1985; (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.

<sup>29</sup> The note to Part 4 of the ECGS 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.

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- a reference to the on-road credits scheme is a reference to the entitlement provisions under Part 3 of the ECGS Act;
- a reference to purchase in relation to diesel fuel includes purchase or import into Australia;
- it is assumed that the requirement to be registered under section 9 of the PGBA Act is met;
- a reference to an eligible activity or activities is a reference to a use that qualifies;
- a reference to a forestry activity is a reference to an activity that is within the meaning of forestry in section 35;
- A reference to the subsection 53(2) primary production exclusion is a reference to the exclusion, in subsection 53(2), from use in primary production of diesel fuel purchased for the purposes of propelling a road vehicle on a public road; and
- this Ruling applies to partnerships and unincorporated associations as if they were a person.<sup>30</sup>

## Ruling

### ***General requirements of the off-road credits scheme***

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

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

### ***Threshold and eligibility requirements***

24. 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.

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<sup>30</sup> Sections 51 and 52 of the PGBA Act. In respect of partnerships, a partner may apply for a private ruling on the partnership's behalf (Product Grant and Benefit Ruling PGBR 2003/2 paragraph 21).

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

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

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

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

27. 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 forestry'***

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

29. 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).

30. Under section 21, the expression 'primary production' means agriculture, or fishing operations, or forestry. Forestry is defined in section 35. A person is, therefore, entitled to an off-road credit if they purchase diesel fuel for use in each of the activities listed in paragraphs 35(a) to 35(f).

31. In the context of the phrase 'in primary production', if an activity takes place 'in the course of' a forestry activity, it takes place 'in' forestry.

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## ***The form of the definition of 'forestry'***

32. The use of the expressions 'means' and 'includes' in the definition of 'forestry' in section 35 means that the definition is an exhaustive one. An activity that is not within any one of paragraphs 35(a) to 35(f) is not a forestry activity.

## ***Apportionment of fuel***

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

## ***Status of contractors***

34. Under the off-road credits scheme, a contractor is entitled to an off-road credit in respect of fuel purchased by them for use in a forestry activity provided the activity is carried out for the purposes of an enterprise to obtain timber as a primary produce.

## ***Activities 'in forestry' carried out for the purposes of a business***

35. To qualify as forestry, each of the activities mentioned in section 35 must be carried out for the purposes of a commercial or business enterprise to obtain timber<sup>31</sup> as primary produce.

## ***The exclusion from a qualifying use of diesel fuel purchased for use in propelling a road vehicle on a public road***

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

## ***What is a road vehicle?***

37. A vehicle is a 'road vehicle' if it is of a kind commonly or regularly used on roads for the transport of goods.<sup>32</sup> We consider that trucks, and truck and trailer combination vehicles, which are vehicles ordinarily used to transport timber logs, are road vehicles for the purposes of the subsection 53(2) primary production exclusion.

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<sup>31</sup> The meaning of 'timber' is discussed in paragraphs 102 to 107 of this Ruling.

<sup>32</sup> Section 4 defines 'road vehicle' to mean: 'a vehicle of a kind ordinarily used on roads for the transport of persons or goods'.

***Meaning of 'public road'****Roads that are public roads*

38. For the purposes of the subsection 53(2) primary production exclusion, we consider that a road is a public road if:

- it is opened, declared or dedicated as a public road under a statute; or
- 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*

39. We consider 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 road is subordinate to the primary objects of the statutory regime;
- a forestry road; and
- a road over privately owned land.

*Forestry roads*

40. For the purposes of the subsection 53(2) primary production exclusion, a forestry road<sup>33</sup> is a road within a forest or plantation which is constructed and maintained primarily and principally for the purposes of providing access to an area to facilitate forestry activities (for example, to facilitate trees to be planted or tended in the area, or timber felled in the area to be removed) and for related forestry management activities.

*Conversion of forestry road into a public road*

41. A forestry road becomes a public road when it is dedicated as a public road. This occurs when responsibility for the forestry road passes to a local government authority, or state or territory government authority, having responsibility for maintenance of highways, main roads or local roads.

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<sup>33</sup> Forestry road includes a road of the kind referred to in paragraph 35(f).

## Explanation

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### **General requirements of the off-road credits scheme**

#### ***Requirement for registration***

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

#### ***The threshold and eligibility provisions***

43. 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.

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

45. 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<sup>35</sup> and it may be recovered.<sup>36</sup>

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

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

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

- the fuel is used for a purpose other than the eligible use for which it was purchased, unless that other use is also eligible for an off-road credit;

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<sup>34</sup> Subsection 9(4) of the PGBA Act.

<sup>35</sup> Section 55.

<sup>36</sup> Section 20 of the PGBA Act; section 255-5 Schedule 1 to the TAA.

- the fuel is sold or otherwise disposed of; or
- the fuel is lost (whether because of accident, theft or any other reason).<sup>37</sup>

48. 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.<sup>38</sup> A person is not entitled to retain the grants in these circumstances. The grants will be recovered by the Tax Office following an amendment to the assessment of the grant payable.<sup>39</sup>

49. Regardless of whether the threshold and eligibility provisions have been met, a person is not entitled to an off-road credit 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).<sup>40</sup> 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.<sup>41</sup>

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

### ***Entitlement to off-road credits for fuel purchased for use ‘in forestry’***

51. A person who is entitled to an off-road credit is thereby entitled to an energy grant.<sup>43</sup>

52. 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).

<sup>37</sup> Section 55.

<sup>38</sup> Section 27 and 27A of the PGBA Act.

<sup>39</sup> Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA.

<sup>40</sup> 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.

<sup>41</sup> Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA.

<sup>42</sup> 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.

<sup>43</sup> Section 56.

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53. 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).<sup>44</sup>

54. 'Primary production' is defined as meaning:

- (a) agriculture; or
- (b) fishing operations; or
- (c) forestry.<sup>45</sup>

55. 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 takes place 'in' primary production.

56. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)*,<sup>46</sup> 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'...

57. We consider that the following three criteria are relevant in determining if an activity takes place 'in the course of' forestry.<sup>47</sup> These are:

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

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

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<sup>44</sup> Subsection 53(2).

<sup>45</sup> Section 21.

