PGBR 2005/2 - Energy grants: off-road credits for mining operations

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Product Grant and Benefit Ruling

Energy grants: off-road credits for mining operations

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Preamble

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

*[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

What this Ruling is about

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

- the meaning of each of the activities in the definition of 'mining operations' in Subdivision B of Division 3 of Part 2 of the EGCS Act;
- the interpretation of the phrase 'in mining operations';
- the exclusion of certain substances from the definition of 'minerals' in section 20;
- the interpretation of the 'solely' requirement in the definition of 'mining operations';
- the meaning of 'at the place' where a mining operation is carried on; and
- the effect of the exclusion in subsection 53(2) of diesel fuel purchased for the purpose of propelling any vehicle on 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 mining operations as defined in section 11 of the EGCS Act.

Date of effect

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

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

Previous Rulings

7. This Ruling replaces Product Grants and Benefit Ruling PGBR 2003/3 which was withdrawn on and from the issue date of this Ruling.

Background

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

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

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

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

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

9. A person who purchases or imports into Australia[5] diesel fuel for use in certain eligible off-road activities may be entitled to an off-road credit under the off-road credit entitlement provisions of the EGCS Act.[6] A person who is entitled to an off-road credit is entitled to an energy grant under the Energy Grants (Credits) Scheme.[7]

10. The legislation enabling payment of the grant is contained in the EGCS Act and the PGBA Act. The EGCS Act contains the entitlement provisions of the scheme and the PGBA Act contains the administrative provisions for the scheme. Section 8 of the PGBA Act sets out the grants and benefits that are covered by that Act. It lists at Item 3 'energy grants' as a grant that is payable and the EGCS Act as the entitlement Act under which that grant is payable.

11. The Energy Grants (Credits) Scheme was introduced on 1 July 2003 to replace the entitlement provisions of the Diesel Fuel Rebate (off-road) Scheme (the previous off-road scheme) administered under the *Customs Act 1901* (Customs Act) and the *Excise Act 1901* (Excise Act) and the Diesel and Alternative Fuels Grants Scheme (the previous on-road scheme) with a single entitlement.[8] The previous off-road scheme and the previous on-road scheme ceased on 1 July 2003.

12. Schedule 7 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003* extends the application of the EGCS Act to cover off-road diesel fuel purchased or imported into Australia from 1 July 2000 to 30 June 2003 inclusive, provided certain conditions are met. Transitional arrangements for the previous off-road scheme and previous on-road scheme provided limited extension of those schemes in relation to fuel purchased prior to 1 July 2003.[9]

13. The Energy Grants (Credits) Scheme is a self-assessment scheme that requires a person to provide to the Australian Taxation Office (Tax Office) sufficient information for the grant to be paid. If a grant is paid for diesel fuel purchased for use or that is used in an activity that is not eligible, the Tax Office will amend the original assessment of the energy grant payable, recover the grant and may impose a penalty and/or General Interest Charge (GIC).[10]

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

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[5] The term 'import into Australia' is defined in section 4. 'Australia' is defined in section 4 as not including the external Territories.
[6] Subsection 53(1).
[7] Subsection 56(1).
[8] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, page 3.
[9] Item 25, Schedule 3 and Item 18, Schedule 4 of the *Energy Grants (Credits) Scheme (Consequential Amendments) Act 2003*.
[10] Section 55 of the EGCS Act; section 20 of the PGBA Act; section 284-75 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) and section 35 of the PGBA Act.
[11] Sections 27, 42 to 45A and 48 of the PGBA Act.

15. The Energy Grants (Credits) Scheme provides for both off-road credits and on-road credits payable in the form of an energy grant. There are separate eligibility criteria for off-road credits and for on-road credits. The Energy Grants (Credits) Scheme provides for off-road credits for diesel fuel that is purchased or imported into Australia for use in certain specified off-road uses.

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

- in mining operations (otherwise than for the purpose of propelling any vehicle on a public road);[13]
- in primary production, (agriculture, forestry or fishing operations),[14] (otherwise than for the purpose of propelling a road vehicle on a public road);[15]
- in rail transport (otherwise than for the purpose of propelling a road vehicle on a public road) in the course of carrying on an enterprise;[16]
- in marine transport in the course of carrying on an enterprise;[17]
- at residential premises to generate electricity for use in certain specified activities;[18]
- at particular premises to generate electricity for use in the course of carrying on at those premises an enterprise that does not have at those premises ready access to a commercial supply of electricity and that has, as its principal purpose, the retail sale of goods or services (other than electricity) or the provision of hospitality;[19]
- at hospitals, nursing homes or other institutions providing medical or nursing care;[20]
- at a home for aged persons;[21] or
- in specific industrial uses.[22]

17. This Ruling addresses the category of mining operations.

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

18. Many of the terms and expressions defined in Division 3 of Part 2[23] of the EGCS Act are identical to those in the previous off-road scheme. Where the Courts or the Administrative Appeals Tribunal (the AAT) have considered or made decisions about those expressions or definitions in the previous off-road scheme, those considerations or decisions have been taken into account in forming our views on the operation of the off-road credits scheme under the Energy Grants (Credits) Scheme.[24]

19. Similar to the previous off-road scheme, the Energy Grants (Credits) Scheme is a beneficial scheme that confers benefits on persons that undertake certain activities. 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.[25]

20. In *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (*Abbott Point*),[26] Ryan and Cooper JJ stated:

> Whether an activity falls within the definition of 'mining operations' as defined in s 164(7) of the *Customs Act* is a question of fact. So too is the question of when recovery is complete. In each case a commonsense and commercial approach has to be taken to the question having regard to the evident purpose of the legislation, to make rebates available to promote the exploitation of mineral deposits in Australia.[27]

21. In *Australian National Railways Commission v. Collector of Customs (SA)*[28] (ANR) Davies J stated:

> Although the diesel fuel rebate provisions use simple language, they are intended to be applied in a practical, common sense manner to commercial operations.[29]

22. 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.

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

[24] The basis of the position was stated by Kirby P in *Public Service Association of NSW v. Industrial Commission of NSW* (1985) 1 NSWLR 627 at 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.'

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

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

[27] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371 at page 378; (1992) 15 AAR 365 at page 372.

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

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

23. 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.[30]

The definition of mining operations

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

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

26. These are listed in paragraphs 11(1)(c) to 11(1)(i) of the EGCS Act and are:

- mining transport activity;
- mining rehabilitation activity;
- mining water activity;
- mining construction activity;
- mining waste activity;
- mining vehicle activity; and
- sundry mining activity.

Each of these is in turn defined in Subdivision B of Division 3 of Part 2 of the ECGS Act.

27. In this Ruling, unless otherwise stated:

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

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[30] See *Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* [2002] AATA 657, 5 August 2002 at paragraphs 46 to 50; (2002) 68 ALD 581 at pages 592-593. See also *Re Brymay Forests Pty. Limited and Collector of Customs Victoria* No. V85/305 AAT No. 2496; (1985) 9 ALN N177; *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271; (1985) 7 ALN N269a; *Re Central Norseman Gold Corporation Limited and Collector of Customs, Western Australia* AAT No. W84/118; (1985) 8 ALN N288; and, *Re Tas Island Shipping Pty Ltd and Collector of Customs* (1989) 11 AAR 121.

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

- the off-road credits scheme is a reference to the off-road credit entitlement provisions under Part 4 of the ECGS Act;[32]
- the on-road credits scheme is a reference to the entitlement provisions under Part 3 of the ECGS Act;
- purchase in relation to diesel fuel includes purchase or import into Australia;
- an eligible activity or activities is a reference to a use that qualifies;
- the subsection 53(2) mining operations exclusion is a reference to the exclusion, in subsection 53(2), from use in mining operations of diesel fuel purchased for the purpose of propelling any vehicle on a public road; and
- a paragraph 11(1)(a) or 11(1)(b) mining operation is a reference to a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1).

- it is assumed that the requirement to be registered under section 9 of the PGBA Act is met; and
- this Ruling applies to partnerships and unincorporated associations as if they were a person.[33]

Ruling

General requirements of the off-road credits scheme

28. 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

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

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

- the activity/operation is not excluded by either the general or specific provisions of the EGCS Act.

Threshold and eligibility requirements

29. 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.

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

30. 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).

31. A person cannot 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 of the ECGS Act. In these circumstances the grant is recoverable under section 20 of the PGBA Act and section 255-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

32. 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.[34]

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

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

34. Under subsection 53(2) a person is entitled to an off-road credit if they purchase diesel fuel for use in mining operations (otherwise than for the purpose of propelling any vehicle on a public road).

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[34] Paragraph 15(2)(e) of the PGBA Act.

35. In the context of the phrase 'in mining operations', if an activity takes place 'in the course of' mining operations, it takes place 'in' mining operations.

36. The use of the expressions, '*means'*, '*includes*' and '*does not include*' in the definition of 'mining operations' in section 11 means that paragraphs 11(1)(c) to 11(1)(i) does not limit paragraphs 11(1)(a) and 11(1)(b). An activity that does not meet the specific requirements of any of paragraphs 11(1)(c) to 11(1)(i) may still be an activity that satisfies the requirements of either paragraph 11(1)(a) or 11(1)(b) and, if not excluded by subsection 11(2), may be an eligible activity.

Apportionment of fuel

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

Status of contractors and subcontractors

38. A contractor or sub-contractor is entitled to an off-road credit and, therefore, an energy grant, provided they purchase fuel for use in an eligible activity, under the definition of 'mining operations'. However, a contractor or a subcontractor is not entitled to an off-road credit for diesel fuel purchased for use in the activity that relates to:

- the generation or provision of electricity solely for a mining town (paragraph 18(d)); and
- the use of off-road diesel fuel at residential premises in the provision of food and drink, lighting, heating, air conditioning, hot water or similar amenities or the meeting of other domestic requirements of the residents of the premises (paragraph 18(e)).

Activities that are mining operations

Exploration or prospecting

39. A person is entitled to an off-road credit if they purchase diesel fuel for use in the exploration or prospecting for minerals.

40. The phrase 'exploration or prospecting' means the systematic search for mineral deposits, and the subsequent determination of the extent of those deposits as part of establishing the commercial viability of mining.

'Removal of overburden' and 'other activities undertaken in the preparation of a site'

41. A person is entitled to an off-road credit if they purchase diesel fuel for use in the removal of overburden and in other activities undertaken in the preparation of a site to enable mining for minerals to commence.

42. The phrase 'removal of overburden' means land clearing, removal of vegetation, and the removal and stockpiling of topsoil. It extends to the removal, whether by digging or blasting, of surface waste or worthless rock overlying a mineral deposit, in order to expose and mine the deposit.

43. The phrase 'other activities undertaken in the preparation of a site to enable mining for minerals to commence' is taken to mean any activity that is undertaken in preparing a site to enable mining for minerals to commence.

Mining for minerals

44. A person is entitled to an off-road credit if they purchase diesel fuel for use in operations for the recovery of minerals being mining for those minerals, including the recovery of salts by evaporation.

45. Mining is the action, process or industry of extracting minerals or ores bearing minerals from a mine or mines.[35] It does not include the synthetic production or manufacture of substances that are minerals.

Beneficiation

46. A person is entitled to an off-road credit if they purchase diesel fuel for use in operations for the recovery of minerals being the beneficiation of those minerals or of ores bearing those minerals.

47. Beneficiation is a technical term applicable to a range of processes undertaken in the mining or metallurgical industries. It is used to describe a treatment to improve, upgrade or concentrate the quality of mineral bearing ore up to, but not including, the refining or final pyrometallurgical or hydrometallurgical process whereby metal is produced.

48. It is clear that 'beneficiation' is distinct from refining to produce metal, or the process of manufacturing, or a process, which results in the destruction of a recovered mineral.

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

Activities included as 'mining operations'

Solely

49. Some activities included in the definition of mining operations must be **solely** for a particular purpose.[36]

50. We take the view that the provisions that contain the solely requirement should not be interpreted so narrowly as to prevent their application in a practical and commonsense manner.

51. We consider that where a person who carries on a paragraph 11(1)(a) or (11)(1)(b) mining operation purchases diesel fuel for use in a number of activities, an apportionment can be made as to its intended use in the different activities.[37] If a portion of the fuel is purchased for use in a qualifying activity that has the solely requirement, an entitlement to an off-road credit arises for the portion of the fuel that is purchased for use in the activity that qualifies as a mining operation.

At the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on

52. The place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on includes the whole of the area, site or land legally occupied for the purposes of the activities mentioned in those paragraphs.

Mining transport activity

53. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining transport activity.

Mining rehabilitation activity

54. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining rehabilitation activity.

Mining water activity

55. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining water activity.

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[36] The word solely is used in paragraphs 14(a), 14(b) and 14(c) in the definition of 'mining water activity', paragraph 15(e) in the definition of 'mining construction activity', paragraph 17(b) and 17(c) of the definition of 'mining vehicle activity', and in paragraph 18(d) of the definition of 'sundry mining activity'.

[37] Or, in relation to the activities mentioned in paragraphs 14(a), 14(b), 14(c), 15(e), 17(b) and 17(c), by a contractor contracted by that person.

Mining construction activity

56. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining construction activity.

Mining waste activity

57. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining waste activity.

Mining vehicle activity

58. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining vehicle activity.

Sundry mining activity

59. A person is entitled to an off-road credit if they purchase diesel fuel for use in a sundry mining activity.

Use of diesel fuel 'at' residential premises

60. In the context of the phrase 'at residential premises' in paragraph 18(e), if diesel fuel is used in plant or equipment that is reasonably identified with those premises then the diesel fuel is for a use that qualifies. We consider that plant or equipment is reasonably identified with the residential premises if it is appurtenant to, and coherent with, the premises sufficient for it to be said that it 'belongs' to those premises.

Activities excluded from mining operations

61. A person is not entitled to an off-road credit if they purchase diesel fuel for use in an activity that is excluded from the definition of 'mining operations' by subsection 11(2).

62. The exclusions relate to:

(a) certain quarrying or dredging operations; or

(b) the use of vehicles not exceeding 3.5 tonnes gross vehicle mass, other than certain vehicles; or

(c) the transport of people, equipment or goods to or from a place, or a place adjacent to that place, where a mining operation as defined in paragraph 11(1) is or is to be carried on, with certain exceptions.

The exclusion from the qualifying use 'in mining operations' of diesel fuel purchased for use in propelling any vehicle on a public road

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

Meaning of 'public road'

Roads that are public roads

64. For the purposes of the subsection 53(2) mining operations exclusion, we consider that a road is a public road if:

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

Roads that are not public roads

65. We consider that the following are not public roads for the purposes of the subsection 53(2) mining operations 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 road that has not been dedicated as a public road over privately owned land; and
- a road that is a private access road for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.[38]

[38] However, the transport of people, equipment to or goods from a place, or a place adjacent to that place, where a paragraph 11(1)(a) or 11(1)(b) mining operation is or is to be carried on may not be a qualifying activity because of the operation of paragraph 11(2)(c).

Explanation

66. For a person to be entitled to an off-road credit under the off-road credits scheme:

- the applicant for the grant must be registered with the Tax Office for entitlement to an energy grant when it makes a claim;[39]
- the threshold provision must apply and at least one of the eligibility provisions must be satisfied; and
- the activity/operation must not be excluded by either the general or specific provisions of the EGCS Act.

General requirements of the off-road credits scheme

Requirement for registration

67. 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.

The threshold and eligibility provisions

68. Under section 53, a person satisfies the threshold and eligibility provisions if 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.

69. 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.

70. 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[40] and it may be recovered.[41]

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[39] Subsection 52(1).
[40] Section 55.
[41] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.

71. 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

72. 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; or
- the fuel is lost (whether because of accident, theft or any other reason).[42]

73. If grants are paid on diesel fuel that is subsequently used in a manner that is not eligible for an off-road credit, 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.[43] 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.[44]

74. Regardless of whether the threshold and eligibility provisions have been met, an energy grant is not payable if fuel is used in an action which is one to which a Subdivision of Division 1, Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* would apply (unless an approval required under that Division was in operation).[45] 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.[46]

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[42] Section 55.
[43] Section 27A of the PGBA Act.
[44] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.
[45] 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.
[46] Section 20 of the PGBA Act; section 255-5 of Schedule 1 to the TAA 1953.

75. 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.[47]

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

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

77. A person who is entitled to an off-road credit is thereby entitled to an energy grant.[48]

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

> 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).

79. A person is entitled to an off-road credit if they purchase diesel fuel for use in mining operations (otherwise than for the purpose of propelling any vehicle on a public road).[49]

80. The expression 'mining operations' is defined in section 11.

'In' mining operations

81. In the context of the expression 'in mining operations' the use of the word 'in' has been determined by the AAT and courts to be restrictive. In *State Rail Authority (NSW) v. Collector of Customs*[50] the full Federal Court found:

> On its face, it appears the object of s.78A of the Act[51] is to allow a rebate in respect of fuel purchased for use 'in mining operations'. Usually the use of the term 'in' in this context is intended to be restrictive (see, e.g., *Robe River Mining Co. Pty Ltd v. Commissioner of Taxation* (1989) 21 FCR 1 at 12).[52]

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[47] 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.
[48] Section 56.
[49] Subsection 53(2).
[50] *State Rail Authority (NSW) v. Collector of Customs* (1991) 33 FCR 211; 14 AAR 307.
[51] In the quotation the AAT was referring to the *Excise Act 1901.*
[52] *State Rail Authority (NSW) v. Collector of Customs* (1991) 33 FCR 211 at page 214; 14 AAR 307 at paragraph 12.

82. The Customs and Excise Legislation Amendment Bill 1995 further sought to narrow the entitlement to rebate to those engaged in mainstream mining operations.[53] The Bill amended the definition of 'mining operations' by removing the so called 'sweeper clauses'. This amendment removed any doubt that the rebate of duty in respect of diesel fuel used 'in mining operations' was restricted to those activities that fall fully within the definition of 'mining operations', rather than in respect of activities that may be remotely connected with 'mining operations'.

83. In the context of the phrase 'in mining operations' in subsection 53(2), the preposition 'in' means 'in the course of' or 'in the process or act of'. Therefore, if an activity takes place 'in the course of' mining operations, it takes place 'in' mining operations.

84. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)*,[54] 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'…

85. We consider that the following three criteria are relevant in determining if an activity takes place 'in the course of' a mining operation.[55] These are:

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

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

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[53] Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995.

