FTR 2006/3 - Fuel tax: fuel tax credits for taxable fuel acquired or manufactured in, or imported into Australia for use in carrying on an enterprise involving 'forestry' as defined in section 35 of the Energy Grants (Credit) Scheme Act 2003

This document has changed over time. This is a consolidated version of the ruling which was published on *2 November 2011*

Fuel Tax Ruling

Fuel tax: fuel tax credits for taxable fuel acquired or manufactured in, or imported into Australia for use in carrying on an enterprise involving 'forestry' as defined in section 35 of the *Energy Grants (Credit) Scheme Act 2003*

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

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

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

[**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 an entity's[1] entitlement to a fuel tax credit under the *Fuel Tax Act 2006* (FT Act) for taxable fuel it acquires or manufactures in, or imports into, Australia to the extent that it does so for use in carrying on an enterprise, which involves activities that are within the meaning of 'forestry' in section 35 of the *Energy Grants (Credits) Scheme Act 2003* (Energy Grants Act).

2. The Ruling also explains:

- the fuel tax credit system[2] under the FT Act, and the relevant transitional provisions; and

[1] Section 110-5 of the FT Act states that entity has the meaning given by section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

[2] In this Ruling the Commissioner refers to the scheme established under the FT Act as the fuel tax credit system.

- the meaning of 'forestry' and related terms in section 35 of the Energy Grants Act. In particular, the Ruling discusses:
  - forestry as an aspect of primary production;
  - the meaning of each of the activities in the definition of 'forestry' in section 35 of the Energy Grants Act; and
  - the effect of the exclusion in subsection 53(2) of the Energy Grants Act of taxable fuel acquired for use in propelling a road vehicle on a public road, including:
    - the definition of a 'road vehicle'; and
    - the definition of a 'public road'.

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

4. This Ruling does not deal with your entitlement to a fuel tax credit if you acquire, manufacture in, or import into, Australia taxable fuel for use in generating electricity for domestic use. Nor does the Ruling deal with entitlement to a fuel tax credit if you acquire, manufacture in, or import into, Australia taxable fuel for use in a vehicle with a gross vehicle mass of more than 4.5 tonnes travelling on a public road.

Definitions

5. In this Ruling, unless otherwise stated:

- a reference to:
  - fuel or diesel fuel is a reference to off-road diesel fuel as defined in section 4;
  - taxable fuel is a reference to taxable fuel as defined in section 110-5 of the FT Act;
  - alternative fuel is a reference to on-road alternative fuel as defined in section 4;
  - the diesel fuel rebate scheme is a reference to the diesel fuel rebate scheme as provided for in section 164 of the *Customs Act 1901* and section 78A of the *Excise Act 1901*;
  - an eligible activity or activities is a reference to a use that qualifies for the purposes of the Energy Grants Act;

- the subsection 53(2) primary production exclusion is a reference to the exclusion, in subsection 53(2), from use in primary production of diesel fuel purchased for the purposes of propelling a road vehicle on a public road;
- 'GST' is a reference to the goods and services tax;
- GST Act is a reference to the *A New Tax System (Goods and Services Tax) Act 1999*;
- 'you' in relation to provisions of the FT Act and the *Fuel Tax (Consequential and Transitional Provisions) Act 2006* applies to entities generally, unless its application is expressly limited;[3]
- The Transitional Act is a reference to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*;
- the transitional provisions is a reference to the relevant provisions in Schedule 3 to the Transitional Act; and
- 'acquire taxable fuel' or 'taxable fuel acquired' is a reference to 'taxable fuel that you acquire or manufacture in, or import into, Australia';

- it is assumed:
  - that if you are entitled to a fuel tax credit you meet the requirements that entitle you to the credit and are not disentitled by the disentitlement rules[4] in the FT Act;
  - during the period 1 July 2006 to 30 June 2009, if you claimed more than $3 million each financial year in fuel tax credits you met the requirements of the Greenhouse Challenge Plus Programme or another programme determined, by legislative instrument, by the Environment Minister for the purposes of section 45-5 (as at 30 June 2009) of the FT Act[4A]; and

[3] Refer to the meaning of 'you' in section 110-5 of the FT Act.
[4] The disentitlement rules are set out in Subdivision 41-B of the FT Act.
[4A] For a full discussion on the Greenhouse Challenge Plus Programme and the entitlement to fuel tax credits, see paragraphs 14 to 14B of this Ruling.

- that if an entity is carrying on an enterprise of forestry it is carrying on an enterprise[5] in the form of a business which involve the activities that are within the meaning of forestry.

6. In this Ruling, a reference to you being entitled to a fuel tax credit if you acquire taxable fuel for use in an activity that falls within the meaning of 'forestry' in section 35 of the Energy Grants Act, assumes that the requirements of either item 10 or 11 of Schedule 3 to the Transitional Act (where relevant) are satisfied.

Class of entities

7. This Ruling applies to the class of entities who acquire or manufacture in, or import into, Australia, taxable fuel to the extent that they do so for use in carrying on an enterprise which involves activities that are within the meaning of 'forestry' in section 35 of the Energy Grants Act.

How to read this Ruling

8. The Ruling section sets out the Commissioner's view on entitlement to a fuel tax credit for taxable fuel acquired or manufactured in, or imported into, Australia for use in carrying on an enterprise that involves activities within the meaning of 'forestry'.

9. For a more detailed analysis and explanation of the issues covered in the Rulings section, you should refer to the Explanation section in Appendix 1 of this Ruling.

10. This is followed by the Background section in Appendix 2 of this Ruling which provides an overview of the fuel tax credit system. Appendix 3 of this Ruling sets out a comparison table of the energy grants scheme and fuel tax credit system.

Ruling

General entitlement rules for a fuel tax credit

11. You are entitled to a fuel tax credit for taxable fuel that you acquire or manufacture in, or import into, Australia[6] to the extent that you do so for use in carrying on your enterprise.[7]

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[5] An enterprise includes an activity, or a series of activities, done in the form of a 'business'. See Fuel Tax Determination FTD 2006/3 Fuel tax: what is an 'enterprise' for the purposes of the *Fuel Tax Act 2006*?'

[6] For the purposes of the FT Act, Australia has the meaning given by section 195-1 of the GST Act.

[7] Subsection 41-5(1) of the FT Act, subject to other provisions affecting your entitlement to the credit (see Subdivisions 41-B and 45-A of the FT Act).

12. However, you are only entitled to the fuel tax credit if, at the time you acquire the taxable fuel, you are registered for GST, or required to be registered for GST.[8] This is regardless of your turnover.[9]

13. The fuel tax credit to which you are entitled is taken into account in calculating your net fuel amount. The net fuel amount must be calculated for each tax period. If your net fuel amount is a positive figure, you must pay this amount to the Commissioner. If the net fuel amount is a negative figure, the Commissioner must pay this amount to you.

14. During the period 1 July 2006 to 30 June 2009 your net fuel amounts for tax periods ending in a financial year were not to take into account more than $3 million of fuel tax credits unless you were a member of the Greenhouse Challenge Plus Programme (GCPP) or another programme determined by the Minister for the Environment, Heritage and the Arts.[10] If you became a member of the GCPP within four years of the end of the financial year that you were unable to take such fuel tax credits into account, you could claim the entitlements as a decreasing fuel tax adjustment in the tax period you became a member of the GCPP.[10A]

14A. Division 45 of the FT Act has been repealed from 1 July 2009. Consequently, you are no longer required to be a member of the GCPP in order to take into account more than $3 million in fuel tax credits in your net fuel amount for tax periods ending in a financial year.

14B. In addition, if you were not a member of the GCPP on 30 June 2009 then you are deemed to have been a member of the GCPP on that date.[10B] This means that you can take into account fuel tax credits in excess of $3 million in your net fuel amount for any financial year between 1 July 2006 and 30 June 2009.[10C] These credits are claimed as a decreasing fuel tax adjustment. The decreasing fuel tax adjustment is attributable to the tax period ending 30 June 2009. You will have four years from the end of that tax period to claim the entitlement.[10D]

15. Taxable fuel means fuel on which customs or excise duty is payable.[11]

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[8] Subsection 41-5(2) of the FT Act. Division 23 of the GST Act provides who must be registered and who may be registered for GST.

[9] Under the GST Act, entities with a low annual turnover (less than $75,000 for a business entity and less than $150,000 for a non-profit body) may choose whether or not to register for GST.

[10] Section 45-5 (repealed as of 1 July 2009).

[10A] Subsection 45-5(2) of the FT Act (as at 30 June 2009).

[10B] Subitems 16(4) and 16(5) of Part 3 of Schedule 7 to the *Tax Laws (2009 Measures No. 2) Act 2009.*

[10C] Subsection 65-5(5) of the FT Act (as at 30 June 2009).

[10D] Section 105-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

[11] Section 110-5 of the FT Act.

16. You must be 'carrying on an enterprise' within the meaning of section 9-20 of the GST Act to be entitled to a fuel tax credit. The expression 'carrying on an enterprise' includes doing anything in the course of the commencement or termination of the enterprise.[12]

17. The words 'to the extent that' in subsection 41-5(1) of the FT Act allow for apportionment between a use that entitles you to a fuel tax credit and one that does not. You can use any fair and reasonable basis for working out the amount of taxable fuel in respect of which you are entitled to a fuel tax credit.[13]

18. The Commissioner's view is that the 'fair and reasonable' principle also applies in determining the extent of your entitlement to a fuel tax credit if the fuel is acquired for a number of uses, some of which qualify for a fuel tax credit and some of which do not.

19. The apportionment method you choose needs to:

- be fair and reasonable;
- reflect the planned use of the taxable fuel if you are claiming a fuel tax credit on the basis of intended uses some of which qualify for the credit; and
- be appropriately documented in your individual circumstances.[14]

Fuel tax credits arising between 1 July 2006 and 30 June 2008

20. Under the transitional provisions, if you acquire taxable fuel (namely diesel fuel) between 1 July 2006 and 30 June 2008 for use in carrying on your enterprise, you are entitled to a fuel tax credit under section 41-5 of the FT Act if you would have been entitled to an off-road credit in respect of the fuel.[15]

21. In determining whether or not you would have been entitled to an off-road credit in respect of the fuel, it is assumed that:

- the references to 'purchase or import into Australia' in the Energy Grants Act were instead references to 'acquire or manufacture in, or import into, Australia'; and

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[12] The definition of carrying on an enterprise in section 110-5 of the FT Act has the meaning given by section 195-1 of the GST Act. For a detailed discussion on the meaning of 'enterprise' see Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number. See also FTD 2006/3.

[13] See Goods and Services Tax Ruling GSTR 2006/4 Goods and services tax: determining the extent of creditable purpose for claiming input tax credits and for making adjustments for changes in extent of creditable purpose for a full discussion on the meaning of the terms 'to the extent that' and 'fair and reasonable'.

[14] For details of the records you need to keep to substantiate your claim for a fuel tax credit see Fuel Tax Determination FTD 2006/2 Fuel tax: what records are required to be kept by taxpayers to substantiate a claim for a fuel tax credit?

[15] Item 10 of Schedule 3 to the Transitional Act.

- you had disregarded subsection 51(2), section 52 (registration requirements) and section 55A of the Energy Grants Act.[16]

22. Under subsection 65-5(1) of the FT Act, your fuel tax credit is attributable to the same tax period as your input tax credit for the creditable acquisition of the taxable fuel under the GST Act, or the same tax period that an input tax credit would have been attributable under the GST Act if the taxable fuel had been a creditable acquisition or a creditable importation.[17]

23. However, under item 12A to the Transitional Act, you may elect, before 31 December 2006, to receive early payments of fuel tax credits to which you are entitled for taxable fuel acquired between 1 July 2006 and 30 June 2008 (inclusive). If you receive an early payment of your fuel tax credit under these rules, you have an increasing fuel tax adjustment.

24. If you account on a cash basis and you provide part of the consideration for the taxable fuel in a tax period, your increasing fuel tax adjustment for an early payment of your fuel tax credit is attributable to that tax period but only to the extent that you provide the consideration in that tax period. In other cases, the increasing fuel tax adjustment is attributed to the earliest tax period to which your fuel tax credit can be attributed. Paragraphs 123 to 130 of this Ruling provide a detailed explanation of the early payments system.

Example 1 – early payment of fuel tax credits

25. *Foulis Enterprises Ltd (Foulis) carries on business as a logging contractor. On 1 September 2006, Foulis elects to receive early payments of fuel tax credits. Prior to 1 July 2006, Foulis was entitled to energy grants for diesel fuel purchased for use in its logging operations which are qualifying activities in forestry. Foulis is a quarterly BAS lodger who accounts for GST on a cash basis.*

26. *On 12 October 2006, Foulis purchases and pays for diesel fuel for use in its logging operations. Foulis claims an early payment of $1,000 in respect of the fuel it has acquired. The early payment is made on 26 October 2006.*

27. *In its BAS for the tax period ending 31 December 2006, Foulis reports a fuel tax credit of a $1,000. Foulis must also report an increasing fuel tax adjustment of $1,000 for this tax period.*

28. *Foulis has a net fuel amount of nil for this tax period as its increasing fuel tax adjustment is equal to the amount of fuel tax credit to which it is entitled.*

[16] Paragraph 10(5)(b) of Schedule 3 to the Transitional Act.
[17] Subsection 65-5(4) of the FT Act, provides for a later attribution of the fuel tax credit in certain circumstances.