<sup>46</sup> *CEO of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 158 ALR 241 at page 259, (1998) 87 FCR 482 at page 501; see also *Re Wandoo Alliance Pty Ltd v. CEO of Customs* [2001] AATA 801, paragraph 9; (2001) 34 AAR 98 at page 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.

<sup>47</sup> 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; *CEO of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482; 158 ALR 241; *Re Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* (2001) 34 AAR 98; [2001] AATA 801, amongst others, it was deemed pertinent to consider one or all of these factors when determining whether an activity or activities were undertaken 'in the course of' something.

***The form of the definition of ‘forestry’: means and includes***

59. The definition of ‘forestry’ in section 35 consists of two parts:

- **subsection 35, paragraphs (a) and (b):** ‘forestry’ *means* the planting and tending of trees intended for felling, and the thinning or felling of standing timber; when these activities are undertaken in a forest or plantation.
- **subsection 35, paragraphs (c) to (f):** ‘forestry’ *includes* a number of specific activities.

60. The use of the form ‘*means ... and includes*’ in section 35 means that paragraphs 35(a) and 35(b) contain the central features of ‘forestry’, which is then expanded by the specific activities listed in paragraphs 35(c) to 35(f). If an activity is within one of paragraphs 35(a) to 35(f), a person is entitled to an off-road credit if they purchase diesel fuel for use in that activity.

61. The form of the definition of ‘forestry’: *means ... and includes*, and the activities that fall within that definition are the same as that used in the definition of forestry in the previous off-road scheme.<sup>48</sup> Previous decisions of the Courts and the AAT are, in our view, relevant to the interpretation of section 35.

62. The use of the expressions, ‘*means*’, and ‘*includes*’ in the definition of ‘forestry’ in section 35 means that the definition is an exhaustive definition. Paragraphs 35(c) to 35(f) do not provide an exhaustive list of eligible activities. Rather, they add to the list of eligible activities in paragraphs 35(a) and 35(b).

63. Activities that are not within any one of paragraphs 35(a) to 35(f) are not forestry activities for the purposes of the off-road credits scheme.

***Apportionment of fuel***

64. 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.

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

<sup>48</sup> Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, paragraph 1.38 page 15.

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

67. There is judicial authority for this view. In *Collector of Customs v. Pozzolanic Enterprises Pty Limited*,<sup>49</sup> 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.<sup>50</sup>

## **Status of contractors**

68. For the purposes of the off-road credits scheme, activity determines eligibility, rather than whether the person's principal business is forestry.

69. Unless otherwise specified, a person who undertakes a forestry activity for the purposes of an enterprise to obtain timber as a primary produce is entitled to an off-road credit if they purchase diesel fuel for use in that activity. This includes forestry activities carried out by a contractor contracted by the person that carries on the enterprise.

## **Activities 'in forestry' carried out for the purposes of a business**

70. Unlike the definitions of agriculture in section 22 and fishing operations in section 34, the definition of forestry in section 35 has no specific requirement that the activities outlined in the section be carried on for the purposes of a business.<sup>51</sup>

71. However, we consider that, as forestry is a subset of primary production, the forestry activities must be carried out for the purpose of a commercial or business enterprise to obtain a primary produce.

72. We take the view that the activities mentioned in each of the paragraphs in section 35 describe the processes necessary, or that assist, in the obtaining of timber as primary produce as part of a commercial or business enterprise.

73. The explanatory memorandum to the Diesel Fuel Taxes Legislation Amendment Bill 1982 supports our view. The *Diesel Fuel Taxes Legislation Amendment Act 1982* introduced the previous off-road scheme into the Customs Act and the Excise Act. The definition

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<sup>49</sup> *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280; 115 ALR 1.

<sup>50</sup> *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280 at page 290; 115 ALR 1 at page 12.

<sup>51</sup> In the definition of 'agriculture' in section 22 and the definition of 'fishing operations' in section 34, this requirement is present because of the manner in which the exclusions contained in those sections operate.

of forestry introduced by that Act was similar to the definition of forestry in section 35.

74. The explanatory memorandum stated that the package was designed to 'introduce ... a new system providing for rebates of duty paid in diesel fuel used for 'off-road' purposes by persons engaged in the agriculture, mining, forestry and fishing industries'. The measures were intended to encourage the primary industries to which they applied.

75. 'Primary industry' is defined as 'any industry such as dairy farming, forestry, mining etc., which is involved in the growing, producing, extracting, etc., of natural resources.'<sup>52</sup>

76. The references to 'industries' in the explanatory memorandum confirms a legislative intent to confine eligibility for the diesel fuel rebate under the previous off-road scheme to those that engaged in primary production as a commercial or business enterprise.

77. As the forestry activities in section 35 are the same as those that were eligible for diesel fuel rebate under the previous off-road scheme,<sup>53</sup> we consider that the comments made in the explanatory memorandum to the Diesel Fuel Taxes Legislation Amendment Bill 1982 apply equally to the meaning of forestry in section 35.

78. Our view is also supported by comments made by the AAT in *Re City of Nunawading and Comptroller-General of Customs*.<sup>54</sup> Although, in that case, the AAT was dealing with the meaning of agriculture and horticulture in subsection 164(7) of the Customs Act, prior to the 1995 amendments to that Act, in relation to the definition of forestry,<sup>55</sup> it observed that:

Where trees are intended for felling then presumably there is both a commercial aspect and a 'product' or 'crop'. We are not so clear that this is always the case when thinning or felling occurs in a forest or plantation of standing timber. Presumably, thinning or felling of that type may occur on occasion for conservation and environmental purposes rather than for the purpose of retrieval of the timber for itself.<sup>56</sup>

79. In relation to horticulture, the AAT, after examining the context in which the word was used, and its ordinary and statutory meaning, concluded:

Looking at the context, we consider that the word 'horticulture', when used in section 164, is not limited to those activities specified in paragraphs (a), (b) and (c) of the definition but that to come within the meaning of horticulture in the Act, an activity must relate in some

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<sup>52</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>53</sup> See paragraph 1.38 of the Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003.

<sup>54</sup> *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758; (1994) 36 ALD 628.

<sup>55</sup> That definition was the same as the definition of forestry in section 35.

<sup>56</sup> *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758 at paragraph 89; (1994) 36 ALD 628 at page 643.