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

[55] In *Federal Commissioner of Taxation v. Payne* [2001] HCA 3; (2001) 46 ATR 228; 2001 ATC 4027; (2001) 202 CLR 93; (2001) 177 ALR 270; (2001) 75 ALJR 442, *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482; (1998) 158 ALR 241; *Re Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* [2001] AATA 801; (2001) 34 AAR 98, 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.

87. Accordingly, the meaning of 'in mining operations' is not restricted to merely the physical act of removing minerals or ore bearing minerals from the ground. In determining whether an activity takes place 'in the course of' mining operations, the three criteria above should be applied.

Apportionment of fuel

88. 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.

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

90. There is judicial authority for this view. In *Collector of Customs v. Pozzolanic Enterprises Pty Limited,*[56] 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.[57]

91. A number of the activities prescribed in the definition of 'mining operations' in Subdivision B of Division 3 of Part 2 of the EGCS Act require a particular activity to be solely for a particular purpose for it to qualify as an eligible activity (the solely requirement). Paragraphs 208 to 241 of this Ruling discuss the solely requirement.

What is a mineral?

92. A central concept of the definition of 'mining operations' is the recovery of minerals, being mining for minerals or the beneficiation of those minerals. It is, therefore, relevant to look at the definition of 'mineral'.

93. Section 20 defines 'minerals' as meaning:

> minerals in any form, whether solid, liquid or gaseous and whether organic or inorganic, except:
>
> (a) sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel or water; or
>
> (b) limestone (other than agricultural use limestone).

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

[57] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280 at page 290; (1993) 115 ALR 1 at page 12.

94. The Courts have taken the view that the term 'minerals' has, in its ordinary meaning, the denotation of substances, which can be won by mining.[58] This denotation is reinforced by the central concept of 'mining operations' being defined to mean, amongst other things, the recovery of minerals by mining for those minerals and the beneficiation of those minerals or of ores bearing those minerals.[59]

95. *The Macquarie Dictionary*[60] defines 'mineral' as 'a substance obtained by mining'. Therefore, a factor to be considered in determining if a substance is a mineral is whether the extraction or recovery process would correspond to the normal understanding of the term 'mining'.

96. The definition provided by section 20 adopts this ordinary meaning of 'minerals'. It then clarifies the meaning in respect of form and chemical qualities – that is, a mineral can be solid, liquid or gaseous and organic or inorganic – and restricts it by excluding the substances listed in paragraphs 20(a) and 20(b).

The exclusion of certain substances

97. Paragraphs 20(a) and 20(b) exclude sand, sandstone, soil, slate, clay (other than bentonite or kaolin), basalt, granite, gravel, water and limestone (other than agricultural use limestone) from the definition of minerals.

98. The exclusion of these substances from the definition of 'minerals' was introduced into the previous off-road scheme by the *Customs and Excise Legislation Amendment Act 1995* No. 87 of 1995. The explanatory memorandum stated:

> The purpose of the amendment proposed in this item is to exclude from eligibility for the payment of rebate diesel fuel for use in extracting certain materials from the ground because they are valuable as extracted, rather than for the purpose of recovering their inherent mineral qualities. For example the use of diesel fuel in the mining of sand for its use in concreting, rather than for the purpose of extracting the minerals contained in the sand, is to be excluded from eligibility for rebate.[61]

99. The activities described in paragraphs 11(1)(a) to 11(1)(i), when undertaken as part of a mining operation to recover a substance excluded by paragraphs 20(a) or 20(b), are not eligible as mining operations.

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[58] As per the comments of Barwick CJ in *Federal Commissioner of Taxation v. Imperial Chemical Industries Australia* (1972) 127 CLR 529 at page 567; (1972) 3 ATR 321 at page 326; 72 ATC 4213 at page 4219.

[59] Paragraph 11(1)(b). For discussion of the meaning of the term 'mining for minerals' see paragraphs 151 to 168 of this Ruling.

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

[61] Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995, Item 7, page 11.

100. However, where a substance excluded by paragraphs 20(a) or 20(b) is extracted from the ground as part of an operation to recover a specific mineral, or minerals, that are contained within that substance the activities may qualify as mining operations for the purposes of the EGCS Act.[62] Decisions of the Courts and the AAT are, in our view, relevant to the interpretation of paragraphs 20(a) and 20(b).

101. In *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs*[63] (*Adelaide Brighton Cement*), the AAT considered whether the exclusion extended to limestone that was extracted for its mineral contents and used in the manufacture of cement. In its decision, the AAT stated:

> I have found that Adelaide Brighton Cement's object in mining is not limestone. Indeed, it discards some of the limestone as suitable only for land rehabilitation. Its operations I have found are for the recovery of calcite, alumina, silica and haematite. They are not for the recovery of limestone. The fact that limestone does or may contain those four minerals does not detract from this finding. The section focuses on Adelaide Brighton Cement's operations and on what those operations are for. It does not focus on whether the minerals sought by Adelaide Brighton Cement are found in limestone and disentitle the company to a diesel fuel claim on that basis.[64]

102. The decision was affirmed by a three to two majority of the full Federal Court.[65] Tamberlin, Sackville and Finn JJ of the full Federal Court held that it was open, on the facts, for the AAT to hold that the extraction was for calcite, silica, alumina and haematite and constituted mining operations. The majority said:

> An operator may excavate limestone with a view to stockpiling and using or marketing the product so excavated, for example for building purposes. The operator may have little or no concern about the precise mineral content of the limestone. In these circumstances, there can be little doubt that the operations should be characterised as mining for limestone. This is so notwithstanding that the particular limestone comprises a number of identifiable mineral compounds. The operations would therefore be caught by the exclusion in para (b) of the definition of 'minerals' in s 164(7) of the Act[66] and the diesel fuel rebate would not be payable.
>
> An operator may, however, excavate limestone with a view to recovering and using the particular mineral compounds found in the limestone. Sometimes it may be quite clear that the operations are for the recovery of one or more of the particular compounds. Other cases, for example when

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[62] However, paragraph 11(2)(a) excludes from 'mining operations', quarrying or dredging operations to the extent that the purpose of the operation is to obtain materials for use in building, road making, land scaping, construction or similar purposes. See paragraphs 437 to 441 of this Ruling for a discussion on this exclusion.

[63] *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs* [2002] AATA 688; (2002) 50 ATR 1123.

[64] *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs* [2002] AATA 688; (2002) 50 ATR 1123 at paragraph 54.

[65] *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183.

[66] In the quotation, the Full Federal Court was referring to the *Customs Act 1901.*

> the operator claims to excavate limestone in order to utilise the particular mineral compounds found in the ore body, as distinct from the limestone as such, may present much more difficult questions of characterisation. It may be that the evidence in a particular case is such that a decision-maker could reasonably reach either conclusion.[67]

103. Tamberlin, Sackville and Finn JJ went on to find that:

> In the present case, the AAT, having found that Adelaide Brighton was mining for minerals, sought to identify the minerals for which Adelaide Brighton was mining. This was the correct question for it to address. In answering that question the AAT took into account a number of matters…[68]

104. In determining whether a particular mining operation is undertaken to recover an excluded substance for use as such, or whether it is undertaken to recover minerals within that substance, the AAT and Courts have had regard to a number of matters, including:

- the ultimate use of the substance that is extracted;
- the ultimate use of the specific mineral(s) contained in the material and the importance of the chemical properties of those minerals to that use;
- the degree of assurance as to the ultimate use of the material extracted. For example, whether the material is mined by the end user or their contractor for a specific use, or whether it is mined for sale on the open market with a range of possible uses;
- the extent of sampling, testing and analysis of the material both prior to and after extraction, to measure the precise levels of the desired mineral(s) contained within the material;
- discarding of the portion of the extracted material that does not contain the required mineral(s) in the required proportions; and
- planning of mining operations to target those parts of the deposit that contain the required mineral(s) in proportions suitable to the intended use.

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[67] *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183 at paragraphs 114 to 115.
[68] *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183 at paragraph 116.

105. In considering the particular matters that the AAT had taken into account, the majority of the full Federal Court in *Adelaide Brighton Cement* said:

> The AAT had to weigh these matters against other considerations, such as the absence of a process designed to separate any of the four minerals and the fact that Adelaide Brighton described its operations as mining for limestone. None of these considerations was, however, decisive. In our view, it was open to the AAT to conclude that Adelaide Brighton's operations involved mining for the four particular mineral compounds rather than limestone. …[69]
>
> The conclusion that the AAT committed no error of law does not necessarily mean that every operation involving the mining of limestone for use in the production of cement is to be regarded as mining for minerals other than limestone. Each case must depend on the evidence and its own circumstances. In particular, other cases may not have the features that persuaded the AAT in the present case to make the critical factual findings in Adelaide Brighton's favour.[70]

106. As pointed out by the majority in *Adelaide Brighton Cement*, the question of whether a person is mining for minerals which are excluded from the definition of minerals will depend on the evidence and the facts of each case. The conclusions reached by the AAT in *Adelaide Brighton Cement* may not necessarily be the conclusions that may be reached in every case involving the extraction of limestone or other material excluded from the definition of 'minerals' in section 20. In deciding whether or not a person is mining for minerals that are excluded from the definition in section 20, regard will be had to the factors listed in paragraph 103 of this Ruling. However, those are not the only relevant factors, and the weighting to be given to those and other matters will depend on the particular facts and circumstances of a case.

107. Where it can be shown that an excluded substance is being extracted to obtain a specific mineral, or minerals, contained within it, and those minerals are not excluded by paragraphs 20(a) or 20(b), fuel purchased for use or used in the particular activity may qualify for an off-road credit.

108. In circumstances where an excluded substance, such as limestone, is extracted to obtain specific minerals contained within it, mining for those minerals ceases when no further process is undertaken by the miner to separate the material adhering to the minerals and intermixed with them, prior to sale or use.[71]

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[69] *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183 at paragraph 117.
[70] *Chief Executive Officer of Customs v. Adelaide Brighton Cement Ltd* [2004] FCAFC 183 at paragraph 120.
[71] *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs* [2002] AATA 688 at paragraph 49.

109. For example, in *Adelaide Brighton Cement*, the AAT ruled that mining ceased when limestone was first stockpiled at the mine site and that activities undertaken after the first point of stockpile do not qualify for an off-road credit. The AAT said:

> I find that the 4 minerals are recovered when they are stockpiled. Any further blending or crushing is beneficial to Adelaide Brighton Cement in its subsequent use of the 4 minerals but it cannot be said to be related to their recovery.[72]

Example 1: Mining for gravel

110. *Big Pit Pty Ltd (Big Pit) operates a gravel quarry. They are contracted to supply dolerite gravel to Hard 'n Fast Ltd for use as an aggregate in pre-mix concrete.*

111. *Big Pit targets the parts of their dolerite deposit that meet the specification required by Hard 'n Fast Ltd. The dolerite is crushed to specified gravel sizes and processed by Big Pit to remove a small proportion of contaminant and debris. Big Pit tests each truck load for compliance with the required specification.*

112. *Big Pit's quarrying operation is undertaken to recover gravel for use as gravel and not its specific mineral contents or to recover specific minerals that are contained within the gravel. Diesel fuel purchased for use in Big Pit's mining operation is excluded from entitlement for an off-road credit because its operations are for the quarrying of materials excluded from the definition of minerals. It is also excluded from entitlement for an off-road credit by paragraph 11(2)(a).*

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

113. The definition of 'mining operations' in section 11 consists of three parts:

- **subsection 11(1), paragraphs (a) and (b):** 'mining operations' *means* exploration or prospecting for minerals, removal of overburden, site preparation to enable mining for minerals to commence, and the recovery of minerals being mining for minerals or recovery of salts by evaporation, or the beneficiation of those minerals or ores bearing those minerals;
- **subsection 11(1), paragraphs (c) to (i):** 'mining operations' *includes* a number of specific activities. Each of these activities is then separately defined in sections 12 to 18; and

[72] *Re Adelaide Brighton Cement Ltd and Chief Executive Officer of Customs* [2002] AATA 688 at paragraph 50.

- **subsection 11(2), paragraphs (a) to (c):** 'mining operations' *does **not** include* the specific operations or activities detailed in these paragraphs.

114. The use of the form '*means ... includes ... does not include*' in section 11 means that paragraphs 11(1)(a) and 11(1)(b) contain the central features of 'mining operations', which is then expanded by the specific activities listed in paragraphs 11(1)(c) to 11(1)(i). All activities contained in paragraphs 11(1)(a) to 11(1)(i) are subject to the specific exclusions contained in paragraphs 11(2)(a) to 11(2)(c). If an activity is within one of paragraphs 11(1)(a) to 11(1)(i) and is not excluded by subsection 11(2), a person is entitled to an off-road credit if they purchase diesel fuel for use in that activity.

115. The form of the definition of '**mining operations**': ***means***, ***includes, does not include*** is substantially the same form of the definition of mining operations as existed in the previous off-road scheme. Previous decisions of the Courts and the AAT are, in our view, relevant to the interpretation of section 11.

116. In our view, the use of the expressions, '*means*', '*includes*' and '*does not include*' in the definition of 'mining operations' in section 11 means that paragraphs 11(1)(c) to 11(1)(i) do not limit paragraphs 11(1)(a) and 11(1)(b).[73] Paragraphs 11(1)(c) to 11(1)(i) do not provide an exhaustive list of eligible activities, and an activity is not necessarily precluded from being an eligible activity if it is not specifically listed in them.

117. An activity that does not meet the specific requirements of any of paragraphs 11(1)(c) to 11(1)(i) may still be an activity that satisfies the requirements of either paragraph 11(1)(a) or 11(1)(b) and, if not excluded by subsection 11(2), may be an eligible activity.

118. Similarly, an activity does not have to be mentioned in subsection 11(2) to be excluded from the definition of 'mining operations'. These paragraphs exclude particular activities from the definition of 'mining operations', while other activities will be excluded because they do not fall within the meaning of 'mining operations' in subsection 11(1).

119. In practical terms, in determining whether a certain activity is 'in mining operations', and, therefore, eligible for an off-road credit, we take the view that it is appropriate to consider:

- firstly, whether the activity falls within one of the paragraphs 11(1)(c) to 11(1)(i). If it does and the activity is not excluded by any of the paragraphs of subsection 11(2), it will be a mining operation for the purposes of the off-road credits scheme; and

[73] See *Re Goodyear Australia Ltd and Others and Chief Executive Officer of Customs* AAT No. 13035 [1998] AATA 488 (1 July 1998) at paragraph 4; *Re Esso Australia Ltd and Chief Executive Officer of Customs* V96/1393 V96/1394 AAT No. 12919; [1998] AATA 366 at paragraphs 5 to 8.

- secondly, if the provisions of paragraphs 11(1)(c) to 11(1)(i) are not met, whether the activity otherwise comes within paragraphs 11(1)(a) or 11(1)(b) of the definition of 'mining operations'.[74] If it does and the activity is not excluded by subsection 11(2), it will be a mining operation for the purposes of the off-road credits scheme.

120. This approach ensures that appropriate consideration is given to the specific activities in paragraphs 11(1)(c) to 11(1)(i) in determining whether a particular activity is in mining operations and is a qualifying use under the off-road credits scheme.

121. Paragraphs 11(1)(c) to 11(1)(i) and paragraphs 11(2)(a) to 11(2)(c) of the definition of 'mining operations' are to be construed in their own terms and not by reference to paragraphs 11(1)(a) and 11(1)(b) of the definition.[75] The operation of paragraphs 11(1)(c) to 11(1)(i) and paragraphs 11(2)(a) to 11(2)(c) is not expanded by cross-referencing with the provisions of paragraphs 11(1)(a) and 11(1)(b). Paragraphs 11(1)(c) to 11(1)(i) should be considered self-contained compartments of specific eligible activities which are within the definition of 'mining operations' for the purposes of the off-road credits scheme.

122. Appendix 1 sets out the basic decision chart for determining if a purchase of diesel fuel qualifies for an off-road credit under the category of 'mining operations'.

Status of contractors and sub-contractors

123. For the purposes of the off-road credits scheme, activity determines eligibility, rather than whether the person's principal business is mining.[76] With the exception of two specified activities, a contractor or sub-contractor is entitled to an off-road credit and an energy grant, provided they purchase fuel and subsequently use it in an eligible activity, under the definition of 'mining operations'.

124. The exception contained in paragraph 18(d), relates to the generation or provision of electricity solely for a mining town. This paragraph states that the generation or provision of electricity must be carried out by the person who carries on the mining operation. A contractor is not entitled to an off-road credit for diesel fuel purchased for use in the activity described in that paragraph.

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[74] *Re Goodyear Australia Ltd and Others and Chief Executive Officer of Customs* AAT No. 13035 [1998] AATA 488 (1 July 1998) at paragraph 19.
[75] Paragraph 11(7)(b).
[76] *Australian National Railways Commission v. Collector of Customs (SA)* (1985) 8 FCR 264; (1985) 69 ALR 367.

125. The exception contained in paragraph 18(e), relates to the use of off-road diesel fuel at residential premises in the provision of food and drink, lighting, heating, air conditioning, hot water or similar amenities or the meeting of other domestic requirements of the residents of the premises. The paragraph states the use must be by a person who carries on a mining operation and that the residential premises must be situated at the place where the mining operation is carried on, or at a place adjacent to that place. A contractor is not entitled to an off-road credit for diesel fuel purchased for use in the activity described in that paragraph.

126. Sections 13, 14, 15 and 17, and paragraph 18(c) make specific reference to the eligibility of contractors of the person that carries on a mining operation. A sub-contractor has the same eligibility as a contractor for the activities mentioned in those provisions.[77] A sub-contractor is, therefore, also entitled to off-road credits if they purchase fuel for use in the activities detailed in sections 13, 15 and 17 and paragraphs 14(a) to 14(c), and 18(c).

Status of diesel fuel purchased by a miner but used by a contractor or subcontractor

127. Under the off-road credits scheme, a contractor is entitled to an off-road credit in respect of all fuel purchased by them for use in an eligible mining activity, and the person who carries on the mining operation in which that activity is carried out is entitled to an off-road credit in respect of all fuel purchased for use by that person in an eligible mining activity.

128. Where a contractor carries out an activity for a person who carries on a mining operation, it is sometimes agreed between the parties that the contractor will be able to replenish their fuel tank from the person's fuel supply throughout the activity and upon its completion.

129. We consider that the fuel supplied by the person who carries on the mining operation to the contractor to enable them to carry out the activity continues to be used in an eligible manner and is not sold or otherwise disposed of by that person.[78] A contractor is not entitled to an off-road credit in respect of this fuel. The person who carries on the mining operation provides the fuel for use by the contractor in a mining activity. Their entitlement to an off-road credit is not affected.