Example 2 – attribution and the early payment of fuel tax credits

29. *Further to Example 1, Foulis acquires another quantity of diesel fuel for use in its logging operations on 11 December 2006. Foulis pays in full for the fuel on 3 January 2007. However, Foulis does not acquire any taxable fuel from 1 January 2007 to 31 March 2007 (inclusive).*

30. *Foulis claims an early payment of another $1,000. The early payment is made to it on 22 December 2006. Foulis receives the early payment in the tax period ending 31 December 2006. However, as it pays for the fuel on 3 January 2007, the increasing fuel tax adjustment for the amount of the early payment is attributed to the tax period ending 31 March 2007 and not to the tax period ending 31 December 2006.*

31. *For the tax period ending 31 March 2007, Foulis has a net fuel amount of nil as its increasing fuel tax adjustment is equal to the amount of its fuel tax credit.*

Fuel tax credits arising between 1 July 2008 and 30 June 2012

32. Under the transitional provisions, if you acquire taxable fuel between 1 July 2008 and 30 June 2012 for use in carrying on your enterprise, you are entitled to a fuel tax credit under section 41-5 of the FT Act if you would have been entitled to an off-road credit in respect of the taxable fuel.[18]

33. In determining whether you would have been entitled to an off-road credit in respect of the taxable fuel, it is assumed that:

- the references to 'purchase or import into Australia' in the Energy Grants Act were instead references to 'acquire or manufacture in, or import into, Australia';
- you had disregarded subsection 51(2), section 52 (registration requirements) and section 55A of the Energy Grants Act; and
- references to 'off-road diesel fuel' were instead references to the fuel.[19]

34. From 1 July 2008, eligibility for a fuel tax credit extends to petrol used in off-road qualifying activities that were previously eligible for an off-road credit under the Energy Grants Act.

35. From 1 July 2008, you are also entitled to a fuel tax credit for taxable fuel acquired even if you are not entitled to an off-road credit for a qualifying use under section 53 of the Energy Grants Act.

[18] Item 11 of Schedule 3 to the Transitional Act.
[19] Paragraph 11(5)(b) of Schedule 3 to the Transitional Act.

However, the amount of the credit is half of the fuel tax credit calculated under Division 43 of the FT Act (half credit).[20]

36. From 1 July 2012, irrespective of whether or not the activity was an eligible activity under the Energy Grants Act, you will be entitled to the full amount of the fuel tax credit for taxable fuel you acquire for use in carrying on your enterprise.

37. From 1 December 2011, coinciding with bringing alternative fuels[21] into the fuel tax system, if you acquire, manufacture in, or import into Australia alternative fuel[22] for use in carrying on your enterprise you are entitled to a fuel tax credit for that fuel.[23] This entitlement is to the full amount of the credit.

Entitlement to fuel tax credits for fuel acquired for use 'in forestry'

38. If you carry on an enterprise involving forestry and you acquire taxable fuel for use in an activity that is within the meaning of 'forestry' in paragraphs 35(a) to 35(f) you are entitled to a fuel tax credit under section 41-5 of the FT Act.

39. For diesel fuel that you acquire between 1 July 2006 and 30 June 2008 (inclusive), for a use in that activity, you are entitled to the full amount of the fuel tax credit.

40. For diesel fuel and petrol that you acquire between 1 July 2008 and 30 June 2012 (inclusive), for a use in that activity, you are entitled to the full amount of the fuel tax credit.

41. For all taxable fuels purchased between 1 July 2008 and 30 June 2012 (inclusive), for use in an activity in forestry for which an off-road credit under the energy grants scheme was not previously available, you are entitled to a half credit.[24]

42. If, between 1 December 2011 and 30 June 2012 (inclusive), you acquire, manufacture or import into, Australia alternative fuel for use in forestry, that is, in an activity that is within the meaning of 'forestry' in paragraphs 35(a) to 35(f), you are entitled to the full amount of the fuel tax credit under section 41-5 of the FT Act.

The form of the definition of 'forestry'

43. The use of the expressions 'means' and 'includes' in the definition of 'forestry' in section 35 means that the definition is an

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[20] The amount of your fuel tax credit is worked out under Division 43 of the FT Act. Under subitem 11(6) of Schedule 3 to the Transitional Act the amount of your credit is half the amount worked out under Division 43 of the FT Act.
[21] Alternative fuels such as LPG, CNG and LNG begin to incur effective fuel tax from 1 December 2011.
[22] Alternative fuels such as LPG, CNG and LNG.
[23] Subitem 11(7) of Schedule 3 to the Transitional Act applies until 30 June 2012.
[24] The amount of your fuel tax credit is worked out under Division 43 of the FT Act. Under subitem 11(6) of Schedule 3 to the Transitional Act the amount of your credit is half the amount worked out under Division 43 of the FT Act.

exhaustive one. Activities that are not within any one of paragraphs 35(a) to 35(f) are not activities in forestry.

44. To qualify as forestry, each of the activities mentioned in section 35 must be carried out for the purposes of a commercial undertaking[25] to obtain timber[26] as primary produce.

Status of contractors and subcontractors

45. A contractor is entitled to a fuel tax credit for taxable fuel they acquire for use in a forestry activity provided the activity is carried out for the purposes of a commercial undertaking to obtain timber as primary produce.

Example 3 – forestry activities by a contractor and subcontractor to a sawmiller

46. *Under a contract with Imillit Ltd (Imillit), Kimba Enterprises Ltd (Kimba), which carries on an enterprise as contractor in the timber industry, undertakes the felling of standing timber and transportation of the logs to Imillit's sawmill located adjacent to the forest. On occasions Kimba, with the consent of Imillit, subcontracts the transportation activity to Timbu Transporters. The transport activity is not on a public road.*

47. *Kimba's felling and transportation activities qualify as forestry activities even though it itself does not carry on a commercial undertaking to obtain timber as primary produce. However, its activities are undertaken for the purposes of a commercial undertaking by Imillit to obtain timber as primary produce.*

48. *Similarly, Timbu Transporters' transportation activity qualifies as a forestry activity as it is for the purposes of Imillit's commercial undertaking to obtain timber as a primary produce.*

Transporting of timber

49. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the transporting of timber, in a forest or plantation, of felled timber from one place in the forest or plantation to another place in that forest or plantation, usually to a mill located in that forest or plantation.

50. The transport of timber includes the return journey of the transport vehicle form the mill to the loading point so it can continue to transport timber. The return journey must form part of a continuous, unbroken process of transporting timber.

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[25] Usually these activities will be carried out by an entity carrying on an enterprise in the form of a business.
[26] The meaning of 'timber' is discussed in paragraphs 186 to 191 of this Ruling.

Example 4 – 'transporting of timber' – return journey

51. *Cheryl carries on an enterprise as a transport contractor who uses a prime mover and trailer combination to carry timber logs for Bigsaw Enterprises Ltd, a sawmiller. The mill is located inside a large forest. The logs are taken from a log dump (within the forest) to the mill along a forestry road that is not a public road. Once the timber is unloaded, Cheryl drives back to the log dump to pick up more logs. When necessary during the day, Cheryl drives to the sawmill's fuel depot, located half a kilometre from the mill, to refuel before returning to the log dump.*

52. *As the return journey from the mill to the log dump forms part of a continuous process of transporting timber, that journey is considered to be 'transporting ... of timber'. The fact that Cheryl drives to the fuel depot to fill the truck's tank does not disqualify the journey from being in transporting of timber for the purposes of paragraph 35(c).*

Example 5 – 'transporting of timber' – not a return journey

53. *Continuing Example 4, after the last load for the day, the trailer is separated and left in a secure area at the sawmill. Cheryl drives the prime mover home where it is garaged overnight. In the morning Cheryl drives to the sawmill and after hitching the trailer to the prime mover drives to the log dump to pick up the first load for the day.*

54. *The travel by Cheryl from the sawmill to her home and from home back to the sawmill does not constitute part of an unbroken process of transporting timber and is not an eligible activity of 'transporting of timber'.*

Transporting of timber to a port

55. To qualify as a forestry activity under paragraph 35(e), the transporting of timber must be to a sawmill or chipmill located in Australia. The transporting of timber from a forest or plantation in which the timber is felled to a port for export to an overseas sawmill or chipmill is not a qualifying activity under this paragraph.

Example 6 – transporting of timber not by road

56. *Umillit Ltd (Umillit) carries on an enterprise as a sawmiller. It fells timber in a forest in a remote region in a State. Felled logs are transported on a private road by a road vehicle a short distance from the coupe to the log dump next to a landing site on a river. The logs are then transported by barge along a river through the forest to Umillit's sawmill located on the coast close to the mouth of the river, which is outside the forest. The barge then returns to the site of the log dump in the forest to undertake further transporting of logs. The logs are milled at the sawmill into timber planks. The planks are then*

transported by road vehicles, with a GVM of more than 4.5 tonnes, on public roads to the nearby docks and loaded onto a ship for export.

57. *The transportation of the felled logs by the road vehicle from the coupe to the log dump and by barge to the sawmill is an activity in forestry and qualifies for the off-road credit. The return journeys of the road vehicle from the log dump to the coupe and of the barge from the sawmill to the log dump are also qualifying uses under paragraphs 35(c) and 35(e).*

58. *However, when the logs have been milled into planks, the transportation of the planks for export is not an activity in 'forestry' under paragraph 35(e).*

59. *Transporting the planks to the nearby docks on public roads for export is not an eligible activity in forestry. However, an, entitlement to a fuel tax credit exists under section 41-5 of the FT Act for taxable fuel acquired for use in this activity. The amount of the fuel tax credit is reduced by the amount of the road user charge under section 43-10 of the FT Act.*

The milling or processing of timber

60. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the milling or processing, in a forest or plantation, of timber felled in the forest or plantation. You are also entitled to a fuel tax credit if you acquire taxable fuel for use in the milling of timber at a sawmill or chipmill that is not located within the forest or plantation in which the timber was felled.

61. The milling of timber includes activities that are integral to, or necessarily incidental to, the process of milling timber. However, it does not include activities regarded as secondary manufacture.

Example 7 – activities that are integral or necessarily incidental to the milling or processing of timber

62. *Seesaw Mills Ltd (Seesaw) carries on an enterprise of sawmilling and operates a rotary mill in a remote forest. When logs from the forest are delivered to Seesaw's mill, they are moved by forklift to a stockpile and left to dry for a period. This drying process is necessary to make the logs suitable for debarking and sawing. Once dry the logs are moved by forklift to the area within the mill where the logs are debarked.*

63. *The drying process and the movement of the logs by forklift are activities necessarily incidental to the process of milling of the logs. They are activities in milling or processing of timber and are forestry activities under paragraph 35(c).*

Example 8 – 'forestry' activities and secondary processing activities

64. *Sawsee Mills Enterprises (Sawsee) carries on an enterprise of sawmilling and operates a sawmill adjacent to a plantation from which it receives its timber logs for processing into planks. The planks are suitable for a variety of uses, including carpentry, building and landscaping. The processing of the timber logs necessarily includes movement of the timber logs by forklift as they go through the various stages of debarking, drying and sawing.*

65. *The finished timber planks are placed on pallets and moved to the dispatch bay. They are then loaded by Sawsee onto a truck operated by a road transport contractor for removal to a separate factory where they are used as inputs into secondary processes.*

66. *The activities at the sawmill are forestry activities up to and including the moving of the timber planks to the dispatch bay.*

67. *However, the loading of the planks from the dispatch bay onto the truck and its subsequent transport are not forestry activities as primary processing of the timber is completed at the point when the dressed timber is moved into the dispatch bay.*

68. *From 1 July 2008 to 30 June 2012 (inclusive), Sawsee will be entitled to a half credit for all taxable fuel it uses in loading the planks in the dispatch bay, onto the truck for transport to the separate factory.*

69. *From 1 July 2012, Sawsee will be entitled to a full fuel tax credit for taxable fuel acquired for use in loading the planks onto the truck.*

Example 9 – milling or processing of timber

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

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

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

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

73. *From 1 July 2008 to 30 June 2012 (inclusive), Peg Post is entitled to half credit in respect of taxable fuel acquired for use in conveying the timber by the conveyor belt after the integrated milling process. Peg Post is also entitled to a half credit in respect of taxable fuel acquired for use in any activity in the plant where the processed timber is manufactured into clothes pegs.*

74. *From 1 July 2012, Peg Post is entitled to the full fuel tax credit for taxable fuel acquired for use in conveying the timber by the conveyor belt after the integrated milling process and taxable fuel acquired for use in any activity in the plant where the processed timber is manufactured into clothes pegs.*

Example 10 – milling or processing of timber

75. *Fancy Floors Ltd (Fancy Floors), which carries on an enterprise of timber manufacturing, makes various timber products used in flooring. It operates a sawmill outside the plantation where the timber used in the flooring is felled.*

76. *Timber from the plantation is transported via a private road to the sawmill and is fed into a debarking machine. After debarking the logs are cut to size, stacked and left to air dry. After air drying, the logs are placed in a diesel fuelled kiln to finish drying. After drying, the logs are removed from the kiln and milled into planks which are stockpiled. The planks are then processed into various flooring products.*

77. *The activities carried out by Fancy Floors up to and including the placing of the milled planks into stockpiles occur as part of the integrated milling process and are eligible forestry activities. Fancy Floors is entitled to a fuel tax credit in respect of taxable fuel acquired for use in each of those activities. This includes the taxable fuel acquired for use in powering the kiln and the equipment used to load the timber into the debarking machine, stack the timber for air drying, loading the air dried timber into the kiln, loading the dried timber into the sawmill and to stockpile the planks.*

78. *From 1 July 2008 to 30 June 2012 (inclusive), Fancy Floors is entitled to a half credit in respect of taxable fuel acquired for use in any activities that occur after the rough planks have been stockpiled, even if those activities involve further milling of the planks, or drying of the planks.*

79. *From 1 July 2012, Fancy Floors will be entitled to the full fuel tax credit for taxable fuel acquired for use in the activities that occur after the rough planks have been stockpiled, even if those activities involve further milling of the planks, or drying of the planks.*

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

80. You are not entitled to a fuel tax credit under the qualifying activity of forestry for taxable fuel you acquire for use in propelling a road vehicle[27] on a public road.

