

Barry Eldridge

[Redacted address]

I am happy to have this made public.

[Signature]

20/3/2014.

January 20, 2014

Senator, The Honourable Barnaby Joyce
Minister for Agriculture
PO Box 963
TAMWORTH NSW 2340

Dear Barnaby,

Re: **Investment in Agriculture**

You probably don't recall meeting me, but as the Chairman of the Diggers and Dealers' Forum in Kalgoorlie I had the pleasure of meeting and welcoming you to our forum last August.

I read with interest in the National Press recently your criticism of the legislation introduced by the previous Labor Government which prevents so called 'Pitt Street Farmers' from claiming losses on agricultural investments when their off-farm income exceeds \$250,000 in the year being assessed.

Unfortunately, having invested around \$4 million to establish a new cattle property at Harvey, south of Perth, I now find myself in this category – thanks to the wisdom of 'The World's Greatest Treasurer,' Wayne Swan.

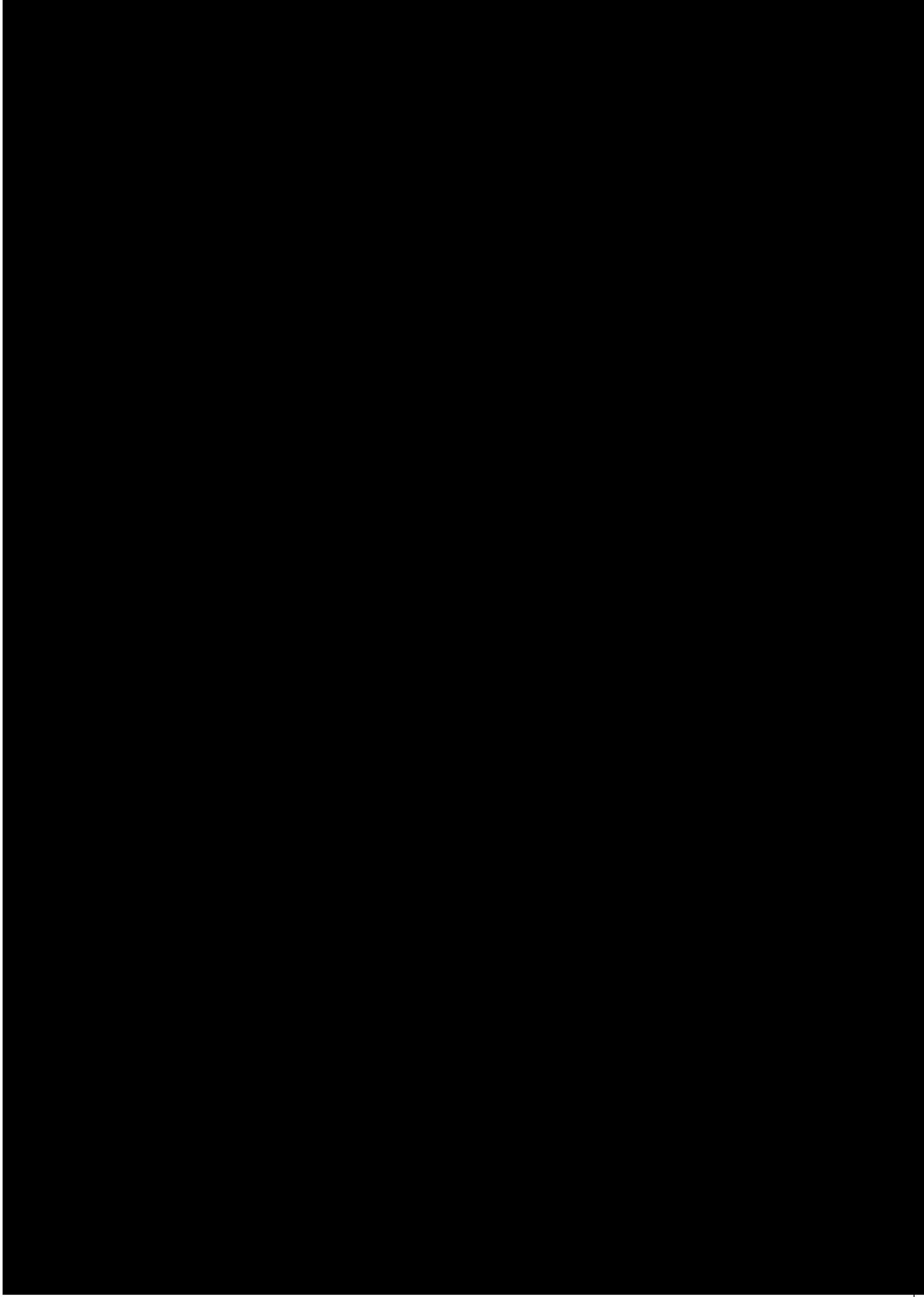
In recent months I have challenged the Tax Commissioner on this matter, as is my right under the Tax Act, but unfortunately, to no avail. Attached for your information are copies of correspondence to that effect. Please feel free to utilise this information in any way you choose if it helps to further my, and anyone else's case in having this ridiculous legislation reversed.