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way to an aspect of primary production conducted as a commercial or business enterprise.<sup>57</sup>

80. We consider that, having regard to forestry being an aspect of primary production as defined in section 21, and the fact that the definition of forestry in section 35 is in identical terms to that in the previous off-road scheme, a similar approach is appropriate to the activities set out in section 35. In our view, those activities must be carried out as part of a commercial or business enterprise to obtain timber as a primary produce.

## Activities that are 'forestry'

81. Paragraphs 35(a) and 35(b) contain the central or core forestry activities. The activities outlined in these paragraphs are:

- the planting or tending, in a forest or plantation, of trees intended for felling (paragraph 35(a)); and
- the thinning or felling, in a forest or plantation, of standing timber (paragraph 35(b)).

82. Paragraphs 35(c) to 35(f) expand the meaning of 'forestry' by including specific activities that are undertaken for the purposes of obtaining timber as primary produce. These activities are:

- the transporting, within a forest or plantation of timber felled in the forest or plantation;
- the milling or processing within a forest or plantation of timber felled within the forest or plantation;
- the transporting of felled timber from the forest or plantation where it was felled to a sawmill or chipmill, located outside that forest or plantation;
- the milling of timber at a sawmill or chipmill that is not situated in the forest or plantation in which the timber was felled; and
- the making and maintaining, in a forest or plantation where trees are planted or tended or where standing timber is thinned or felled, of a road that is integral to the forestry activities mentioned in paragraphs 35(a), 35(b) and 35(c).

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<sup>57</sup> *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758 at paragraph 99; (1994) 36 ALD 628 at page 645.

***Planting or tending of trees***

83. The definition of 'forestry' in section 35 states in part:

The expression **forestry** means:

- (a) the planting or tending, in a forest or plantation, of trees intended for felling.

84. A person is entitled to an off-road credit if they purchase diesel fuel for use in the planting or tending, in a forest or plantation, of trees intended for felling. The activity must be carried out as part of a commercial or business enterprise to obtain timber as a primary produce.

85. The words 'planting', 'tending', 'forest', and 'plantation' and 'felling' are not defined in the Act. They therefore take their ordinary meanings.

***Planting of trees***

86. The verb 'to plant' is defined as 'to put or set in the ground, as seeds, young trees, etc'.<sup>58</sup> 'Planting of trees' is the act of putting or setting seeds or young trees in the ground.

87. In those cases where soil is ploughed, broken or turned, then fertilised or conditioned, and then afterwards seeds or seedlings are placed in the soil as part of an integrated process, 'planting' includes the activities of ploughing, breaking or turning of the soil, the fertilisation or conditioning of the soil and the placing of the seeds or seedlings into the ground. Having regard to the three criteria mentioned in paragraph 57 of this Ruling, we consider that all of these activities take place 'in' the planting of trees.

88. In relation to the temporal link referred to in paragraph 57 of this Ruling, we recognise that activities performed in relation to planting trees in a plantation are seasonally dependent activities.<sup>59</sup> Where best forest practice dictates particular seasonal conditions for optimal planting of trees intended for felling, the elapse of a reasonable length of time, determined in accordance with those forestry practices, between ripping and other soil preparation and subsequent planting of seedlings will not, of itself, sever the temporal connection.

89. The 'planting of trees' includes the digging of holes in which seeds or seedlings are to be put provided this occurs immediately prior to putting of seeds or seedlings into the ground. It also includes planting after harvesting an area in a forest or plantation as well as the planting of trees in a new plantation. Planting does not include activities such as the felling of trees, clearing of scrub, removal of

<sup>58</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>59</sup> Taxation Determination 2003/12: Income tax: what activities are 'seasonally dependent agronomic activities' for the purposes of section 82KZMG of the *Income Tax Assessment Act 1936*?

stones and other actions undertaken in land clearing for the purposes of establishing a new plantation.

### *Tending of trees*

90. The verb to tend is defined as '1. to attend to by work or services, care etc: *to tend a fire* 2. to look after; watch over and care for; minister to or wait on with service.'<sup>60</sup> The 'tending of trees' means the undertaking of activities to ensure the survival of the trees or to enhance their growth, quality and vigour. 'Tending of trees' includes:

- fertilising after planting;
- spraying trees against pests and diseases;
- eliminating weeds;
- fire protection measures; and
- watering.

### *The meanings of 'forest' and 'plantation'*

91. The ordinary meaning of the word 'forest' is 'a large tract of land covered with trees'.<sup>61</sup>

92. The word 'plantation' is defined as 1. a farm or estate, especially in a tropical or subtropical country, on which cotton, tobacco, coffee, sugar or the like is cultivated, usually by resident labourers. 2. a group of planted trees or plants.<sup>62</sup>

93. We consider that in the context of the meaning of forestry in section 35, the term 'forest' refers to a large group of naturally occurring trees, which are capable of being harvested for use as a natural resource, and the term 'plantation' refers to a large group of trees that have been planted with the intention of harvesting as timber.

### *Intended for felling*

94. The word 'to fell' is defined as 'to cause to fall, knock, strike, or cut down'.<sup>63</sup>

95. We consider that for an activity to be a forestry activity under paragraph 35(a) there must be an intention to harvest the timber from the trees planted or tended. The intention must be present at the time the trees are planted and during their tending.

<sup>60</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>61</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>62</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>63</sup> *Macquarie Dictionary*, Revised Third Edition.

96. The planting or tending of trees in a forest or plantation for a purpose other than for felling, for example, for ecological conservation, is not a forestry activity under paragraph 35(a). These activities are not for the purposes of a commercial or business enterprise to obtain timber as a primary produce.

97. Planting and tending of trees does not include the delivery to and unloading of seedlings, fertilisers and pesticides in the forest, plantation or proposed plantation. Such activities are considered to take place prior to planting, and are therefore not 'in' forestry.

98. In ANR,<sup>64</sup> 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.<sup>65</sup>

### ***Thinning or felling of standing timber***

99. The definition of 'forestry' in section 35 states in part:

The expression **forestry** means:

- (b) the thinning or felling, in a forest or plantation, of standing timber.

100. A person is entitled to an off-road credit if they purchase diesel fuel for use in the thinning or felling of standing timber in a forest or plantation. The activity must be carried out as part of a commercial or business enterprise to obtain timber as a primary produce.

101. Thinning refers both to the removal of dead, dying and suppressed trees (known as 'thinning to waste') and also to the removal of stems for sale or use in manufacture.