81. However, you are entitled to a fuel tax credit under section 41-5 of the FT Act for taxable fuel you acquire for use in a vehicle[28] with a GVM greater than 4.5 tonnes, travelling on a public road.[29]

What is a road vehicle?

82. A vehicle is a 'road vehicle' if it is of a kind commonly or regularly used on roads for the transport of goods.[30] The Commissioner considers that trucks, and truck and trailer combination vehicles, which are vehicles ordinarily used to transport timber logs, are road vehicles for the purposes of the subsection 53(2) primary production exclusion.

Meaning of 'public road'

Roads that are public roads

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

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

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

[28] The term 'vehicle' is not defined and takes its ordinary meaning, it includes a 'road vehicle' as defined in section 4.

[29] You are entitled to the fuel tax credit subject to meeting certain environmental criteria as required by section 41-25 of the FT Act. The amount of the fuel tax credit is reduced by the amount of the road user charge in accordance with section 43-10 of the FT Act.

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

Example 11 – a public road – a road managed by a statutory authority responsible for state highways and main roads

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

85. *The Act provides that, in New South Wales, the Roads and Traffic Authority (RTA) is the roads authority for all freeways, the Minister is the roads authority for all Crown roads, and the council of a local government area is the roads authority for all public roads within its area.*[31]

86. *That Act provides that the Minister may dedicate any unoccupied Crown land as a public road.*[32]

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

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

89. *Lumbering Giants is not entitled to a fuel tax credit under the qualifying activity of forestry for taxable fuel acquired for use in propelling its vehicles on this road as the fuel is acquired for use in propelling a road vehicle on a public road.*

90. *However, Lumbering Giants is entitled to a fuel tax credit*[33] *under section 41-5 of the FT Act for taxable fuel acquired for use in its vehicles for transporting the logs on the road as the fuel is acquired for use in a vehicle, with a GVM greater than 4.5 tonnes, travelling on a public road.*

Roads that are not public roads

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

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[31] Section 7 of the *Roads Act 1993* (NSW).
[32] Section 12 of the *Roads Act 1993* (NSW).
[33] In accordance with section 43-10 of the FT Act, the amount of the fuel tax credit is reduced by the road user charge.

- a road constructed or maintained under a statutory regime by a public authority that is not an authority responsible for the provision of road transport infrastructure, in circumstances where the statutory regime provides that public use of, or access to, the road is subordinate to the primary objects of the statutory regime;
- a forestry road; or
- a road that has not been dedicated as a public road over privately owned land.

Example 12 – not a public road

92. *A State Water Management Authority constructs and maintains a road leading to a dam (dam road) in a remote part of the State. The road is constructed to allow access by the authority to the dam for service and maintenance purposes. However, the authority permits members of the public to have limited access to the road for the purposes of accessing a popular hiking area near the dam.*

93. *Signs at the start of the road and along it indicate that the road is not a public road and is liable to closure without notice.*

94. *The water authority is not responsible for the provision of road and transport infrastructure. Any public use of the dam road is subordinate to the primary purpose of making and maintaining the road, which is to assist the water management authority in its water management role. The road is not a public road.*

Forestry roads

95. For the purposes of the subsection 53(2) primary production exclusion, a forestry road is a road within a forest or plantation which is constructed and maintained primarily and principally for the purposes of providing access to an area to facilitate forestry activities (for example, to facilitate trees to be planted or tended in the area, or timber felled in the area to be removed) and for related forestry management activities.[34]

Example 13 – not a public road – forestry roads

96. *Following on from Example 12, the transporting of timber logs from the coupe to the main road is on a forestry road constructed by the New South Wales Forestry Commission (state forestry road) and transport from the main road to the saw mill is on a road constructed and maintained by Toothsaw (Toothsaw forestry road).*

97. *Members of the public are allowed to use the state forestry road to access a popular camping and hiking area in the forest.*

[34] Forestry road includes a road of the kind referred to in paragraph 35(f).

However, signs at the entrance to the road make it clear that the road is a forestry road, which is used for the transporting of timber and may be closed to members of the public without notice.

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

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

100. *Taxable fuel acquired for use in propelling road vehicles on these forestry roads is not excluded under the subsection 53(2) primary production exclusion from being for a qualifying use.*

Conversion of forestry road to a public road

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

Date of effect

102. This Ruling applies from 1 July 2006.

103. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10 Income tax, fringe benefits tax and product grants and benefits: Public Rulings).

Note: the Addendum to this Ruling that issued on 15 August 2007 explains our view of the law as it applied as follows:

- paragraph 3 of the Addendum apply on and from 1 July 2006; and
- paragraphs 1, 2 and 4 of the Addendum apply on and from 1 July 2007.

Withdrawal

104. This Ruling is withdrawn and ceases to have effect on 1 July 2012. The Ruling continues to apply, in respect of the fuel tax

law ruled upon, to all taxpayers within the specified class who acquire, manufacture in, or import into Australia, taxable fuel before 1 July 2012. Thus, the Ruling continues to apply to those taxpayers, even following its withdrawal, who acquire taxable fuel prior to the withdrawal of the Ruling (see paragraph 46 of TR 2006/10).

Commissioner of Taxation
4 October 2006

Appendix 1 – Explanation

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

105. The fuel tax credit system commenced on 1 July 2006. Prior to the commencement of the fuel tax credit system, claims for an energy grant for off-road credits for diesel fuel purchased for the qualifying use of primary production (the definition of which in section 21 includes forestry) were made under the energy grants scheme.

General entitlement rules for a fuel tax credit

106. You are entitled to a fuel tax credit[35] for taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in carrying on your enterprise.[36]

107. However, you are only entitled to the fuel tax credit if, at the time you acquire the taxable fuel, you are registered for GST, or required to be registered for GST.[37] This is regardless of your turnover.

108. You must be 'carrying on an enterprise' within the meaning of section 9-20 of the GST Act to be able to claim a fuel tax credit. The expression 'carrying on an enterprise' includes doing anything in the course of the commencement or termination of the enterprise.

109. The expressions 'fuel tax', 'taxable fuel', 'acquire or manufacture in', and 'for use in carrying on your enterprise' are concepts that differ to terms used in the Energy Grants Act.

110. Fuel tax[38] means duty that is payable on fuel under the *Excise Act 1901* or the *Customs Act 1901* and the respective Tariff Acts,[39] other than any duty that is expressed as a percentage of the value of fuel for the purposes of section 9 of the *Customs Tariff Act 1995*.

111. Taxable fuel means fuel on which customs or excise duty is payable.[40]

112. You will not be considered to have used the taxable fuel if you sell the taxable fuel to another entity.[41]

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[35] The amount of your fuel tax credit is worked out under Division 43 of the FT Act.
[36] Subsection 41-5(1) of the FT Act. Subject to other provisions affecting your entitlement to the credit (see Subdivisions 41-B and 45-A of the FT Act).
[37] Subsection 41-5(2) of the FT Act.
[38] See section 110-5 of the FT Act and note the exceptions – that is, fuels specifically excluded from the definition of taxable fuel in section 110-5.
[39] *Excise Tariff Act 1921* and *Customs Tariff Act 1995*.
[40] Section 110-5 of the FT Act.
[41] The meaning of the term 'use' is explained in paragraphs 2.33 to 2.37 of the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and Fuel Tax (Consequential and Transitional Provisions) Bill 2006.

113. You only need to acquire taxable fuel with the intention of using it for an eligible purpose to become entitled to a fuel tax credit. It is not necessary for the taxable fuel to have been used by you at the time you make the claim. However, if you acquire the taxable fuel with the intention of using it for a particular purpose but subsequently use the taxable fuel for a different purpose and the amount of fuel tax credit worked out on the basis of the intended use is different from the amount you are actually entitled to worked out on the basis of actual use, you will have a fuel tax adjustment.[42]

114. Under the FT Act, you are required to calculate your net fuel amount[43] for each tax period.[44] Your net fuel amount is worked out using the formula[45] set out in subsection 60-5(1) of the FT Act. The net fuel amount is claimed on your Business Activity Statement (BAS). If the net fuel amount is positive, you must pay that amount to the Commissioner. If the net fuel amount is negative, the Commissioner must pay that amount to you. The attribution rules in Division 65 of the FT Act determine the tax period to which your fuel tax credit is attributed.[46]

115. During the period 1 July 2006 to 30 June 2009 your net fuel amounts for tax periods ending in a financial year were not to take into account more than $3 million of fuel tax credits unless you were a member of the Greenhouse Challenge Plus Programme (GCPP) or another programme determined by the Minister for the Environment, Heritage and the Arts.[47] If you became a member of the GCPP within four years of the end of the financial year that you were unable to take such fuel tax credits into account, you could claim the entitlements as a decreasing fuel tax adjustment in the tax period you became a member of the GCPP.[47A]

115A. Division 45 of the FT Act has been repealed from 1 July 2009. Consequently, you are no longer required to be a member of the GCPP in order to take into account more than $3 million in fuel tax credits in your net fuel amount for tax periods ending in a financial year.

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[42] Division 44 of the FT Act.
[43] See Division 60 of the FT Act. The net fuel amount reflects how much you or the Commissioner must pay.
[44] See sections 61-15 and 61-20 of the FT Act.
[45] Under the formula, Net fuel amount = Total fuel tax – Total fuel tax credits + Total increasing fuel tax adjustments - Total decreasing fuel tax adjustments; where the total fuel tax is zero.
[46] See subsections 65-5(1) to 65-5(3) of the FT Act for the primary attribution rules for fuel tax credits. In some circumstances, you can claim a fuel tax credit in the tax period in which the fuel is used – see subsection 65-5(4) of the FT Act.
[47] Section 45-5 (repealed as of 1 July 2009).
[47A] Subsection 45-5(2) of the FT Act (as at 30 June 2009).

115B. In addition, if you were not a member of the GCPP on 30 June 2009 then you are deemed to have been a member of the GCPP on that date.[47B] This means that you can take into account fuel tax credits in excess of $3 million in your net fuel amount for any financial year between 1 July 2006 and 30 June 2009.[47C] These credits are claimed as a decreasing fuel tax adjustment. The decreasing fuel tax adjustment is attributable to the tax period ending 30 June 2009. You will have four years from the end of that tax period to claim the entitlement.[47D]

General principles of apportionment

116. The words 'to the extent that'[48] in subsection 41-5(1) of the FT Act allow for apportionment between a use that qualifies and one that does not. You can use any reasonable basis for apportionment to work out your entitlement to a fuel tax credit if you acquire taxable fuel that you use for qualifying and non-qualifying uses.

117. An apportionment can be made on the basis of an intended use even if precise quantification cannot be made at the time that the taxable fuel is acquired.

118. In *Collector of Customs v. Pozzolanic Enterprises Pty Limited,*[49] 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.[50]

119. If you acquire taxable fuel partly for use in carrying on your enterprise of forestry, apportionment of the fuel tax credit referable to that acquisition is required. In practice, this will usually involve an initial decision about whether the acquisition of the fuel is 'solely' for a particular purpose (in which case apportionment will not be required).

120. The principles to be applied in identifying situations where apportionment is appropriate in an income tax context, and the method to be employed where apportionment is required, were considered by the High Court in *Ronpibon Tin NL v. FC of T.*[51] In that case, the High Court considered what part of management and

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[47B] Subitems 16(4) and 16(5) of Part 3 of Schedule 7 to the *Tax Laws (2009 Measures No. 2) Act 2009.*
[47C] Subsection 65-5(5) of the FT Act (as at 30 June 2009)
[47D] Section 105-55 of Schedule 1 to the TAA 1953.
[48] See Goods and Services Tax Ruling GSTR 2006/3 Goods and services tax: determining the extent of creditable purpose for providers of financial supplies, and GSTR 2006/4 for a full discussion on meaning of the terms 'to the extent' and 'fair and reasonable'.
[49] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280; (1993) 115 ALR 1.
[50] *Collector of Customs v. Pozzolanic Enterprises Pty Limited* (1993) 43 FCR 280 at 290; (1993) 115 ALR 1 at 12.
[51] *Ronpibon Tin NL v. FC of T* (1949) 78 CLR 47.

administrative expenses incurred by a taxpayer (whose principal business activity had been interrupted by World War II), were referable to gaining or producing assessable income. The High Court considered both the allocation of distinct expenditure to specific activities, and also apportionment, and said:

> In applying the foregoing test or standard separate and distinct items of expenditure should be dealt with specifically. To begin with there are the payments by Ronpibon Tin No Liability to the dependants of members of that company's Eastern staff. …from the point of view of the income-tax law they could not be regarded as business expenditure…
>
> In the next place the cost incurred by the same company in cables and other communications with reference to the buffer stock scheme cannot be deducted. … Sufficient details do not appear to say what other distinct and severable items are wholly incapable of reference to the gaining of assessable income.
>
> The charges for management and the directors' fees are entire sums which probably cannot be dissected. But the provision contained in s.51(1) [of the ITAA 1936], as has already been said, contemplates apportionment. The question what expenditure is incurred in gaining or producing assessable income is reduced to a question of fact when once the legal standard or criterion is ascertained and understood. This is particularly true when the problem is to apportion outgoings which have a double aspect, outgoings that are in part attributable to the gaining of assessable income and in part to some other end or activity. It is perhaps desirable to remark that there are at least two kinds of items of expenditure that require apportionment.
>
> One kind consists in undivided items of expenditure in respect of things or services of which distinct and severable parts are devoted to gaining or producing assessable income and distinct and severable parts to some other cause. In such cases it may be possible to divide the expenditure in accordance with the applications which have been made of the things or services. The other kind of apportionable items consists in those involving a single outlay or charge which serves both objects indifferently. Of this directors' fees may be an example. With the latter kind there must be some fair and reasonable assessment of the extent of the relation of the outlay to assessable income. It is an indiscriminate sum apportionable, but hardly capable of arithmetical or rateable division because it is common to both objects. [52]

121. The High Court therefore emphasised the necessity of considering the facts of individual cases. Where items of expenditure ('acquire, manufacture in or import into, Australia' in the context of the FT Act) are not referable to a particular object, then apportionment is required using a method which results in a fair and reasonable reflection of the relation of the expenditure to assessable income.