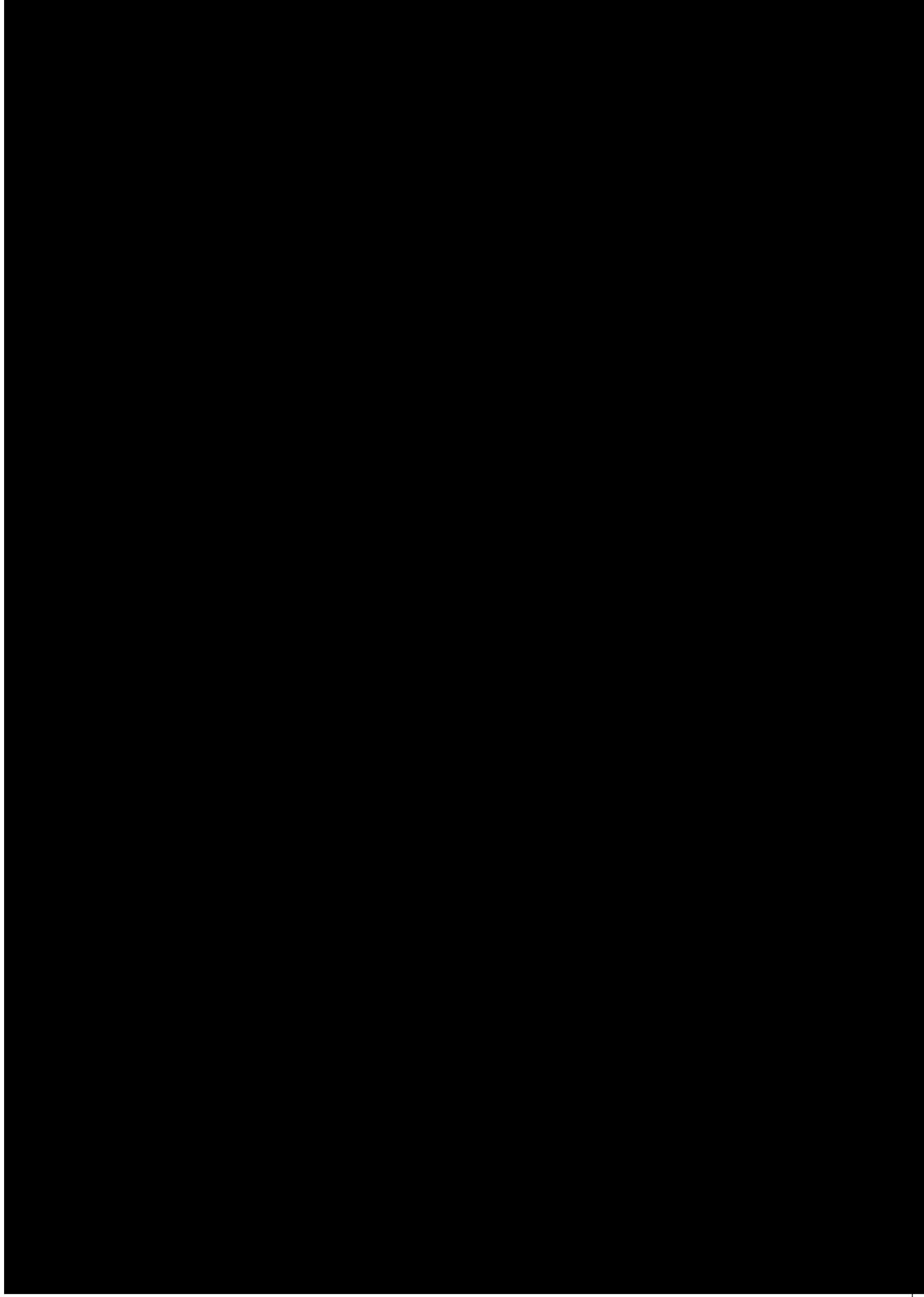
My experience tells me that a large percentage of those people who invest in agriculture in Australia are people such as myself. To disincentivise this sector of the investment community with discriminatory legislation is nonsense.

I thank you for your support to the industry and look forward to hearing that this crazy legislation is eventually withdrawn.