[77] Paragraph 11(7)(a).
[78] See *Re Riviera Nautic Pty Ltd and Federal Commissioner of Taxation* [2002] AATA 657, 5 August 2002; (2002) 50 ATR 1106; (2002) 68 ALD 581 for a discussion on use.

130. However, the person's entitlement to an off-road credit is affected if the fuel used to replenish the contractor's equipment at the end of the particular mining activity is not used in any mining operation. This occurs where the contractual arrangement for the use of the contractor's services ends. In this situation, the person who carries on the mining operation uses the diesel fuel for a purpose other than the eligible use for which it was purchased. Under section 55, a person is not entitled to an off-road credit if diesel fuel they purchase is used for a purpose other than the eligible use for which it was purchased, unless that other use is also a qualifying use, or if the fuel is sold or otherwise disposed of.

Activities that are 'mining operations'

131. Paragraphs 11(1)(a) and 11(1)(b) contain the central concepts of 'mining operations'. These paragraphs are dealt with below.

'Exploration or prospecting'

132. The definition of 'mining operations' in paragraph 11(1)(a) states in part:

> Subject to subsection (2), the expression ***mining operations*** means:
>
> (a) exploration or prospecting for minerals.

133. A person is entitled to an off-road credit if they purchase diesel fuel for use in the exploration or prospecting for minerals.

134. The terms 'exploration' and 'prospecting' are not defined in the EGCS Act. They, therefore, take their ordinary meaning.[79] The phrase 'exploration or prospecting' means the systematic search for mineral deposits, and the subsequent determination of the extent of those deposits as part of establishing the commercial viability of mining.

135. When considering what activities should be included as 'exploration or prospecting', the same criteria mentioned in paragraph 84 of this Ruling – causal, spatial and temporal proximity – should be considered. This will be a case of fact and degree that will vary between activities.

136. Activities that are considered to be exploration or prospecting include:

- geological, geophysical and geochemical mapping and surveys;
- systematic search for minerals by drives, shafts, cross-cuts, winzes and drilling;
- magnetometry;

[79] *Re BHP Petroleum Pty Ltd and Collector of Customs* (1987) 11 ALD 413, at pages 420 to 423; (1987) 6 AAR 245 at pages 252 to 255.

- construction and maintenance of trial pits, surface headings, underground headings, drifts or tunnels;
- construction and maintenance of access roads used in exploration or prospecting;
- construction and maintenance of infrastructure integral to the undertaking of exploration or prospecting; and
- repositioning or relocation of equipment engaged in a systematic search at a designated exploration site or place within an area covered by an exploration permit, lease or licence. However, the transportation of equipment between areas covered by different exploration permits, leases or licences would not be regarded as activities in exploration or prospecting.[80]

'Removal of overburden' and 'other activities undertaken in the preparation of a site'

137. The definition of 'mining operations' in paragraph 11(1)(a) states in part:

> Subject to subsection (2), the expression ***mining operations*** means:
>
> (a) the removal of overburden and other activities undertaken in the preparation of a site to enable mining for minerals to commence.

138. A person is entitled to an off-road credit if they purchase diesel fuel for use in the removal of overburden and in other activities undertaken in the preparation of a site to enable mining for minerals to commence.

139. The phrase 'removal of overburden' means land clearing, removal of vegetation, and the removal and stockpiling of topsoil. It extends to the removal, whether by digging or blasting, of surface waste or worthless rock overlying a mineral deposit, in order to expose and mine the deposit. We consider that these processes are completed at the first point at which the material removed is stockpiled.

140. The phrase 'other activities undertaken in the preparation of a site to enable mining for minerals to commence' is not restricted in meaning to activities similar in nature to the removal of overburden. It is taken to mean any activity that is undertaken in preparing a site to enable mining for minerals to commence.

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[80] *Re BHP Petroleum Pty Ltd and Collector of Customs* (1987) 11 ALD 413; (1987) 6 AAR 245, in which the AAT determined that the relocation of rigs between places of exploration was not an eligible activity. The transporting by any means of people, equipment or goods to or from a place where a mining operation referred to in subsection 11(1) is, or is to be, carried on is excluded as a qualifying use under paragraph 11(2)(c).

141. Activities considered eligible under this category are not restricted to those undertaken at the point of mineral extraction, or the area immediately surrounding that point. Instead, the term 'site' is not taken to have a restricted meaning, and thus refers to an area or location utilised for the mining of minerals. In addition, acts of preparation of a site are not restricted to acts on the site.[81]

142. Whether an activity takes place in the course of preparation of a site to enable mining for minerals to commence is a question of fact, determined having regard to the facts and circumstances of each case.

143. Activities that are considered to be 'other activities undertaken in the preparation of a site to enable mining for minerals to commence' include the following:

- activities undertaken in the dewatering of a site, including drilling bore holes and monitoring holes; or
- construction and maintenance of infrastructure of sufficient causal, temporal and spatial proximity. This infrastructure may include plant, buildings, access roads and other equipment necessary for preparation and the subsequent mining to take place. Diesel fuel purchased for use in the transportation of materials used in this construction, however, is not eligible.[82]

144. Preparation of a site that will be involved in **beneficiation activities only** is **not** eligible under paragraph 11(1)(a). It is considered that such activities are not undertaken in the preparation of a site to enable **mining for minerals** to commence. Rather, they are undertaken in the preparation of a site to allow **beneficiation of those minerals** to take place.

145. We consider that construction of plant or buildings to enable beneficiation to commence will fall for consideration under paragraph 15(d). However, the construction of plant or buildings does not include preparatory work done on the site of the beneficiation plant prior to the commencement of the construction work.[83]

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[81] *Re: Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* [2001] AATA 801; (2001) 34 AAR 98, *Dawson Rockwater Joint Venture between Dawson Engineering Pty Ltd and Brown & Root Pty Ltd v. Chief Executive Officer of Customs* [1998] FCA 1010.

[82] *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482; (1998) 158 ALR 241.

[83] Construction of private airstrips, plant, buildings or equipment is discussed at paragraphs 352 to 358 of this Ruling.

Example 2: Mobile manufacturing units used in the removal of overburden

146. *Blastitaway Pty Ltd (Blastitaway) is contracted by a mining principal to remove overburden by blasting. The mining principal operates a mine located on a single mining lease in northern Western Australia. Rather than transport pre-mixed explosive products, Blastitaway utilises mobile manufacturing units (MMUs) to produce the explosives used on site.*

147. *Diesel fuel purchased for use in the MMUs whilst on the mining lease is considered to be for use in the removal of overburden. Blastitaway is entitled to an off-road credit as it purchases diesel fuel for use in an eligible activity.*

148. *Diesel fuel purchased for use in the operation of the MMUs whilst on public roads, or otherwise off the mining lease, is not for a qualifying use under the off-road credits scheme. However, this fuel may be eligible for the grant under the on-road credits scheme.*

Example 3: Pipelines used in natural gas extraction

149. *Gas O Enterprises Ltd (Gas O) intends to mine natural gas on permits that it holds on the North West Shelf. Before mining can take place, wellheads at the point of extraction and a processing and control facility on a nearby island need to be constructed. In addition to these elements of infrastructure, pipelines are required to transport the raw gas fifty kilometres from the wellhead to the processing and control facility. Gas O transports construction material by vessels to the relevant sites for the construction work to be done.*

150. *As activities undertaken in the preparation of a site to allow mining for minerals to commence are not restricted to those undertaken at the point of mineral extraction, or the area immediately surrounding that point, Gas O is entitled to an off-road credit for diesel fuel purchased for use in the construction of the pipeline. This is an activity undertaken in the preparation of a site to enable mining for minerals to commence. It is a mining operation under paragraph 11(1)(a).*

151. *Gas O is not entitled to an off-road credit, under the mining operations category, for diesel fuel purchased for use in the transport of construction materials. This is not an activity undertaken in the preparation of a site to enable mining for minerals to commence and, therefore, is not a mining operation. The transport activities take place prior to the activities undertaken in the preparation of a site to enable mining for minerals to commence. It may, however, qualify for an off-road credit under the category of 'use in marine transport' under subsection 53(3).*

Mining for minerals

152. The definition of 'mining operations' in subparagraph 11(1)(b)(i) states:

> Subject to subsection (2), the expression ***mining operations*** means:
>
> (b) operations for the recovery of minerals, being:
>
> (i) mining for those minerals including the recovery of salts by evaporation.

153. A person is entitled to an off-road credit if they purchase diesel fuel for use in operations for the recovery of minerals being mining for those minerals, including the recovery of salts by evaporation.

154. 'Mining' is not defined by the EGCS Act, and must take its ordinary meaning. Mining is the action, process or industry of extracting minerals or ores bearing minerals from a mine or mines.[84]

155. A 'mine' means an excavation made in the earth for the purposes of getting out minerals (including coal), ores or, precious stones, or a deposit of such minerals, ores or precious stones, either below the ground or at its surface.[85]

156. It will be self-evident in most cases whether an activity is mining for minerals. The factors determining whether an activity is mining for minerals will vary, and these will need to be considered on a case-by-case basis.

157. In determining what constitutes mining for minerals, the Courts have had regard to the informed general usage of the term.[86] Factors taken into account in making that determination include:

- the way in which the deposits of the material occur;
- the character of the material to be recovered; and
- the use to which it may be reasonably put.

158. Certain activities are sometimes undertaken to synthetically produce or manufacture substances, which would come under the definition of 'minerals', by means other than that which would normally be considered mining. As stated in paragraph 94 of this Ruling, a factor to be considered in determining if a substance is a mineral is whether the extraction or recovery process for the substance would correspond to the normal understanding of the term 'mining'.

159. We do not consider synthetic production or manufacturing operations of this kind to be within the normal understanding of the term 'mining'. Such processes will not be mining operations.

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[84] *The Macquarie Dictionary,* 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[85] *The Macquarie Dictionary,* 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[86] See, for example, *North Australian Cement Ltd v. Federal Commissioner of Taxation* (1969) 119 CLR 353 at pages 362 to 363; (1969) 1 ATR 225 at page 231; 69 ATC 4077 at pages 4082 to 4083.

160. We further consider that the creation of an artificial environment in which minerals are generated by a natural process is not mining for the purposes of the off-road credits scheme. For instance, the burying of waste in a landfill site in order to facilitate the natural production of methane for later extraction is not 'mining for minerals'. We also take the view that this activity is not an activity 'undertaken in the preparation of a site to enable mining for minerals to commence'.

161. The point at which 'operations for the recovery of minerals' cease depends upon whether any processes of beneficiation are undertaken. If no beneficiation process is undertaken, 'operations for the recovery of minerals' cease when 'mining for minerals' is completed. This is provided for in paragraph 11(3)(b) which states:

> For the purposes of the definition of ***mining operations***, operations for the recovery of a mineral cease:
>
> (b) in the absence of a beneficiation process – when the mineral, or ores bearing the mineral:
>
> (i) are first stockpiled or otherwise stored at the place at which the mining operation is carried on; or
>
> (ii) if subparagraph (i) does not apply – are removed from the ore body or deposit.

162. In cases not involving any process of beneficiation, 'mining operations' will cease at the first point of stockpile or storage of the minerals, or the ores bearing minerals, after mining. Where the mineral or the ore bearing mineral is not stockpiled and there is no process of beneficiation, 'mining operations' will cease when the mineral or the ore bearing mineral is removed from the ore body or deposit. The factors determining when 'mining operations' cease will vary, and these will need to be considered on a case-by-case basis.

163. Activities that are considered to be 'mining for minerals' include:

- operations undertaken in the physical recovery of minerals or ores bearing minerals; and
- construction and operation of facilities and infrastructure used directly in the recovery of minerals or ore bearing minerals.

164. The recovery of salt by evaporation is specifically included as 'mining for minerals' by subparagraph 11(1)(b)(i). The recovery of salt by evaporation includes screening, grinding or other like processes, the washing process, and dry stockpile operations undertaken as part of a continuous process for the recovery of salt. Salt is fully recovered once these operations are complete.

165. The generation of electricity for use at a mine site, that is, for use in a mining operation under subparagraph 11(1)(b)(i), is also part of the operations for the recovery of minerals, and hence a qualifying use.

Example 4: Generation of electricity for support facilities

166. *Blackstump Mining Ltd (Blackstump) operates a mine site on a mining lease in remote South Australia. It constructs its own power station to provide power for its mining operations. In addition to power provided to equipment used in the extraction of ore, the station also provides power to a small camp housing mine staff, administration offices and other amenities located on the mining lease.*

167. *Blackstump is entitled to an off-road credit for diesel fuel purchased for use in the generation of the power, as this is an activity that is a mining operation under subparagraph 11(1)(b)(i).*

Example 5: Generation of electricity by a contractor

168. *Goldee Mining Enterprises Ltd (Goldee Mining) has a mine site on a mining lease in a remote location in the Northern Territory. It engages Goldy Locker Contractors (Goldy Locker) to construct and provide it with power for use in mining at the mine site. Goldy Locker constructs and operates a power station for this purpose.*

169. *Goldy Locker is entitled to an off-road credit for the diesel fuel it purchases for use in the generation of power at the power station, as this is an activity that is a mining operation under subparagraph 11(1)(b)(i).*

Beneficiation

170. The definition of 'mining operations' in subparagraph 11(1)(b)(ii) states:

> Subject to subsection (2), the expression ***mining operations*** means:
>
> (b) operations for the recovery of minerals, being:
>
> (ii) the beneficiation of those minerals, or of ores bearing those minerals.

171. A person is entitled to an off-road credit if they purchase diesel fuel for use in operations for the recovery of minerals being the beneficiation of those minerals or of ores bearing those minerals.

172. Beneficiation is not a term in ordinary English usage. It is a technical term applicable to a range of processes undertaken in the mining or metallurgical industries. It is used to describe a treatment to improve, upgrade or concentrate the quality of mineral bearing ore up to, but not including, the refining or final pyrometallurgical or hydrometallurgical process whereby metal is produced.

173. The meaning of the term 'beneficiation' was discussed in *Abbott Point*.[87] In *Abbott Point*, the court dealt with a claim for rebate under the previous off-roads scheme for diesel fuel used in transporting coal by rail and in vehicles at the export facility.

174. In dismissing the claim, Ryan and Cooper JJ said:

> It is clear, in our view, that 'beneficiation' is not a term in ordinary English usage. It is a technical term applicable to a range of processes in the mining and metallurgical industries. Accordingly, its meaning is to be determined as a question of fact. … Here the Tribunal found, … 'beneficiation' denotes the processing of minerals or ore-bearing minerals to improve their physical and chemical properties.[88]

175. Ryan and Cooper JJ went on to find that:

> The process of recovery includes, in our view, those steps which are taken by a miner before sale, by whatever process, to remove the mineral from that in which it is embedded or with which it is intermixed. Such a process comprehends the refining of minerals or ore to remove impurities naturally occurring in the material as it has been mined. Once the process of separation or refining has been completed, to subject the mineral product to a process or procedure designed purely to facilitate its better use as so separated or refined or to render it more readily or advantageously marketable is not in our view part of the recovery process.[89]

176. Subsection 11(4) specifies that the beneficiation of ores bearing manganese ceases when manganese-mineral concentrates are last deposited in a holding bin, or in a stockpile, at the place where the concentration is carried on, before transportation of those concentrates.

177. For the purposes of the definition of 'mining operations' in subparagraph 11(1)(b)(ii), beneficiation is a technical concept rather than an economic concept. Subsection 11(5) states that, in determining whether a particular process constitutes beneficiation, regard is to be had to the nature of the technical process involved but no regard is to be had to any market considerations. That is, if market forces dictate that a mineral must undergo a certain process to result in a saleable product, this does not necessarily mean that the process will be considered beneficiation.

178. Subsection 11(6) provides that the EGCS Regulations may provide a list of specific processes that are considered beneficiation for the purpose of the EGCS Act. As at the date of release of this Ruling no regulations have been made under subsection 11(6).

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[87] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371; (1992) 15 AAR 365.
[88] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371 at page 374; (1992) 15 AAR 365 at page 368.
[89] *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371 at page 379; (1992) 15 AAR 365 at page 373.

179. Activities eligible as beneficiation begin after the last point of stockpile or storage of the minerals or ores after 'mining for minerals' has taken place.

180. In cases where beneficiation occurs at the site or at a place adjacent to the site and there is no stockpile of minerals or ores, we consider that beneficiation begins after 'mining for minerals' has taken place. The factors determining when 'mining for minerals' cease will vary, and these will need to be considered on a case-by-case basis.

181. We consider that if beneficiation occurs at a different place to that at which mining for minerals is conducted, beneficiation begins at the last point of stockpile or storage of the minerals or ores after transport.[90]

182. Whether or not a mineral or an ore is beneficiated is a question of fact, and will need to be determined on a case-by-case basis in light of technical evidence in the relevant mining industry. However, it is clear that 'beneficiation' is distinct from refining to produce metal, or the process of manufacturing, or a process, which results in the destruction of a recovered mineral.

183. The point at which beneficiation is deemed to have been completed differs depending upon the mineral in question and the precise process utilised. Factors affecting beneficiation, including mining, metallurgical and environmental factors, mean that beneficiation processes can vary both between and within minerals.

Cessation of 'operations for the recovery of minerals'

184. The point at which 'operations for the recovery of minerals' cease is dependent upon whether a process of beneficiation is carried out. This is provided for in subsection 11(3), which states:

> For the purposes of the definition of ***mining operations***, operations for the recovery of a mineral cease:
>
> (a) when the process of beneficiation ceases.
>
> (b) in the absence of a beneficiation process – when the mineral , or ores bearing the mineral:
>
> (i) are first stockpiled or otherwise stored at the place at which the mining operation is carried on; or
>
> (ii) if subparagraph (i) does not apply – are removed from the ore body or deposit.

[90] See also paragraphs 265 to 278 of this Ruling for discussion of journeys involving transportation of minerals or mineral bearing ore for beneficiation. This is a qualifying use under 'mining transport activity' as defined in section 12.

185. Under the off-road credits scheme, a person is entitled to an off-road credit for diesel fuel purchased for use in the beneficiation of minerals or ores bearing minerals until the first point of stockpile or storage after beneficiation.[91] Alternatively, in the absence of a point of stockpile or storage after beneficiation, there is an entitlement for an off-road credit for diesel fuel purchased for use until the final process of beneficiation has been completed, prior to the commencement of further processing.