122. Following the principles set out by the High Court, the method you choose to apportion the taxable fuel that you acquire between a qualifying use and a non-qualifying use needs to:

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[52] *Ronpibon Tin NL v. FC of T* (1949) 78 CLR 47 pages 58-59.

- be fair and reasonable;
- reflect the planned use of the taxable fuel if you are claiming on the basis of intended use; and
- be appropriately documented in your individual circumstances.

Fuel tax credits arising between 1 July 2006 and 30 June 2008

123. Under the transitional provisions, if you acquire taxable fuel, (namely diesel fuel) between 1 July 2006 and 30 June 2008 (inclusive) for use in carrying on your enterprise, you are entitled to a fuel tax credit under section 41-5 of the FT Act if you would have been entitled to an off-road credit under the energy grants scheme in respect of the fuel.[53]

124. In determining whether or not you would have been entitled to an off-road credit in respect of the fuel, it is assumed that:

- the references to 'purchase or import into Australia' in the Energy Grants Act were instead references to 'acquire or manufacture in, or import into, Australia'; and
- you had disregarded subsection 51(2), section 52 (registration requirements) and section 55A.[54]

Early payments of fuel tax credits

125. Under the transitional provisions, you may elect to claim for an early payment of fuel tax credit for taxable fuel acquired between 1 July 2006 and 30 June 2008.[55]

126. The Commissioner must make an early payment[56] to you, if:

- you elect before 31 December 2006 (in the approved form) to receive early payments of the fuel tax credit;
- you were previously claiming an energy grant under the Energy Grants Act;
- you acquire taxable fuel between 1 July 2006 and 30 June 2008 (inclusive);
- you are entitled to a fuel tax credit under section 41-5 of the FT Act as affected by the Transitional Act;

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[53] Item 10 of Schedule 3 to the Transitional Act.
[54] Paragraph 10(5)(b) of Schedule 3 to the Transitional Act.
[55] Item 12A of Schedule 3 to the Transitional Act.
[56] Subparagraph 12A(1)(c)(i) of Schedule 3 of the Transitional Act. The entity or another member of the GST group for which the entity is the representative member or another participant in a GST joint venture for which the entity is the joint venture operator must have been entitled to an energy grant.

- the fuel tax credit or part of the fuel tax credit is attributable to:
  - if you account on a cash basis – the tax period in which the claim for the early payment is made or a later tax period;[57] or
  - if you do not account on a cash basis – the tax period in which the claim for early payment is made;[58] and
- you have not previously received an early payment of the fuel tax credit for the taxable fuel.[59]

127. The amount of the early payment is the amount of the fuel tax credit to which you are entitled.[60]

128. If you:

- receive an early payment;
- account on a cash basis; and
- in a tax period provide part of the consideration for the taxable fuel,

you have an increasing fuel tax adjustment for the amount of the early payment, but only to the extent that you provide the consideration in that tax period. The increasing fuel tax adjustment is attributable to that tax period.[61]

129. If you:

- receive an early payment; and
- account on a non-cash basis,

you have an increasing fuel tax adjustment for the amount of the early payment. The increasing fuel tax adjustment is attributable to the earliest tax period to which the credit can be attributed.[62]

130. If you elect to receive early payments you are not obliged to claim all fuel tax credits as an early payment. Fuel tax credits not claimed as any early payment can be claimed on your BAS in the relevant tax period.

Fuel tax credits arising between 1 July 2008 and 30 June 2012

131. Under the transitional provisions, if you acquire taxable fuel between 1 July 2008 and 30 June 2012 (inclusive) for use in carrying on your enterprise, you are entitled to a fuel tax credit under

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[57] Subparagraph 12A(1)(e)(i) of Schedule 3 to the Transitional Act.
[58] Subparagraph 12A(1)(e)(ii) of Schedule 3 to the Transitional Act.
[59] Paragraph 12A(1)(f) of Schedule 3 of the Transitional Act.
[60] Subitem 12A(2) of Schedule 3 to the Transitional Act.
[61] Paragraph 12A(3)(a) of Schedule 3 to the Transitional Act.
[62] Paragraph 12A(3)(b) of Schedule 3 to the Transitional Act.

section 41-5 of the FT Act if you would have been entitled to an off-road credit in respect of the fuel.[63]

132. From 1 July 2008, eligibility for a fuel tax credit also extends to petrol used in off-road activities that were previously eligible for an off-road credit under the Energy Grants Act.

133. In determining whether or not you would have been entitled to an off-road credit in respect of the fuel, it is assumed that:

- the references to 'purchase or import into Australia' in the Energy Grants Act were instead references to 'acquire or manufacture in, or import into, Australia' and references to 'off-road diesel fuel' were instead references to taxable fuel;
- you had disregarded subsection 51(2), section 52 (registration requirements) and section 55A of the Energy Grants Act; and
- the references to 'off-road diesel fuel' were instead references to the fuel.[64]

134. From 1 July 2008, under the transitional provisions, if you are not entitled to an off-road credit for a qualifying use under section 53, you are entitled to a fuel tax credit for taxable fuel (includes diesel and petrol) under section 41-5 of the FT Act. However, your entitlement is limited to a half credit.[65]

135. From 1 July 2012, irrespective of whether or not the activity was a qualifying use under the Energy Grants Act, you will be entitled to the full amount of the fuel tax credit for taxable fuel.

136. From 1 December 2011, coinciding with bringing alternative fuels[66] into the fuel tax system, if you acquire, manufacture in, or import into, Australia alternative fuel[67] for use in carrying on your enterprise you are entitled to a fuel tax credit.[68]

Entitlement to fuel tax credits for taxable fuel acquired between 1 July 2006 and 30 June 2012 for use in forestry

137. You are entitled to a fuel tax credit[69] for taxable fuel you acquire for use or used 'in primary production'. Forestry is included in the definition of 'primary production' in section 21. The expression 'forestry' is defined in section 35.

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[63] Item 11 of Schedule 3 to the Transitional Act.
[64] Paragraph 11(5)(b) of Schedule 3 to the Transitional Act.
[65] The amount of your fuel tax credit is worked out under Division 43 of the FT Act. Under subitem 11(6) of Schedule 3 to the Transitional Act the amount of your credit is half the amount worked out under Division 43 of the FT Act.
[66] Alternative fuels such as LPG, CNG and LNG begin to incur effective fuel tax from 1 December 2011.
[67] Alternative fuels such as LPG, CNG and LNG.
[68] Subitem 11(7) of Schedule 3 to the Transitional Act applies until 30 June 2012.
[69] Subject to items 10 and 11 of Schedule 3 to the Transitional Act.

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

139. In *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)*,[70] 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'…

140. The Commissioner considers that the following three criteria may be relevant in determining if an activity takes place 'in the course of' forestry.[71] These are:

- a **causal** link exists – in other words, a certain activity is *functionally integrated* with forestry, 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 forestry; and
- a **temporal** link exists – the activity takes place in a timely fashion, not prior to, or after the completion of, the forestry activity.

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

The form of the definition of 'forestry': means and includes

142. The definition of 'forestry' in section 35 consists of two parts:

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

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[70] *Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance)* (1998) 87 FCR 482 at 501; (1998) 158 ALR 241 at 259. See also *Re Wandoo Alliance Pty Ltd and Chief Executive Officer of Customs* [2001] AATA 801 paragraph 9; (2001) 34 AAR 98 at 114.

[71] 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) 34 AAR 98; [2001] AATA 801, amongst others, it was deemed pertinent to consider one or all of these factors when determining whether an activity or activities were undertaken 'in the course of' something.

143. The use of the form 'means ... and includes' in section 35 means that the definition is an exhaustive definition. Paragraphs 35(a) and 35(b) contain the central features of 'forestry', which are then expanded by the specific activities listed in paragraphs 35(c) to 35(f). If an activity is within one of paragraphs 35(a) to 35(f), you are entitled to an off-road credit if you acquire diesel fuel for use in that activity.

144. The form of the definition of 'forestry': means ... and includes, and the activities that fall within that definition are the same as that used in the definition of forestry in the diesel fuel rebate scheme.[72] Decisions of the Courts and the Administrative Appeals Tribunal (AAT) in relation to the diesel fuel rebate scheme are, in the Commissioner's view, relevant to the interpretation of section 35.

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

146. Activities that are not within any one of paragraphs 35(a) to 35(f) are not forestry activities for the purposes of the energy grants scheme.

147. As no entitlement to an off-road credit exists under the qualifying use of 'forestry' for those activities, from 1 July 2006 to 30 June 2008 (inclusive) no entitlement to a fuel tax credit arises for taxable fuel acquired for use in those activities.

148. From 1 July 2008 to 30 June 2012 (inclusive), an entitlement to a half credit[73] would arise and from 1 July 2012, an entitlement for the full fuel tax credit would arise for taxable fuel you acquire for use in those activities.

Status of contractors and subcontractors

149. To be entitled to an off-road credit for forestry, activity determines eligibility, rather than whether your principal business is forestry.[74]

150. Unless otherwise specified, if you undertake a forestry activity for the purposes of a commercial undertaking to obtain timber[75] as primary produce you are entitled to a fuel tax credit if you acquire taxable fuel for use in that activity. This includes forestry activities carried out by you as a contractor contracted by the entity that carries on the commercial undertaking or by you as a subcontractor, even if

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[72] Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003, paragraph 1.38, page 15.
[73] The amount of your fuel tax credit is worked out under Division 43 of the FT Act. Under subitem 11(6) of Schedule 3 to the Transitional Act the amount of your credit is half the amount worked out under Division 43 of the FT Act.
[74] *Australian National Railways Commission v. Collector of Customs SA* (1985) 8 FCR 264; (1985) 69 ALR 367.
[75] The meaning of 'timber' is discussed in paragraphs 186 to 191 of this Ruling.

those activities only form a part of the overall commercial process of obtaining timber as primary produce.[76]

Activities 'in forestry' carried out for commercial purposes

151. Unlike the definitions of 'agriculture' in section 22, and 'fishing operations' in section 34, the definition of forestry in section 35 has no specific requirement that the activities outlined in the section be carried on for the purposes of a business.[77]

152. However, the Commissioner considers that, as forestry is a subset of primary production, the forestry activities must be carried out for the purposes of a commercial undertaking to obtain primary produce. In the case of forestry, the primary produce is timber.[78] The Commissioner's view is that the activities mentioned in each of the paragraphs in section 35 describe the processes necessary, or that assist, in the obtaining of timber as primary produce.

153. The Explanatory Memorandum to the Diesel Fuel Taxes Legislation Amendment Bill 1982 supports the Commissioner's view. The *Diesel Fuel Taxes Legislation Amendment Act 1982* introduced the diesel fuel rebate scheme into the Customs Act and the Excise Act. The definition of forestry introduced by that Act was similar to the definition of forestry in section 35.

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

155. 'Primary industry' is defined as 'any industry such as dairy farming, forestry, mining etc., which is involved in the growing, producing, extracting, etc., of natural resources.'[79]

156. The references to 'industries' in the Explanatory Memorandum confirms a legislative intent to confine eligibility for the diesel fuel rebate under the diesel fuel rebate scheme to those that engaged in primary production as a commercial or business enterprise.

157. As the forestry activities in section 35 are similar to those that were eligible for diesel fuel rebate under the diesel fuel rebate scheme,[80] The Commissioner considers that the comments made in

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[76] However, you are not entitled to the fuel tax credit for the taxable fuel if it is reasonable for you to conclude that the entity that carries out the commercial undertaking, or the contractor, has previously been entitled to a fuel tax credit or a decreasing fuel tax adjustment for the fuel. See section 41-15 of the FT Act.

[77] In the definition of 'agriculture' in section 22 and the definition of 'fishing operations' in section 34, this requirement is present because of the manner in which the exclusions contained in those sections operate.

[78] The meaning of 'timber' is discussed at paragraphs 186 to 191 of this Ruling.

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

[80] See paragraph 1.38 of the Explanatory Memorandum to the Energy Grants (Credits) Scheme Bill 2003.

the Explanatory Memorandum to the Diesel Fuel Taxes Legislation Amendment Bill 1982 apply equally to the meaning of forestry in section 35.

158. The Commissioner's view is supported by comments made by the AAT in *Re City of Nunawading and Comptroller-General of Customs*.[81] Although, in that case, the AAT was dealing with the meaning of agriculture and horticulture in subsection 164(7) of the Customs Act, prior to the 1995 amendments to that Act, in relation to the definition of forestry,[82] it observed that:

> Where trees are intended for felling then presumably there is both a commercial aspect and a 'product' or 'crop'. We are not so clear that this is always the case when thinning or felling occurs in a forest or plantation of standing timber.
>
> Presumably, thinning or felling of that type may occur on occasion for conservation and environmental purposes rather than for the purpose of retrieval of the timber for itself.[83]

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

> Looking at the context, we consider that the word 'horticulture', when used in section 164, is not limited to those activities specified in paragraphs (a), (b) and (c) of the definition but that to come within the meaning of horticulture in the Act, an activity must relate in some way to an aspect of primary production conducted as a commercial or business enterprise.[84]

160. The Commissioner considers that, having regard to forestry being an aspect of primary production as defined in section 21, and the fact that the definition of forestry in section 35 is in identical terms to that in the diesel fuel rebate scheme, a similar approach is appropriate to the activities set out in section 35. In the Commissioner's view, those activities must be carried out as part of a commercial undertaking[85] to obtain timber[86] as primary produce.