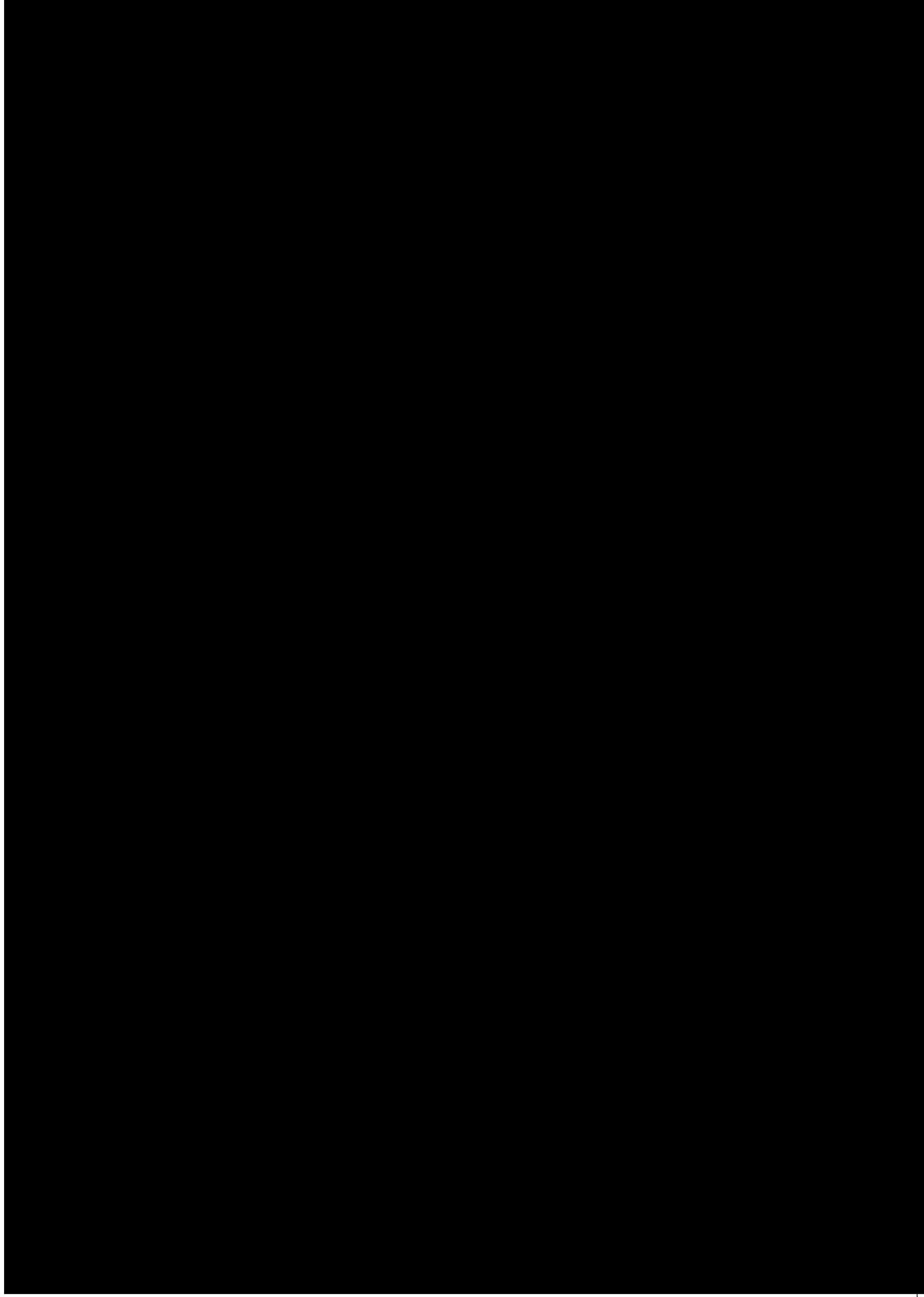
Yours faithfully,

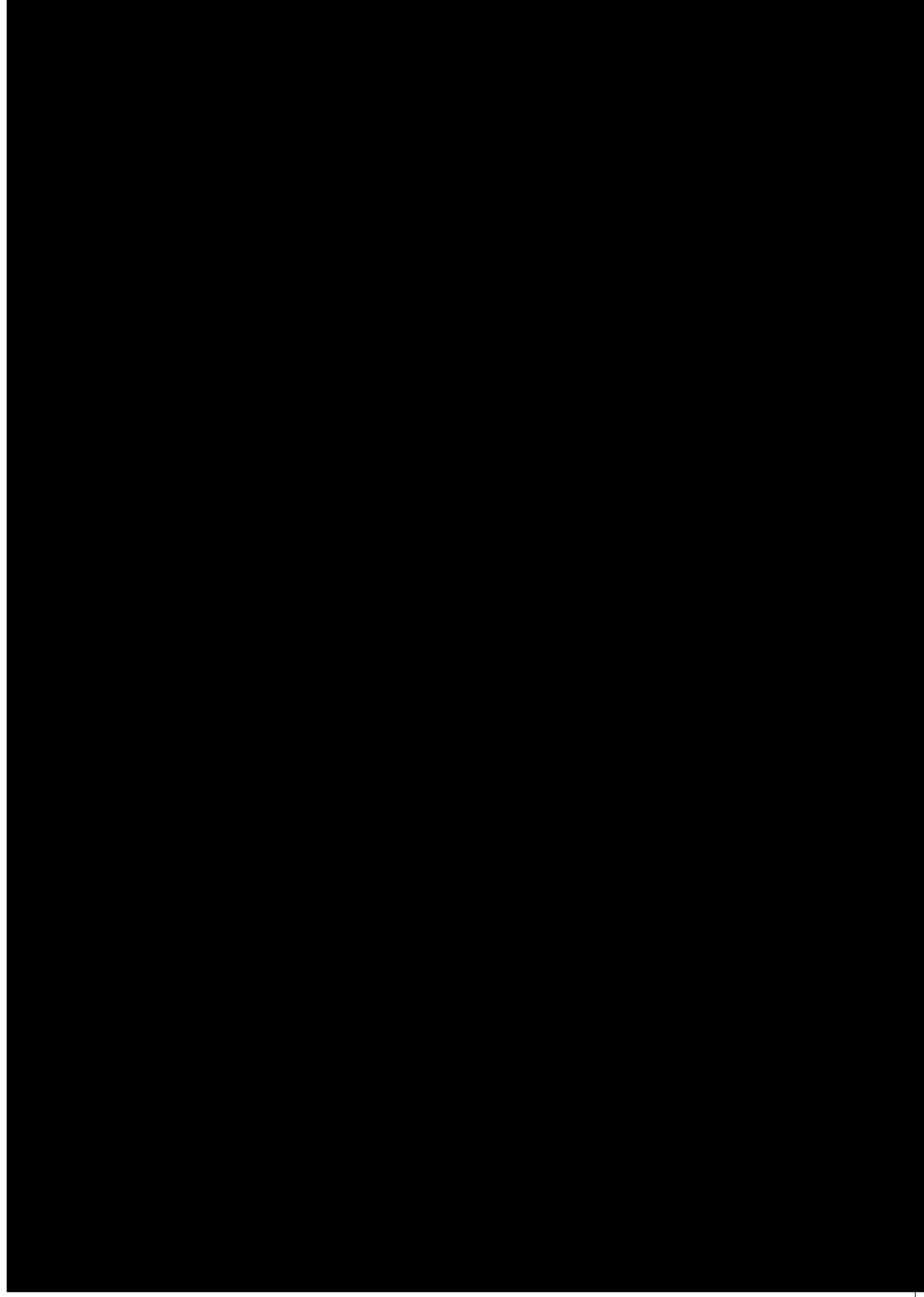
Barry Eldridge
cc. The Honourable Joe Hockey, Treasurer.











1. Description of activities

A cattle grazing farm with 302 cattle (including steers and lactating cows/breeders) located in Harvey, Western Australia. Run by one full-time employee and supervised by the Taxpayer.

The main business activity is the production of premium beef for sale in Australia and overseas.

2. The estimates of quantity and volume of sales as at the 2014-2015 income year are:

The pasture improvement program is aimed at producing eight tonne (8000 kg) of foliage per year and as cattle consume 3% of their body weight per day (lactating cows consume 4% of body weight) the 180 hectare property should produce approximately 8000 kg per year (= 3966kg per day). The Taxpayer intends to run:

- 300kg steers @3% = 9kg per day = 440 head of cattle; and
- 700 kg lactating cows @ 4% = 28kg =142 head of cattle,

being a total of 582 per year.

The table below outlines the increase in stock numbers for the two properties.

- Sales of cattle from original property averaged 74 head per year.
- Current sales are now 180 head per year, realising a gross income of \$137,000 per year.
- On completion of the pasture improvement and fencing programs, stock increases will allow for yearly sales of 360 head per year realising a gross income of \$224,000.

Stock take date	Total stock number
30/6/2008	179
1/7/2009	168
30/6/2010	172
30/6/2011	155
30/6/2012	163
30/6/2013	208
1/9/2013	243
2014	
2015	582 (estimated)

With the pasture and farm improvement programs coming to a conclusion, more stock are able to be purchased and run over the properties. This accounts for the projected increase in stock figures for the coming years.

3. Income expected from the Property is as follows:

- 2013 = approx. \$88,000
- 2014 = approx. \$137,000
- 2015 = approx. \$175,000
- 2016 = approx. \$224,000

4. Research conducted by the Taxpayer:

Stock

In order to produce high quality beef – 3 top quality stud bulls were purchased by the Taxpayer one of which is a Blonde Aquitaine. Blonde Aquitaine's characteristically produce high quality, muscled beef cattle that produce high yielding carcasses.

This bull was bred with Angus cows. The result of this breeding experimentation was the production of high quality beef.

Pasture improvement

As part of the pasture improvement program the Taxpayer experimentally used rye grass and clovers in an attempt to improve the condition of the pasture. The Taxpayer successfully improved the life and performance of the pastures. This of course improves the production and quality of the cattle.

Beetles

The Taxpayer (in conjunction with the CSIRO) is monitoring environmental impact of beetles on the districts eco-system.

5. The expected expenses and capital outlays include:

The graph which the Taxpayer encloses as **Annexure 3** with this application outlines the extensive capital outlay made by the Taxpayer, on the following:

- machinery;
- stock;
- pasture;
- fencing;
- buildings;
- tools; and
- electricity.

6. The Taxpayer finances these expenses and outlays in the following manner:

- Income is expected to rise as at the 2014-15 income year.
- The major infrastructure work was completed in 2008 and in 2012/2013 when the respective properties were purchased.
- Due to the state of both properties, all existing infrastructure was demolished and new roads, fences, sheds, livestock yards and houses were built and over 600 native trees were planted.
- This infrastructure was required in order to bring each property to a standard to produce beef cattle of the desired quality.
- Any income produced in the 2014-15 income year going forward will be used to pay the ordinary expenses of the cattle grazing activities.
- The Taxpayer's personal income has also been used to finance the majority of the infrastructure works on each property to date (approximately \$4 million) and will continue to be used.
- The taxpayer has made a substantial financial commitment to set up the business as he intends the profits of the business to provide for his retirement.
- The business is not a hobby for the taxpayer, but rather a venture into which he has committed a large amount of money out of which he expects to make enough income in the future to live off.