186. In the absence of a beneficiation process, a person is entitled to an off-road credit for diesel fuel purchased for use for the recovery of minerals or ores bearing the mineral until the first point of stockpile or storage at the place at which the mining operation is carried on. In the event that the mineral or the ores bearing the mineral are not stockpiled or stored, mining operations cease when the mineral is removed from the ore body or deposit and loaded onto a vehicle or any other plant or equipment (for example, a conveyor belt) for transport from the excavation site.

187. Some of the more common minerals, and examples of the processes involved in beneficiation and the points at which beneficiation may cease are contained in the following paragraphs 188 to 200.

Coal

188. Beneficiation of coal ceases after it has been washed in a preparation plant and dewatered at a product stockpile at the mine site. Beneficiation of coal extends to pushing-in and pushing-out operations at the load-outs, if undertaken with a view to dewatering.[92] Blending of coal is not considered beneficiation, nor is the magnetic removal of foreign contaminants from the coal.[93]

Gold

189. Beneficiation of gold includes the crushing and grinding of ore, the carbon in pulp (CIP) and electrowinning processes. Beneficiation is considered to be complete when the electrowinning process is complete prior to the smelting of gold.

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[91] Subject to the operation of subsection 11(4), discussed at paragraph 175 of this Ruling.

[92] *Re BHP Australia Coal Ltd and Collector of Customs* Q91/446, AATA No. 9266; (1994) 32 ALD 773. This decision was confirmed by the full Federal Court – see *Collector of Customs v. BHP Australia Coal Ltd* (1994) 53 FCR 499.

[93] See the AAT's decision in *Re Freight Rail Corporation and Anor and Chief Executive Officer of Customs* [2000] AATA 175, N98/1352 & 1353; (2000) 44 ATR 1028; the decision was *affirmed* by Hill J in *Freight Rail Corporation v. Chief Executive Officer of Customs* (2000) 107 FCR 15 at page 27; [2000] FCA 1796 at paragraph 53.

Silver

190. Beneficiation of silver is usually considered to be complete at the first concentrate stage. Silver is generally a by-product of lead, copper, zinc or gold extraction, and the first concentrate may be obtained by the 'flotation' method through the processing of the ore known as 'Galena'. When extracted through the production of lead/zinc, beneficiation of the silver will cease when the beneficiation of the lead/zinc material ceases. If silver is a by-product of gold extraction, beneficiation is complete at the end of the electrowinning process, prior to smelting.

Copper

191. Beneficiation of copper continues until the matte stage is reached. Matte is an impure sulfide mixture produced by smelting the sulfide ores of copper. Alternatively, if an interim matte is not produced, beneficiation continues through all smelting furnace processes up until the point at which a copper anode, suitable for refining, is produced. The leaching of copper, involving any preceding crushing, grinding, screening plus leaching or bacterial leaching, solvent extraction and electrowinning, is also considered beneficiation.

Uranium

192. Beneficiation includes grinding, crushing and flotation, and continues up to the calcining process. Beneficiation does not include the calcining process. Calcining is the heating of ores, precipitates, concentrates or residues so that hydrates, carbonates or other compounds are decomposed and the volatile material is expelled.

Bauxite

193. Beneficiation includes the production of alumina by the Bayer process.

Crude oil

194. Beneficiation of crude oil includes any process that separates oil from the other constituents of crude oil to yield the product known as stock tank oil.

Lead ore

195. Beneficiation includes any crushing, screening, wet sizing, separation, thickening, drying, filtration, flotation and sintering processes, until the point at which the ore is put in the top of a blast furnace or an electric arc furnace.

Natural gas for liquefaction

196. Beneficiation includes the removal of carbon dioxide, water, mercury, hydrogen sulphide and other sulphide compounds. The separation of heavier hydrocarbon gases (pentanes and heavier) is not beneficiation as these gases are not waste, but other minerals that are recovered for use. The separation of the heavier gases in a liquefied natural gas (LNG) processing train is part of the liquefaction of natural gas and diesel fuel used in that process qualifies for an off-road credit under paragraph 18(a) of the definition of 'sundry mining activity'.

Natural gas for sale as domestic gas

197. Beneficiation includes the removal of mercury and water. The recovery and beneficiation is complete prior to the compression or storage of the gas or the introduction into a pipeline for distribution.

198. The transport of gas from a mining site to a place for liquefaction is a qualifying use as a mining operation under paragraph 12(b) of the definition of 'mining transport activity'.[94] The liquefaction of natural gas is a qualifying use as a mining operation under paragraph 18(a) of the definition of 'sundry mining activity'.[95]

Iron ore

199. Beneficiation of iron ore for the recovery of minerals includes the crushing, screening, flotation, water reduction and sintering processes, until the point at which the ore is put in the top of a blast furnace or an electric arc furnace.

Nickel

200. Beneficiation of nickel is completed when nickel matte is produced.[96] Beneficiation includes processes leading up to this stage, such as crushing, grinding, flotation and smelting.

201. In determining, whether a process or processes described above (for example, crushing) is beneficiation or not, consideration needs to be given on a case by case basis as to whether:

- the recovery of minerals is complete;
- the process is simply being conducted to produce a more saleable product;[97] or
- the process is part of an integrated process that is not in mining operations as defined in subsection 11(1).

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[94] This is discussed in paragraphs 279 to 281 of this Ruling.
[95] This is discussed in paragraphs 404 to 408 of this Ruling.
[96] *Re Western Mining Corporation Ltd and Collector of Customs* [1984] AAT W83/13 (Unreported, 30 March 1984).
[97] Subsection 11(5). See also *Abbott Point Bulk Coal Pty Ltd & Anor v. Collector of Customs* (1992) 35 FCR 371 at page 379; (1992) 15 AAR 365 at page 373.

202. The processes in relation to the minerals mentioned above are examples only and do not limit entitlement to an off-road credit for beneficiation involving other processes for the particular mineral or ores bearing minerals.

203. For the purposes of the off-road credits scheme, beneficiation of minerals is not limited to beneficiation of minerals or ores that are mined in Australia. A person is entitled to an off-road credit for diesel fuel purchased for use in the beneficiation, in Australia, of imported minerals or imported ores.

Example 6: Transport and beneficiation of imported ore

204. *U Copper Enterprises Ltd (U Copper) is engaged in the mining and beneficiation of ores bearing copper at various locations throughout Australia. In addition to these activities, they also source ores bearing copper from a number of overseas locations for importation and subsequent beneficiation. It uses rail transport to transport the ore from the port to its beneficiation plant. It purchases diesel fuel for use in the beneficiation of the ore.*

205. *The beneficiation of the imported ore qualifies as a mining operation for the purposes of the off-road credits scheme. U Copper is entitled to an off-road credit as it purchases diesel fuel for use in a mining operation being beneficiation of ores bearing copper.*

206. *However, the off-road transport of the imported ore from the port to the place of beneficiation is not a mining operation under subparagraph 11(1)(b)(ii). In this case, the off-road transport may be eligible for the grant under the 'use in rail transport' entitlement category of the off-road credits scheme.*

Activities included as 'mining operations'

207. Paragraphs 11(1)(c) to 11(1)(i) set out the activities that are included as mining operations. To qualify as a mining operation for the purposes of the off-road credits scheme, some activities included in the definition of mining operations must be **solely** for a particular purpose.[98] For example, paragraph 14(a) refers to 'searching for ground water solely for use in a mining operation referred to in paragraphs (a) or (b) of the definition of that expression in subsection 11(1)'. In addition, some activities must be **at the place** where a relevant mining operation is carried on or **at a place adjacent to that place**.

208. Each of these concepts is discussed in the following paragraphs.

[98] The word solely is used in paragraphs 14(a), 14(b) and 14(c) in the definition of 'mining water activity', paragraph 15(e) in the definition of 'mining construction activity', paragraph 17(b) and 17(c) of the definition of 'mining vehicle activity', and in paragraph 18(d) of the definition of 'sundry mining activity'.

Solely

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

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

211. In *Randwick Municipal Council v. Rutledge*[99] (*Randwick Council*), Windeyer J in relation to the use of the words 'exclusively' or 'solely' stated:

> The words 'exclusively' and 'solely' are familiar in fiscal and rating law. Where an exemption from rating depends upon the use of land exclusively for a particular stated purpose, then the use must be for that purpose only. … such words confine the use of the property to the purpose stipulated and prevent any use of it for any purpose, however minor in importance, which is collateral or independent, as distinguished from incidental to the stipulated use.[100]

212. A strict and narrow interpretation of the provisions of the definition of mining operations in the EGCS Act that contain the solely requirement would mean that a person may not be entitled to an off-road credit for diesel fuel purchased for use in an activity that is essential to a paragraph 11(1)(a) or 11(1)(b) mining operation.

213. For example, paragraph 14(c) provides that mining water activity includes the supply of water solely for a paragraph 11(1)(a) or 11(1)(b) mining operation. If a miner supplies water to a beneficiation plant only or exclusively for use in beneficiation activities, the supply of water will be a water mining activity. The miner is entitled to an off-road credit for diesel fuel purchased for use in the supply of water.

214. If, however, the bulk of the water is for use in beneficiation activities, and a small quantity is for use in post beneficiation activities, then, on a strict and narrow reading of paragraph 14(c), the activity is not a water mining activity as the supply of water is not solely for a paragraph 11(1)(a) or 11(1)(b) mining operation. No entitlement to an off-road credit will arise even though the bulk of the water is for use in the relevant mining operation.

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

216. We take the view that the provisions that contain the solely requirement should not be interpreted so narrowly as to prevent their application in a practical and commonsense manner.

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[99] *Randwick Municipal Council v. Rutledge* (1959) 102 CLR 54.
[100] *Randwick Municipal Council v. Rutledge* (1959) 102 CLR 54 at pages 93 to 94.

217. We consider that where a person who carries on a paragraph 11(1)(a) or (11)(1)(b) mining operation purchases diesel fuel for use in a number of activities, an apportionment can be made as to its intended use in the different activities.[101] If a portion of the fuel is purchased for use in a qualifying activity that has the solely requirement, an entitlement to an off-road credit arises for the portion of the fuel that is purchased for use in the activity that qualifies as a mining operation.

218. Our views accord with the legislative intent in relation to the introduction of the solely requirement in a number of specified eligible activities in the definition of mining operations in the previous off-road scheme. Our views are also supported by some AAT and judicial decisions.

Legislative intent

219. Prior to the 1995 amendments to the Customs Act and the Excise Act, the eligibility criteria for the 'mining operations' category of the previous off-road scheme contained two broad eligibility criteria known as the 'sweeper clauses'.[102] The so called 'sweeper clauses' provided that operations 'connected with' relevant mining activities were eligible activities.

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

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

> In the existing legislation, both the definition of 'agriculture' and the definition of 'mining operations' employ what are known as 'sweeper clauses', which have the effect of making other operations connected with agriculture or mining eligible for the payment of rebate. The interpretation of these 'sweeper clauses' has been a source of contention over the years, and has generated most of the litigation in the lifetime of the scheme. …
>
> The intention of these amendments is to put beyond doubt that the Scheme is not meant to provide rebate eligibility for activities which are not sufficiently connected with mining or agriculture; for instance, the provision of a service or utility to a farmer or miner, such as electricity through a grid, …
>
> Because claims of these kinds have sought to broaden the scheme well beyond what it should be, the Government is proposing that these amendments be made retrospective to 1 August 1986 to protect the revenue.[103]

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[101] Or, in relation to the activities mentioned in paragraphs 14(a), 14(b), 14(c), 15(e), 17(b) and 17(c), by a contractor contracted by that person.
[102] Paragraphs 164(7)(c) and 164(7)(ca) of the Customs Act.
[103] Second Reading Speech, Customs and Excise Legislation Amendment Bill 1995.

222. The Customs and Excise Legislation Amendment Bill 1995 was subject to further amendments in the Senate prior to being enacted. Those further amendments introduced the solely requirement into a number of specified activities.

223. In explaining the further amendments, the Supplementary Explanatory Memorandum stated:

> The stated intention of the Bill is not to affect the eligibility of rebate of persons engaged in mainstream farming and mining. … The schedule of amendments to the Bill is a direct response to these representations and proposes to expand the list of eligible activities under both the definitions of 'agriculture' and 'mining operations'. It is considered that the expanded list will maintain the integrity of the Scheme in assisting persons engaged in mainstream… mining operations while excluding from eligibility activities that can only be regarded as being remotely connected with agriculture or mining.[104]

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

AAT and judicial decisions

225. Further, our view on the interpretation of the provisions that have the solely requirement takes into account the views expressed in AAT and Court decisions.

226. *Re Central Norseman Gold Corporation Limited and Collector of Customs*[105] (*Central Norseman*), although decided in the context of the 'sweeper clauses', is instructive as to how the AAT or the Courts may interpret the provisions that have the solely requirement. In its decision, the AAT stated:

> These provisions are intended to apply to commercial operations and are therefore to be read in a practical, commonsense manner. They therefore permit the apportionment of a bulk purchase of fuel whenever it can be shown that there is an appropriate basis upon which the apportionment should be made. Although the matter was not argued before the Tribunal, we would accept that a case for apportionment may in a proper case be made out in relation to the purchase of fuel for the operation of a powerhouse which produces electricity for use partly in the course of a mining operation as defined and partly not in the course of such an operation.

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[104] Supplementary Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995.

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

> That is not to say, however, that the rebate is to be determined simply by apportioning the use to which electricity from a multi-purpose powerhouse is actually used or is intended to be used. The applicant is not entitled to a rebate unless it demonstrates that it purchased diesel fuel for use in a mining operation as defined. If it is established that it has done so, the applicant will not lose its entitlement to rebate simply because some of the electricity produced is in fact used for a purpose which, looked at on its own, does not form part of a mining operation as defined.[106]

227. In *Randwick Council*, Windeyer J, in relation to land, accepted that questions may arise when part of the land is used for the relevant purpose and another part for a different purpose. He referred to the decision of the High Court in *Sisters of Mercy Property Association v. Newtown and Chilwell*[107] (*Sisters of Mercy*).

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

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

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

230. The court adopted an apportionment approach and held that the land actually occupied by the 'altar-bread building' with its curtilage (if any) was exempt from rates, but that this did not bring about the exemption of any other part of the land.[108]

231. The above decisions indicate that, in appropriate circumstances, an apportionment can be made to determine the extent to which an activity or thing is solely or 'exclusively' for a particular purpose.

232. We consider that, in relation to those activities in the definition of 'mining operations' under the Energy Grants (Credits) Scheme that have the solely requirement, it is open and appropriate for the Commissioner to take the apportionment approach in determining whether or not an activity is solely for the relevant purpose.[109] The provisions are capable of this interpretation, which gives a reasonable result that accords with the legislative intent.[110]

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[106] *Re Central Norseman Gold Corporation Ltd and Collector of Customs, Western Australia* AAT No. W84/118; (1985) 8 ALN N288 at page 1.
[107] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369.
[108] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369, Latham CJ at page 376.
[109] See paragraphs 211 to 213 of this Ruling for an alternative narrow interpretation of solely and its effect.
[110] *Sisters of Mercy Property Association v. Newtown and Chilwell* (1944) 69 CLR 369, Latham CJ at page 376.

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

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

235. For example, in relation to the supply or pumping of water solely for use in a mining operation, appropriate records to substantiate apportionment include:

- the quantity (in litres or tonnes) of water supplied to the site and any other sites;
- if meters are installed, meter readings of the quantity of water supplied to the mining operation and other sites; and
- the total number of hours and fuel consumption rate for the equipment used to pump water to a mining operation.

236. In relation to the supply of electricity to a mining town, the calculation of kilowatts produced at a power station and the appropriate measurement (for example, meter readings) of the kilowatts of power supplied to a mining town would be evidence of the extent to which power is generated solely for or supplied solely to a mining town.

237. If an activity fails to meet the provisions of one of the paragraphs where the solely requirement is present, its eligibility as a mining operation under paragraphs 11(1)(a) and 11(1)(b) can be considered.[111]

Example 7: An eligible activity – generation and provision of electricity to a mining town

238. *Minotrics Pty Ltd (Minotrics) operates a mine and associated mining town in the Northern Territory. It uses its own power station to produce electricity, which is transmitted by different feeder lines to the mine site, the mining town, and a small nearby community that has negotiated with Minotrics for a portion of the electricity generated to be supplied to them. Fuel is purchased for use in the generation and supply of electricity for these purposes.*

[111] See paragraph 117 of this Ruling.

239. *Paragraph 18(d) provides that* ***sundry mining activity*** *includes the generation of electricity solely for, or the provision of electricity solely to, a mining town if the conditions specified in subparagraphs 18(d)(i) and (ii) are met. In the case of Minotrics, both those conditions are met.*

240. *At the time of purchase of the diesel fuel for use in the power station, Minotrics estimates on a reasonable basis the amount of power generated (in kilowatts) for each use and that:*

- *65% of the electricity it generates is for its general mining operations;*
- *30% of it is provided solely to the mining town; and*
- *5% is provided to the local community.*

241. *30% of the fuel is therefore purchased for use in the provision of electricity solely to a mining town.*

242. *Minotrics is entitled to an off-road credit for 95% of the diesel fuel, being:*

- *65% in respect of an activity that is a mining operation under paragraph 11(1)(b); and*
- *30% in respect of an activity that is a mining operation under paragraph 18(d).*

At the place where the mining operation is carried on

243. The phrase 'at the place where the mining operation is carried on' is used in paragraphs 17(a), 18(c) and 18(e), and sections 14, 15 and 16.[112] These paragraphs and sections contain the definitions of specific activities that are included in the definition of 'mining operations'. The reference to 'the mining operation' in the phrase is a reference to the mining operations as referred to in paragraphs 11(1)(a) or 11(1)(b) of the definition of 'mining operations'.

244. Whether the relevant 'mining operation' is carried on at one or more places is a question of fact to be determined on a case by case basis. However, the 'place' at which those operations are carried on is taken to include the whole of the land legally occupied for the exploration or prospecting, site preparation, mining for minerals and the beneficiation of those minerals. This includes any land that is legally occupied for the purposes of private roads that connect a mine site to the place of beneficiation of minerals from the mine, or to connect those areas to a public road.[113]

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[112] The phrase is also used in paragraph 11(2)(c). A reference to the mining operation in the phrase in paragraph 11(2)(c) is a reference to a mining operation referred to in any of the paragraphs in subsection 11(1).

[113] *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs* (2000) 34 AAR 130; (2001) 49 ATR 1005; [2001] AATA 894.