Activities that are 'forestry'

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

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

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[81] *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758; (1994) 36 ALD 628.
[82] That definition was the same as the definition of forestry in section 35.
[83] *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758 at paragraph 89; (1994) 36 ALD 628 at 643.
[84] *Re City of Nunawading and Comptroller-General of Customs* No. V93/540 AAT No. 9758 at paragraph 99; (1994) 36 ALD 628 at 645.
[85] Such a commercial undertaking would usually be carried out by an entity in the form of a business.
[86] The meaning of 'timber' is discussed at paragraphs 186 to 191 of this Ruling.

- the thinning or felling, in a forest or plantation, of standing timber (paragraph 35(b)).

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

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

Planting or tending of trees

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

> The expression ***forestry*** means:
>
> (a) the planting or tending, in a forest or plantation, of trees intended for felling

164. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the planting or tending, in a forest or plantation, of trees intended for felling. The activity must be carried out as part of a commercial undertaking to obtain timber as a primary produce.

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

Planting of trees

166. The verb 'to plant' is defined as 'to put or set in the ground, as seeds, young trees, etc'.[87] 'Planting of trees' is the act of putting or setting seeds or young trees in the ground.

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

167. In those cases where soil is ploughed, broken or turned, then fertilised or conditioned, and then afterwards seeds or seedlings, are placed in the soil as part of an integrated process, 'planting' includes the activities of ploughing, breaking or turning of the soil, the fertilisation or conditioning of the soil and the placing of the seeds or seedlings into the ground. Having regard to the three criteria mentioned in paragraph 140 of this Ruling, the Commissioner considers that all of these activities take place 'in' the planting of trees.

168. In relation to the temporal link referred to in paragraph 140 of this Ruling, The Commissioner recognises that activities performed in relation to planting trees in a plantation are seasonally dependent activities.[88] Where best forest practice dictates particular seasonal conditions for optimal planting of trees intended for felling, the elapse of a reasonable length of time, determined in accordance with those forestry practices, between ripping and other soil preparation activities and subsequent planting of seedlings will not, of itself, sever the temporal connection.

169. The 'planting of trees' also includes planting after harvesting an area in a forest or plantation as well as the planting of trees in a new plantation. Planting does not include activities such as the felling of trees, clearing of scrub, removal of stones and other actions undertaken in land clearing for the purposes of establishing a new plantation.

Tending of trees

170. The verb 'to tend' is defined as:

> **1.** to attend to by work or services, care etc: to tend a fire.
>
> **2.** to look after; watch over and care for; minister to or wait on with service. [89]

The 'tending of trees' means the undertaking of activities to ensure the survival of the trees or to enhance their growth, quality and vigour. 'Tending of trees' includes:

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

[88] See Taxation Determination TD 2003/12 Income tax: what activities are 'seasonally dependent agronomic activities' for the purposes of section 82KZMG of the *Income Tax Assessment Act 1936*?

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

The meaning of 'forest' and 'plantation'

171. The terms 'forest' and 'plantation' in section 35 are not defined in the Energy Grants Act and are to be given their ordinary meaning having regard to their statutory context.[90]

172. The ordinary meaning of the term 'forest' is:

> **1.** an area of bushland in which the trees grow to great stature.
>
> **2.** a tract of land on which trees are cultivated or have been cultivated; 'a large tract of land covered with trees.[91]

173. What is a forest is a question of fact and degree to be determined having regard to a number of factors including, the area of land on which trees are growing, its size, the use of the land on which the trees are growing, the activity or activities carried on in the area, the size of the canopy and the nature of the trees growing on it.

The Commissioner considers that the National Forest Inventory's definition of forest, which is:

> . . . an area, incorporating all living and non-living components, that is dominated by trees having usually a single stem and a mature or potentially mature stand height exceeding 2 metres and with existing or potential crown cover of overstorey strata about equal to or greater than 20 per cent[92]

is an apt definition of 'forest' for the purposes of section 35.

174. The fact that, at a particular time, the area of land normally regarded as a forest does not have any trees on it (for example, as a consequence of a bush fire, or if trees have been felled for timber in the area and it is being replanted with trees for later felling) does not prevent the area from being regarded as a forest if it is left for the regeneration of trees.

175. However, not every area of land covered with trees is a forest. Having regard to the factors mentioned in paragraph 140 of this Ruling, the following are examples of what is not a 'forest' for the purposes of section 35:

- a group of trees on a farm to provide shelter for farm animals;
- a group of trees growing in a suburban park for recreational or ornamental purposes; and
- a group of trees growing on a golf course to provide an obstacle for golfers.

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[90] *Cooper Brooks (Wollongong) Pty Ltd v. FCT* (1981) 147 CLR 297, *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384.
[91] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[92] This definition includes Australia's diverse native forests and plantations, regardless of age. It is also sufficiently broad to encompass areas of trees that are sometimes described as woodlands.

176. The term 'plantation' is relevantly defined in the Macquarie Dictionary[93] as:

> **2**. a group of planted trees or plants.

In the context of the definition of 'forestry', a plantation is a group of planted trees, grown specifically for harvesting as timber.

177. Modern enterprises involved in felling standing timber are required, under Commonwealth/State Regional Forest Agreements to prepare, and operate within, a formal forest management plan. If a forest management plan applies to an area on which trees are either naturally growing or are planted specifically for harvesting as timber, the place is taken to be a forest or plantation for the purposes of section 35.

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

179. In *Australian National Railways Commission v. Collector of Customs SA*[94] Davies J dismissed the appeal against the refusal of diesel fuel rebate for fuel used in the transportation of fertiliser. In his decision, he said:

> The diesel fuel rebate looks to operations within a narrower compass than the operations in respect of which the applicant's claims in this respect were made. The rebate for primary production is concerned with production of primary produce, not with the manufacture and wholesale distribution of superphosphate or with the marketing of primary produce once grown and harvested.[95]

Intended for felling

180. The word 'to fell' is defined as 'to cause to fall, knock, strike, or cut down'.[96]

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

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[93] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[94] *Australian National Railways Commission v. Collector of Customs SA* (1985) 8 FCR 264; (1985) 69 ALR 367.
[95] *Australian National Railways Commission v. Collector of Customs SA* (1985) 8 FCR 264 at 271; (1985) 69 ALR 367 at 373. Although the case was decided in the context of a former definition, in subsection 164(7) of the Customs Act, of 'agriculture', the Commissioner considers that this applies equally to the definition of 'forestry' in the Energy Grants Act.
[96] *The Macquarie Dictionary*, 2001, rev. 3rd edn., The Macquarie Library Pty Ltd, NSW.

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

Thinning or felling of standing timber

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

> The expression ***forestry*** means:
>
> (b) the thinning or felling, in a forest or plantation, of standing timber

184. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the thinning or felling of standing timber in a forest or plantation. The activity must be carried out as part of a commercial undertaking to obtain timber as a primary produce.

185. Thinning refers both to the removal of dead, dying and suppressed trees (known as 'thinning to waste') and also to the removal of tree trunks or other parts of a tree for sale or use in manufacture.

What is timber?

186. The word 'timber' has as its ordinary meaning,

> **1**. wood, especially when suitable for building houses, ships etc., or for use in carpentry, joinery, etc.
>
> **2**. the wood of growing trees suitable for structural uses.
>
> **3**. the trees themselves.[97]

187. The term 'timber' embraces trees and constituent parts of trees which are intended for further processing and consumption.[98] It is not limited to sawlogs, but includes the trunk, branches, bark or any other part of the tree with a commercial value.

188. The term 'standing timber' in paragraph 35(b) refers to trees in their entirety prior to being felled. The term 'timber' is not limited to any particular component of the tree and does not exclude any part of the tree.[99]

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[97] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[98] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 32; (1993) 17 AAR 557 at 561.
[99] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557.

189. In the context of forestry as an aspect of primary production, the term 'timber' is applied throughout the process of further reduction in size and shape up to the point immediately before the basic constituent material, in reduced or separated form, is subjected to a secondary process or treatment.[100] The determination of whether something is timber for the purposes of section 35 requires a careful examination of the processes that it undergoes, and whether it is produced by the operation of saws at a mill.

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

191. However, wood, which has been shaped specifically for use in secondary manufacture, for example, wood shaped into skirting boards, is no longer 'timber' for the purposes of section 35 as it is the product of a process undertaken after primary production has ceased. Wood, which is shaped, moulded or cut to size specifically for a particular purpose has been subject to a secondary process or treatment. Examples of wood that has been subject to secondary processing are posts, fence pickets, 'tongue and grooved' flooring and architrave mouldings as well as plywood, which involves the gluing together of thin sheets of wood under pressure.

Felling of timber

192. 'Felling'[101] of standing timber includes the preparation of felled trees to enable them to be moved, such as the removal of lateral growth and cutting into manageable lengths.

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

[100] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 24; (1993) 17 AAR 557 at 562.
[101] See paragraph 180 of this Ruling for definition of 'fell'.

Activities that are included in 'forestry'

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

> The expression ***forestry*** means:
>
> …and includes:
>
> (c) the transporting, milling or processing, in a forest or plantation, of timber felled in the forest or plantation; or
>
> (d) the milling of timber at a sawmill or chipmill that is not situated in the forest or plantation in which the timber was felled; or
>
> (e) where timber is milled at a sawmill or chipmill that is not situated in the forest or plantation in which the timber was felled – the transporting of the timber from the forest or plantation in which it was felled to the sawmill or chipmill….

Transporting, milling or processing of timber

Transporting of timber in a forest or plantation

195. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the transporting, in a forest or plantation, of timber felled in the forest or plantation.

196. The term 'transporting' is not defined in the Energy Grants Act and therefore, in the context of paragraph 35(c), takes its ordinary meaning, of 'carrying or conveying from one place to another'.[102] 'Transporting' for the purpose of paragraph 35(c) is not limited to transporting by road.[103]

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

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

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[102] See the definition of 'transport' in *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

[103] For example, the transport of timber on water may fall within this paragraph or under the marine transport category of eligibility under the Energy Grants Act.

199. The 'transporting … of timber' in paragraph 35(c) also includes the return journey of the transport vehicle after the felled timber has been delivered to a sawmill or chipmill or log dump situated within the forest or plantation back to the loading point so it can continue to transport timber. For a return journey to be part of the 'transporting... of timber', the return journey must form part of a continuous, unbroken process of transporting timber. Short breaks to refuel the vehicle or to allow the driver to take a lunch break or mandatory rest breaks do not prevent the return journey from forming part of a continuous unbroken process of transporting timber.

200. The 'transporting of timber' in paragraph 35(c) is subject to the subsection 53(2) primary production exclusion (taxable fuel acquired for use in propelling a road vehicle on a public road). Therefore, if the timber is transported by road, no entitlement to a fuel tax credit arises in respect of taxable fuel acquired for use in propelling a road vehicle, used for transporting timber, on a public road under the qualifying use of forestry.[104]

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

201. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the transporting of timber from the forest or plantation, in which it was felled, to a sawmill or chipmill situated outside the forest or plantation.[105] The purpose of the journey so undertaken must be to transport timber for its milling at a sawmill, or chipmill, located outside the forest in which the timber was felled.

202. The 'transporting of the timber' in paragraph 35(e) includes the return journey of the transport vehicle from the sawmill or chipmill back to the forest or plantation so that it can continue transporting timber from the forest or plantation to the sawmill or chipmill.[106]

203. For the purposes of paragraph 35(e), if the transporting of timber to a sawmill or chipmill is undertaken in stages, then some or all of the stages of the journey may be a qualifying use under paragraph 35(e).

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[104] See paragraphs 256 to 308 of this Ruling for a discussion on the exclusion for taxable fuel purchased for use in propelling a road vehicle on a public road. However, you are entitled to a fuel tax credit under section 41-5 of the FT Act for taxable fuel acquired for use in a vehicle, with a GVM greater than 4.5 tonnes, travelling on a public road subject meeting certain environmental criteria in section 41-25. The amount of the fuel tax credit is reduced by the amount of the road user charge under section 43-10 of the FT Act.

[105] Paragraph 35(e). See paragraphs 195 to 200 of this Ruling for the meaning of 'transporting'.

[106] See paragraphs 50 to 54 of this Ruling for a discussion on return journeys.

Transporting of timber to a port for export

204. If, after felling, timber is taken to a port for export to a sawmill or chipmill located outside Australia, the Commissioner takes the view that the transport of the timber to the port does not qualify as a forestry activity under paragraph 35(e). The Commissioner considers that, for the purposes of that paragraph, the sawmill or chipmill must be located in Australia.

205. The decision of the full Federal Court in *State Rail Authority of NSW v. Collector of Customs*[107] *(SRA)* supports the Commissioner's view that the transport of timber from a forest or plantation to a port for export to an overseas sawmill or chipmill is not a qualifying activity under paragraph 35(e).

206. In that case, the full Federal Court considered an application under the 'mining operations' category of the diesel fuel rebate scheme. The claimant sought the diesel fuel rebate for transportation of minerals from the mining site to a port, where the minerals were loaded onto ships for beneficiation overseas.

207. The full Federal Court held that operations for recovery of minerals, including any beneficiation, must take place in Australia. In that case, as beneficiation did not take place in Australia, the fuel was not purchased for use in mining operations as defined in subsection 164(7) of the Customs Act. The Court (and the AAT) relied on paragraph 21(b) of the *Acts Interpretation Act 1901* in coming to its conclusion.