### ***What is timber?***

102. The word 'timber' is defined as '1. wood, especially when suitable for building houses, ships etc., or for use in carpentry, joinery, etc 2. the wood of growing trees suitable for structural uses 3. the trees themselves'.<sup>66</sup>

<sup>64</sup> *Australian National Railways Commissioner v. Collector of Customs, SA* (1985) 8 FCR 264; (1985) 69 ALR 367.

<sup>65</sup> *Australian National Railways Commissioner 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', we consider that this applies equally to the definition of forestry in the EGCS Act.

<sup>66</sup> *Macquarie Dictionary*, Revised Third Edition.

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103. The term 'timber' embraces trees and constituent parts of trees which are intended for further processing and consumption.<sup>67</sup>

104. In the context of the meaning of forestry as an aspect of primary production, the term 'timber' is applied throughout the process of further reduction in size and shape up to the point where the basic constituent material, in reduced or separated form, is subjected to a secondary process or treatment.<sup>68</sup> The determination of whether something is timber for the purposes of section 35 requires a careful examination of the processes that it undergoes, and whether it is produced by the operation of saws at a mill.

105. Wood which has been milled or processed into planks, and which is suitable for a variety of structural or carpentry uses, is 'timber' for the purposes of section 35, as it is not considered to have been subject to a secondary process or treatment, even where the timber has been smoothed or 'dressed'.

106. However, wood, which has been shaped specifically for use in secondary manufacture, for example, wood shaped into skirting boards, is not 'timber' for the purposes of section 35. It is considered that wood, which is shaped specifically for a particular purpose has been subject to a secondary process or treatment. Examples of wood that has been subject to secondary processing are posts, poles and railways sleepers as well as wood used in the manufacture of plywood, which involves the gluing together of thin sheets of wood under pressure.

107. The term 'standing timber' in paragraph 35(b) refers to trees in their entirety prior to being felled. The term 'timber' is not limited to any particular component of the tree and does not exclude any part of the tree.<sup>69</sup>

108. 'Felling' of standing timber includes the preparation of felled trees to enable them to be moved, such as the removal of lateral growth and cutting into manageable lengths. When carried out by the person who felled the trees, the normal preparation for removal is regarded as 'felling'.

109. 'Felling' does not include the production of posts, poles, railway sleepers and the like. The shaping of timber into consumable products is secondary processing and is not 'forestry'.

110. The felling of standing timber by, or on behalf of, an electricity authority within an electricity transmission line easement is not a forestry activity. In these cases, felling is undertaken for the purposes of safety control and access for repairs and maintenance and not for the purposes of a commercial or business enterprise to obtain timber as a primary produce.

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<sup>67</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 32; (1993) 17 AAR 557 at page 561.

<sup>68</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 24; (1993) 17 AAR 557 at page 562.

<sup>69</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557.

**Activities that are included in ‘forestry’**

111. The definition of 'forestry' in section 35 states in part:

The expression **forestry** means:

...

and includes:

- (c) the transporting, milling or processing, in a forest or plantation, of timber felled in the forest or plantation; or
- (d) the milling of timber at a sawmill or chipmill that is not situated in the forest or plantation in which the timber was felled; or
- (e) where timber is milled at a sawmill or chipmill that is not situated in the forest or plantation in which the timber was felled – the transporting of the timber from the forest or plantation in which it was felled to the sawmill or chipmill;

***Transporting, milling or processing of timber******Transporting of timber in a forest or plantation***

112. Under paragraph 35(c), a person is entitled to an off-road credit if they purchase diesel fuel for use in the transporting, in a forest or plantation, of timber felled in the forest or plantation.

113. The term 'transport' is not defined in the EGCS Act and therefore takes its ordinary meaning of 'to carry or convey from one place to another'.<sup>70</sup>

114. The term 'transporting ... of timber' in paragraph 35(c) refers to the conveying or carrying, in a forest or plantation, of felled timber from one place in the forest or plantation where the timber was felled to another place in that forest or plantation. To qualify as an eligible activity, the transport must be undertaken entirely within the forest or plantation in which the timber is felled.

115. Transporting ... of timber includes the carrying or conveying by the person who felled the timber from the place where it is felled in the forest or plantation to a delivery point (a loading point or 'log dump') in that forest or plantation from which the timber is to be transported to a sawmill or chipmill for milling or processing.

116. The 'transporting ... of timber' in paragraph 35(c) also includes the return journey of the transport vehicle after the felled timber has been delivered to a sawmill or chipmill or log dump situated within the forest or plantation.

<sup>70</sup> *Macquarie Dictionary*, Revised Third Edition.

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117. The 'transporting ... of timber' in paragraph 35(c) is subject to the subsection 53(2) primary production exclusion (diesel fuel purchased for use in propelling a road vehicle on a public road). No entitlement to an off-road credit arises in respect of diesel fuel purchased for use in propelling a road vehicle, used for transporting timber, on a public road.<sup>71</sup>

## *Transporting of felled timber to a sawmill or chipmill situated outside the forest or plantation*

118. Under paragraph 35(e), a person is entitled to an off-road credit if they purchase diesel fuel for use in the transporting of timber from the forest or plantation, in which it was felled, to a sawmill or chipmill situated outside the forest or plantation.<sup>72</sup> The purpose of the journey so undertaken must be the milling of the timber at the sawmill, or chipmill, to which it is transported.

119. The 'transporting of the timber' in paragraph 35(e) includes the return journey of the transport vehicle after the felled timber has been delivered to a sawmill or chipmill situated outside the forest or plantation.

120. The 'transporting of the timber' in paragraph 35(e) is subject to the subsection 53(2) primary production exclusion (diesel fuel purchased for use in propelling a road vehicle on a public road). No entitlement to an off-road credit arises in respect of diesel fuel purchased for use in propelling a road vehicle, used for transporting timber, on a public road.<sup>73</sup>

121. The transport of timber from the sawmill, or chipmill, subsequent to milling or processing is not a forestry activity. This transport is not covered by paragraph 35(c), nor by paragraph 35(e).<sup>74</sup>

## *Milling or processing of timber*

122. Under paragraph 35(c), a person is entitled to an off-road credit if they purchase diesel fuel for use in the milling or processing, in a forest or plantation, of timber felled in the forest or plantation.

123. Under paragraph 35(d), a person is entitled to an off-road credit if they purchase diesel fuel for use in the milling of timber at a sawmill or chipmill that is not located in the forest or plantation in which the timber was felled.