245. In *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs*[114] (*BHP Billiton*), the AAT considered the meaning of 'at the place' in relation to the exclusion, under paragraph (z) of the definition of 'mining operations' in subsection 164(7) of the Customs Act. That paragraph excluded transport activities (with certain exceptions) to or from a place where mining operations as defined in paragraphs (a) to (w) of the definition in subsection 164(7) is, or is to be, carried on, or to or from a place adjacent to that place, other than transport that constituted specified activities.

246. In *BHP Billiton*, the mining operations involved onshore bases and offshore locations and the transport of goods between the two. The AAT found that the transport of goods between the two locations did not occur 'at the place where the mining operation is carried on' but rather between two separate locations over many kilometres of ocean not occupied by the miner and not used by the miner otherwise than as a transport route.[115] In its decision the AAT stated:

> If an onshore base and offshore location, and the sea between, can be characterised as one place we do not see that that has the consequence that the onshore and offshore locations cannot also separately be described as places. The fact that it can be said that one of the places where a miner carries out mining operations is Western Australia does not preclude it being said that one place of its operations is, for example, Kalgoorlie.[116]

247. The decision of the AAT was confirmed by the full Federal Court.[117] The approach adopted by the AAT in *BHP Billiton* and confirmed by the full Federal Court[118] is consistent with the approach taken by the AAT in *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs*[119] (*Hampton Transport*).

248. In *Hampton Transport*, the AAT dealt with the question of whether diesel fuel purchased for use in the maintenance of the private portion of an access/haul road between the Red October mine site south of Leonora in Western Australia and the mine's processing plant near Leonora was eligible for the diesel fuel rebate.

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[114] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453; (2002) 50 ATR 1156; [2002] AATA 705.
[115] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453; (2002) 50 ATR 1156; [2002] AATA 705.
[116] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs,* (2002) 69 ALD 453 at page 473; (2002) 50 ATR 1156 at page 1177; [2002] AATA 705 at paragraph 58.
[117] *BHP Billiton Petroleum Pty Ltd v. Chief Executive Officer of Customs* [2003] FCAFC 61; (2003) 52 ATR 491.
[118] *BHP Billiton Petroleum Pty Ltd v. Chief Executive Officer of Customs* [2003] FCAFC 61; (2003) 52 ATR 491.
[119] *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs* (2000) 34 AAR 130; (2001) 49 ATR 1005; [2001] AATA 894.

249. The AAT held that it was. In reaching its conclusions, the AAT stated:

> In the Tribunal's view the words 'mining operation', in the phrase 'occurs at the place where the mining operation is carried on', mean *all* of the operations involved in mining for minerals and in the beneficiation of those minerals and thus the places at which those operations occur include the whole of the land legally occupied for the purposes of the excavation or extraction process, the whole of the land legally occupied for the purposes of the beneficiation process, and the whole of the land legally occupied for the purposes of private roads that connect that parcel or those parcels of land, either together, or to the public road system beyond.[120]

250. In *Hampton Transport*, the legal occupation of the land by way of leases, licences and permits for the purposes of carrying on mining operations and the need for a connecting road between the mining site and the beneficiation site meant that the construction of the road was 'at the place'. In *BHP Billiton*, there was no possibility of there being legal occupation of the ocean serving as the transport route between the onshore bases and the offshore locations.

251. The legal entitlement to conduct mining operations in a specified area may flow from a variety of agreements or licences. The entitlement to legally occupy that area for the purposes of a paragraph 11(1)(a) or 11(1)(b) mining operation is usually in the form of an exploration or prospecting licence, lease or permit, a mining licence, lease or permit, or a miscellaneous licence, lease or permit that is issued for a purpose directly associated with the mining operations.

252. State or Territory authorities issue these licences, leases or permits under their relevant mining Acts. They provide the holder with the legal entitlement to undertake specific activities in relation to exploration and prospecting, site preparation and the recovery of minerals.

Example 8: Mine site and beneficiation plant connected by private road

253. *Digitup Enterprise Ltd (Digitup), a mining company runs an integrated mining operation that consists of three pits, a camp and an administration base, which are all located on one mining lease. The operation also includes a beneficiation plant that, for reasons of geographic practicality, is located on a non-adjoining lease.*

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[120] *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs* (2000) 34 AAR 130 at page 135; (2001) 49 ATR 1005 at pages 1010 to 1011; [2001] AATA 894 at paragraph 17.

254. *An access road links the pits and the camp to the beneficiation plant. The road runs across a series of adjoining miscellaneous leases held by Digitup. These miscellaneous leases are issued under a State Mining Act, and were granted to the mining company for the purpose of activities directly connected to mining operations.*

255. *The pits, beneficiation plant, camp and the access road are all on land legally occupied by Digitup for the purpose of carrying on mining operations. They are therefore 'at the place' at which a mining operation under paragraph 11(1)(a) or 11(1)(b) is carried on.*

Example 9: Integrated mining operation – onshore base and offshore gas production site

256. *Gas to You Ltd (Gas to You), as an operator, is engaged in oil and gas exploration and production off the southern Australian coast. Gas to You runs an integrated mining operation that consists of an onshore equipment base and an offshore gas production well. The offshore gas production well is situated on an offshore mining permit issued under the Petroleum (Submerged Lands) Act 1967*.

257. *The onshore base and offshore gas production well are sites legally occupied for the purpose of carrying on mining operations. The two locations are separated by many kilometres of ocean.*

258. *Even though Gas to You runs an integrated mining operation, the onshore base and offshore gas production sites are two separate sites at which mining operations occur. The two locations and the space between them can not be considered to be 'at the place' as they are separated by ocean not legally occupied by Gas to You.*

A place adjacent to the place where the mining operation is carried on

259. In the phrase 'a place adjacent to the place where the mining operation is carried on',[121] the word 'adjacent' takes its ordinary meaning of, lying near, close or contiguous.[122]

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[121] The phrase 'a place adjacent to that place' refers to a place that is adjacent to a place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on. The phrase is found in paragraphs 14(b), 14(c), 15(b) and 18(e).

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

260. A place is adjacent if it is abutting, close or near, and is not distant or remote from the place at which the mining operation is carried on. A place is adjacent if it is in sufficient proximity so as to enable it to be reasonably identified with the mining operation. It is not possible to give precise measurements or distances between places to determine their adjacency. It is a question of fact and degree in each case as to whether a place is adjacent to the place where the relevant mining operation is carried on.

261. In *Federal Commissioner of Taxation v. BHP Minerals Ltd*,[123] the Court was called upon to decide whether residential accommodation was 'at a place adjacent to the site of prescribed mining operations'. In their majority judgment, Toohey and Lockhart JJ in relation to the concept of adjacency said:

> In our view the inquiry as to the definition of the expression 'at a place adjacent to, the site of prescribed mining operations …' calls for a broad approach and not one that is narrow or pedantic. …The expression is not one which is capable of a precise or uniform meaning. …
>
> An ordinary and natural meaning of the word 'adjacent' is 'near' or 'close'. …But to be provided at a place adjacent to the site of mining operations does not require contiguity or abutment. Nor does it necessarily require very close proximity. It is sufficient that it is near or close to the site.[124]

Mining transport activity

262. The definition of 'mining operations' in paragraph 11(1)(c) states:

> Subject to subsection (2), the expression mining operations includes:
>
> (c) a mining transport activity.

263. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining transport activity.

264. Mining transport activity is defined in section 12. Paragraph 12(a) refers to journeys involving the transportation of minerals or mineral bearing ore for beneficiation. Paragraph 12(b) refers to the transporting of natural gas for liquefaction.

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

[124] *Federal Commissioner of Taxation v. BHP Minerals Ltd* (1983) 51 ALR 166 at pages 173 to 174; (1983) 14 ATR 389 at pages 396 to 397; 83 ATC 4407 at page 4413.

(a) Journeys involving the transportation of minerals or mineral bearing ore for beneficiation

265. Paragraph 12(a) states:

> The expression ***mining transport activity*** means:
>
> (a) if minerals, or ores bearing minerals, are beneficiated at a place other than the mining site as an integral part of operations for their recovery:
>
> (i) the journey undertaken for the purpose of transporting the minerals or ores from the mining site to that place; and
>
> (ii) the return journey of a vehicle, a locomotive or other equipment from that place to the mining site or any part of that journey if it is undertaken for the purpose of repeating a journey referred to in subparagraph (i) or for the backloading of raw materials or consumables for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1).

266. If the beneficiation of minerals or ores bearing minerals occurs at a place other than the mining site, the off-public road transportation of minerals or ores bearing minerals from the mine site to the place of beneficiation is a 'mining operation' as a mining transport activity under subparagraph 12(a)(i).

267. Under subparagraph 12(a)(ii), a return journey, that is, to the mine site from the place of beneficiation, is also a mining transport activity. The return journey, or a part of that journey, must be for the purpose of repeating a journey to transport minerals or ore from the mine site to the place of beneficiation, or for the purpose of backloading raw materials or consumables for use in a paragraph 11(1)(a) or 11(1)(b) mining operation. There is no requirement that the transport must be done in one continuous operation. We consider that transport where the forward journeys are carried out by vehicles or equipment servicing several mines but where these vehicles or equipment do not always return to the same mine site qualify as mining operations under paragraph 12(a).[125]

[125] These are often referred to as 'closed loop' return journeys.

268. We further consider that, under paragraph 12(a), the journey must be between a mine site situated in Australia and a place of beneficiation that is also situated within Australia.[126] The beneficiation must also be an integral part of operations for the recovery of minerals.

269. Mining transport activity does not include transport using a vehicle that is covered by paragraph 11(2)(b).

270. Paragraph 11(2)(b) excludes the use of vehicles not exceeding 3.5 tonnes gross vehicle weight other than fork-lifts, front-end loaders, tractors, and any other vehicle specified in the regulations. The exclusion does not apply to such a vehicle that is extensively modified for use underground while it is so used.

271. If beneficiation is to take place overseas, the transportation of minerals or ores to a port for export will not be a 'mining operation' within paragraph 12(a).[127] However, the extraction of the mineral or ore by mining will be a mining operation under subparagraph (11)(1)(b)(i).

272. Mining transport activity does not include the transportation of imported minerals or ores from a port to a place in Australia for beneficiation.[128] Such transportation does not constitute 'mining operations' under paragraph 12(a), as there is no journey 'from the mining site' in Australia to a place of beneficiation within Australia. The beneficiation of imported ore itself, however, is an eligible activity under subparagraph (11)(1)(b)(ii).[129]

Example 10: Mining transport activity – closed loop journeys involving several mine sites

273. *Manymines Pty Ltd (Manymines) has a number of mine sites in close proximity on adjoining leases. It also operates a beneficiation plant located some 35 kilometres away on a separate lease.*

274. *Mineral bearing ore for beneficiation is transported via rail from mine site A to the beneficiation plant. Raw materials and consumables for use in mining at the mine sites are then loaded at the beneficiation plant, and are transported to mine site B.*

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[126] Paragraph 21(b) of the *Acts Interpretation Act 1901* states: 'references to localities, jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth'. See also *State Rail Authority (NSW) v. Collector of Customs* (1991) 33 FCR 211 at pages 213 to 216; 14 AAR 307 at pages 309 to 312 in relation to the former paragraph(d) of the definition of 'mining operations' in subsection 164(7) of the Customs Act.

[127] However, this transport activity may be eligible under either the marine or rail transport activity or under the on-road credits scheme, depending on the method of transport.

[128] However, this transport activity may be eligible under either the marine or rail transport activity or under the on-road credits scheme, depending on the method of transport.

[129] Beneficiation is discussed at paragraphs 170 to 206 of this Ruling.

275. *The raw materials are unloaded at mine site B. The empty train then travels to mine sites A and C to collect further mineral bearing ore for beneficiation.*

276. *Each of these journeys is considered to form part of a closed loop journey. Each journey is a mining transport activity. Manymines is entitled to off-road credits as it purchases diesel fuel for use in journeys that are mining operations under paragraph 12(a) and 12(b).*

Example 11: Not a mining transport activity - transport of minerals for overseas beneficiation

277. *Nickcob Mining Ltd (Nickcob) mines ore bearing nickel and cobalt on a mining lease in northern Western Australia. All beneficiation of the ore takes place in the Philippines. After extraction, the ores are transported via rail to a nearby port for export.*

278. *Nickcob is not entitled to off-road credits under the mining operations category for diesel fuel purchased for use in transporting the ore for export to, and subsequent beneficiation in, the Philippines. This transport activity is not a mining transport activity. It may, however, be an eligible activity under the 'use in rail transport' category of the off-road credits scheme.*

(b) The transporting of natural gas for liquefaction

279. Paragraph 12(b) states:

> The expression ***mining transport activity*** means:
>
> (b) if natural gas is liquefied at a place other than the mining site –
>
> (c) the transporting of the natural gas from the mining site to that place.

280. If natural gas is liquefied at a place other than a mining site, the transport of the gas from the mining site to the place of liquefaction is a mining operation under paragraph 12(b). A person (including a contractor or a subcontractor) is entitled to an off-road credit if they purchase diesel fuel for use in the transporting of the natural gas from the mining site to the place of liquefaction.[130]

281. However, the transport must not be by a vehicle that is excluded under paragraph 11(2)(b).[131]

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[130] See paragraphs 404 to 408 of this Ruling for a discussion on liquefaction of natural gas. Liquefaction of natural gas is a sundry mining activity – see paragraph 18(a).
[131] See paragraphs 443 to 449 of this Ruling for a discussion on this exclusion.

Mining rehabilitation activity

282. The definition of 'mining operations' in paragraph 11(1)(d) states:

> Subject to subsection (2), the expression ***mining operations*** includes:
>
> (d) a mining rehabilitation activity.

283. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining rehabilitation activity.

284. Mining rehabilitation activity is defined in section 13 to mean:

> …the rehabilitation of a place affected by a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the rehabilitation is carried out by:
>
> (a) the person who carried on the mining operation; or
>
> (b) a person contracted by that person to carry out the rehabilitation.

285. Rehabilitation means the act of restoration.[132] In this context, it means the act of restoring a place (usually land) affected by a paragraph 11(1)(a) or 11(1)(b) mining operation to a reasonable approximation of the condition it was in prior to that mining operation taking place, and/or to an agreed or acceptable environmental standard.

286. Activities that extend beyond the restoration of a place to the condition it was in prior to the relevant mining operation taking place and/or to an agreed environmental standard are not mining rehabilitation activities. For example, preparatory work for building construction, the establishment of sports fields, or for converting a disused mine site to a garbage tip are not mining rehabilitation activities for the purposes of the off-road credits scheme.

287. Whilst rehabilitation activities will generally be undertaken when the relevant mining operations have been completed, this is not a condition of eligibility. Diesel fuel purchased for use in rehabilitation that takes place while a paragraph 11(1)(a) or 11(1)(b) mining operation is continuing is also eligible for an off-road credit.

288. Paragraphs 13(a) and 13(b) each apply a clear identity test. Only a person that carries on the relevant mining operation or a contractor who is contracted by that person to carry out the rehabilitation are entitled to off-road credits if they purchase diesel fuel for use in the rehabilitation activities that qualify.

289. Rehabilitation activities carried out at a place where a paragraph 11(1)(a) or 11(1)(b) mining operation is not, or was not, carried out are not mining rehabilitation activities for the purposes of the off-road credits scheme.

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

290. Mining rehabilitation activity does not include the rehabilitation of a place if the material extracted from or beneficiated at that place is excluded from the definition of minerals[133] or is excluded from being a mining operation by paragraph 11(2)(a). Paragraph 11(2)(a) excludes from the definition of mining operations quarrying or dredging operations to the extent that the purpose of the operations is to obtain materials for use in building, road making, landscaping, construction or similar purposes.

291. Where rehabilitation occurs at a site that has been used for a paragraph 11(1)(a) or 11(1)(b) mining operation and also for other industrial purposes, only activities undertaken to rehabilitate those parts of the site used for mining operations will qualify for an off-road credit. In such cases, an apportionment may be made in respect to the amount of diesel fuel purchased for a use that qualifies.

Example 12: Mining rehabilitation activity – rehabilitation of a mining and industrial site

292. *Major Demolition Ltd is contracted, by the former operators of a de-commissioned metal refining and extrusion plant, to demolish and remove all plant and to rehabilitate the entire site.*

293. *The site contains an area where mineral bearing ore was stockpiled prior to beneficiation and a processing plant where the ore was beneficiated. The site also contains a metal smelting plant and an extrusion plant where the refined metal was formed into various profiles.*

294. *Only those two areas of the site where the ore was stockpiled prior to beneficiation and where the beneficiation plant is located are places where 'mining operations' were carried out. Major Demolition Ltd is entitled to an off-road credit to the extent that fuel is purchased for use, or used to rehabilitate those two specific areas within the site.*

295. *Major Demolition Ltd must determine the amount of fuel used in rehabilitating those two areas. To the extent that Major Demolition Ltd purchases diesel fuel for use in the rehabilitation of the other places at the site no entitlement to an off-road credit arises in respect of this diesel fuel.*

Mining water activity

296. The definition of 'mining operations' in paragraph 11(1)(e) states:

> Subject to subsection (2), the expression ***mining operations*** includes:
>
> (e) a mining water activity.

[133] See paragraphs 92 to 112 of this Ruling for a discussion on the meaning of 'minerals'.

297. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining water activity.

298. Paragraphs 14(a) to 14(c) specify the activities that qualify as mining water activity. Each of the activities is discussed below under the broad categories of searching for ground water, pumping of water and the supply of water.

(a) Searching for ground water

299. Paragraph 14(a) provides:

> The expression ***mining water activity*** means:
>
> (a) searching for ground water solely for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1), or the construction or maintenance of facilities for the extraction of such water, solely for that use, if the searching, construction or maintenance:
>
> (i) occurs at the place where the mining operation is carried on; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the searching, construction or maintenance.

300. As explained at paragraph 210 of this Ruling, the expression solely in paragraph 14(a) takes on its ordinary meaning of 'only' or 'exclusively'. Therefore, the water, which is the subject of the search, must be exclusively for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.

301. Unlike paragraphs 14(b) and 14(c) (discussed below), the search for ground water or the construction or maintenance of facilities for the extraction of the ground water is limited to the place where the relevant mining operation is carried on.

302. Paragraph 14(a) is limited in its application to searching for *ground water*. This is different from paragraphs 14(b) and 14(c), which are not limited in their application to the pumping or supply of ground water but which refer to the pumping and the supply of *any water* solely for use in the relevant mining operation.

303. 'Ground water' is water that lies beneath the surface of the ground, usually in aquifers. Searching for ground water includes the repositioning or relocation of equipment used in searching for ground water provided it is performed in a systematic manner within the place where the relevant mining operation is carried on. It does not include the relocation of equipment between places where the relevant mining operations are carried on, as such relocation is not 'at the place'.