208. In reaching its decision the full Court said:

> As has been noted, it is submitted on behalf of SRA that s 21 of the Acts Interpretation Act should have been applied to the element of transportation in s 164(7)(d) rather than applied to the location of the place where the beneficiation of the minerals is carried out. We have difficulty in accepting this analysis.
>
> …
>
> Once it is concluded that the relevant subject matter of the legislation is the recovery of minerals, it must follow that, in any but a special case (such as perhaps might be involved in mining in or near Australian Territorial waters), in order to qualify for a rebate, the operations for the recovery of the minerals, including any beneficiation, must take place in Australia.[108]

209. Paragraph 21(1)(b) of the *Acts Interpretation Act 1901*[108A] provides:

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[107] *State Rail Authority of NSW v. Collector of Customs* (1991) 33 FCR 211; 14 AAR 307.
[108] *State Rail Authority of NSW v. Collector of Customs* (1991) 33 FCR 211 at 215-216; 14 AAR 307 at 311-312.
[108A] Subsection 21(1) the *Acts Interpretation Act 1901* was amended by the *Acts Interpretation Amendment Act 2011*, to remove the words 'unless the contrary intention appears'. Per section 2 of the *Acts Interpretation Amendment Act 2011* this amendment is to take effect no later than 6 months and one day after the date of Royal Assent. The *Acts Interpretation Amendment Act 2011* received Royal Assent on 27 June 2011.

> In any Act, unless the contrary intention appears:
>
> (b) 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.

210. The jurisdictional limit placed on the activity considered in SRA applies equally to activities in forestry under the Energy Grants Act. The Commissioner considers that paragraph 21(b) of the *Acts Interpretation Act 1901* applies equally to the operation of paragraph 35(e). The sawmill or chipmill to which timber is transported are 'things' that must be located in Australia.

211. If timber is felled for export, the primary production activity ceases when the timber is felled and placed in the log dumps ready for transport to a port for export.

212. If the felled timber is not placed in log dumps ready for transport, but is loaded directly from the floor of the forest coupe, for transport to a port for export, the primary production activity ceases when the timber has been felled.

213. Once the primary production activity ceases, the subsequent activity of transporting the logs to a port is not a forestry activity within paragraph 35(e).[109]

214. The 'transporting of the timber' in paragraph 35(e) is subject to the exclusion in subsection 53(2) (fuel acquired for use in propelling a road vehicle on a public road). If timber is transported by road, no entitlement to an off-road credit arises in respect of taxable fuel acquired for use in propelling a road vehicle, used for transporting timber, on a public road.[110] In addition, the transporting of timber from the sawmill, or chipmill, subsequent to milling or processing is not a forestry activity as this transport occurs after primary production is complete. This transport is not covered by paragraph 35(c), nor by paragraph 35(e).[111]

Milling or processing of timber

215. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the milling or processing, in a forest or plantation, of timber felled in the forest or plantation.[112]

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

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[109] If the transport takes place within the forest or plantation in which the timber was felled, it may be an eligible activity under paragraph 35(c).
[110] See paragraphs 256 to 308 of this Ruling for a discussion on the exclusion for diesel fuel purchased for use in propelling a road vehicle on a public road.
[111] *Australian National Railways Commission v. Collector of Customs SA* (1985) 8 FCR 264 at 270; (1985) 69 ALR 367 at 372.
[112] Paragraph 35(c).

217. You are also entitled to a fuel tax credit if you acquire taxable fuel for use in the milling of timber at a sawmill or chipmill that is not located in the forest or plantation in which the timber was felled.[113]

218. The terms 'mill', 'sawmill' and 'chipmill are not defined in the Energy Grants Act, and have no particular trade or industry meanings.[114] They therefore take their ordinary meanings.

Mill

219. The term 'mill' is a term of wide meaning. Its relevant ordinary meaning is:

> **1**. a building or establishment fitted with machinery, in which any of various mechanical operations or forms of manufacture is carried on, especially the spinning or weaving of cotton or wool… **5**. a machine which does its work by rotary motion, as one used by a lapidary for cutting and polishing precious stones.[115]

220. A machine, which operates by rotary action, is accepted as falling within the ordinary concept of a mill.[116] Machinery which does not work by rotary action is not in itself a 'mill'. For example:

- log splitters, which use hydraulically powered rams to push timber onto fixed blades, which split the wood into smaller pieces; or
- veneer slicing machines in which the timber is attached to a moveable carriage and drawn across a fixed blade to produce veneer strips,

are not in themselves 'mills'.

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

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[113] Paragraph 35(d).
[114] See the discussion in *Wesfi Pty Ltd v. Collector of Customs WA*, No. W84/46, 20 December 1984 at paragraph 9; (1984) 7 ALN N8 at paragraph 28, in relation to the word 'sawmill', and the comment of the AAT in *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557 at paragraph 31 in relation to a 'chip mill'.
[115] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[116] *Re Wesfi Pty Ltd v. Collector of Customs WA*, No. W84/46, 20 December 1984 at paragraph 9; (1984) 7 ALN N8 at paragraph 9.

222. It is not necessary that, to be a mill, the particular operation be of a certain size or take a particular standard form. For example, the fact that a machine is designed to be mobile does not deprive it of the character of being a 'mill'.[117] In *TJ Depiazzi and Sons v. Collector of Customs*[118], the AAT stated:

> A machine which mills must be a mill. There is no statutory prescription in the s. 164(7) definition of 'forestry' which requires milling to take place in a building. It is not that specific. A mill can be either fixed and housed in a building or it can be moveable, designed to function at different locations. The latter is nonetheless a mill. The emphasis is on function rather than the environment in which the function occurs. The processes of saw milling and chip milling are capable of technological advance and adaptation and what might be classically regarded as a saw mill or chip mill at one point of time may be overtaken by an operation employing a more advanced method of processing at a later time.[119]

223. In the making of matches, the debarking and sawing of logs into billets was held to constitute the 'milling of timber', as was the peeling of match veneer sheets off the billets by means of a rotary veneering machine. However, in the next stage of the production line, the chopping of the veneer sheets into splints was considered unlikely to be 'the milling or processing of timber' as that process was a secondary treatment and not a process of primary production.[120]

224. The Commissioner considers that the milling of timber is not limited to the actual subjection of the timber to the sawing or chipping activity at a mill, but it includes activities that are integral to, or necessarily incidental to, the process of milling timber. However it does not include activities regarded as secondary manufacture.

225. The term 'processing' in paragraph 35(c) is not defined. It, therefore, takes its ordinary meaning. The Macquarie Dictionary[121] relevantly defines the verb 'process' as:

- 'to treat or prepare by some particular process, as in manufacturing;' or
- 'to convert (an agricultural commodity) into marketable form by some special process'.[122]

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[117] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993 at paragraph 32; (1993) 17 AAR 557 at 561.
[118] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557.
[119] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557 at paragraph 29.
[120] *Re Brymay Forests Pty Ltd and Collector of Customs Victoria* No. V85/305 AAT No. 2496, 24 December 1985; (1985) 9 ALN N177.
[121] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[122] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

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

What is a sawmill?

227. A 'sawmill' is a mill in which the sawing of timber is the main or predominant process performed.[123]

228. In *Wesfi Pty Ltd v. Collector of Customs Western Australia*[124] the AAT referred to the Shorter Oxford English Dictionary meaning of the term 'sawmill', which was:

> A factory in which wood is sawn into planks or boards by machinery (now usu. propelled by steam or electricity)

and said:

> We understand a sawmill to be a mill in which wood is converted from one form to another by means of saws. That is not to say that a sawmill may not use other machinery additionally to convert timber into a required form or to dry timber or for like associated purposes; but it is the saws which give to the mill the character of a sawmill. … The element 'saw' characterises a mill as a mill in which timber is sawn.[125]

229. A sawmill includes a rotary peel veneer plant. A rotary peel veneer plant produces timber veneer by making billets into perfect cylinders. The logs are then mounted centrally on a lathe and rotated against a razor sharp cutting blade.

230. As the timber is converted from one form to another, the rotary peel veneer plant will be a sawmill if the conversion is undertaken by means of a saw.

231. A 'saw' is defined in The Macquarie Dictionary[126] as:

> **1**. a tool or device for cutting, typically a thin blade of metal with a series of sharp teeth, **2**. any similar tool or device, as a rotating disc in which a sharp continuous edge replaces the teeth.

232. As the blade of the rotary peel machine has a sharp continuous edge which cuts the timber, the machine is within the ordinary meaning of a 'saw'. Consequently, a rotary veneer peel plant is a 'sawmill'.

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[123] *Re Brymay Forests Pty Ltd and Collector of Customs Victoria* No. V85/305 AAT No. 2496, 24 December 1985; (1985) 9 ALN N177.
[124] *Wesfi Pty Ltd v. Collector of Customs Western Australia* No. W84/46, 20 December 1984; (1984) 7 ALN N8.
[125] *Wesfi Pty Ltd v. Collector of Customs Western Australia* No. W84/46, 20 December 1984; (1984) 7 ALN N8 at paragraph 18.
[126] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

What is a chipmill?

233. A 'chipmill' is a mill at which the 'chipping' of timber or parts of timber occurs. A mill, which engages in a process of milling involving a substantial, though not necessarily predominant, proportion of chipping, is a chipmill.[127]

234. 'Chipping' refers to one of the reduction processes through which tree parts and residue are broken down to a state where they become material capable of use in other productive activities.[128] Examples of end products of chipping in chipmills are wood chips for use in making cardboard or chipboard.

235. Machines, which perform the processing of raw materials received from local sawmills into smaller pieces by the action of hammers, which operated by rotary motion, have been held to be chipmills.[129]

Making and maintaining roads

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

> The expression ***forestry*** means:
>
> … and includes:
>
> (f) the making and maintaining in a forest or plantation referred to in paragraph (a) or (b) of a road that is integral to the activities referred to in paragraph (a), (b) or (c).

237. You are entitled to a fuel tax credit if you acquire taxable fuel for use in the making and maintaining of a road:

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

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[127] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557 at paragraph 30; (1993) 17 AAR 557 at 564.
[128] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557 at paragraph 31; (1993) 17 AAR 557 at 564.
[129] *Re TJ Depiazzi and Sons v. Collector of Customs NSW* No. W92/114 AAT No. 8770, 11 June 1993; (1993) 17 AAR 557.

Road

238. The word 'road' is not defined in the Energy Grants Act. Its relevant ordinary meanings are:

> **1**. a way, usually open to the public for the passage of vehicles, persons, and animals. **2.** any street so called. **3**. the track on which vehicles, etc., pass, as opposed to the pavement.[130]

239. The Commissioner considers that for the purposes of paragraph 35(f), 'road' includes the infrastructure that is necessary to and forms a fundamental part of the road network within the forest, such as culverts, bridges and hardstand areas (also known as log dumps).

240. Other infrastructure such as fuel dumps, quarries and pits which may be connected to the road network within the forest are not 'roads' for the purposes of paragraph 35(f) as the Commissioner does not consider that these form part of the road network.

'Making and maintaining'

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

242. The term 'making and maintaining ... of a road' includes all activities undertaken at the road construction site to make or maintain the road.

243. The Commissioner's view is, the 'making ... of a road' commences with the initial clearing of the road alignment.

244. The Commissioner considers that 'maintaining ... of a road' encompasses a range of road maintenance activities, necessary to maintain a road to the operational standard required specified in the relevant Forestry Code of Practice or state Regulatory regime. This includes the upgrading of an existing road.

245. The term 'making and maintaining ... of a road' does not include the process of extraction of gravel and its transportation to the road site for use in the construction of the road.[131]

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[130] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[131] *Re MSD Constructions Pty Ltd and CEO of Customs* (Unreported, Administrative Appeals Tribunal, Webster SM, Davis M, Cunningham M, 11 September 1996) T95/130, Hobart.

246. The term 'making and maintaining ... of a road' does not include the maintenance of road signs, road safety barriers and the like when they are carried as independent activities. However, if road signs and safety barriers are constructed in a way that is integral and incidental to the making or maintaining of a road, then the construction or maintenance of road signs, road safety barriers and the like are part of that road making or road maintenance activity.

Integral

247. The word 'integral' means:

> **1.** having to do with a whole; belonging as part of the whole, constituent or component: the integral parts of the human body. **2.** necessary to the completeness of the whole'.[132]

248. A road will be integral to the activities referred to in paragraphs 35(a), 35(b) or 35(c), if the road is necessary to and forms a fundamental part of those activities.

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

250. The making and maintaining of a road outside the relevant forest or plantation is not a qualifying activity under paragraph 35(f).

251. If the 'making' and 'maintaining' activities are carried out both within the relevant forest or plantation and outside that forest or plantation, an apportionment is necessary to determine the extent to which taxable fuel is acquired for use in a qualifying activity.

252. An example of a road in a forest or plantation that is accepted as being 'integral' to the relevant activities is a forestry road as described in paragraph 95 of this Ruling. The making of a forestry road and its maintenance are qualifying forestry activities under paragraph 35(f).

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

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

254. If a road in a forest or plantation is made and maintained for more than one purpose, the dominant purpose must be integral to forestry for the construction and maintenance of that road to be a qualifying use. If the dominant purpose for the construction and maintenance is for forestry purposes, the road is regarded as integral to the forestry activities mentioned in paragraphs 35(a), 35(b) and 35(c). In these circumstances, you are entitled to a fuel tax credit in respect of all the taxable fuel acquired for use in the making and maintaining of the road.

255. If, however, the dominant purpose of the road is not for forestry activities but for some other activity (for example for tourism purposes), no entitlement to a fuel tax credit arises in respect of any taxable fuel acquired for use in the making and maintaining of the road.

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

256. The subsection 53(2) primary production exclusion excludes from the qualifying use 'in primary production' (and, therefore, 'in forestry'), taxable fuel acquired for use in propelling a road vehicle on a public road.