Personal Circumstances of the Taxpayer

The Taxpayer notes that he did not satisfy the requirements of subsection 35-10(2E) of the ITAA97 in the income years the subject of this ruling request.

The Taxpayer's submits that compassionate circumstances have largely led to this being the case. The Taxpayer was unexpectedly requested to join the board of Sundance Resources after a tragedy in June 2010 resulted in the death of five of the company's board. This appointment has resulted in his assessable income exceeding \$250,000 for the years the subject of the ruling. The Taxpayer anticipates resigning from the Sundance Board during the 2014 income year.

The Taxpayer stresses that the Property will supplement his retirement position. A significant amount of capital has been invested in the Property to bring it to a state it is in as at the date of this application and it has always been the intention to make the Property commercially viable in its own right.

Question 7 – Facts and circumstances of the scheme

The first half of the Taxpayer's Property was purchased in June 2007 (**First Property**) the second half was purchased in 2010 (**Second Property**).

No maintenance had been conducted on the First Property for more than 25 years. . Evidence regarding the state of disrepair of the First and Second Properties is included as **Annexure 1**.

Accordingly, the pasture improvement program was comprehensive. At the direction of agronomists, the program was designed to establish, and then rapidly improve, the pasture over the First Property. Initially it was envisaged to produce nine (9) tonnes of foliage per hectare per annum. However, after implementation of the pasture improvement program, it became apparent that only eight (8) tonnes per hectare was achievable.

The Taxpayer also embarked on a five (5) year plan to bring the operational plant and equipment of the First Property to a standard suitable for a premium beef producing property. These works included:

- replacement of all fences on the First Property;
- replacement of the machinery shed, hay shed; and
- replacement of cattle yards.

In the period from the 2010 income year the market value for cattle decreased. This was a result of factors outside the control of the Taxpayer, including less predictable seasons and legislative change resulting in a downturn in the industry.

As a result of this, a decision was made to purchase the adjoining Second Property to the Taxpayer's existing property. According to the prior owner, the last pasture improvement exercise was carried out in 1958. and the same five (5) year plan was entered into by the Taxpayer to bring the Second Property up to the requisite standard for a premium beef grazing property.

With the two adjoining properties, the Taxpayer projects that the properties (as a whole) will be profitable in the 2015 income year.

The beef cattle that are reared on the Taxpayer's properties are sold as premium quality Chargrey beef for the domestic and international markets. As a result, more time, effort and money has been invested ensuring that the Property is in an appropriate condition for grazing animals of this standard. The Taxpayer has obtained Full Accreditation under the Livestock Production Assurance Program (**LPA Program**) – attached as **Annexure 2**. The LPA Program is Meat and Livestock Australia's on-farm food safety accreditation program which beef (lamb and goat) producers can apply to obtain and acts as an endorsement of the quality of their produce. The LPA imposes stringent requirements on complying producers so that they meet the requirements of the domestic and international export markets. The Taxpayer accreditation under the LPA Program evidences his commitment to producing quality beef.

The current business plan for the property outlines the following:

Question 8 – The Taxpayer’s Arguments and references

Paragraph 35-55(1)(a):

the business activity was or will be affected in the excluded years by special circumstances outside the control of the operators of the business activity, including drought, flood, bushfire or some other natural disaster

The Taxpayer submits that there were circumstances outside his control during the periods covered by the application. Specifically there has been an evident lack of increase in price of cattle from the commencement of the operation until the date of this application. This can be attributable to the Federal Government’s decision to cease live cattle export in 2011.

Year	Price paid for Taxpayers beef (steers) per kg
2008	\$1.95
2010	\$1.95
2011	\$1.26 (price per kg after the Federal Government’s decision to cease live cattle export).
2012	\$1.50
2013	\$1.95 (price as of September 2013)

Paragraph 35-55(1)(c):

for an applicant who carries on the business activity who does not satisfy subsection 35-10(2E) (income requirement) for the most recent income year ending before the application is made—the business activity has started to be carried on and, for the excluded years:

- (i) because of its nature, it has not produced, or will not produce, assessable income greater than the deductions attributable to it; and***
- (ii) there is an objective expectation, based on evidence from independent sources (where available) that, within a period that is commercially viable for the industry concerned, the activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).***

The Taxpayer has made every effort to ensure that the business is a commercially viable operation.

The nature of the operation is that it is a premium beef grazing enterprise. In recognition of this fact, the taxpayer went to considerable effort and expense in establishing the Property. This included out of the ordinary expenditure in relation to re-pasteurisation and infrastructure, coupled with this is the fact that the Properties were in a serious state of disrepair at the time they were purchased by the tax payer. The tax payer has a number of local farmers willing to provide evidence that this was the case. The Taxpayer submits that this should be distinguished from circumstances where grazing activities can be conducted immediately.

The land had not been used for grazing activities for some time (if at all), and there was no established pasture nor grazing rotation system which is required for cattle grazing. The Taxpayer had to plant and establish an adequate pasture for premium cattle grazing, and had to stagger the acquisition of the herd in order to efficiently implement a tactical rotational grazing system. The Taxpayer submits that this distinguishes his circumstances from one of purely pasture improvement in which he accepts it would be the case that the operations would be commercially viable much sooner.

As outlined in the facts, the Taxpayer intends this operation to be an income producing asset in his retirement. In recognition of the fact that it was unlikely to be the case with the operations being conducted over just the one property, a decision was made to purchase the adjoining property in the 2010 year. This meant that the process outlined above needed to be conducted all over again on another property by the Taxpayer.

The slow acquisition of the herd, due to the need to let the pasture adequately establish and erect cattle grade fences to contain the animals, hindered the Taxpayer's ability to make the operation on the first property commercially viable within the Commissioner's generally accepted time period.

As outlined in the facts above the Taxpayer expects the operations conducted over the amalgamated properties to become commercially viable in the 2015 income year, this is within the time period accepted by the Commission for a premium beef grazing activity to become commercially viable.

20th Aug. 2013

[REDACTED]
[REDACTED]
[REDACTED]

TO WHOM IT MAY CONCERN

I was farming in the Brunswick district when I first met Mr Barry Eldridge who had recently purchased a rundown dairy farm not far from my location. It was not long before I realised that Mr Eldridge had a genuine passion for beef farming which stemmed back to his boyhood days on the east coast and it soon became blatantly obvious that his new farm was not to become a hobby block or weekend retreat but a serious attempt to establish a viable working farm.

I did not envy the work before him as all aspects of his block were in appalling condition having suffered years of neglect and decay. Not to be deterred, Mr Eldridge set about the massive task of re building his block from scratch in a manner in which those that know him have come to expect, namely perfection.

Derelict buildings were demolished, the entire property was fenced to cattle standards, new cattle yards built to provide a safe working environment, movement lanes created, machinery and hay sheds installed, deadfall cleared and irrigation channels cleaned and dug out. Then there was the task of soil testing and pasture improvement before cattle could be safely installed. All of his capital works were necessary and of a high standard. There were no "show pony" grand entrances or white painted fence posts nor were there any signs of unnecessary or extravagant expenditure – THIS WAS A WORKING FARM.

