

# ***PR 2006/22 - Income tax: Gunns Plantations Winegrape Project 2005 Supplementary Release - 2006 Investors***

⚠ This cover sheet is provided for information only. It does not form part of *PR 2006/22 - Income tax: Gunns Plantations Winegrape Project 2005 Supplementary Release - 2006 Investors*

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *22 March 2006*



## Product Ruling

### Income tax: Gunns Plantations Winegrape Project 2005 Supplementary Release – 2006 Investors

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**ⓘ This Ruling provides you with the following level of protection:**  
This publication (excluding appendices) 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 taxation 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 under-paid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state the law how the current law applies to you.

### **No guarantee of commercial success**

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme is not carried out as described, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme include in their income tax returns income derived in those future years.

### **Terms of use of this Product Ruling**

This Product Ruling has been given on the basis that the entity(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'taxation provision(s)' identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the 'Gunns Plantations Winegrape Project 2005 Supplementary Release 2006 Investors' or simply as 'the Project'.

### Relevant taxation provision(s)

2. The tax laws dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 8-1 of the ITAA 1997;
  - section 17-5 of the ITAA 1997;
  - section 25-25 of the ITAA 1997;
  - Division 27 of the ITAA 1997;
  - Division 35 of the ITAA 1997;
  - Division 40 of the ITAA 1997;
  - Subdivision 61-J of the ITAA 1997;
  - Division 328 of the ITAA 1997;
  - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
  - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 82KZL of the ITAA 1936;
  - sections 82KZME and 82KZMF of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

### Goods and Services Tax

3. All fees and expenditure referred to in this Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

**Changes in the Law**

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

**Class of entity**

7. The class of each entity to whom this Ruling applies is the entity more specifically identified in the Ruling part of this Product Ruling and who enters into the scheme specified below on or after the date this Ruling is made. The entity will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, the entity is referred to as 'Growers'.

8. The class of entity to whom this Ruling applies does **not** include:

- an entity who intends to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- an entity who participates in the Project through offers made other than through the Supplementary Product Disclosure Statement;
- an entity who is accepted to participate in the Project after 31 May 2006;
- an entity who finances their participation in the Project with loans other than from Gunns Finance Pty Ltd or Allco Managed Investments, or other than as described at paragraph 56 to 64 of this Ruling; and
- Gunns Plantations Limited or its associates.

## Qualifications

9. The class of entity defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 15 to 64.
10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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12. This Ruling applies prospectively from 22 March 2006, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).
13. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the scheme covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

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## Withdrawal

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14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entity's involvement in the scheme.

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## Scheme

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15. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following documents:

- Application for Product Ruling received 13 September 2005, and additional correspondence, emails, facsimiles and telephone conversations dated 16, 23 and 28 September, 2, 3 and 30 November, 1, 5 and 6 December 2005, 5, 6, 10, 12, 18 and 25 January 2006, 2, 20, 21, 22 and 23 February 2006;
- Draft **Supplementary Product Disclosure Statement** ('Supplementary PDS') for the Project received 7 November 2005;
- Draft Constitution of the Gunns Plantations Winegrape Project 2005 and First Supplemental Deed for the Project received 13 September 2005 (Collectively called the **Constitution**);
- Variation to Compliance Plan for the Project adopted by Gunns Plantations Limited (as 'Responsible Entity') received 13 September 2005;
- Initial and Additional Services Sub-contracting Agreement between Gunns Plantations Limited and Gunns Limited (as 'Sub-contractor') for the Gunns Plantations Winegrape Project 2005 and Variation of Initial and Additional Services Sub-contracting Agreement between Gunns Plantations Limited and Gunns Limited (as 'Sub-contractor') for the Project received 13 September 2005;