257. Although not a qualifying use in primary production, you are entitled to a fuel tax credit under section 41-5 of the FT Act for taxable fuel acquired for use in a vehicle[133] with a GVM greater than 4.5 tonnes, travelling on a public road.[134]

258. For the purposes of the exclusion it is necessary to determine what a road vehicle is and what a public road is.

Meaning of 'road vehicle'

259. A 'road vehicle' is a vehicle of a kind ordinarily used on roads for the transport of persons or goods.[135]

260. The Macquarie Dictionary[136] defines a 'vehicle' as:

> **1.** any receptacle, or means of transport, in which something is carried or conveyed, or travels. **2.** a carriage or conveyance moving on wheels or runners.

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[133] The term 'vehicle' is not defined and takes its ordinary meaning. It includes a 'road vehicle' as defined in section 4.
[134] You are entitled to the fuel tax credit subject to meeting certain environmental criteria as required by section 41-25 of the FT Act. The amount of the fuel tax credit is reduced by the amount of the road user charge in accordance with section 43-10 of the FT Act.
[135] The definition of 'road vehicle' is set out in section 4.
[136] *The Macquarie Dictionary*, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

261. It defines a 'road' as:

> **1.** a way, usually open to the public for the passage of vehicles, persons and animals. **2.** any street so called. **3.** The track on which vehicles etc pass, as opposed to the pavement.[137]

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

263. The meaning of the phrase 'of a kind ordinarily used' was considered in *Clean Investments Pty Ltd v. Commissioner of Taxation* (*Clean Investments*).[138] The full Federal Court reviewed the authorities[139] in relation to the question whether coin-operated washing machines were goods of a kind ordinarily used for household purposes. The Full Court concluded:

> The statutory question is not whether those goods of the taxpayer will in fact be used for household purposes but whether they are goods 'of a kind ordinarily used for household purposes' …
>
> …it is preferable to pose the statutory question as a single composite question.
>
> In some cases it may be misleading to address separately the question of identification of the 'genus' to which the particular goods in question belong …
>
> Goods and purposes can be equally correctly described in different ways, in particular, broadly or narrowly, yet the description selected may dictate the answer to the statutory question. For example, an architect's stool, an office chair and a kitchen stool or chair may be described as 'stools' or 'chairs' and their purpose as being 'to provide seating'. Yet it would be wrong to conclude that the architect's stool or the office chair is of a kind ordinarily used for household purposes for no other reason than that, like the kitchen chair, it is ordinarily used for the purpose of providing seating …
>
> If, in the present case, one were to define the genus of which the relevant machines are members as 'machines designed to wash fabrics', apparently even industrial washing machines would qualify as goods ordinarily used for household purposes…

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

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

[139] *Deputy Commissioner of Taxation (NSW) v. Newbound & Co Pty Ltd* (1952) 26 ALJR 386; (1952) 10 ATD 59, *Deputy Commissioner of Taxation v. Stewart* (1984) 154 CLR 385; (1984) 52 ALR 253, *Commissioner of Taxation v. Sherwood Overseas Pty Ltd* (1985) 85 ATC 4267; (1985) 16 ATR 473; (1985) 75 FLR 474, *Kentucky Fried Chicken Pty Ltd v. Federal Commissioner of Taxation* (1986) 86 ATC 4701; (1986) 17 ATR 1039, *Hygienic Lily Ltd v. Deputy Commissioner of Taxation* (1987) 71 ALR 441; (1987) 13 FCR 396, *OR Cormack Pty Ltd v. Federal Commissioner of Taxation* (1992) 23 ATR 151; (1992) 92 ATC 4121, *Diethelm Manufacturing Pty Ltd v. Commissioner of Taxation* (1993) 44 FCR 450; (1993) 116 ALR 420, *Commissioner of Taxation v. Chubb Australia Ltd* (1995) 128 ALR 489; (1995) 56 FCR 557.

> I accept that 'ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly' …[140]

264. *In ICI Australia Operations Pty. Ltd. v. Deputy Commissioner of Taxation (Vic)* (*ICI Operations*),[141] the full Supreme Court of Victoria dealt with the question of whether a mobile manufacturing unit (MMU) was a road vehicle for the purpose of item 14 of the First Schedule to the *Sales Tax (Exemptions and Classifications) Act 1935*. Excluded from the exemption were 'road vehicles of the kinds ordinarily used for the transport or delivery of goods, or parts of those road vehicles'.

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

> … The expression 'road vehicles of the kinds ordinarily used etc.' is to my mind perfectly apt to define a category which might be described as conventional road vehicles whose purpose and customary use is to transport persons or goods, e.g. cars, buses and goods carrying vehicles of various types.
>
> The exception presupposes that there is more than one kind of road vehicle which is 'ordinarily used etc.' The expression 'of the kinds' indicates classes of vehicles the functions of which make it necessary to classify them in terms of transportation of persons or goods.
>
> It is next necessary to identify 'the kinds' of road vehicles which fall within the genus 'ordinarily used etc.'. In this category are cars, buses, utility trucks, tray-bodied trucks, dump trucks, road trains and the like. The test for inclusion in this category is that one can stipulate that the primary purpose of the vehicle and its customary use is to transport goods or persons in the course of commercial activity. In applying this test, the concept of 'ordinarily used for' equals 'whose primary but not necessarily exclusive purpose and customary use is'. I say that because in my view the expression 'ordinarily used' in the present context cannot be divorced from the concept of the primary purpose for which the vehicle is intended to be used and is in fact customarily used.[142]

266. The Commissioner considers that the comments made by the Full Federal Court in *Clean Investments* and Gray J in *ICI Operations* are relevant in determining the meaning of a road vehicle in the subsection 53(2) primary production exclusion.

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

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

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

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

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

(b) their primary use, as a class of goods, is for that other purpose.[143]

268. Felled timber is usually transported to sawmills or chipmills in combination vehicles such as 'B-doubles' and 'Quad Dogs'. Some state and territory road traffic authorities describe these vehicles as vehicles at 'Higher Mass Limits'.[144] The higher mass limits vehicles used for the transportation of felled timber are usually vehicle combinations consisting of a prime mover and a specialised trailer. The combinations are customised to enable them to operate safely in difficult terrain under very heavy loads.

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

270. In some states and territories, vehicles used in the transporting of timber may travel only on designated roads. For example, in Victoria, approximately 19,000 kilometres of main roads are approved as roads for use by higher mass limits vehicles.[145] In some cases, local roads may be used by these vehicles only with the written permission of the local council of the area where that road is located and with a permit from the relevant road authority.

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

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

[144] See regulation 2 of Interstate Road Transport Regulations 1986, and corresponding legislation in states and territories.

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

272. By way of contrast, a vehicle in a class that can clearly be seen to have been designed for use off-road, with only limited design features enabling its use on public roads, is not a road vehicle. This is so even though, with significant restrictions in relation to matters such as speed and load, the vehicle may be used on public roads in particular and limited circumstances, or may be required to be registered for use on public for those circumstances. Examples of vehicles used by entities engaged in forestry activities that are not road vehicles are bulldozers, skidders, excavators, mobile mechanical felling machines and loaders.

273. The following table illustrates your entitlement to fuel tax credits for road vehicles and for dedicated forestry vehicles that are not of a kind ordinarily used on roads for the transport of goods or persons.

	Qualifying off-road use	**On-road use (travel on a public road)**
Road vehicles (e.g. 'Quad dogs', B doubles and other truck and trailer combination vehicles)		
GVM ≤ 4.5 tonnes	Entitled to a full fuel tax credit	Not entitled to a fuel tax credit[146]
GVM > 4.5 tonnes	Entitled to a full fuel tax credit	Entitled to a partial credit[147]
Dedicated forestry vehicles (e.g. bulldozers, skidders, excavators, mobile mechanical felling machines and loaders)		
GVM ≤ 4.5 tonnes	Entitled to a full fuel tax credit	Not entitled to a fuel tax credit[148]
GVM > 4.5 tonnes	Entitled to a full fuel tax credit	Entitled to a partial credit[149]

[146] However, entitlement to a fuel tax credit exists for diesel vehicles with a GVM equal to 4.5 tonnes acquired before 1 July 2006 – see item 12 of Schedule 3 to the Transitional Act.
[147] A partial credit is the amount of fuel tax credit minus the road user charge.
[148] Entitlement to a fuel tax credit exists for diesel vehicles with a GVM equal to 4.5 tonnes acquired before 1 July 2006 – see item 12 of Schedule 3 to the Transitional Act.
[149] You are entitled to a partial credit (fuel tax credit minus the road user charge) unless the travel on a public road is incidental to the vehicle's main use. See section 43-10 of the FT Act.

Meaning of 'public road'

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

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

Roads that are public roads

276. 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.[150]

277. However, in Australia the vast majority of public roads are constructed by government. In *Brodie and Anor v. Singleton Shire Council*,[151] 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…).[152]

278. 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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[150] *Permanent Trustee Company of New South Wales Ltd v. Campbelltown Municipal Council* (1960) 105 CLR 401 at 420-426; [1961] ALR 164 at 174; (1960) 6 LGRA 340 at 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 18-21.

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

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

National highways

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

State and territory highways and main roads

280. Each state and territory has a statutory authority[153] 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.

281. 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.[154]

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

Local roads

283. 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.

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

285. 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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[153] 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.

[154] 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) and section 13 of the *Main Roads Act 1930* (WA).

286. 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.[155] 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.[156] As noted by Murray CJ in *Attorney-General; Ex rel Australian Mutual Provident Society v. Corporation of the City of Adelaide*:[157]

> …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.[158]

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

Public roads under the common law

288. 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.

289. For a road to be 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'.[159]

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[155] 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)'.

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

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

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

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

290. Factors to be considered in determining whether an owner of land has dedicated it as a public road under the common law include:

- 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 (indicating acceptance of the dedication);
- 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.

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

292. 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*,[160] 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.[161]

293. 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*.[162]

Roads that are not public roads

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

294. If a road is constructed or maintained by a statutory authority, other than an authority having responsibilities for highways, main roads or local roads, 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.

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

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

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

Forestry roads

297. 'Forestry roads' are roads within forests or plantations, which are constructed primarily and principally for the purposes of providing access to an area to enable trees to be planted or tended in the area, or timber felled in the area to be removed.[163] Forestry roads may be constructed or managed by a forestry authority[164] in the course of carrying out its statutory function[165] for the purposes of forest management and the production and harvesting of timber, or they may be constructed by entities engaged in forestry activities. A road that is constructed and which falls within paragraph 35(f) is a forestry road.

298. The Commissioner considers that a forestry road as described in paragraph 95 of this Ruling is not a public road for the purposes of the section 53(2) primary production exclusion.

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[163] Subsection 43-72(1) of the *Income Tax Assessment Act 1997* sets out the definition of 'forestry road' for the purposes of that Act. The Commissioner considers that definition to be an appropriate description of 'forestry roads' for the purposes of the off-road credits scheme.

[164] Forestry authorities are statutory authorities which manage forests on public land. Forestry authorities are created under state legislation. For example, *Forestry Act 1916* (NSW), *Forests Act 1958* (Vic), *Forestry Act 1920* (Tas) and *Forest Products Act 2000* (WA).

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

299. In some states and territories, forestry roads are required to be constructed in accordance with a Code of Practice.[166] In all states and territories, forestry roads are required to be constructed in accordance with environmental, conservation and heritage laws.

300. A number of state and territory forestry statutes require forestry authorities to encourage public use of forests for recreation.[167]

301. The Commissioner takes the view that forestry roads are not public roads even if public access is encouraged. A forestry road does not become a public road merely because members of the public use the road to access a forest area for recreation purposes (for example, for picnics or for bushwalking) or for the purposes of removing firewood from designated areas for personal use. The use of forestry roads for such purposes is subordinate to the primary objects of forestry management and the production and harvesting of timber. Members of the public do not have a sufficiently unfettered right of access to, or use of, the roads to characterise them as public roads.

302. An example of the above is to be found in the New South Wales. *The Forestry Act 1916* (Forestry Act) of that State creates a Forestry Commission. One of its objects is to conserve and utilise the timber on Crown-timber lands and land owned by the Commission otherwise under its control and management.[168] The Act authorises the Commission to construct roads necessary for the taking or removing of timber from Crown lands or from state forests.[169]

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

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

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

[167] For example, section 20 of the *Forests Act 1958* (Vic) sets out certain powers and duties of the forestry authority. These include the provision of facilities for public recreation.

[168] Paragraph 8A(1)(a) of the *Forestry Act 1916* (NSW).

[169] Paragraph 11(1)(e) of the *Forestry Act 1916* (NSW).

Conversion of a forestry road to a public road

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

306. For example, the Victorian Roads Corporation established under the *Transport Act 1983* (Vic), has as one of its objects the maintenance and upgrading of the State's road networks[170] and, in the exercise of its powers, can declare a road to be a 'forest road'.[171] In this case, the 'forest road' is a public road because it is constructed and maintained by the Victorian authority having responsibility for highways and main roads.

Roads over privately owned land

307. An owner of private property may permit members of the public to pass over the property. An entity may lawfully enter private land if the entity has an express or implied invitation, licence, permission, lawful authority or consent of the entity in possession of the land.[172] An entity who initially enters land with lawful authority becomes a trespasser if the consent of the owner is revoked.[173]

308. 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.[174]

[170] Section 16 of the *Transport Act 1983* (Vic).
[171] Section 1 of Schedule 5 of the *Transport Act 1983* (Vic).
[172] *Lincoln Hunt Australia Pty Ltd v. Willesee* (1986) 4 NSWLR 457 – NSWSC – 13/02/1986.
[173] *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.
[174] *Attorney-General for the Northern Territory v. Minister for Aboriginal Affairs and Others* (1989) 23 FCR 536 at 542.

Appendix 2 – Background

This Appendix is provided as information to help you understand the fuel tax credit system. It does not form part of the binding public ruling.