Mr Eldridge purchased fifty five superb young cows with heifer (future breeders) calves at foot from my large herd of Chargrey cattle and set about building his own herd using quality sires and careful selection. In recent years, Mr Eldridge was given the opportunity to purchase the block next door in order to provide more grazing land and increase his numbers of cattle. Again it was a very run down block requiring fencing, dead fall clearing, laneways and

pasture improvement but Mr Eldridge seized the opportunity to expand his farm rather than just enjoy the original holding. This is NOT a sign of a hobby farmer rather it is evidence of a man dedicated to the establishment of fully operational and viable farm.

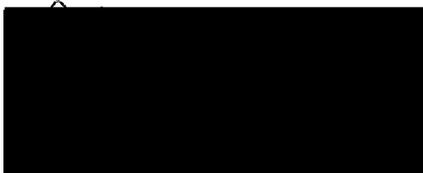
Over the years I have never seen a decline in enthusiasm by Barry Eldridge in his dream of establishing a fully functional beef farm. Anyone who knows Barry would agree that failure is not a word in his vocabulary and his love of farming has been more than demonstrated to me in the many conversations we have had over the years. Tax is not a dirty word as in a perfect world it is or should be associated with profit - something we all strive to achieve.

I am also of the opinion that Barry plays a valuable role in supporting the local contractors by way of machinery, fencing, shed building, cartage, seed and fertilizer, hay making and wages. Without the contribution of people such as Barry, the fragile local economy would suffer greatly.

Mr Eldridge should be applauded for his rehabilitation of two derelict blocks, for setting a standard we would all like to follow and be seen as an example by government agricultural groups of how waste land can be successfully restored to a quality working farm.

In conclusion, Barry has incurred enormous costs in establishing his farm. These costs were far greater than normally experienced when buying a walk in walk out property. He has established an excellent property which should provide a good outcome for the future provided south west beef farmers are not continually treated as "price takers" by major processors in the future.

Yours sincerely

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19th August 2013

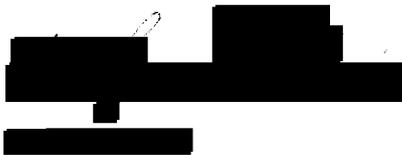
To Whom it May Concern

In 2007 Mr Barry Eldridge approached me as he sought my professional opinion to help purchase the highest quality of beef cattle as I had 40 years of experience with Harvey Beef and he wanted to establish himself as a beef farmer.

At this time, cattle were purchased which consisted of top quality Breeders & Prized Bulls with the intent to build up a profitable herd in years to come and increase herd numbers in the future.

Due to our objective of having only the best quality breeders, the purchase of these animals came at a very high purchase price which also meant high maintenance costs occurred to keep up the wellbeing of these animals.

Yours sincerely,



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ANNEXURE 2



LIVESTOCK PRODUCTION ASSURANCE PROGRAM

20 March 2012

Barry Eldridge [REDACTED]
PO Box 109
BRUNSWICK WA 6224

Dear Producer

Re: ON FARM AUDIT FOR LPA

As a producer who has progressed to Full Accreditation in the Livestock Production Assurance (LPA) Program, your PIC is eligible to participate in the audit program that forms an integral part of LPA.

I wish to advise that your property [REDACTED] has been selected within a group of Property Identification Codes (PICs) in your region for an on-farm audit. On-farm audits review record keeping and management systems in relation to each of the five (5) key areas of LPA. The scope of the on-farm audit is detailed in the '*Guide to the NVD Waybill*' booklet available at the time of initial registration of your PIC to LPA. This information is also available from the Meat and Livestock Australia (MLA) (www.mla.com.au/lqs) or AUS-MEAT (www.ausmeat.com.au) websites.

LPA is Australia's on-farm food safety certification program designed to help the red meat industry strengthen the food safety systems currently in place. The program is managed by the LPA Advisory Committee (LPAAC), which comprises representatives from industry sectors including cattle, sheep, goat and dairy producers, processors and livestock agents.

The LPA Program is associated with basic on-farm food safety guidelines, which underpin food safety declarations on the National Vendor Declaration (NVD). These guidelines are based upon the five (5) key areas aimed at enabling producers to verify the claims made on LPA NVDs in relation to livestock being fit for human consumption.

You will be contacted by a representative of LPA to schedule a suitable time and date for this audit. It is anticipated that the audit will occur during the period **April - June 2012**.

Please be aware that the LPA representative may contact you outside normal business hours when scheduling the audit. The cost of these audits is incorporated into the purchase price of NVDs and there is no direct charge for this audit where they are promptly scheduled. LPA Administration will contact you should an audit of the PIC not be required.

You are encouraged to review the enclosed information to assist in your preparation for the audit.

On behalf of LPA, I wish to thank you for your participation and co-operation and request that you contact the LPA enquiry line on **1800 683 111** (select Option 1), should you have any questions in relation to the on-farm audit process.