- Draft Maintenance and Harvesting Sub-Contracting Agreement between Gunns Plantations Limited and Gunns Limited (as sub-contractor) for the Gunns Plantations Winegrape Project 2005 and Variation of Maintenance and Harvesting Sub-Contracting Agreement between Gunns Plantations Limited and Gunns Limited (as sub-contractor) for the Project received 13 September 2005;
- Draft Management Agreement between Gunns Plantations Limited and a Grower for the 'Gunns Plantations Winegrape Project 2005' and Variation of Management agreement between Gunns Plantations Limited and Grower for the Project received 13 September 2005 (Collectively called the **Management Agreement**);
- Draft Vine Right Agreement between Gunns Plantations Limited and a Grower for the Gunns Plantations Winegrape Project 2005 and Variation of Vine Right agreement between Gunns Plantations Limited and Grower for the Project received 13 September 2005 (Collectively called the **Vine Right Agreement**);
- Draft Lease Agreement between Gunns Limited (as 'Landowner') and Gunns Plantations Limited in relation to land at 'Coombend' and Extension or Variation of Lease or Sub-lease in respect to land at 'Coombend' received 13 September 2005;
- Draft Lease agreement dated 29 June 2004 between Gunns Limited (as 'Landowner') and Gunns Plantations Limited in relation to land at 'White-Hills' and North Slopes and Extension or Variation of Lease or Sub-lease in respect to land at 'White-Hills' and North Slopes, received 13 September 2005;
- Draft Custody Agreement for the 'Gunns Plantations Winegrape Project 2005 to be entered into by Gunns Plantations Limited and Gunns Limited and Variation of Custody Agreement for the Project to be entered into by Gunns Plantations Limited and Gunns Limited received 13 September 2005;
- Draft **Finance Package** for the Project between Gunns Finance Pty Ltd and Growers entering into the Project on or before 31 May 2006, received 7 November 2005;
- Draft **Finance Application** for the Project between Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1 (Allco Managed Investments) and Growers entering into the Project on or before 31 May 2006, received 20 February 2006; and

- Draft **Terms Arrangement** for the Project between Gunns Plantation Limited, Growers and Guarantor, received 7 November 2005.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

16. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

17. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

### Overview

18. The main features of the Project are as follows:

Location – Existing Vineyards	‘North Slopes’ and ‘White Hills’, Northern Tasmania
Location – New Vineyard	‘Coombend’, Eastern Tasmania
Type of business to be carried on by each participant	Commercial growing of wine grapes for the purpose of harvesting and selling the produce.
Number of hectares offered for cultivation	138 hectares and oversubscription will not be accepted
Size of each interest	0.20 hectares ‘Vinelot’, of which 0.06 hectare will be of ‘Existing Vineyard’ and 0.14 hectare will be of ‘New Vineyard’
Minimum allocation	One ‘Vinelot’
Number of vines per hectare	Approximately 2,424 vines per hectare
Term of the Project	20 years
Initial cost	\$17,325
Initial cost per hectare	\$86,625
Ongoing costs	<ul style="list-style-type: none"> <li>• ‘Management &amp; Harvest Fees’;</li> <li>• Vine Right Fee; and</li> <li>• ‘Sales Commission’ of 2.2% of ‘Grape Sale Proceeds’.</li> </ul>

19. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. Gunns Plantations Limited ('Gunns Plantations') has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

20. An offer to participate in the Project will be made through a Supplementary Product Disclosure Statement ('Supplementary PDS') for 690 'Vinelots' which comprises a total of 138 hectares. Participants will be invited to subscribe in the Project on or before 31 May 2006. Each entity will become a Grower of cool climate wine grapes by acquiring a 'Vine Right' over a 0.20 hectare 'Vinelot', of which 0.06 hectares will be of 'Existing Vineyards' and 0.14 hectares will be of 'New Vineyard'.

21. To participate in the Project participants must complete the Application and Power of Attorney Form in the Supplementary PDS and pay the 'Application Fee'. The 'Application Fee' will be banked into the relevant 'Applications Portion'. These monies will be released to Gunns Plantations when certain specified criteria have been met in accordance with clause 7 and 8 of the Constitution.

22. Each Grower will enter into a 'Vine Right Agreement' with Gunns Plantations. The 'Vine Right Agreement' will comprise contractual rights in relation a parcel of land of 0.20 hectares called a 'Vinelot'.

23. Each 'Vinelot' will comprise of 0.14 hectares which will be situated within the 'New Vineyard', on which the 'Vines' will be planted before 31 December 2006, and 0.06 hectares of fully established vines situated within the 'Existing Vineyards', which were completed prior to January 2005.

24. Each Grower will also enter into a Management Agreement to contract with Gunns Plantations as the 'Manager', to undertake the 'Initial Services' and the 'Additional Services'. Gunns Plantations will also provide 'Maintenance and Harvest Services' and arrange to market and sell the 'Grapes'.

25. Gunns Plantations will appoint Gunns Limited as subcontractor to perform the 'Initial Services' and 'Additional Services' under each Management Agreement on the terms contained in the Sub-Contracting Agreement.

26. Gunns Plantations will not accept oversubscriptions. There is no minimum amount that must be raised under the Supplementary PDS.