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<sup>71</sup> See paragraphs 151 to 207 of this Ruling for a discussion on the exclusion for diesel fuel purchased for use in propelling a road vehicle on a public road.

<sup>72</sup> See paragraph 113 of this Ruling for the meaning of 'transport'.

<sup>73</sup> See paragraphs 151 to 207 of this Ruling for a discussion on the exclusion for diesel fuel purchased for use in propelling a road vehicle on a public road.

<sup>74</sup> *Australian National Railways Commission v. Collector of Customs, SA* (1985) 8 FCR 264 at page 270; 69 ALR 367 at page 372.

124. Under paragraph 35(c), the 'milling or processing' of timber felled in a forest or plantation is a forestry activity only if the milling or processing is in the same forest or plantation in which the timber is felled.

125. The word 'mill' is a term of wide meaning. A machine, which operates by rotary action, is accepted as falling within the ordinary concept of a mill.<sup>75</sup>

126. 'Milling of timber' is undertaken by subjecting timber to the operation of a rotary mill for the purpose of reducing the timber in size and shape.

127. It is not necessary that, to be a mill, the particular operation be of a certain size or take a particular standard form. For example, the fact that a machine is designed to be mobile does not deprive it of the character of being a 'mill'.<sup>76</sup> The emphasis is on function rather than the environment in which the function occurs.

128. In the making of matches, the debarking and sawing of logs into billets was held to constitute the 'milling of timber', as was the peeling of match veneer sheets off the billets by means of a rotary veneering machine. However, in the next stage of the production line, the chopping of the veneer sheets into splints was considered unlikely to be 'the milling or processing of timber' as that process was a secondary treatment and not a process of primary production.<sup>77</sup>

129. The term 'processing' in paragraph 35(c) is not defined. It, therefore, takes its ordinary meaning. The Macquarie Dictionary<sup>78</sup> relevantly defines the verb 'process' as:

- 'to treat or prepare by some particular process, as in manufacturing;' or
- 'to convert (an agricultural commodity) into marketable form by some special process'.

130. We consider that the term 'processing ... of timber' in paragraph 35(c) refers to the treatment or preparation of the felled timber by the use of any process. It includes the preparation of the felled timber for pulping. The processing of timber is a qualifying use only to the extent that the processing is for the purpose of a commercial or business enterprise to obtain timber as a primary produce. Secondary processing to convert timber for specific uses is not a qualifying forestry activity.

<sup>75</sup> *Re Wesfi Pty Ltd and Collector of Customs WA*, No. W84/46, 20 December 1984 at paragraph 9; (1984) 7 ALN N8 at paragraph 9.

<sup>76</sup> *Re T J Depiazzi and Sons v Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 32. (1993) 17AAR 557 at page 561.

<sup>77</sup> *Re Brymay Forests Pty Ltd and Collector of Customs, Victoria* No. V85/305 AAT No. 2496, 24 December 1985; (1985) 9 ALN N177.

<sup>78</sup> *Macquarie Dictionary*, Revised Third Edition.

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## *What is a sawmill?*

131. A 'sawmill' is a mill in which the sawing of timber is the main or predominant process performed.<sup>79</sup>

## *What is a chipmill?*

132. A 'chipmill' is a mill at which the 'chipping' of timber or parts of timber occurs. A mill, which engages in a process of milling involving a substantial, though not necessarily predominant, proportion of chipping, is a chipmill.<sup>80</sup>

133. 'Chipping' refers to one of the reduction processes through which tree parts and residue are broken down to a state where they become material capable of use in other productive activities.<sup>81</sup> Examples of end products of chipping in chipmills are wood chips for use in making cardboard or chipboard.

134. Machines, which perform the processing of raw materials received from local sawmills into smaller pieces by the action of hammers, which operated by rotary motion, have been held to be chipmills.<sup>82</sup>

## *Example 1: Milling or processing of timber*

135. *Peg Post Pty Ltd (Peg Post) is a manufacturer of wooden clothes pegs. Peg Post grows trees in a plantation on private property close to a sawmill it operates to process timber for its purposes. The felled timber is taken from the plantation to the mill by a truck-trailer vehicle combination on a private road. Harvested timber logs are placed on a production line by a front-end grab tractor. They then pass through an integrated milling process involving:*

- *removal of the bark by a de-barking machine;*
- *the cutting of timber into lengths measuring two metres by three centimetres by three centimetres by a series of circular saws; and*
- *planing to obtain a smooth finish.*

136. *The timber at the end of this integrated process is then carried by a conveyor belt to a plant next to the sawmill where they are further trimmed, cut and shaped by a lathe to the right size and manufactured into clothes pegs.*

<sup>79</sup> *Re Brymay Forests Pty Ltd and Collector of Customs*, Victoria No.V85/305 AAT No. 2496, 24 December 1985; (1985) 9 ALN N177.

<sup>80</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 30; (1993) 17AAR 557 at page 564.

<sup>81</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 31; (1993) 17AAR 557 at page 564.

<sup>82</sup> *Re T J Depiazzi and Sons and Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17AAR 557.

137. *The activities carried out by Peg Post up to and including the planing of the timber at the sawmill as part of the integrated milling process are eligible forestry activities. Peg Post is entitled to an off-road credit in respect of diesel fuel purchased for use in each of those activities. This includes the diesel fuel purchased for use in the transporting of timber from the plantation to the mill and for use in the front-end grab tractor to place the felled timber onto the production line.*

138. *Peg Post is not entitled to an off-road credit in respect of diesel fuel purchased for use in conveying the timber by the conveyor belt after the integrated milling process. Nor is Peg Post entitled to an off-road credit in respect of diesel fuel purchased for use in any activity in the plant where the processed timber is manufactured into clothes pegs.*

### ***Making and maintaining roads***

139. The definition of 'forestry' in section 35 states in part:

The expression **forestry** means:

...

and includes:

...

- (f) the making and maintaining in a forest or plantation referred to in paragraph (a) or (b) of a road that is integral to the activities referred to in paragraph (a), (b) or (c).

140. Under paragraph 35(f), a person is entitled to an off-road credit if they purchase diesel fuel for use in the making and maintaining of a road that:

- is in a forest or plantation in which trees intended for felling are planted or tended; or
- is in a forest or plantation in which standing timber is thinned or felled; and
- is integral to the activities of planting or tending of trees intended for felling, the thinning or felling of standing timber in that forest or plantation, or to the transporting, milling or processing, in the forest or plantation, of timber felled in that forest or plantation.