Yours faithfully

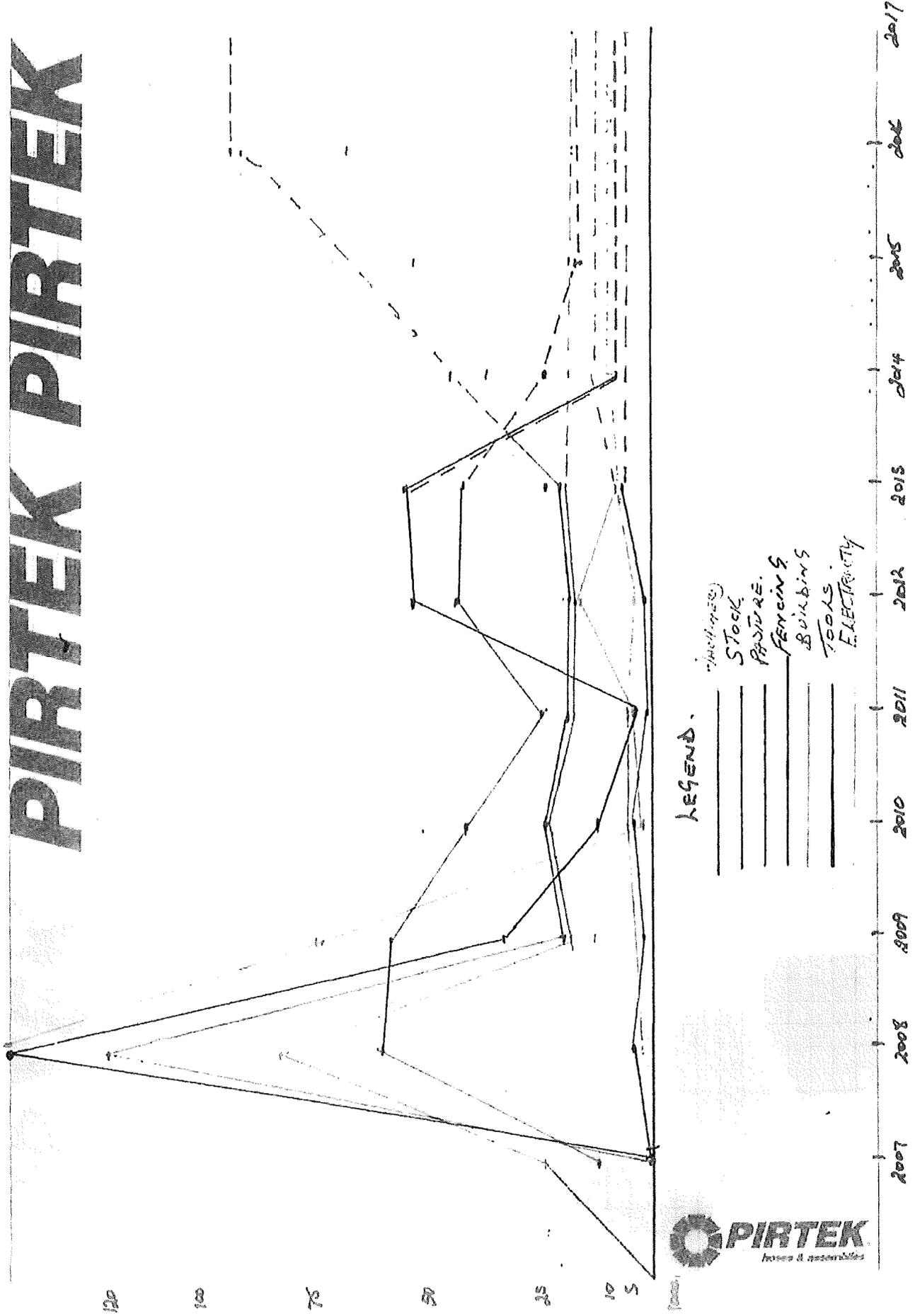
Kevin Roberts
Chairman - LPA Advisory Committee

AUS-MEAT LIMITED

Unit 1 / 333 Queensport Road North, MURARRIE, QLD 4172 • PO Box 3403, TINGALPA DC, QLD 4173 • Tel (07) 3361 9200 • Fax (07) 3361 9222
ABN: 44 082 528 881 • Web: www.ausmeat.com.au

PIRTEK PIRTEK

ANNEXURE 3





Reply to: PO Box 3000
PENRITH NSW 2740
Our reference: 1012568833332
Contact officer: [Redacted]
Phone: 13 28 69
Fax: 1300 139 011

20 December 2013

We are notifying you of your private ruling

Authorisation number: [Redacted]
Authorising officer: [Redacted]

Dear [Redacted]

On 29 October 2013, you applied for a private ruling on behalf of Barry Eldridge relating to Non-commercial losses and the Commissioner's discretion.

Please find:

- below your private ruling and the reasons for our decision
- attached a fact sheet giving information about private rulings including how to have the decision reviewed by objecting, and
- attached an edited version of your ruling that we will publish on our website.

You have:

- 60 days (longer in some cases) to object to the private ruling if you disagree with it and have not had an assessment for the relevant period, and
- 28 days to comment on the edited version.

More information is included in the *Private rulings* fact sheet.

Notice of private ruling

This ruling applies to:

Client name
BARRY ELDRIDGE [Redacted] [Redacted]

Question

Will the Commissioner exercise the discretion in paragraph 35-55(1)(a) or paragraph 35-55(1)(c) of the *Income Tax Assessment Act 1997* (ITAA 1997) to allow you to include any losses from your beef cattle activity in the calculation of your taxable income for the 2010-11 to 2012-2013 financial year?

Answer

No.

This ruling applies for the following period

Year ended 30 June 2011
Year ended 30 June 2012

Year ended 30 June 2013

The scheme commenced on

1 June 2007

Relevant facts and circumstances

This ruling is based on the facts stated in the description of the scheme that is set out below. If your circumstances are materially different from these facts, this ruling has no effect and you cannot rely on it. The fact sheet has more information about relying on your private ruling.

You purchased the first half of the property on which you conduct a beef cattle activity in June 2007 and the second half of the property in 2010.

No maintenance had been conducted on the first property in more than 25 years.

The second property last had pasture improvement exercised in 1958.

You undertook a five year plan to bring the properties to a standard for premium beef grazing. A great deal of money has been invested in the improvements to the properties.

You expect to make a profit in the 2014-15 financial year.

Your stock numbers were as follows:

Date	Number of stock
30 June 2008	179
1 July 2009	168
30 June 2010	172
30 June 2011	155
30 June 2012	163
30 June 2013	208
1 September 2013	243

The amount you received per kilogram for the cattle sold has decreased in 2011 and 2012 but has risen to the 2008 amount in 2013.

You do not satisfy subsection 35-10(2E) of the ITAA 1997 as your adjusted taxable income was more than \$250,000 in the 2010-11 to 2012-13 financial years.

Relevant legislative provisions

Income Tax Assessment Act 1997 - Section 35-1.

Income Tax Assessment Act 1997 - Subsection 35-10(2E).

Income Tax Assessment Act 1997 - Subsection 35-55(1)

Income Tax Assessment Act 1997 - Paragraph 35-55(1)(c).

Income Tax Assessment Act 1997 - Paragraph 35-55(1)(a)

For more information

If you have any questions, please phone 13 28 69 between 8.00am and 5.00pm, Monday to Friday, [REDACTED].

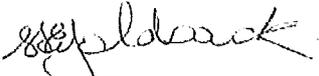
What you need when you phone us

We need to know we're talking to the right person before we can discuss your tax affairs. We'll ask for details only you or someone you've authorised would know. An authorised person is someone who you've previously told us can act on your behalf. It will help if you quote 'Our reference', which you will find at the top of this letter and have your tax file number or Australian business number handy.

Yours sincerely

Steve Vesperman
Deputy Commissioner of Taxation

Per



Reasons for decision

These reasons for decision accompany the *Notice of private ruling* for BARRY ELDRIDGE.

While these reasons are not part of the private ruling, we provide them to help you to understand how we reached our decision.

For the 2009-10 and later income years, Division 35 of the ITAA 1997 will apply to defer a non-commercial loss from a business activity unless:

- you meet the income requirement and you pass one of the four tests
- the exceptions apply
- the Commissioner exercises his discretion.

In your situation, you do not satisfy the income requirement (that is, your taxable income, reportable fringe benefits and reportable superannuation contributions but excluding your business losses, exceeds \$250,000) and do not come under any of the exceptions. Your business losses are therefore subject to the deferral rule unless the Commissioner exercises his discretion.