**Constitution**

27. The Constitution for the Project sets out the general functions, powers and duties under which the Responsible Entity agrees to act for the Growers and to manage the Project. The Vine Right Agreement and the Management Agreement are Schedules to the Constitution. These Agreements will be executed on behalf of each Grower who has signed the 'Application and Power of Attorney Form' attached to the Supplementary PDS and who is accepted into the Project on or before 31 May 2006. After acceptance and execution of the Agreements, Growers are bound by the Constitution by virtue of their participation in the Project.

28. Upon acceptance of an application, the Responsible Entity will allocate the 'Vinelot'(s) to the Grower and prepare the Vine Right Agreement and Management Agreement in accordance with clause 6.

29. Before authorising or instructing the Custodian to release the 'Application Money', the Responsible Entity must be satisfied among other things that:

- the Vine Right Agreements have all been duly completed and executed;
- it has the capacity to grant the rights referred to in the Vine Right Agreement;
- all necessary consents have been obtained;
- the property that is the subject of the rights referred to in the Vine Right Agreement is not subject to any encumbrance or restrictions which detrimentally affects the interests of Growers;
- the Leases are registered prior to, or immediately after the acceptance of an application in respect of the Vine Right Agreement; and
- the Leases are not deregistered while it is subject to any Vine Right Agreement and Management Agreement entered into under the Constitution, clause 7.

30. The Responsible Entity is entitled to receive fees according to clause 11 and may instruct the Custodian to invest all or part of the 'Proceeds Portion' and 'Application Portion' according to clause 12.

31. Among other things the Constitution sets out in detail the following:

- general functions, powers and duties, clause 13;
- complaints, clauses 14;
- compliance committee requirement under the Corporations Act, clause 15;

- the requirement for the Responsible Entity to procure a written report from the Independent Viticulturist and for Growers to receive copies of the Viticulturist's Report, clause 16;
- the transfer and transmission of a Growers' interest, clauses 18 and 19;
- the retirement or removal of the Responsible Entity according to the Corporations Act, clause 22;
- the issue of a 'Vinlot' Statement and a 'Register of Members' of the Project, clauses 23 and 24; and
- the 'Collections and payments' of all 'Grape Sale Proceeds', the distribution from the 'Proceeds Portion of the Fund' and 'Deductions from Income or Profit', clauses 26, 27 and 28.

## **Compliance Plan**

32. As required by the *Corporations Act 2001*, Gunns Plantations has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Gunns Plantations manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

## **Lease Agreements**

### ***Lease of 'New Vineyard'***

33. Gunns Limited (the 'Landowner'), is the registered proprietor of the 'Land' on which the 'New Vineyard' will be established and has agreed to grant to the Responsible Entity a 'Lease' of the 'Land', together with all the rights described in clauses 3.2 and 4, for the 'Term' of the Project.

34. The parties have signed the 'Lease', and it will be registered against the relevant titles. A variation to the 'Lease' will be prepared extending the term of the lease for the length of the Project.

### ***Lease of 'Existing Vineyard'***

35. The Landowner is the registered proprietor of the 'Land' on which the 'Existing Vineyards' are situated and has granted to the Responsible Entity a 'Lease' of the 'Land', together with all the rights described in clauses 3.2 and 4, for the 'Term' of the Project.

36. The parties have signed the 'Lease', and it has been registered against the relevant titles.

**Vine Right Agreement**

37. Growers participating in the Project will enter into a 'Vine Right Agreement' with Gunns Plantations for the 'Term' of the Project. Gunns Plantations will grant to each Grower 'Vine Rights' over the 'Vinlot' which include the following:

- access to the 'Vinlot' and the 'Common Areas';
- access to and use of the 'Vineyard Infrastructure';
- an exclusive right to access, use and enjoy the benefit of the 'Vines';
- an exclusive right to 'Harvest' the 'Grapes'; and
- an exclusive right to take all right, title and interest in the 'Harvested Grapes'.

38. The rights and obligations of the Grower and of Gunns Plantations are set out in Clause 4 and 5. This includes the Grower having at all times full right, title and interest in the 'Harvested Grapes'.

39. Gunns Plantations is entitled to the 'Vine Right Fee' as described in Item 2 of Schedule 1 – Reference Table. In respect of the period from the Commencement Date to 30 June 2008, the 'Vine Right Fee' will be included in the 'Application Fee'. For the year ended 30 June 2009, the Gross Proceeds Entitlement will be retained by the Custodian, on behalf of GPL, and paid to GPL in lieu of the Vine Right Fee. From 1 July 2009 the 'Vine Right Fee' will be deducted by the Custodian on behalf of Gunns Plantations from the 'Gross Proceeds Entitlement' but where a Growers' obligation to pay the 'Total Fee Liability' (which includes the 'Vine Right Fee') exceeds their 'Gross Proceeds Entitlement', a Grower will be invoiced for the shortfall in accordance with clause 12 of the Management Agreement.