141. The term 'and' in the phrase 'making and maintaining' in paragraph 35(f) is non-cumulative. This means that the activity of making of a road referred to in that paragraph is to be read separately from the activity of maintaining a road referred to in the paragraph. Each activity is an eligible activity if the requirements of paragraph 35(f) are met.

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142. The word 'integral' means '1. having to do with a whole; belonging as part of the whole, constituent or component: *the integral parts of the human body*. 2. necessary to the completeness of the whole'.<sup>83</sup>

143. We consider that a road in a forest or plantation which is constructed and maintained in accordance with a regional Forest Agreement, or a Plan or Code governed by a Regional Forest Agreement, is integral to the forestry activities mentioned in paragraphs 35(a), 35(b) and 35(c) that take place in that forest or plantation.

144. The construction and maintenance of a road, is a qualifying activity under paragraph 35(f) only if the activity is carried out in a forest or plantation where the planting or tending of trees intended for felling is to be carried out, or in a forest or plantation where the thinning or felling of standing timber is to be carried out.

145. The construction and maintenance of a road outside the relevant forest or plantation is not a qualifying activity under paragraph 35(f).

146. Where the construction and maintenance activities are carried out both within the relevant forest or plantation and outside that forest or plantation, an apportionment will be necessary to determine the extent to which diesel fuel is purchased for use in a qualifying activity.

147. The term 'making and maintaining ... of a road' does not include the process of extraction of gravel and its transportation to the road site for use in the construction of the road.<sup>84</sup>

148. An example of a road in a forest or plantation that is accepted as being 'integral' to the relevant activities is a forestry road as described in paragraph 40 of this Ruling. We consider that the construction of a forestry road and the maintenance of a forestry road are both qualifying forestry activities under paragraph 35(f).

149. We consider that roads made or maintained primarily or principally for recreational or tourism purposes are not integral to the relevant forestry activities, even though these roads may be used in the transportation of timber in a forest or plantation or from a forest or plantation to a sawmill or chipmill not situated in the forest or plantation.

150. Where a road in a forest or plantation is made and maintained for more than one purpose, the dominant purpose must be integral to forestry for the construction and maintenance of that road to be a qualifying use. If the dominant purpose for the construction and maintenance is for forestry purposes, the road is regarded as integral to the forestry activities mentioned in paragraphs 35(a), 35(b) and 35(c). In these circumstances, a person is entitled to an off-road

<sup>83</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>84</sup> *Re MSD Constructions Pty Ltd and CEO of Customs* (Unreported, Administrative Appeals Tribunal, Webster SM, Davis M, Cunningham M, 11 September 1996) T95/130, Hobart.

credit in respect of all the diesel fuel purchased for use in the construction and maintenance of the road. Where, however, the dominant purpose of the road is not for forestry activities but for some other activity (for example for tourism purposes), no entitlement to an off-road credit arises in respect of any diesel fuel purchased for use in the construction and maintenance of the road.

**The exclusion from a qualifying use of diesel fuel purchased for use in propelling a road vehicle on a public road**

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

***Meaning of 'road vehicle'***

152. A 'road vehicle' is a vehicle of a kind ordinarily used on roads for the transport of persons or goods.<sup>85</sup>

153. The meaning of the phrase 'of a kind ordinarily used' was considered in *Clean Investments Pty Ltd v. Commissioner of Taxation*<sup>86</sup>. The full Federal Court reviewed the authorities<sup>87</sup> in relation to the question whether coin-operated washing machines were goods of a kind ordinarily used for household purposes. The Full 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.

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 ...

<sup>85</sup> The definition of 'road vehicle' is set out in section 4.

<sup>86</sup> *Clean Investments Pty Ltd v. Commissioner of Taxation* [2001] FCA 80, 14 February 2001; (2001) 105 FCR 248; (2001) 184 ALR 314; (2001) ATC 4068; (2001) 46 ATR 248.

<sup>87</sup> *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; *Commissioner of Taxation v. Chubb Australia Ltd* (1995) 128 ALR 489; (1995) 56 FCR 557.

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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' ...<sup>88</sup>

154. The test to be applied in determining whether a vehicle, which is used to transport felled timber to a sawmill or chipmill, is a road vehicle is whether the vehicle is of a kind commonly or regularly used on roads for the transport of goods.

155. The Macquarie Dictionary<sup>89</sup> 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'.

156. 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'.

157. Felled timber is usually transported to sawmills or chipmills in combination vehicles such as 'B-doubles' and 'Quad Dogs'. Some state and territory road traffic authorities describe these vehicles as vehicles at 'Higher Mass Limits'.<sup>90</sup> The higher mass limits vehicles used for the transportation of felled timber are usually vehicle combinations consisting of a prime mover and a specialised trailer. The combinations are customised to enable them to operate safely in difficult terrain under very heavy loads.

158. Vehicles of this type may lawfully travel on public roads only where such vehicles can operate safely with other traffic and where the road infrastructure (road pavements and bridges) is suitable.

159. In some states and territories, vehicles used in the transporting of timber may travel only on designated roads. For example, in Victoria, some 19,000 kilometres of main roads are

<sup>88</sup> *Clean Investments Pty Ltd v. Commissioner of Taxation* [2001] FCA 80, 14 February 2001; (2001) 105 FCR 248; (2001) 184 ALR 314; (2001) ATC 4068; (2001) 46 ATR 248; per Lingren J, with whom Cooper and Lee JJ agreed.

<sup>89</sup> *Macquarie Dictionary*, Revised Third Edition.

<sup>90</sup> See Interstate Road Transport Regulations 1986 (Cth), Regulation 2, and corresponding legislation in states and territories.

approved as roads for use by higher mass limits vehicles.<sup>91</sup> In some cases, local roads may be used by these vehicles only with the written permission of the local council of the area where that road is located and with a permit from the relevant road authority.

160. Although these vehicles may travel on designated roads or on specified roads only with permits, the fact that they do so means that they are of a kind commonly or regularly used on roads to transport timber. They are, therefore, vehicles of a kind that are ordinarily used on roads for the transport of goods (timber). They are road vehicles for the purposes of the subsection 53(2) primary production exclusion.