304. The construction or maintenance of facilities must be for the extraction of the ground water found, and not for any other purpose. For the relevant activity to qualify as a 'mining operation' under paragraph 14(a), it must be carried on either by the person who carries on the relevant mining operation or by a contractor contracted by that person.

305. Searching for ground water solely for use in a paragraph 11(1)(a) or 11(1)(b) mining operation is a mining water activity even if the search does not result in any ground water being found.

(b) Pumping of water

306. Paragraph 14(b) provides:

> The expression ***mining water activity*** means:
>
> (b) the pumping of water solely for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the pumping:
>
> (i) occurs at the place where the mining operation is carried on or at a place adjacent to that place; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the pumping.

307. To qualify as a 'mining operation' under paragraph 14(b), the water being pumped must be solely, that is, exclusively or only for use in paragraph 11(1)(a) or 11(1)(b) mining operations.[134] The pumping of water must occur at the place where that mining operation is carried on, or at a place that is adjacent to that place. The pumping must be carried out either by the person that carries on the relevant mining operations or by a contractor contracted by that person.

308. The activity that constitutes 'mining operations' under paragraph 14(b) is the actual pumping of water. The construction or maintenance of facilities for the pumping or the maintenance of infrastructure, including the laying of supply pipes, does not qualify as a mining operation under this paragraph. However, these activities may qualify as a mining operation under another category of eligible activities in subsection 11(1).

309. The pumping of water is not restricted to ground water and applies to the pumping of any water solely for use in the relevant mining operations.

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[134] See paragraphs 209 to 242 of this Ruling for a discussion on solely.

(c) Supply of water

310. Paragraph 14(c) provides:

> The expression ***mining water activity*** means:
>
> (c) the supply of water solely for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if:
>
> (i) the supply is to the place where the mining operation is carried on; and
>
> (ii) the water comes from that place or a place adjacent to that place; and
>
> (iii) the supply is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the supply.

311. For the supply of water to qualify as a 'mining operation' under paragraph 14(c), the water must be solely, that is, exclusively or only, for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.[135]

312. The supply is not limited to the supply of ground water. However, the water must come from either the place where the relevant mining operation is carried on or from a place that is adjacent to that place. The supply must be to the place where that mining operation is carried on.

313. The supply of water includes all off-public road modes of supplying water. These can include private road transportation (subject to the exclusion in paragraph 11(2)(b)), supply through a pipeline system, and water carried as part of the cargo on a vessel.

314. Where the water is carried as part of the cargo on a vessel, only the transport of the water constitutes a mining operation for the purposes of the off-road credits scheme. The transport of water solely for use in a paragraph 11(1)(a) or 11(1)(b) mining operation is not excluded from being a mining operation by paragraph 11(2)(c).

315. In those circumstances, an apportionment may be necessary to ensure that an off-road credit entitlement only arises in respect of diesel fuel that is purchased for use in the transporting of water.[136]

316. For example, if a supply vessel, transporting a mixture of cargo including water, undertakes a direct journey from its home port to an offshore rig, an apportionment is necessary to ensure that an entitlement to an off-road credit only arises in relation to the transport of water, and not in relation to the transport of other cargo. The latter transport is excluded from the definition of 'mining operations' by paragraph 11(2)(c).

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[135] See paragraphs 209 to 242 of this Ruling for a discussion on solely.
[136] *Re BHP Billiton Petroleum Pty Ltd v. Chief Executive Officer of Customs* [2003] FCAFC 61; (2003) 52 ATR 491.

317. A reasonable basis of apportionment must be used. For example, an apportionment could be made by reference to the weight of the water as a percentage of the total weight of the cargo. That percentage would then be applied to the diesel fuel purchased for use in that journey to calculate the amount of the grant payable. If a journey involves detours, a more complicated method of apportionment may need to be used.

318. Apportionment of the diesel fuel for the transport of water is provided for by the exclusion from the operation of paragraph 11(2)(c) of:

> …such transport *to the extent* that it constitutes the activity described in:
>
> (ii) paragraph (c) of the definition of mining water activity in section 14; (emphasis added).

319. An apportionment may not be necessary if, in relation to the rest of the cargo on the vessel, an off-road credit entitlement arises for a use that qualifies under the marine transport category of the off-road credits scheme. In these cases, the applicant for an energy grant should make a claim for the energy grant in respect of a use that qualifies as a mining operation under paragraph 14(c) and a use that qualifies as being in marine transport.

320. We do not consider the concept of supply to extend to all of the steps necessary for the supply of water to take place. A person is not entitled to off-road credits for diesel fuel purchased for use in the construction and maintenance of supply infrastructure, such as pipelines, as a qualifying use under paragraph 14(c). However, these activities may qualify as a mining operation under another category of activities in subsection 11(1).

Mining construction activity

321. The definition of 'mining operations' in paragraph 11(1)(f) states:

> Subject to subsection (2), the expression ***mining operations*** includes:
>
> (f) a mining construction activity.

322. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining construction activity.

323. Mining construction activity is defined in section 15. Activities that constitute mining construction activities can broadly be described as:

- the construction or maintenance of private access roads;
- the construction or maintenance of tailings dams and dams which store contaminants;
- the construction or maintenance of dams for the storage of uncontaminated water;
- the construction or maintenance of private airstrips, buildings, plant or equipment; and
- the construction or maintenance of power stations or power lines.

324. Each of these activities is discussed in the following paragraphs.

(a) The construction or maintenance of private access roads

325. Paragraph 15(a) provides:

> The expression ***mining construction activity*** means:
>
> (a) the construction or maintenance of private access roads for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the construction or maintenance:
>
> (i) occurs at the place where the mining operation is carried on; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

326. For the purposes of paragraph 15(a), it is necessary to make a distinction between roads that are private access roads and those that are not (that is, public roads). For a discussion on what is a public road see paragraphs 462 to 500 of this Ruling. Examples of private access roads for use in a mining operation include a private road which is necessary to allow access to a paragraph 11(1)(a) or 11(1)(b) mining operation from a public road and a private road which connects a mining site and a place at which beneficiation occurs.[137]

327. Factors that are indicative of a private access road:

- permission is required from the land owner, permit holder or licensee to use the road;
- the land owner, permit holder or licensee has the ability to deny access to the road;[138]
- the road is not constructed for use by the public, and is not continuously or regularly used by the public at large;
- there is no thoroughfare to places, for example local communities, other than the relevant mining operations;
- the road is constructed 'at the place where the mining operation is carried on';
- the road is constructed for private use in a paragraph 11(1)(a) or 11(1)(b) mining operation; and/or

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[137] See *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs* (2000) 34 AAR 130; (2001) 49 ATR 1005; [2001] AATA 894 at paragraph 12.

[138] For example, a sign restricting access to the road, or use of a gate to restrict access to the road.

- the road provides a private right of entry to a 11(1)(a) or 11(1)(b) mining operation.

328. No single factor is conclusive in identifying whether a road is a private access road or not. What is required is a weighing up of a combination of factors in the context of the facts of each case.

329. The construction or maintenance of a private access road includes the grading, levelling, watering or compacting of the soil. The extraction, processing or transportation of road base materials for use in the construction or the maintenance of roads is not a mining operation under paragraph 15(a) as these activities occur prior to construction or maintenance of a road.

330. The activities of constructing and maintaining private access roads are restricted to 'the place' where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on. The construction of a private access road on land that is the subject of a miscellaneous licence granted to the person, linking a mining site to a public road will qualify as a mining operation under paragraph 15(a) as being 'at the place'.[139]

331. The construction and maintenance of a private access road connecting or interconnecting parcels of land not legally occupied for the purposes of mining for minerals and the beneficiation of those minerals or for the purposes of private roads that are not private access roads will not qualify as a mining operation under paragraph 15(a).

Example 13: Private access road 'at the place'

332. *Goldflinger Pty Ltd (Goldflinger) engages in gold mining at a site northwest of Kalgoorlie. In order to facilitate access to the site, a private road is required to link it to a public road. The public road is 60 kilometres away.*

333. *The mine itself is located on a mining lease. The private road is to be constructed partly on this lease, as well as on a series of adjoining miscellaneous leases held by Goldflinger. These miscellaneous leases are issued under the State Mining Act, and were granted to Goldflinger for the purpose of activities directly connected to mining operations.*

334. *As the access road is to be constructed on land legally occupied by Goldflinger for the purposes of undertaking a mining operation, it is 'at the place'. The construction is a mining construction activity.*

335. *Goldflinger is entitled to an off-road credit for diesel fuel purchased for use in the construction and maintenance of the road.*

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[139] See the facts of the case in *Re Hampton Transport Services Pty Ltd and Chief Executive Officer of Customs* (2000) 34 AAR 130; (2001) 49 ATR 1005; [2001] AATA 894.

Example 14: Private access road not 'at the place'

336. *Further to example 13, Goldflinger wishes to facilitate access to the mine site by constructing a private road from the mine site to a regional airstrip 20 kilometres away.*

337. *The mine itself is located on a mining lease. The regional airstrip is on public land which adjoins the mining lease. The private road is to be partly constructed on the mining lease and partly on public land leading to the regional airstrip.*

338. *As the access road does not connect parcels of land legally occupied for the purposes of carrying on the relevant mining operations, it is not 'at the place'. The construction of the private access road is not a mining construction activity even though the road may be for use in a mining operation.*

339. *Goldflinger is not entitled to an off-road credit for diesel fuel purchased for use in the construction and maintenance of the road.*[140]

(b) The construction or maintenance of tailings dams or dams which store contaminants

340. Paragraph 15(b) provides:

> The expression ***mining construction activity*** means:
>
> (b) the construction or maintenance of:
>
> (i) tailings dams for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1); or
>
> (ii) dams, or other works, to store or contain water that has been used in, or obtained in the course of conducting, a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) and that contains contaminants that preclude its release into the environment;
>
> if the construction or maintenance:
>
> (iii) occurs at the place where the mining operation is carried on or at a place adjacent to that place; and
>
> (iv) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

[140] However, that portion of the construction and maintenance activity which occurs at the place where the mining operation is carried on may be eligible as a paragraph 11(1)(a) or 11(1)(b) mining operation.

341. Tailings are materials resulting from processes in the mining or beneficiation of ores or minerals. A tailings dam is therefore an area set aside for the storage of these materials.

342. We consider dams or other works used in the storage of contaminated water that has been used or obtained in the course of conducting a paragraph 11(1)(a) or 11(1)(b) mining operation to consist of ponds, mud lakes, dykes and other similar works.

343. The construction or maintenance of dams to hold contaminated water involves the grading, levelling or compacting of the soil. It also includes the construction of dams composed of concrete, steel and other materials.

344. Paragraph 15(b) does not include the extraction, processing or transportation of materials for use in the construction or the maintenance of these dams as the extraction, processing and transportation are activities that occur before the construction and maintenance activities that are within the paragraph.

345. The phrase 'construction or maintenance' includes repairing and servicing.

346. The construction and maintenance of tailings dams or other dams to store or contain contaminated water can be either at the place where the relevant mining operation is carried out or at a place adjacent to it.[141]

(c) The construction or maintenance of dams for the storage of uncontaminated water

347. Paragraph 15(c) provides:

> The expression mining construction activity means:
>
> (c) the construction or maintenance of dams for the storage of uncontaminated water for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the construction or maintenance:
>
> (i) occurs at the place where the mining operation is carried on; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

348. The construction or maintenance of dams to hold uncontaminated water involves the grading, levelling or compacting of the soil. It also includes the construction of dams composed of concrete, steel and other materials.

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[141] See paragraphs 259 to 261 of this Ruling for a discussion on 'a place adjacent to the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on'.

349. Paragraph 15(c) does not include the extraction, processing or transportation of materials for use in the construction or maintenance of these dams as the extraction, processing and transportation are activities that occur before the construction and maintenance activities that are within the paragraph.

350. The phrase 'construction or maintenance' includes repairing and servicing.

351. The construction and maintenance of dams to store or contain uncontaminated water must be at the place where the relevant paragraph 11(1)(a) or 11(1)(b) mining operation is carried on.[142]

(d) The construction or maintenance of private airstrips, buildings, plant or equipment

352. Paragraph 15(d) provides:

> The expression mining construction activity means:
>
> (d) the construction or maintenance of private airstrips, buildings, plant or equipment for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the construction or maintenance:
>
> (i) occurs at the place where the mining operation is carried on; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

353. For the purposes of the off-road credits scheme, the construction or maintenance of administration offices, mess halls, equipment sheds, workshops and storage facilities that are for use in a paragraph 11(1)(a) or 11(1)(b) mining operation is a qualifying use under paragraph 15(d).

354. The reference to buildings, plant or equipment is not limited to those that are associated with any airstrip that is constructed or maintained but applies to all buildings, plant and equipment for use in the relevant mining operation. However, the construction and maintenance of a mining town would not be a mining operation under this paragraph as the construction and maintenance of a mining town is not for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.

355. We consider that the phrase 'construction or maintenance' includes repairing and servicing.

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[142] See paragraphs 243 to 258 of this Ruling for a discussion of 'at the place'.

356. Construction and maintenance activities that fall within paragraph 15(d) include the construction and maintenance of pipelines used in the supply of water and the construction of a beneficiation plant (but not the preparation of the site to enable the construction work for the beneficiation plant to commence).

357. For the activity to be a mining operation under paragraph 15(d), it must occur at the place where the paragraph 11(1)(a) or 11(1)(b) mining operation is carried on. The construction or maintenance must be carried out by the person who carries on the mining operation or by a contractor contracted by that person.[143]

358. Paragraph 15(d) does not include the extraction, processing or transportation of materials for use in the construction or the maintenance of private airstrips, buildings, plant or equipment as the extraction, processing and transportation are activities that occur before the construction and maintenance activities that are within the paragraph.[144]

(e) The construction or maintenance of power stations or power lines

359. Paragraph 15(e) provides:

> The expression mining construction activity means:
>
> (e) the construction or maintenance of power stations or power lines solely for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the construction or maintenance:
>
> (i) occurs at the place where the mining operation is carried on; and
>
> (ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the construction or maintenance.

360. For the construction or maintenance of power stations or power lines to be a 'mining operation' under paragraph 15(e), they must be solely, that is exclusively or only for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.[145] The power station or power lines must not be constructed or maintained partly for use in the relevant mining operation and partly for some other purpose.

361. We consider that the phrase 'construction or maintenance' includes repairing and servicing.

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[143] See paragraphs 243 to 258 of this Ruling for a discussion of 'at the place'.
[144] *Re McDermott Industries and others and Chief Executive Officer of Customs* (7 July 1997) W96/238 AAT No. 12014; (1997) 47 ALD 134.
[145] See paragraphs 209 to 242 of this Ruling for a discussion on solely.

362. The construction of a power station or power lines by a general utility provider as part of a grid for the supply of electricity to the general public does not qualify as a mining construction activity under paragraph 15(e). The power station or power lines constructed are not solely for use in a paragraph 11(1)(a) or 11(1)(b) mining operation.

363. Paragraph 15(e) does not include the extraction, processing or transportation of materials for use in the construction or maintenance of a power station or power lines as the extraction, processing and transportation are activities that occur before the construction and maintenance activities that are within the paragraph.

Example 15: Power lines for the provision of electricity to a mining site

364. *Drawing on the facts in example 7 at paragraphs 238 to 242, only the construction or maintenance of the feeder line to the mine site by Minotrics Pty Ltd would be a qualifying mining construction activity and therefore a qualifying use within paragraph 15(e).*

Mining waste activity

365. The definition of 'mining operations' in paragraph 11(1)(g) states:

> Subject to subsection (2), the expression ***mining operations*** includes:
>
> (g) a mining waste activity.

366. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining waste activity.

367. Mining waste activity is defined in section 16 to mean:

> (a) the removal of waste products of a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) from the place where the mining operation is carried on; or
>
> (b) the disposal of waste products of a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) at the place where the mining operation is carried on.

368. A waste product is a material produced in a process and discarded as useless when that process is completed.[146] It can be described as something that is an excess material, or is unproductive and superfluous.

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[146] *Re Water Administration Ministerial Corporation and Chief Executive Officer of Customs* (13 August 1997) N96/1212 AAT No. 12111, in which the AAT considered that the term 'waste' could encompass these concepts. See also *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453; (2002) 50 ATR 1156; [2002] AATA 705.

369. A waste product can include any matter, whether liquid, solid, gaseous or radioactive, with or without matter in suspension or solution in it, which is discharged, emitted or deposited in such volume, constituency or manner as to cause an alteration of the environment. The concept of waste embraces all unwanted and economically unusable or rejected by-products at any given place and time, and any other matter which may be discharged, accidentally or otherwise, to the environment.

370. Waste is not restricted to naturally occurring materials such as tailings and gangue. Waste also includes:

- sewerage;
- garbage;
- used pipes or tubing from drilling operations; and
- domestic and industrial waste from a paragraph 11(1)(a) or 11(1)(b) mining operation.[147]

371. Useful material cannot be waste products, even if the proposed use is confined to analysis. Nor can material, which is to be repaired for further use, be waste products.[148]

372. The fact that something may, at some later time, be reused does not necessarily preclude it from being waste.

373. A person must be able to prove that the waste products have been produced as a result of the relevant mining operation. The waste products must be a product of a paragraph 11(1)(a) or 11(1)(b) mining operation and not of a mining operation under paragraphs 11(1)(c) to 11(1)(i) or of some other operation.

374. To qualify as a mining operation under paragraph 16(a), the removal of the waste products must be *from* the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on. Under paragraph 16(b), the disposal of the waste products must be *at* the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on.

375. Removal in the context of paragraph 16(a) means the taking away of, or the movement of, the waste product from the place where the relevant mining operation is carried on. The requirements of paragraph 16(a) will not be met if there is a movement of waste products from one part of the place to another part of the same place.

376. Paragraph 16(a) does not encompass the disposal of waste products at the place where the relevant mining operation is carried on. The meaning of the phrase 'at the place where the mining operation is carried on' is discussed at paragraphs 243 to 258 of this Ruling.

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[147] *Re Esso Australia Pty Ltd and Chief Executive Officer of Customs* V96/1393 V96/1394 AAT No. 12919; [1998] AATA 366 at paragraph 20.
[148] *Re BHP Billiton Petroleum Pty Ltd and Chief Executive Officer of Customs* (2002) 69 ALD 453; (2002) 50 ATR 1156; [2002] AATA 705.