40. During the 'Term' of the 'Lease' the Landowner will, in the event of destruction or serious fault, replace all 'Vineyard Infrastructure' necessary for carrying out the Project, clause 5.1(b)(1).

41. In the event of destruction or death of the 'Vines', the Landowner will replant for the 'Term' (as close as is practically possible to 100% of the average initial planting density of the 'Developed Area') all 'Vines' necessary for carrying out the Project (clause 5.1(b)(3)) but subject to the condition at clause 8 (see paragraph 42).

42. At any time after the second anniversary of the 'Commencement Date', if 95% of the 'Vines' are destroyed or materially damaged by fire or any other cause, then Gunns Plantations may terminate this agreement by notice in writing to each Grower, clause 8.

## Management Agreement

43. A Management Agreement is entered into between Gunns Plantations, as 'Manager' and each Grower. The parties agree that the Manager will be appointed to perform the 'Services' in respect of each Grower's 'Vinelot' and to act as sole agent to market, enter into negotiations and sell the Harvested Grapes on the Grower's behalf, in accordance with the terms and conditions set out in this agreement.

44. The Manager must use its best endeavours to complete all of the 'Initial Services' in relation to each Grower's 'Vinelot' before 30 June 2006, clause 4.

45. The Manager must also complete all of the following 'Additional Services' in relation to each Grower's 'Vinelot', clause 5A:

- procuring and attaching dripper lines in respect of the 'New Vineyard' on or before 30 June 2006;
- planting 'Vines' in the 'New Vineyard' during the months from October to December 2006; and
- placing vineguards used in the vine establishment process of the 'New Vineyard' on or before 30 June 2007.

46. Payment of the 'Application Fee' constitutes full payment of the fees relating to the 'Initial Services', described in clause 4, and the 'Additional Services' described in clause 5A.

47. The Manager will perform the 'Maintenance and Harvest Services' in a proper and efficient manner and in accordance with the requirements of clause 5.2. The Manager warrants to the Grower that it has access to such staff, personnel, consultants and other specialists' services as may be reasonable necessary to perform the 'Maintenance and Harvest Services', clause 5.1.

48. The Manager will be entitled to an annual 'Maintenance and Harvest Fee' in consideration for the performance of the 'Maintenance and Harvest Services', clause 9.2, subject to variations noted in paragraph 54.

49. Under this agreement the Grower appoints the Manager as sole agent to market, enter into negotiations and sell the 'Grapes' on the Grower's behalf at a fair and reasonable price taking into account factors listed at clause 11(b).

50. The Manager will be responsible for insuring the 'Vineyard' against public risk. If requested in writing by the Grower, the Manager will endeavour to procure for the Grower insurance cover against destruction or damage of the Grower's 'Grapes'. If the Manager is able to effect insurance as requested, the Manager will invoice the Grower for the relevant premium together with an administration charge of 10% of the amount of the premium in each 'Year' of the 'Term'. For each Grower that does obtain such insurance, and subsequently makes a successful claim in relation to the policy, 35% of the insurance proceeds must be paid to the Manager in satisfaction of the 'Ongoing Fees' for that 'Vinelot', clause 13.

51. Any Grower who suffers financial hardship at any time after the fourth anniversary of the 'Commencement Date', may apply to the Manager to pay on the Grower's behalf all 'Ongoing Fees' payable by the Grower under the Management Agreement, clause 16.

### **Pooling of 'Grapes' and distribution of proceeds**

52. The Constitution sets out provisions relating to the pooling of amounts from the sale of the Growers 'Grapes' and the distribution of proceeds from that sale. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed 'Grapes' from a 'Harvest' to the pool making up the proceeds are entitled to benefit from distributions from those proceeds; and
- 'Grapes' can only be pooled with the 'Grapes' of Growers accepted to participate in the Project.

### **Project Fees**

53. The Grower must pay an Application Fee of \$17,325 per 'Vinelot' payable on Application which will be applied towards the following:

- \$10,585 for the 'Initial Services' to be provided from the 'Commencement Date' to 30 June 2006;
- \$1,146 for 'Vine Right Fees' for the period from the 'Commencement Date' to 30 June 2008;
- \$4,070 for 'Maintenance and Harvest Fees' for the period from 1 July 2006 to 30 June 2008;
- \$534 as the 'Irrigation Fee';
- \$392 as the 'Vine Guard Fee'; and
- \$598 as the 'Planting Fee.'