Commercially viable period

The relevant discretion may be exercised for the income year in question where:

- it is in the nature of your business activity that there will be a period before a tax profit can be produced
- there is an objective expectation your business activity will produce a tax profit within the commercially viable period for your industry.

In your case, you have had a cattle business since 2007 when you purchased the first property on which you graze beef cattle and the second property since 2010.

The nature of your activity has continued to be cattle grazing. While the activity increased in size with the purchase of the second property, it is considered that the activity commenced in the 2006-07 financial year. *NO*

Therefore, the Commissioner can not exercise the discretion available in accordance with subsection 35-55(1) and paragraph 35-55(1)(c) of the ITAA 1997 in relation to your business for the 2010-11 to 2012-13 financial years as the commercially viable period has expired.

Special circumstances

For the 2009-10 and later income years division 35 of the ITAA 1997 will apply to defer a non-commercial loss from a business activity carried on by a taxpayer who is an individual, unless:

- the individual's business activity meets one of the four tests and the income requirement is also satisfied;
- the Commissioner has exercised the discretion in section 35-55 of the ITAA 1997; or
- the individual comes within the Exception contained in subsection 35-10(4) of the ITAA 1997.

(refer subsection 35-10(1) of the ITAA 1997).

You have not satisfied the income requirement as the relevant income exceeds \$250,000 and the Exception in subsection 35-10(4) of the ITAA 1997 does not apply. Losses made from the activity in this year are therefore subject to the loss deferral rule in subsection 35-10(2) of the ITAA 1997 unless the Commissioner decides under paragraph 35-55(1)(b) of the ITAA 1997 that it would be unreasonable for this to occur.

The Commissioner's discretion in paragraph 35-55(1)(a) may be exercised for the income year in question where the business activity is affected by special circumstances outside the control of the operators of the business activity.

Special circumstances are those circumstances which are sufficiently different to distinguish them from the circumstances that occur in the normal course of conducting a business activity. For those individuals who do not satisfy the income requirement special circumstances are those which have materially affected the business activity, causing it to make a loss. For these individuals the Commissioner's discretion in paragraph 35-55(1)(a) may be exercised for the income year in question where:

- but for the special circumstances, the business activity would have made a tax profit; and
- the activity passes at least one of the four tests or, but for the special circumstances, would have passed one of the four tests.

In your case, you meet the income test and the real property test.

Taxation Ruling TR 2007/6 sets out the Commissioner's interpretation of the exercise of the Commissioner's discretion under paragraph 35-55(1)(a) of the ITAA 1997. The following has been extracted from paragraphs 47 to 53 of this ruling:

Although not limited to natural disasters, paragraph 35-55(1)(a) of the ITAA 1997 refers to special circumstances outside the control of the business activity, including drought, flood, bushfire or some other natural disaster. Cyclones, hailstorms and tsunamis are examples of other natural disasters that would come within the scope of the paragraph. These events are taken to be special circumstances outside the control of the operators of the business activity. The special circumstances must have affected the business activity.

While we accept that you have invested a great deal of money to bring the properties to a standard for premium beef grazing, this was out of your control and is not considered to be a special circumstance that has affected the business activity.

We also acknowledge that the price of the cattle sold has not risen. Market fluctuations are not considered to be special circumstances as described above. However, even if this was considered to be a special circumstance, it could not be said that this was the reason for the activity not producing a profit. Rather, the expenses of improving the property were sufficient to cause the activity to make a loss.

In view of the above, the Commissioner's discretion in respect of special circumstances will not be exercised for the 2010-11 to 2012-13 financial years.

Private rulings

Income tax, Medicare levy and franking tax

HOW DOES YOUR PRIVATE RULING PROTECT YOU?

Your ruling only applies in the circumstances set out in the 'Relevant facts and circumstances' section of the ruling.

If you 'rely' on your ruling, that is, conduct your tax affairs in a way that is consistent with your ruling, we must apply the law to you in the way set out in the ruling.

If we find out later that your ruling is incorrect – for example, it does not correctly set out how the law applies, and you would have to pay more tax under the correct interpretation – you can rely on the ruling and will not have to pay any more tax. The ruling also protects you from penalties and from paying any interest. This protection applies to the period specified in the notice.

However, if the correct interpretation of the law is to your advantage, we will apply the law to give you the advantage (unless a time limit prevents us from doing so).

You will not have this protection if:

- * you already have a ruling on the same matter and for the same period, and you have not told us about it (then the later ruling is taken not to have been made), or
- ** another ruling revises or changes this ruling before you begin the arrangement described in the ruling, and before any income year or other period stated in the ruling starts (then this ruling does not apply).

DO YOU HAVE TO FOLLOW THE RULING?

If you disagree with this ruling, you can choose not to follow it. You can change your mind at any time (subject to time limits imposed by the law).

If you choose not to follow your ruling and your tax position is later found to be incorrect, you will owe any tax shortfall, plus interest. That is, if you have not followed it, merely having a ruling does not protect you from having to pay more tax.

You may also have to pay penalties unless you can show that you have exercised reasonable care in deciding to adopt your tax position or have adopted a 'reasonably arguable' tax position.

DOES THE RULING AFFECT A TAX ASSESSMENT?

If your ruling affects a tax assessment you have already received, you may need to ask us for an amendment. We do not amend your assessments automatically because you may choose not to follow the ruling.

If you choose to rely on your private ruling, and think you may need an amendment, advise your contact officer.

DO YOU DISAGREE WITH THE RULING?

If you are not satisfied with this ruling you can ask us to review it. There are two ways of doing this, depending on whether or not you have a tax assessment for the matter (or period) that your ruling covers. If you:

- * don't have an assessment, you may object to the ruling itself within
 - 60 days of the date of the ruling, or
 - two years after the last day for lodging the relevant return (four years in some circumstances), if that is later.
- ** have an assessment, you object to the assessment rather than the ruling. You have at least two years after the date of the assessment to object to it, and up to four years in some circumstances.



PRIVATE RULINGS

How to object to a ruling

You must make your objection in writing and it must:

- be signed and dated
- state fully and in detail the grounds you are relying on.

You can submit your objection:

- via the tax agent or business portals
- by fax to **(02) 6225 0901**, or
- by mail to:

Australian Taxation Office
MEI Provision of Advice
PO Box 1130
PENRITH NSW 2740

Please quote the authorisation number of the ruling in your objection. This is located towards the top right hand corner of the first page of the ruling.

Our website has more information on how to lodge an objection. Go to www.ato.gov.au and type 'objection' in the search box.

Alternatively, phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask to speak to the contact officer named in your *Notice of private ruling*.

! If you are not satisfied with our decision on your objection you may be able to:

- have it reviewed by the Administrative Appeals Tribunal, or
- appeal to the Federal Court.

We will include more information about these processes when we give you our decision.

PUBLISHING YOUR RULING ON OUR WEBSITE

To ensure the integrity of our advice, we publish a version of every private ruling on our website www.ato.gov.au in the *Register of private binding rulings*.