161. Examples of vehicles used by persons engaged in forestry activities that are not road vehicles are bulldozers, skidders, excavators, mobile mechanical felling machines and loaders.

### ***Meaning of 'public road'***

162. The activities in forestry, as defined in section 35, include transporting timber in a forest or plantation where the timber was felled, or from the forest or plantation to a sawmill or chipmill situated outside the forest or plantation.

163. The operation of the subsection 53(2) primary production exclusion means that only the transportation of timber on roads that are not public roads qualifies as an eligible use under paragraphs 35(c) and 35(d). For the purposes of the subsection 53(2) primary production exclusion, it is, therefore, important to define 'public road'.

### ***Roads that are public roads***

164. 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.<sup>92</sup>

<sup>91</sup> See for example article titled 'B-doubles & Higher Mass Limits Trucks', VicRoads website: <http://www.vicroads.vic.gov.au>, accessed 6 May 2004.

<sup>92</sup> *Permanent Trustee Company of New South Wales Ltd v. Campbelltown Municipal Council* (1960) 105 CLR 401 at pages 420-426; [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 18-21.

165. However, in Australia the vast majority of public roads are constructed by government. In *Brodie and Anor v Singleton Shire Council*,<sup>93</sup> 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...).<sup>94</sup>

166. 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.

### *National highways*

167. 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 highways and main roads*

168. Each state and territory has a statutory authority<sup>95</sup> 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.

169. 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.<sup>96</sup>

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<sup>93</sup> *Brodie and Anor v. Singleton Shire Council* (2001) 206 CLR 512; (2001) 180 ALR 145.

<sup>94</sup> *Brodie and Anor v. Singleton Shire Council* (2001) 206 CLR 512 at page 588; (2001) 180 ALR 145 at page 198.

<sup>95</sup> 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.

<sup>96</sup> For example, section 13 of the *Roads Act 1993 (NSW)*; section 23 of the *Transport Infrastructure Act 1994 (Qld)*; Schedule 2 of the *Transport Act 1983 (Vic)*; section 7 of the *Roads and Jetties Act 1935 (Tas)*; section 13 of the *Main Roads Act 1930 (WA)*.

170. We consider that, in each state and 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*

171. 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.

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

173. The powers of local government authorities in each state and the Northern Territory are enumerated in the statutes which create local governments 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.

174. 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.<sup>97</sup> 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.<sup>98</sup> As noted by Murray CJ in *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide*:<sup>99</sup>

...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.<sup>100</sup>

<sup>97</sup> 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).'

<sup>98</sup> 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.

<sup>99</sup> *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide* [1931] SASR 217.

<sup>100</sup> *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.*

175. We consider 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***

176. 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.

177. 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'.<sup>101</sup>

178. To establish whether an owner of land has dedicated it 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; and
- the expenditure of money by public bodies in forming or maintaining the land as a road.

179. 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.

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*Corporation of the City of Henley and Grange* (1971) 6 SASR 186 at pages 192 to 193; (1971) 33 LGRA 286 at page 292.

<sup>101</sup> *Attorney-General for the Northern Territory of Australia v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536 at page 542.

180. 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*,<sup>102</sup> 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.<sup>103</sup>

181. 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*.<sup>104</sup>

### ***Roads that are not public roads***

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

182. 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.

183. 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. We consider that where the public does not have a plenary right of access and use, a road cannot be characterised as a public road.

184. 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.

<sup>102</sup> *President of the Shire of Narracan v. Leviston* (1906) 3 CLR 846; (1906) 12 ALR 294.

<sup>103</sup> *President of the Shire of Narracan v. Leviston* (1906) 3 CLR 846 at page 871; (1906) 12 ALR 294 at page 301.

<sup>104</sup> *Attorney-General for the Northern Territory of Australia v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536.

## *Forestry roads*

185. 'Forestry roads' are roads within forests or plantations, which are constructed primarily and principally for the purposes of providing access to an area to enable trees to be planted or tended in the area, or timber felled in the area to be removed.<sup>105</sup> Forestry roads may be constructed or managed by a forestry authority<sup>106</sup> in the course of carrying out its statutory function<sup>107</sup> for the purposes of forest management and the production and harvesting of timber, or they may be constructed by entities engaged in forestry activities. For example, a road that is constructed and which falls within paragraph 35(f) is a forestry road.

186. We consider that a forestry road as described in paragraph 40 of this Ruling is not a public road for the purposes of the section 53(2) primary production exclusion.

187. In some states and territories, forestry roads are required to be constructed in accordance with a Code of Practice.<sup>108</sup> In all states and territories, forestry roads are required to be constructed in accordance with environmental, conservation and heritage laws.

188. A number of state and territory forestry statutes require forestry authorities to encourage public use of forests for recreation.<sup>109</sup>

189. We take the view that forestry roads are not public roads even where public access is encouraged. A forestry road does not become a public road merely because members of the public use the road to access a forest area for recreation purposes (for example, for picnics or for bushwalking) or for the purposes of removing firewood from designated areas for personal use. The use of forestry roads for such purposes is subordinate to the primary objects of forestry management and the production and harvesting of timber. Members

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<sup>105</sup> Subsection 43-72(1) of the *Income Tax Assessment Act 1997* sets out the definition of 'forestry road' for the purposes of that Act. We consider that definition to be an appropriate description of 'forestry roads' for the purposes of the off-road credits scheme.

<sup>106</sup> Forestry authorities are statutory authorities which manage forests on public land. Forestry authorities are created under state legislation. For example, *Forestry Act 1916 (NSW)*; *Forests Act 1958 (Vic)*; *Forestry Act 1920 (Tas)*; and *Forest Products Act 2000 (WA)*.

<sup>107</sup> For example, paragraph 11(1)(e) of the *Forestry Act 1916 (NSW)* provides a specific power to the NSW Forestry Commission to 'construct roads, bridges, gates, ramps, railways, or incidental works, as necessary for the taking or removing of timber or products on Crown-timber lands or for the taking or removing of any forest materials from any State forest'.

<sup>108</sup> For example, under the Forestry Practices Code (Tasmania), Chapter B deals with 'Building Access to the Forest'. Part B1 sets out the general principles for planning and locating roads having regard to relevant design standards, specific topography, significant unstable areas, significant areas of natural and cultural values, watercourses, minimisation of snagging and road construction impacts and minimisation of soil erosion.