377. We consider that the transport of a waste product for disposal within a place at which a mining operation is carried on may be an eligible activity under paragraph 11(1)(a) or 11(1)(b).

378. The transportation of waste products from the place where the relevant mining operation is carried on is not affected by the exclusion contained in paragraph 11(2)(c).

379. Under paragraph 16(b), the disposal of waste products of the relevant mining operation must occur at the place where the relevant mining operation is carried on. The waste product must be the product of the particular mining operation. In the context of the paragraph, 'disposal' means the elimination, destruction or, in any other manner, getting rid of a waste product. This can include disposal by burying or incineration.

Mining vehicle activity

380. The definition of 'mining operations' in paragraph 11(1)(h) states:

> Subject to subsection (2), the expression ***mining operations*** includes:
>
> (h) a mining vehicle activity.

381. A person is entitled to an off-road credit if they purchase diesel fuel for use in a mining vehicle activity.

382. Mining vehicle activity can broadly be described as:

(a) the service, maintenance or repair of vehicles, plant or equipment for use in a paragraph 11(1)(a) or 11(1)(b) mining operation (paragraph 17(a));

(b) the service, maintenance or repair of vehicles or equipment solely for use in a paragraph 12(a) mining transport activity (paragraph 17(b)); or

(c) the service, maintenance or repair of transport networks that are employed solely for use in a paragraph 12(a) mining transport activity (paragraph 17(c)).

383. Each of these activities is discussed in following paragraphs.

(a) The service, maintenance or repair of vehicles, plant or equipment for use in a paragraph 11(1)(a) or 11(1)(b) mining operation

384. ***Mining vehicle activity*** is defined in paragraph 17(a) to mean:

> (a) the service, maintenance or repair of vehicles, plant or equipment for use in a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) if the service, maintenance or repair:
>
> (i) occurs at the place where the mining operation is carried on; and

(ii) is carried out by the person who carries on the mining operation or by a person contracted by that person to carry out the service, maintenance or repair.

385. Subject to paragraph 11(2)(b), the service, maintenance or repair of vehicles used in exploration or prospecting, removal of overburden and other activities undertaken in the preparation of a site, mining for minerals, or the beneficiation of those minerals or of ores bearing minerals are eligible activities for the purposes of the off-road credits scheme.

386. Plant can be described as the machinery and tools needed to carry on the relevant mining operations. Plant can include the pipeline constructed between a well head and beneficiation plant. Service or maintenance can include sand blasting and/or repainting of the eligible vehicles, plant or equipment.

387. For the purposes of paragraph 17(a), the service, maintenance or repair must occur at the place where the mining operation is carried on.[149] The transportation of vehicles, plant or equipment away from the place for repair work to be carried out elsewhere is not an activity that is within the paragraph.

388. Paragraph 11(2)(b) precludes from the definition of mining operations, the use of vehicles, other than fork-lifts, front-end loaders, and tractors, not exceeding 3.5 tonnes gross vehicle weight (other than such vehicles that have been extensively modified for use underground while they are so used).

389. As the use of such vehicles is specifically excluded from the definition of mining operations, and as paragraph 17(a) only applies to the service, maintenance and repair of vehicles used in a paragraph 11(1)(a) or 11(1)(b) mining operation, paragraph 17(a) does not apply to the service, maintenance and repair of such vehicles.

(b) The service, maintenance or repair of vehicles or equipment used solely in a mining transport activity in paragraph 12(a)

390. ***Mining vehicle activity*** is defined in paragraph 17(b) to mean:

(b) the service, maintenance or repair of vehicles or equipment solely for use in a mining transport activity referred to in paragraph (a) of the definition of that expression in section 12 if the service, maintenance or repair is carried out by:

(i) the person who carries on the mining operation; or

(ii) a person contracted by that person to carry out the service, maintenance or repair.

[149] *Re Goodyear Australia Ltd and Others and Chief Executive Officer of Customs* AAT No. 13035 [1998] AATA 488 (1 July 1998) at paragraph 13.

391. Unlike paragraph 17(a), paragraph 17(b) refers to vehicles or equipment used in activities referred to in paragraph 12(a); that is, the transportation of minerals or ores for beneficiation at a place other than the mine site.[150] Paragraph 17(b) does not apply to plant that is used in the relevant mining operation.

392. The vehicle or equipment must be for use solely, that is, exclusively or only in activities outlined in paragraph 12(a) for their service, maintenance or repair to qualify as a mining operation under paragraph 17(b).[151] Paragraph 17(b) does not require that the service, maintenance or repair be carried out either at the mining site or the place where the beneficiation takes place. However, paragraph 11(2)(c) excludes the transportation of equipment, people and parts to or from the place where the mining operation under paragraph 11(1)(h) is carried on.

393. For the purposes of paragraph 17(b), service or maintenance of vehicles includes sand blasting and/or repainting of the relevant vehicles or equipment.

(c) the service, maintenance or repair of transport networks

394. ***Mining vehicle activity*** is defined in paragraph 17(c) to mean:

> (c) the service, maintenance or repair of transport networks (including conveyor belts, pipelines and railway lines) that are employed solely for use in a mining transport activity referred to in paragraph (a) of the definition of that expression in section 12 to the extent that the service, maintenance or repair:
>
> (i) is carried out on so much of the network as is located at the place where a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) is carried out; and
>
> (ii) is carried out by the person who carries on the mining transport activity referred to in paragraph (a) of the definition of that expression in section 12 or by a person contracted by that person to carry out the service, maintenance or repair.

395. We consider that a transport network consists of a group or system of interconnected transport infrastructures utilised for the movement of minerals, or ores bearing minerals, from the mining site to the place of beneficiation. A transport network is intended to encompass railway and road networks,[152] and is defined to include conveyor belts, pipelines and railway lines.[153]

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[150] For a discussion on paragraph 12(a) of the definition of mining operations, see paragraphs 265 to 278 of this Ruling.
[151] See paragraphs 209 to 242 of this Ruling for a discussion on solely.
[152] Supplementary Explanatory Memorandum to the Customs and Excise Legislation Amendment Bill 1995 Item 21. (The criteria for this particular eligible activity are unchanged in the provisions of the new scheme).
[153] Paragraph 17(c).

396. For the service, maintenance or repair of transport networks to qualify as a mining operation under paragraph 17(c), the following requirements must be met:

- the transport network must be employed solely, that is exclusively or only, for use in activities that constitute paragraph 12(a) mining transport activities;[154]
- the service, maintenance or repair must be carried out on so much of the transport network that is located at the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried out; and
- it must be carried out by the person who undertakes the journeys referred to in paragraph 12(a), or by a person contracted by that person.

397. Where the service, maintenance or repair is carried out on parts of the transport network that are located partly at the place where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on and partly outside that place, only the service, maintenance or repair carried out at the place qualifies as a mining operation under paragraph 17(c). An apportionment of diesel fuel will need to be made as the entitlement to an off-road credit only arises in relation to diesel fuel purchased for use in the activity that qualifies as a mining operation.

398. Under paragraph 17(c), only the service, maintenance or repair of transport networks qualifies as mining operations. The construction or installation of a transport network does not qualify as a mining operation under this paragraph, as these activities occur prior to any service, maintenance or repair.

399. Paragraph 11(2)(c) precludes from the definition of mining operations the transport of people, equipment or goods to or from the place at which a mining operation is carried on. No entitlement to an off-road credit for use in mining operations arises for diesel fuel purchased for use in the transport of people, equipment or goods required for service and maintenance to or from the place where the service, maintenance or repair of transport networks is carried out.

Sundry mining activity

400. The definition of 'mining operations' in paragraph 11(1)(i) states:

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

401. A person is entitled to an off-road credit if they purchase diesel fuel for use in a sundry mining activity.

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[154] See paragraphs 209 to 242 of this Ruling for a discussion on solely.

402. Section 18 sets out a number of activities that qualify as mining operations under the category of sundry mining activities. These can broadly be described as:

(a) the liquefaction of natural gas;

(b) the reactivation of carbon for use in the beneficiation of ore bearing gold;

(c) coal stockpile management;

(d) the generation of electricity solely for, or the provision of electricity solely to, a mining town; and

(e) the use of diesel fuel at residential premises for specified purposes.

403. Each of these activities is discussed below.

(a) The liquefaction of natural gas

404. Paragraph 18(a) provides:

> The expression ***sundry mining activity*** means:
>
> (a) the liquefying of natural gas.

405. The expression 'natural gas' in paragraphs 18(a) of the definition of sundry mining activity and paragraph 12(b)[155] of the definition of mining transport activity covers all naturally occurring gases. The chief component of natural gas is methane, which usually makes up between 80% to 95% of the gas, with the remaining components comprising varying amounts of ethane, propane, butane, and other naturally occurring compounds such as nitrogen, oxygen and carbon dioxide.

406. Liquefaction is not synonymous with 'beneficiation'. It is a separate process, involving the use of high pressure and/or refrigeration, carried out after the gas has been beneficiated. In essence, liquefied natural gas is produced by refrigerating natural gas to approximately minus 160 degrees Celsius.

407. The process of liquefaction occurs after beneficiation. In relation to natural gas, as operations for the recovery of minerals cease when the process of beneficiation ceases, we consider that other activities that are associated with, but are not liquefying of natural gas, are not activities that are 'mining operations' under either paragraph 11(1)(a) or 11(1)(b).

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[155] Paragraph 12(b) is about the transporting of natural gas from the mining site to the place where that natural gas is liquefied if it is liquefied at a place other than the mining site. See paragraphs 279 to 281 of this Ruling for a discussion on that mining transport activity.

408. For example, not all diesel fuel purchased for use in the construction of a liquefied natural gas processing plant that consists of some components for beneficiation and other components for liquefaction will be eligible for an off-road credit. An apportionment would need to be made for diesel fuel used in the construction of that part of the plant that comprises beneficiation components. The diesel fuel used in construction of the remaining components would be considered to be construction of infrastructure for processes that occur after 'recovery of minerals' has ceased.

(b) The reactivation of carbon for use in the beneficiation of ore bearing gold

409. Paragraph 18(b) provides:

> The expression ***sundry mining activity*** means:
>
> (b) the reactivation of carbon for use in the beneficiation of ores bearing gold if the reactivation occurs at the place where a recovery operation referred to in paragraph (b) of the definition of mining operations in subsection 11(1) is carried on.

410. Reactivation is a process to restore the adsorption capacity of Granular Activated Carbon (GAC) using a special furnace operating at over 800 degrees Celsius. Reactivated carbon is typically used to adsorb the gold directly from a cyanided pulp in a series of large adsorption tanks. This is known as the carbon-in-pulp process.

411. Reactivation of GAC can be carried out on-site. However, in most cases, it is more efficient to utilise a Reactivation Centre. Under paragraph 18(b), only the reactivation of carbon 'at the place' where the recovery operation referred to in paragraph 11(1)(b) is carried on is a qualifying use. As paragraph 18(b) specifically refers to the reactivation of carbon for use *in the beneficiation of ores bearing gold*, the reference to 'at the place' where the recovery operation is carried on is a reference to a place where beneficiation of ores that bear gold takes place.

(c) Coal stockpile management

412. Paragraph 18(c) provides:

> The expression ***sundry mining activity*** means:
>
> (c) coal stockpile management for the prevention of the spontaneous combustion of coal if the management is carried out:
>
> (i) by a person who carries on a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1); or
>
> (ii) by a person contracted by that person to carry out the management;
>
> at the place where the mining operation is carried on.

413. Coal stockpile management for the prevention of spontaneous combustion of coal usually involves the use of bulldozers to compact the coal on a stockpile.

414. Coal stockpile management also includes coal temperature monitoring, the cutting in and cutting out of coal to spread, cool and compact it, and other activities involved in the compacting of coal.[156] Each of these operations must be undertaken for the prevention of spontaneous combustion for the activity to qualify as a sundry mining activity as coal stockpile management.

415. To be entitled to an off-road credit for diesel fuel purchased for use in coal stockpile management, a person must be able to prove that the reason for the activity was to prevent the spontaneous combustion of coal 'at the place' where a paragraph 11(1)(a) or 11(1)(b) mining operations is carried on. There are no limits as to how many stockpiles may be managed for this purpose.

416. Stockpile management for any other purpose is not eligible as a mining operation under paragraph 18(c). However, other stockpile management activities may qualify as a mining operation under subparagraph 11(1)(b)(ii) as they may be a part of the beneficiation process of a particular mineral or ore bearing minerals.[157]

(d) The generation of electricity solely for, or the provision of electricity solely to, a mining town

417. Paragraph 18(d) provides:

> The expression ***sundry mining activity*** means:
>
> (d) the generation of electricity solely for, or the provision of electricity solely to, a mining town if:
>
> (i) the existence of the town is necessary to enable a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1) to be undertaken; and
>
> (ii) the generation or provision is carried out by the person who carries on the mining operation.

418. To qualify as a mining operation the generation and provision of the electricity must be solely, that is exclusively or only for or to a mining town. Paragraphs 209 to 242 of this Ruling set out the Commissioner's view on how the solely requirement is to be interpreted.

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[156] *Re BHP Australia Coal Ltd and Collector of Customs* Q91/446 AATA No. 9266; (1994) 32 ALD 773 paragraphs 10 to 47.
[157] This is discussed at paragraphs 170 to 206 of this Ruling.

419. ***Mining town*** is defined in section 19 to mean:

> …a town constructed by or on behalf of a person engaged in mining operations, in an area where immediately prior to its construction there was no town, principally to house employees of the person, but does not include a town administered by:
>
> (a) a council that is constituted under local government legislation of a State or Territory; or
>
> (b) an organisation taken to be a council under such legislation.

420. A mining town is, therefore, a purpose-built settlement, constructed by or on behalf of a person who is engaged in mining operations. For the town to be a mining town, it must be constructed mainly to house employees of the person that carries on the relevant mining operation and it must be constructed in an area where no town previously existed.

421. However, the term 'mining town' does not include a town that is administered by a local council or similar body, even if the town is constructed by the person engaged in mining operations for the purpose of enabling the relevant mining operations be carried on.[158]

422. Paragraph 18(d) does not require that the electricity be generated at the place where the relevant mining operation is carried on or that it be provided from that place or from a place that is adjacent to that place. However, the existence of the mining town must be necessary to enable a paragraph 11(1)(a) or 11(1)(b) mining operation to be undertaken. From a practical point of view, the mining town would be expected to be located reasonably close to the place where the relevant mining operation is being carried on.[159]

423. For the purposes of paragraph 18(d), the person that carries on the paragraph 11(1)(a) or 11(1)(b) mining operation must carry out the generation or provision of the electricity. The generation or provision of electricity by a contractor or a subcontractor does not qualify as a mining operation under paragraph 18(d).

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[158] *Energy Resources of Australia v. Chief Executive Officer of Customs* (1998) 81 FCR 139; (1998) 97 LGERA 405; (1998) 26 AAR 487.

[159] In the case of *Collector of Customs v. Cliffs Robe River Iron Associates* (1985) 7 FCR 271; (1985) 7 ALN N269a, the town of Pannawonica was located some five kilometres from the place where mining was being carried on, and this was not deemed excessive for a mining town.

(e) The use of diesel fuel at residential premises for specified purposes

424. Paragraph 18(e) provides:

> The expression ***sundry mining activity*** means:
>
> (e) the use of off-road diesel fuel at residential premises in:
>
> (i) providing food and drink for; or
>
> (ii) providing lighting, heating, air-conditioning, hot water or similar amenities for; or
>
> (iii) meeting other domestic requirements of;
>
> residents of the premises if:
>
> (iv) the use is by a person who carries on a mining operation referred to in paragraph (a) or (b) of the definition of that expression in subsection 11(1); and
>
> (v) the residential premises are situated at the place where the mining operation is carried on, or at a place adjacent to that place.

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

(a) premises used as a house;

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

but does not include:

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

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

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

(f) premises used as a boarding school.

426. To qualify as a mining operation under this category, the use of the diesel fuel at residential premises must meet a dual locational test.

427. The first part of this test is the determination of whether the use of the diesel fuel is 'at' residential premises.

428. When considering this issue, the Courts have taken the view that the diesel fuel must be purchased for use at a place that may be reasonably identified with the premises. The plant or generator in which the diesel fuel is used must be appurtenant to the premises and coherent with them, and it should be able to be said that they 'belong' to the premises.[160]

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[160] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406 at page 421; (1994) 48 FCR 177 at page 193.

429. In *Collector of Customs, Tasmania v. Flinders Island Community Association*,[161] the Association operated a generator, which supplied electricity to nearby houses located on a housing estate. In relation to the meaning of 'at' residential premises under the previous off-road scheme, the Court found that the word 'at' required:

> …a close connection between the use and the residential premises but not use within the residential premises. What is a sufficiently close connection must depend upon the circumstances of the particular case… In this regard it appears that the Parliament intended to give a rebate in respect of use of diesel fuel for what might be called home generation of electricity for domestic purposes… It is consistent with that policy, and the use of the word 'at', that the generation takes place in physical proximity to the supplied houses and that the resultant electricity be used only at premises falling within the definition of 'residential premises'.[162]

430. In *Collector of Customs v. Rottnest Island Authority*[163] the Authority was responsible for generating all electricity for use on the island. Electricity was generated for use in a number of residential premises, in a shopping complex, other shops, a garden golf complex, street lighting and other commercial venues.

431. The Court considered that:

> … the section requires that, because the existence of some appropriate heating or generating plant is clearly contemplated, the location of such a plant be in sufficient proximity to the premises as to enable it reasonably to be identified with the premises. It must be appurtenant to the premises and coherent with them. It must be able to be said of the plant using the fuel that it belongs to the premises even though it be not a part of them.[164]

432. Although the above decisions were in respect of a separate category of eligible activities (diesel fuel purchased for use 'at residential premises') for the purposes of the previous off-road scheme, we consider that the principles established in them are relevant in determining whether the use of diesel fuel is 'at residential premises' under paragraph 18(e) of the definition of 'sundry mining activity'.[165]

433. The second part of the locational test is to determine whether the premises themselves are 'at the place' at which a paragraph 11(1)(a) or (11)(1)(b) mining operation is carried on, or 'at a place adjacent to that place'.[166]

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[161] *Collector of Customs, Tasmania v. Flinders Island Community Association* (1985) 7 FCR 205; (1985) 60 ALR 717.
[162] *Collector of Customs, Tasmania v. Flinders Island Community Association* (1985) 7 FCR 205 at page 213; (1985) 60 ALR 717 at page 724.
[163] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406; (1994) 48 FCR 177.
[164] *Collector of Customs v. Rottnest Island Authority* (1994) 119 ALR 406 at page 422; (1994) 48 FCR 177 at page 193.
[165] See paragraph 17 of this Ruling for a discussion on why cases relating to the previous off-road scheme are relevant.
[166] See paragraphs 243 to 258 of this Ruling for a discussion of 'at the place' and paragraphs 259 to 261 for a discussion of 'a place adjacent to the place'.