Before we publish, we edit each ruling to remove all identifying details. This ensures that your privacy is protected. A copy of this edited version is included with your ruling.

Do you want to change the edited version?

If you are concerned that the edited version may still allow you to be identified, contact us within **28 days** of the date of your ruling at:

Practice Management Unit
Australian Taxation Office
PO Box 9990
NEWCASTLE NSW 2300

If you do not contact us within 28 days, we will publish the edited version in the *Register of private binding rulings*.

Edited version of your private ruling

This edited version of your ruling will be published in the public register of private binding rulings after 28 days from the issue date of the ruling. The attached private rulings fact sheet has more information.

Please check this edited version to be sure that there are no details remaining that you think may allow you to be identified. If you have any concerns about this ruling you wish to discuss, you will find our contact details in the fact sheet.

Ruling

Subject: Non-commercial losses and the Commissioner's discretion

Question

Will the Commissioner exercise the discretion in paragraph 35-55(1)(a) or paragraph 35-55(1)(c) of the *Income Tax Assessment Act 1997* (ITAA 1997) to allow you to include any losses from your animal activity in the calculation of your taxable income for the 2010-11 to 2012-2013 financial year?

Answer

No.

This ruling applies for the following period

Year ended 30 June 2011

Year ended 30 June 2012

Year ended 30 June 2013

The scheme commenced on

1 June 2007

Relevant facts

You purchased the first half of the property on which you conduct a animal activity in June 2007 and the second half of the property in 2010.

No maintenance had been conducted on the first property in more than 25 years.

The second property last had pasture improvement exercised over 50 years ago.

You undertook a five year plan to bring the properties to a standard for premium animal grazing. A great deal of money has been invested in the improvements to the properties.

You expect to make a profit in the 2014-15 financial year.

The amount you received per kilogram for the animals sold has decreased in 2011 and 2012 but has risen to the 2008 amount in 2013.

You do not satisfy subsection 35-10(2E) of the ITAA 1997 as your adjusted taxable income was more than \$250,000 in the 2010-11 to 2012-13 financial years.

Relevant legislative provisions

Income Tax Assessment Act 1997 - Section 35-1.

Income Tax Assessment Act 1997 - Subsection 35-10(2E).

Income Tax Assessment Act 1997 - Subsection 35-55(1)

Income Tax Assessment Act 1997 - Paragraph 35-55(1)(c).

Income Tax Assessment Act 1997 - Paragraph 35-55(1)(a)

Reasons for decision

For the 2009-10 and later income years, Division 35 of the ITAA 1997 will apply to defer a non-commercial loss from a business activity unless:

- you meet the income requirement and you pass one of the four tests
- the exceptions apply
- the Commissioner exercises his discretion.

In your situation, you do not satisfy the income requirement (that is, your taxable income, reportable fringe benefits and reportable superannuation contributions but excluding your business losses, exceeds \$250,000) and do not come under any of the exceptions. Your business losses are therefore subject to the deferral rule unless the Commissioner exercises his discretion.

Commercially viable period

The relevant discretion may be exercised for the income year in question where:

- it is in the nature of your business activity that there will be a period before a tax profit can be produced
- there is an objective expectation your business activity will produce a tax profit within the commercially viable period for your industry.

In your case, you have had a cattle business since 2007 when you purchased the first property on which you graze animalcattle and the second property since 2010.

The nature of your activity has continued to be cattle grazing. While the activity increased in size with the purchase of the second property, it is considered that the activity commenced in the 2006-07 financial year.

Therefore, the Commissioner can not exercise the discretion available in accordance with subsection 35-55(1) and paragraph 35-55(1)(c) of the ITAA 1997 in relation to your business for the 2010-11 to 2012-13 financial years as the commercially viable period has expired.

Special circumstances

For the 2009-10 and later income years division 35 of the ITAA 1997 will apply to defer a non-commercial loss from a business activity carried on by a taxpayer who is an individual, unless:

- the individual's business activity meets one of the four tests and the income requirement is also satisfied;
- the Commissioner has exercised the discretion in section 35-55 of the ITAA 1997; or
- the individual comes within the Exception contained in subsection 35-10(4) of the ITAA 1997.

(refer subsection 35-10(1) of the ITAA 1997).

You have not satisfied the income requirement as the relevant income exceeds \$250,000 and the Exception in subsection 35-10(4) of the ITAA 1997 does not apply. Losses made from the activity in this year are therefore subject to the loss deferral rule in subsection 35-10(2) of the ITAA 1997 unless the Commissioner decides under paragraph 35-55(1)(b) of the ITAA 1997 that it would be unreasonable for this to occur.

The Commissioner's discretion in paragraph 35-55(1)(a) may be exercised for the income year in question where the business activity is affected by special circumstances outside the control of the operators of the business activity.

Edited version of private ruling

Special circumstances are those circumstances which are sufficiently different to distinguish them from the circumstances that occur in the normal course of conducting a business activity. For those individuals who do not satisfy the income requirement special circumstances are those which have materially affected the business activity, causing it to make a loss. For these individuals the Commissioner's discretion in paragraph 35-55(1)(a) may be exercised for the income year in question where:

- but for the special circumstances, the business activity would have made a tax profit; and
- the activity passes at least one of the four tests or, but for the special circumstances, would have passed one of the four tests.

In your case, you meet the income test and the real property test.

Taxation Ruling TR 2007/6 sets out the Commissioner's interpretation of the exercise of the Commissioner's discretion under paragraph 35-55(1)(a) of the ITAA 1997. The following has been extracted from paragraphs 47 to 53 of this ruling:

Although not limited to natural disasters, paragraph 35-55(1)(a) of the ITAA 1997 refers to special circumstances outside the control of the business activity, including drought, flood, bushfire or some other natural disaster. Cyclones, hailstorms and tsunamis are examples of other natural disasters that would come within the scope of the paragraph. These events are taken to be special circumstances outside the control of the operators of the business activity. The special circumstances must have affected the business activity.

While we accept that you have invested a great deal of money to bring the properties to a standard for premium animal grazing, this was out of your control and is not considered to be a special circumstance that has affected the business activity.

We also acknowledge that the price of the cattle sold has not risen. Market fluctuations are not considered to be special circumstances as described above. However, even if this was considered to be a special circumstance, it could not be said that this was the reason for the activity not producing a profit. Rather, the expenses of improving the property were sufficient to cause the activity to make a loss.

In view of the above, the Commissioner's discretion in respect of special circumstances will not be exercised for the 2010-11 to 2012-13 financial years.

Disclaimer

You cannot rely on the rulings in the *Register of private binding rulings* in your tax affairs. You can only rely on a private ruling that we have given to you or to someone acting on your behalf.

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The rulings in the register have been edited and may not contain all the factual details relevant to each decision. Do not use the register to predict ATO policy or decisions.