<sup>109</sup> For example, section 20 of the *Forests Act 1958 (Vic)* sets out certain powers and duties of the forestry authority. These include the provision of facilities for public recreation.

of the public do not have a sufficiently unfettered right of access to or use of the roads to characterise them as public roads.

190. An example of the above situation is to be found in the New South Wales *Forestry Act 1916* (Forestry Act). That Act creates a Forestry Commission. One of its objects is to conserve and utilise the timber on Crown-timber lands and land owned by the Commission otherwise under its control and management.<sup>110</sup> The Act authorises the Commission to construct roads necessary for the taking or removing of timber from Crown lands or from state forests.<sup>111</sup>

191. Under the terms of the Forestry Act, the Forestry Commission is not an authority having statutory responsibility for road transport infrastructure. Roads are constructed by the Commission for its own purposes and are not dedicated to public use. While members of the public make use of the forestry roads under the management and control of the Forestry Commission they may do so only where this does not interfere with the primary and principal purpose of the roads, being for forestry management purposes, including the removal of timber from the forest.

192. In relation to the above example, we take the view that the limitations on public use of forestry roads constructed, managed and maintained by the Forestry Commission in New South Wales indicates that those forestry roads are not public roads. Our conclusion would be the same in relation to identical regimes in other States or in the Australian Capital Territory or the Northern Territory.

#### *Conversion of a forestry road into a public road*

193. On occasions, responsibility for a forestry road is formally passed from the forestry authority to a local government authority or to a state or territory authority having responsibility for highways and main roads. In such cases, the affected road will, thereafter, be a public road even if, after the transfer, it is formally declared by the state or territory main road authority or local government authority to be a 'forest road'. The transfer of control and management of the road to the authority having responsibility for highways and main roads results in the road being declared or dedicated as a public road.

194. For example, the Victorian Roads Corporation established under the *Transport Act 1983 (Vic)*, has as one of its objects the maintenance and upgrading of the State's road networks<sup>112</sup> and, in the exercise of its powers, can declare a road to be a 'forest road'.<sup>113</sup> In this case, the 'forest road' is a public road because it is constructed and maintained by the Victorian authority having responsibility for highways and main roads.

<sup>110</sup> Paragraph 8A(1)(a) of the *Forestry Act 1916 (NSW)*.

<sup>111</sup> Paragraph 11(1)(e) of the *Forestry Act 1916 (NSW)*.

<sup>112</sup> Section 16 *Transport Act 1983 (Vic)*.

<sup>113</sup> Section 1 of Schedule 5 *Transport Act 1983 (Vic)*.

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## *Roads over privately owned land*

195. 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.<sup>114</sup> A person who initially enters land with lawful authority becomes a trespasser if the consent of the owner is revoked.<sup>115</sup>

196. 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.<sup>116</sup>

## *Example 2: A public road: a road managed by a statutory authority responsible for a state highway and main roads*

197. *The Roads Act 1993 (NSW) is concerned with the development and maintenance of the state road network in New South Wales.*

198. *The Act provides that, in New South Wales, the Roads and Traffic Authority (RTA) is the roads authority for all freeways, the Minister is the roads authority for all Crown roads, and the council of a local government area is the roads authority for all public roads within its area.*<sup>117</sup>

199. *That Act provides that the Minister may dedicate any unoccupied Crown land as a public road.*<sup>118</sup>

200. *The RTA, through its contractors constructs a main road linking two towns in rural New South Wales. Part of the road is constructed through a state forest. The road is constructed specifically to enable the public to travel directly between the two towns. The members of the public have an unfettered right to use the road and the road is opened as a public road.*

201. *Toothsaw Enterprises Ltd (Toothsaw) carries out forestry activities in the state forest through which the new road is constructed. It operates a sawmill located on the inside edge of the forest. It uses the services of Lumbering Giants Pty Ltd (Lumbering Giants) to transport the logs from the coupe to the sawmill. Lumbering Giants has a fleet of three truck trailer combination vehicles, which it uses to haul the felled timber to the sawmill. Part of this transport is on the new main road. Lumbering Giants agrees to pay a levy for the*

<sup>114</sup> *Lincoln Hunt Australia Pty Ltd v. Willesee* (1986) 4 NSWLR 457 – NSWSC – 13/02/1986.

<sup>115</sup> *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.

<sup>116</sup> *Attorney-General for the Northern Territory v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536 at page 542.

<sup>117</sup> Section 7, *Roads Act 1993 (NSW)*.

<sup>118</sup> Section 12, *Roads Act 1993 (NSW)*.

*maintenance of that part of the new road that it uses for transporting logs.*

*202. Lumbering Giants is not entitled to an off-road credit for diesel fuel purchased for use in propelling its vehicles on this road.*

*Example 3: Not a public road: forestry roads*

*203. Following from example 2: the transporting of timber logs from the coupe to the main road is on a forestry road constructed by the New South Wales Forestry Commission (state forestry road) and transport from the main road to the saw mill is on a road constructed and maintained by Toothsaw (Toothsaw forestry road).*

*204. Members of the public are allowed to use the state forestry road to access a popular camping and hiking area in the forest. However, signs at the entrance to the road make it clear that the road is a forestry road, which is used for the transporting of timber and may be closed to members of the public without notice.*

*205. Toothsaw and Lumbering Giants both pay a levy to the State Forestry Commission for the maintenance of the state forestry road. Toothsaw is solely responsible for the maintenance of the Toothsaw forestry road. Members of the public are not permitted to use this road.*

*206. The state forestry road and the Toothsaw forestry road are not public roads. The roads are not declared, dedicated or opened as public roads and, although members of the public can access the state forestry road, that access is fettered; access can be denied to them at any time at the discretion of the State Forestry Commission.*

*207. Diesel fuel purchased for use in propelling road vehicles on these forestry roads is not excluded under subsection 53(2) from being for a qualifying use.*

## **Your comments**

208. We invite you to comment on this draft Product Grant and Benefit Ruling. Please forward your comments to the contact officer by the due date.

**Comments by Date:** 25 June 2004  
**Contact Officer:** Cheryl Weeks  
**E-mail address:** [cheryl.weeks@ato.gov.au](mailto:cheryl.weeks@ato.gov.au)  
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NO: 2003/8358  
ISSN: 1038-8982