Fuel tax credit system

309. The fuel tax credit system commenced on 1 July 2006. The table below depicts how the fuel tax credit available for different fuel uses will be phased in over between 1 July 2006 and 1 July 2012.

Fuel use	***1 July 2006***	***1 July 2008***	***1 December 2011***	***1 July 2012***
On-road use in vehicles with a gross vehicle mass over 4.5 tonnes	All fuels, including petrol – a credit to the extent that the fuel tax paid on the fuel exceeds the road-user charge	Continuing		
In burner applications	All fuels effectively fuel tax-free	Continuing		
Use of fuel other than as fuel	All fuels effectively fuel tax-free	Continuing		
Activities that were previously entitled to an off-road credit under the Energy Grants Scheme	Diesel, and diesel-like fuels – a full credit of the effective fuel tax paid on the fuel	Petrol – a full credit of the effective fuel tax paid on the fuel	Continuing	
Commercial and household electricity generation	All fuels, including petrol – full credit of the effective fuel tax paid on the fuel	Continuing		
All other off-road use	Nil	All fuels – including petrol – 50% of the effective fuel tax paid on the fuel	Liquefied petroleum gas, liquefied natural gas and compressed natural gas – full credit of the effective fuel tax paid on the fuel[175]	All fuels – full credit of the effective fuel tax paid on the fuel

[175] LPG, CNG and LNG begin to incur effective fuel tax from 1 December 2011.

310. From 1 July 2006, fuel tax credits are claimable by businesses via the BAS. Special transitional arrangements allow certain eligible entities to make a claim for an early payment of fuel tax credits without having to wait for the lodgment of a BAS.[176]

311. Separate claiming arrangements apply to non-business claimants for the generation of electricity for domestic use.

312. Even though the FT Act is a taxing Act,[177] many provisions of the fuel tax credit system and the transitional provisions are beneficial in that they confer benefits on entities that acquire taxable fuel for use in carrying on an enterprise. Having regard to this policy intent, a purposive interpretive approach will be taken in the interpretation of these provisions.

Energy grants claimed under the Fuel Tax Act

313. Entitlement to an energy grant for off-road diesel fuel is limited to fuel purchased or imported between 1 July 2003 and 30 June 2006 inclusive.[178] Entities entitled to an energy grant will have 12 months after that date to claim an energy grant under the *Product Grants and Benefits Administration Act 2000* (PGBA Act) if they were entitled to an off-road credit under the Energy Grants Act. This means that the claim must be made before the earlier of 1 July 2007 and the end of three years after the start of the claim period.[179]

314. Alternatively, a claim for such grants (where off-road diesel fuel is purchased or imported between 1 July 2003 and 30 June 2006) can be made under the FT Act by way of a 'decreasing fuel tax adjustment'.[180]

315. You are not entitled to an energy grant for an off-road credit for diesel fuel, if you have already given the Commissioner a return for a tax period or a fuel tax return period which takes into account a decreasing fuel tax adjustment that relates to the fuel.[181]

316. The transitional provisions allow you to claim a 'decreasing fuel tax adjustment' on your BAS if the adjustment is attributable to the tax period or fuel tax return period that you choose that ends before 1 July 2009.[182] The amount of the adjustment is equal to the amount of off-road credit for the energy grant that you were entitled to under the Energy Grants Act.

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[176] Certain entities may elect for an early payment of a fuel tax credit for taxable fuel acquired between 1 July 2006 and 30 June 2008. See paragraphs 20 to 31 and 125 to 130 of this Ruling for a full explanation of early payments of the fuel tax credit.
[177] Paragraph 1.66 of the Revised Explanatory Memorandum for the Fuel Tax Bill 2006 and Fuel Tax (Consequential and Transitional Provisions) Bill 2006.
[178] Subsection 51(2).
[179] See subsection 51(2) (and the Note), and paragraph 15(2)(db) of the PGBA Act.
[180] Item 9 of Schedule 3 to the Transitional Act.
[181] Subsection 15(2A) of PGBA Act.
[182] Subitem 9(3) of Schedule 3 to the Transitional Act.

317. A 'decreasing fuel tax adjustment' decreases an entity's 'net fuel amount'.[183] That is, a 'decreasing fuel tax adjustment' increases the amount of fuel tax credit an entity is otherwise entitled to.[184]

Energy Grants Scheme

318. For the Commissioner's views in relation to the operation of the energy grants credits scheme in general and the off-road credit entitlements for the qualifying use of 'forestry' in particular, see Product Grants and Benefits Ruling PGBR 2005/1 Energy grants: off-road credits for forestry.

319. Appendix 3 of this Ruling provides a comparison of the energy grants scheme and the fuel tax credit system.

[183] An entity's net fuel amount is worked out using the formula in section 60-5 of the FT Act.
[184] Subsection 44-5(3) of the FT Act.

Appendix 3 – Comparison table

This Appendix is provided as information to help you understand the differences between the energy grants scheme and the fuel tax credit system. It does not form part of the binding public ruling.

320. A comparison table of the Energy Grants Scheme and the fuel tax credit system in relation to off-road activities. The comparison is only in relation to taxable fuel acquired for use in carrying on an enterprise other than in a vehicle with a GVM greater than 4.5 tonnes, travelling on a public road.

	Energy Grants Scheme	**Fuel tax credit system**
Application of the legislation	Repealed on 1 July 2012	Applies from 1 July 2006 Transitional provisions apply for: • Energy grants arising before 1 July 2006; and • Fuel tax credits arising between 1 July 2006 and 30 June 2012 (phasing out period for the Energy Grants Act).
Description of the claimant	Reference to 'you' or 'person'. In the following Rulings the Commissioner uses the term 'person' to describe the claimant of an energy grant: • PGBR 2004/1 Energy grants: off-road credits for fishing operations; • PGBR 2005/1 Energy grants: off-road credits for forestry; • PGBR 2005/2 Energy grants: off-road credits for mining operations; and • PGBR 2005/3 Energy grants: off-road credits for agriculture.	Reference to 'you' or 'entity' or 'taxpayer'. Note 'you' is not used in provisions that apply only to entities that are not individuals. In this Ruling the Commissioner uses the term 'you' and 'entity' to describe the claimant of a fuel tax credit.
Requirement for registration	A person must be registered for energy grants under section 9 of the PGBA Act.	An entity carrying on an enterprise must be registered for GST or required to be registered for GST.

	Energy Grants Scheme	**Fuel tax credit system**
Method of claiming	Claiming by phone. Submitting a paper claim form to the Tax Office. Claiming via the internet. Claiming using eGrant – through your fuel supplier or fuel card provider. Claim submitted for client by their tax agent.	Claimed by entities carrying on an enterprise on their BAS. Non-business taxpayer's will claim fuel tax credits in a form approved by the Tax Office. Early payment of the fuel tax credit available to certain entities for taxable fuel acquired between 1 July 2006 and 30 June 2008.
Timing and method of claim for fuel 'purchased or imported' before 1 July 2006.	For energy grants relating to fuel purchased or imported before 1 July 2006, the claim must be made before the earlier of 1 July 2007 and the end of 3 years after the start of the claim period. *Alternatively*, a claim may be made under the transitional provisions of the FT Act.	Transitional provisions allow energy grants to be claimed on the BAS as a 'decreasing fuel tax adjustment' for off-road diesel fuel purchased or imported between 1 July 2003 and 30 June 2006 (inclusive).
Terminology in relation to the fuel	Under subsection 53(1) Energy Grants Act 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. The phrase 'purchase or import' only applies for credits arising for fuel purchased or imported before 1 July 2006.	Under section 41-5 of the FT Act you are entitled to a fuel tax credit for taxable fuel that you '**acquire, or manufacture in, or import into,** Australia…' Note: in determining whether the transitional provisions apply from 1 July 2006 to 30 June 2012 in relation to the phasing-in of credit entitlements under the Transitional Act, the provisions assume that references in the Energy Grants Act to 'purchase or import into Australia' were instead references to 'acquire or manufacture in, or import into, Australia'.

	Energy Grants Scheme	**Fuel tax credit system**
Use of fuel	Under section 53 Energy Grants Act you are entitled to an off road credit…for a use by you that qualifies. For example, for use in: • mining operations; • primary production (including agriculture, forestry and fishing); • rail transport; and • marine transport.	Under section 41-5 of the FT Act you are entitled to a fuel tax credit for taxable fuel …to the extent that you do so **for use in carrying on your enterprise**. Carrying on an enterprise has the meaning given by section 195-1 of the GST Act. Transitional provisions phase out the existing grants under the Energy Grants Act between 1 July 2006 and 1 July 2012.
Type of fuel	Entitlement to an off-road credit, and therefore entitlement to an energy grant is for '**off-road diesel fuel**'. No credits provided for the use of petrol.	Fuel tax credit is for '**taxable fuel**'. From 1 July 2008 eligibility for a fuel tax credit extends to petrol used in qualifying activities that were previously eligible for an off-road credit under the Energy Grants Act (or from 1 July 2008 until 1 July 2012 at the rate of half the credit where the entity was not previously eligible for an off-road credit under the Energy Grants Act). From 1 July 2012 a full entitlement is allowed under the FT Act.
Fuel used other than a fuel	For energy grants prior to 1 July 2006: entitlement arose under subsection 53(6) Energy Grants Act, where the use is: • as a solvent; • as a mould agent; • in road construction; or • any other use specified in the regulations.	From 1 July 2006 fuel tax credits can be claimed under section 41-5 of the FT Act. Note: fuel is taken to have been used if it is blended as specified in a determination made under section 95-5 of the FT Act.
Fuel used other than in an internal combustion engine (eg burner applications)	For energy grants prior to 1 July 2006: entitlement arose under subsection 53(7) Energy Grants Act.	From 1 July 2006 fuel tax credits can be claimed for fuel used other than in an internal combustion engine under section 41-5 of the FT Act.

	Energy Grants Scheme	**Fuel tax credit system**
Terminology in relation to vehicles	Subsection 53(2) excludes an off-road credit for diesel fuel if the use is for the purpose of '**propelling any vehicle**' on a public road (for mining operations), or 'for **propelling a road vehicle**' on a public road (for primary production). Subsection 53(3) excludes an off-road credit for diesel fuel if the use is for the purpose of '**propelling a road vehicle**' on a public road (for rail transport).	Transitional provisions for credits arising between 1 July 2006 and 30 June 2012 excludes fuel for use in '**a vehicle travelling**' on a public road. No reference to 'road' vehicle. Reference to **'use in a motor vehicle'** in section 41-25 of the FT Act.
Treatment of alternative fuels	No entitlement for off-road use.	From 1 December 2011 to 30 June 2012 transitional provisions apply to allow a fuel tax credit for acquiring or manufacture in, or importing into, Australia alternative fuel[185] for off-road business use. From 1 July 2012 a fuel tax credit is available under section 41-5 of the FT Act..

[185] Alternative fuels such as LPG, CNG and LNG.

Appendix 4 – Detailed contents list

321. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PGBR 2004/1; PGBR 2005/1; PGBR 2005/2; PGBR 2005/3; TD 2003/12; MT 2006/1; FTD 2006/2; FTD 2006/3; GSTR 2006/3; GSTR 2006/4; TR 2006/10

Subject references:

- acquire
- acquire, manufacture in, or import into, Australia
- apportionment
- carry on an enterprise
- chipmill
- commercial undertaking
- contractors
- diesel fuel
- eligible use
- energy grant
- energy Grants (Credits) Scheme
- enterprise
- in
- in the course of
- felling standing trees
- forest
- forestry, meaning of
- grants
- maintaining roads
- making roads
- meaning of forestry
- mill
- milling of timber
- plantation
- planting or tending of trees
- processing of timber
- public road
- road vehicle
- sawmill
- tending of trees
- thinning of standing timber
- transporting of timber
- timber
- use

Legislative references:

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- EGCSA 2003 35(d)
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- FTA 2006 43-10
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- FTA 2006 44-5(3)
- FTA 2006 Subdiv 45-A
- FTA 2006 45-5
- FTA 2006 45-5(2)
- FTA 2006 Div 60
- FTA 2006 60-5
- FTA 2006 60-5(1)
- FTA 2006 61-15
- FTA 2006 61-20
- FTA 2006 Div 65
- FTA 2006 65-5(1)
- FTA 2006 65-5(3)
- FTA 2006 65-5(4)
- FTA 2006 65-5(5)
- FTA 2006 95-5
- FTA 2006 110-5
- FT (Consequential and Transitional Provisions) Act 2006

- FT (Consequential and Transitional Provisions) Act 2006 Sch 3
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 9
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 9(3)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 10
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 10(5)(b)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 11
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 11(5)(b)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 11(6)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 11(7)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 12
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 12A
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 12A(1)(c)(i)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 12A(1)(e)(i)
- FT (Consequential and Transitional Provisions) Act 2006 Sch 3 12A(1)(e)(ii)
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- Barker v. R (1983) 153 CLR 338; (1983) 47 ALR 1; (1983) 57 ALJR 426
- Brodie and Anor v. Singleton Shire Council (2001) 206 CLR 512; (2001) 180 ALR 145
- Re Brymay Forests Pty Ltd and Collector of Customs Victoria No. V85/305 AAT No. 2496 24 December 1985; (1985) 9 ALN N177
- Chief Executive Officer of Customs v. WMC Resources Ltd (as agent for East Spar Alliance) (1998) 87 FCR 482; (1998) 158 ALR 241
- CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384
- Re City of Nunawading and Comptroller-General of Customs No. V93/540 AAT No. 9758; (1994) 36 ALD 628
- Clean Investments Pty Ltd v. Commissioner of Taxation [2001] FCA 80 14 February 2001; (2001) 105 FCR 248; (2001) 184 ALR 314; 2001 ATC 4068; (2001) 46 ATR 248
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