434. To qualify for an off-road credit for use in a mining operation under paragraph 18(e), the diesel fuel that is used must meet the following criteria:

- the use of the fuel is 'at' the residential premises;
- it is purchased for use in the manner dictated by subparagraphs 18(e)(i), (ii) or (iii), that is, in providing for residents of the premises:
  - (ii) food and drink,
  - (iii) lighting, heating air conditioning, hot water or similar amenities; or
  - (iv) meeting their other domestic requirements
- the use of the fuel is by a person carrying on a paragraph 11(1)(a) or (11(1)(b) mining operation; and
- the residential premises at which the diesel fuel is used must be located 'at the place' or 'adjacent to that place' where a paragraph 11(1)(a) or 11(1)(b) mining operation is carried on.

435. For the purposes of paragraph 18(e), the person that carries on the paragraph 11(1)(a) or 11(1)(b) mining operation must use the diesel fuel 'at' the residential premises. The use of diesel fuel by a contractor or a subcontractor does not qualify as a mining operation under paragraph 18(e).

Activities excluded from 'mining operations'

436. A person is not entitled to an off-road credit if they purchase diesel fuel for use in an activity that is excluded from the definition of 'mining operations' by subsection 11(2).

437. As discussed at paragraphs 113 to 122 of this Ruling, certain activities are excluded from 'mining operations' by paragraphs 11(2)(a) to (c) of the definition. The exclusions relate to:

(a) certain quarrying or dredging operations;

(b) the use of vehicles not exceeding 3.5 tonnes gross vehicle mass, other than certain vehicles; or

(c) the transport of people, equipment or goods to or from a place, or a place adjacent to that place, where a mining operation as defined in paragraph 11(1) is or is to be carried on, with certain exceptions.

(a) Certain quarrying or dredging operations

438. Paragraph 11(2)(a) provides:

> The expression ***mining operations*** does not include:
>
> (a) quarrying or dredging operations to the extent that the purpose of the operations is to obtain materials for use in building, road making, landscaping, construction or similar purposes.

439. The object of quarrying operations is to generally seek and extract commonly occurring rock, stone, gravel and so on to meet physical requirements rather than a particular mineral composition. We consider quarrying to mean the removal of stone, slate or other materials, for use in building, road making, landscaping, construction or similar purposes, from an excavation or pit by cutting or blasting.

440. Dredging involves the use of a machine or equipment to remove sand, silt and mud, usually from the bottom of a waterway. The material obtained by dredging is then carried away by the dredging vessel, by another vessel or is pumped away through a pipe.

441. The exclusion of quarrying or dredging operations depends on the purpose for which such operations are undertaken. It is only when the purpose of the operation is to obtain materials for use in building, road making, landscaping, construction or other similar purpose, that it is excluded under paragraph 11(2)(a) from being a mining operation for the purposes of the off-road credits scheme.[167]

442. Quarrying or dredging operations undertaken for the exploration or prospecting for minerals[168] and mining for those minerals (other than to obtain materials for use in building, road making, construction or other similar purpose) are mining operations for the purposes of the off-road credits scheme.

(b) The use of vehicles not exceeding 3.5 tonnes gross vehicle mass

443. Paragraph 11(2)(b) provides:

> The expression ***mining operations*** does not include:
>
> (b) the use of a vehicle (other than a fork-lift, front-end loader, tractor or other similar vehicle that is specified in the regulations) not exceeding 3.5 tonnes gross vehicle mass, other than such a vehicle that is extensively modified for use underground while it is so used.

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[167] The note to subsection 11(2) provides that examples of quarrying or dredging operations include operations for obtaining materials for use as concrete aggregate, road base materials, railway ballast, fill materials, building stone or monumental stone.

[168] See Section 20 for the definition of 'minerals'. Also see discussion on 'What is a mineral?' at paragraphs 92 to 112.

444. There is no single factor that is conclusive in identifying a vehicle that has been 'extensively modified for use underground'.

445. As a guide, factors that may be indicative of a vehicle that is extensively modified for underground use include the following:

- the vehicle is locked into low range gearing, that is, it can only operate in 1st, 2nd or 3rd gear;
- significant alterations or modifications are made to the vehicle's bodywork;
- the vehicle is fitted with a speed limiting device;
- the vehicle is fitted with overhead protection;
- the vehicle is fitted with electronic system isolating switches;
- the vehicle is flame proof, has emission controls and is purpose built with electronic shutdown systems; and/or
- the vehicle has been specifically approved for underground use by a State or Territory mining authority.

446. Paragraph 11(2)(b) applies to vehicles that are under 3.5 tonnes gross vehicle mass and are not fork-lifts, front-end loaders or tractors or similar vehicles that are modified for use in an open cut mine. These vehicles are not modified for use underground.

447. If a vehicle is extensively modified for use underground and is used partially underground and partially above ground (including in an open cut mine), an apportionment of the use needs to be made to determine that portion that is not a mining operation because of the operation of paragraph 11(2)(b). It is only the use of the vehicle that is extensively modified for use underground *while it is used underground,* that qualifies as a mining operation. Any other use of the modified vehicle is not a mining operation.

448. Minor modifications, such as the removal or addition of certain lights, bumpers or doors, do not make a vehicle extensively modified for underground use, regardless of the fact that such modifications may make the vehicle unable to be registered for use on a public road.

449. The service, maintenance or repair of vehicles, the use of which is excluded by paragraph 11(2)(b) from being a mining operation, are also excluded from being a mining operation.[169]

[169] See discussion on service, maintenance and repair of vehicles at paragraphs 390 to 393 of this Ruling. Service, maintenance or repairs of vehicles under paragraph 17(a) only applies to vehicles used in a mining operation covered by paragraphs 11(1)(a) or 11(1)(b). The use of vehicles covered by paragraph 11(2)(b) is not a mining operation covered by paragraph 11(1)(a) or (b) and therefore such vehicles are not the type of vehicles to which paragraph 17(a) applies.

(c) The transport of people, equipment or goods to or from a place, or a place adjacent to that place, where a mining operation as defined in paragraph 11(1) is or is to be carried on

450. Paragraph 11(2)(c) provides:

> The expression ***mining operations*** does not include:
>
> (c) the transport, by any means, of people, equipment or goods to or from a place where a mining operation referred to in any of the paragraphs in subsection (1) is, or is to be, carried on, or to or from a place adjacent to that place, other than such transport to the extent that it constitutes the activity described in:
>
> (i) the definition of ***mining transport activity*** in section 12; or
>
> (ii) paragraph (c) of the definition of ***mining water activity*** in section 14; or
>
> (iii) paragraph (a) of the definition of ***mining waste activity*** in section 16.

451. Paragraph 11(2)(c) excludes, from the definition of mining operations, the transportation of people, equipment or goods to or from 'a place', being a place where the relevant mining operation is being carried on, or 'a place adjacent to that place'.[170]

452. The paragraph does not apply to transportation activities that are specifically covered by section 12, paragraph 14(c), or paragraph 16(a).

453. However, the paragraph does not exclude operating eligible vehicles, vessels or other transport infrastructure for the transport of people, equipment or goods 'within' a place where a mining operation as defined in subsection 11(1) is carried on.

454. Transport 'to the extent' that it constitutes an activity described in section 12 (mining transport activity), paragraph 14(c) (the supply of water solely for a paragraph 11(1)(a) or 11(1)(b) mining operation) or paragraph 16(a) (the removal of waste products of a paragraph 11(1)(a) or 11(1)(b) mining operation from the place where that mining operation is carried on) is not within the exclusion in paragraph 11(2)(c).

455. The use of the words 'to the extent' in paragraph 11(2)(c) means that apportionment can be made of the transport activities to determine the extent of the transport activity that is excluded under paragraph 11(2)(c) from being a mining operation.

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[170] See paragraphs 243 to 258 of this Ruling for a discussion of 'at the place' and paragraphs 259 to 261 for a discussion of 'a place adjacent to the place'.

456. The views expressed in paragraphs 451 to 454 are supported by the full Federal Court decision in *BHP Billiton Petroleum Pty Ltd v. Chief Executive Officer of Customs*.[171] In that case the issues were:

- whether BHP Billiton was entitled to diesel fuel rebate in respect of diesel fuel used by supply boats to assist in the towing of mobile offshore drilling units (MODU); and
- whether the AAT was entitled to apportion diesel fuel in relation to transport activities giving rise to rebate and those activities not giving rise to the rebate.

457. On the first issue, the Court agreed with the AAT in denying rebate in respect of diesel fuel used in the towing activity. On the second issue, the Court found that the use of the phrase 'to the extent that' in paragraph (z) of the definition of mining operations in subsection 164(7) of the Customs Act called for an apportionment between the transport that was eligible (transport of water and removal of waste) and transport that was not eligible.

Example 16: Activities excluded under paragraph 11(2)(c) – the towing of off-shore drilling platforms

458. *Big Towaways Enterprises Ltd (Big Towaways) is contracted by a mining company to transport a concrete gravity structure (CGS) from Hobart to Bass Strait. The CGS is to be used in the drilling for oil. For this to happen, Big Towaways needs to move their vessels from Townsville to Hobart.*

459. *The movement of the vessels from Townsville to Hobart is not a mining operation under subsection 11(1).*

460. *The towing of the CGS is a transport activity that is within paragraph 11(2)(c) and is excluded from being a mining operation for the purposes of the off-road credits scheme.*

461. *Big Towaways is not entitled to off-road credits for diesel fuel purchased for use in moving its vessels from Townsville to Hobart and for towing the CGS from Hobart to the Bass Strait as they are not qualifying uses.*

462. *However, the diesel fuel used in both the forward journey from Townsville to Hobart and in the subsequent towing activities may fall for consideration under the 'use in marine transport' category of the off-road credits scheme.*

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[171] *BHP Billiton Petroleum Pty Ltd v. Chief Executive Officer of Customs* [2003] FCAFC 61; (2003) 52 ATR 491.

The exclusion from the qualifying use of 'in mining operations' of diesel fuel purchased for use in propelling any vehicle on a public road

463. Subsection 53(2) excludes from the qualifying use 'mining operations', diesel fuel purchased for use in propelling any vehicle on a public road. For the purposes of the exclusion it is necessary to determine what a public road is.

Roads that are public roads

464. 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.[172]

465. However, in Australia the vast majority of public roads are constructed by government. In *Brodie and Anor v. Singleton Shire Council*,[173] 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…).[174]

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

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

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

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

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

National highways

467. 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) mining operations exclusion.

State highways and main roads

468. Each state and territory has a statutory authority[175] 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.

469. 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.[176]

470. 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) mining operations exclusion.

Local roads

471. 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.

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

473. 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.

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[175] 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.

[176] 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).

474. 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.[177] 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.[178] As noted by Murray CJ in *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide*:[179]

> …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.[180]

475. 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) mining operations exclusion.

Public roads under the common law

476. 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.

477. 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'.[181]

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[177] 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).'

[178] 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.

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

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

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

478. 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.

479. 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.

480. 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*,[182] 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.[183]

481. 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*.[184]

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

Roads that are not public roads

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

482. 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.

483. 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.

Roads over privately owned land

484. 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.[185] A person who initially enters land with lawful authority becomes a trespasser if the consent of the owner is revoked.[186]

485. 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.[187]

Example 17: A private road

486. *Frog Mining Pty Ltd (Frog Mining) mines nickel ore in a remote area of North West Australia. As part of Frog Mining's agreement with the State Government, Frog Mining is responsible for the construction and maintenance of roads to be used in its operations.*

487. *To facilitate access to Frog Mining's mining operations it is required to construct a road from a state highway to its mine site.*

488. *The road is constructed on land legally occupied for purposes of the mining lease.*

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[185] *Lincoln Hunt Australia Pty Ltd v. Willesee* (1986) 4 NSWLR 457 – NSWSC – 13/02/1986.

[186] *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.

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

489. *The road is shown on maps of the local area and as such the road may at times be used by persons not engaged in Frog Mining's operations. Frog Mining has the ability to deny members of the public access to the road.*

490. *The road linking the mine site to the state highway is not a public road for the purposes of the subsection 53(2) mining operations exclusion. The road is a private road*[188] *as Frog Mining constructed the road for it own use, the road is on land legally occupied for the purposes of mining operations and public use is irregular and may be denied.*

Example 18: A public road

491. *Further to the example above, Frog Mining is also required under its agreement to contribute to the construction and maintenance costs of a new road linking a state highway to a remote town.*

492. *The road is to be constructed, maintained and managed by the state authority responsible for road transport infrastructure. Frog Mining can not deny access to this road by members of the public.*

493. *The road is also to be constructed on land covered by Frog Mining's mining lease.*

494. *The road is used by persons engaged in Frog Mining's operations.*

495. *Even though Frog Mining has contributed to the cost of construction and maintenance of the road, the road linking the state highway to the town site is a public road as the road was constructed for public use and not for the purposes of Frog Mining's mining operations.*

Example 19: A private road

496. *Toad Mining Pty Ltd (Toad Mining) mines nickel in a remote region of Australia. Frog Mining Pty Ltd (Frog Mining) mines nickel in an adjacent lease to Toad Mining*

497. *Toad Mining and Frog Mining are jointly responsible for the construction and on going maintenance of a road from a state highway to a point where the access road splits in two (section A), with a spur to each mining operation (section B and C). Toad Mining and Frog Mining are each responsible for the construction and on going maintenance of their respective spur roads.*

498. *Sections B and C of the road are constructed on land legally occupied for the purposes of the mining operations of Frog Mining and Toad Mining. Section A is constructed on a series of adjoining miscellaneous leases held by either mining company. Section A of the road is not dedicated for public use.*

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[188] The road is also a 'private access road' for the purposes of paragraph 15(a). Also, see discussion on the exclusion of certain activities from 'mining operations' at paragraphs 450 to 462 of this Ruling.

499. *Persons engaged in either company's mining operations use the road.*

500. *The road is shown on maps of the local area and as such the road may at times be used by persons not engaged in either company's mining operations.*

501. *The road linking the mine sites to the state highway is not a public road for the purposes of the subsection 53(2) mining operations exclusion. The road is a private road*[189]*as it is constructed for the use in mining operations; public use is irregular and may be denied.*

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[189] The road is also a 'private access road' for the purposes of paragraph 15(a). Also, see discussion on the exclusion of certain activities from 'mining operations' at paragraphs 450 to 462 of this Ruling.

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Commissioner of Taxation
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Not previously issued as a draft

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Previous Ruling:

PGBR 2003/3

Subject references:

- apportionment of fuel
- beneficiation
- claims
- diesel fuel
- eligible use
- energy grant
- Energy Grants (Credits) Scheme
- exclusion of certain substances
- exploration
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- product grants and benefits
- prospecting
- public road
- quarrying or dredging operations
- removal of overburden
- solely
- sundry mining activity
- transport
- use in a mining operation

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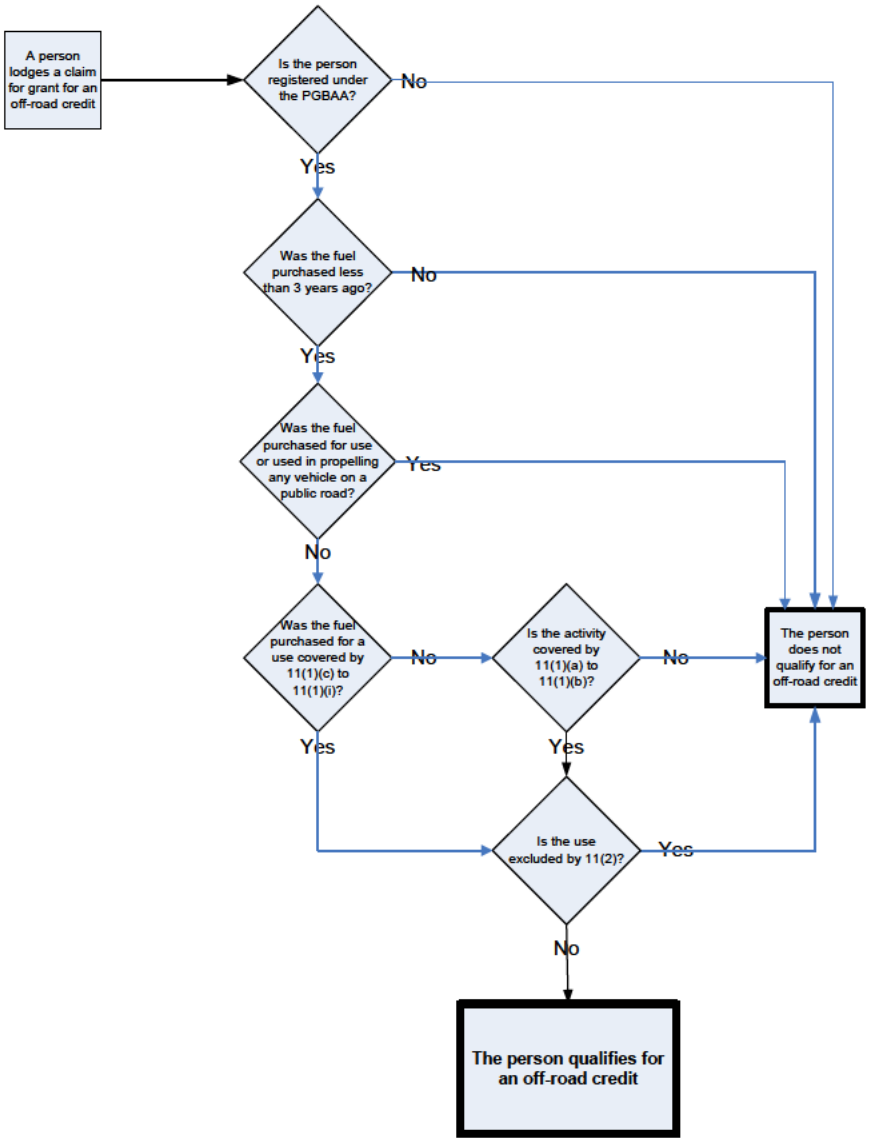
Appendix 1

Basic decision chart for qualification for an off-road credit for claims made under the category of 'mining operations' - paragraphs 118 to 121 of this Ruling