54. Under clause 9.2 of the Management Agreement each Grower will make the following other 'Maintenance and Harvest Fee' payments per 'Vinelot':

For the year ending 30 June 2008:

- any 'Gross Proceeds Entitlement' will be retained by the Custodian, on behalf of the Manager, and paid to the Manager to offset 'Maintenance' and 'Harvest' costs; and
- Growers will be invoiced an amount equal to 10% of any 'Gross Proceeds Entitlement', being for GST on that component of the 'Maintenance and Harvest Fee'.

For the year ending 30 June 2009:

- any 'Gross Proceeds Entitlement' will be retained by the Custodian, on behalf of the Manager, and paid to the Manager to offset Maintenance and Harvest costs; and
- Growers will be invoiced an amount equal to 10% of any 'Gross Proceeds Entitlement', being for GST on that component of the 'Maintenance and Harvest Fee'.

For Years 4 (2010) to 20 (2026):

- the 'Maintenance and Harvesting Fee' will be equal to the cost of performing the Maintenance and Harvest Services plus a 21% mark-up as an administration charge. The maximum fee will not exceed \$3,300 per 'Vinlot' in year 4 but be subject to CPI indexation annually;
- the Manager is entitled to a 'Sales Commission' of 2.2% of the 'Grape Sale Proceeds'; and
- the 'Maintenance and Harvest Fee', and 'Sales Commission' will be deducted by the Custodian on behalf of the Manager from the 'Gross Proceeds Entitlement' and paid to the Manager in accordance with the Constitution. Where a Growers' obligation to pay the 'Maintenance and Harvest Fee' exceeds their 'Gross Proceeds Entitlement', and the Grower will be invoiced for the shortfall.

55. Under clause 6 of the 'Vine Right Agreement' each Grower will make the following 'Vine Right Fee' payment per 'Vinlot':

- from the 'Commencement Date' to period ending 30 June 2008 a 'Vine Right Fee' of \$1,146 is included in the 'Application Fee';
- for each subsequent year after 30 June 2008, a 'Vine Right Fee' of \$550 per year (indexed annually for CPI from the 12 months ended 30 March 2007);
- for the period from 1 July 2008 to 30 June 2009 the Manager will retain the 'Gross Proceeds Entitlement' in lieu of a 'Vine Right Fee'; and
- from 1 July 2009 until the 'Term' of the Project, the 'Vine Right Fee' will be deducted by the Custodian on behalf of the Manager from the 'Gross Proceeds Entitlement' and paid to the Manager in accordance with the Constitution. Where a Grower's obligation to pay the 'Vine Right Fee', exceeds their 'Gross Proceeds Entitlement', and the Grower will be invoiced for the shortfall.

**Finance**

56. Each Grower can fund their involvement in the Project as follows:

- from their own financial resources;
- under a Terms Agreement with Gunns Plantations;
- by borrowing from Gunns Finance Pty Ltd (Gunns Finance) (a lender associated with the Responsible Entity);
- by borrowing from Allco Managed Investments; or
- by borrowing from an independent lender.

57. Growers cannot rely on this Product Ruling if they enter into a finance package with Gunns Finance or Allco Managed Investments that materially differs from those provided to the Tax Office by Gunns Plantations with the application for this Product Ruling. These finance packages are summarised below.

**Terms Agreement**

58. If Gunns Plantations accepts that the application fee can be paid under a terms arrangement the Grower must complete a terms application and Direct Debit Authority. The Grower will be required to pay their application fee as follows:

- (i) 10% of the fee on application;
- (ii) The balance (plus stamp duty) by 11 equal consecutive monthly instalments as set out in Schedule 3, with the first instalment to be made on the last business day of the month following the month in which the Grower's application is accepted and thereafter on the last business day of each successive month until fully paid;
- (iii) Gunns Plantations will take security over the Grower's 'Vinelot'; and
- (iv) There will be no interest levied to the Grower, unless instalments are not paid on time, then interest at a rate of 6% above the 5 year swap reference rate of the ANZ Bank (or Gunns Limited's banker at the time) will be levied.

**Finance by Gunns Finance**

59. The loans offered by Gunns Finance are Principal and Interest loans with terms of 3, 5, 10 or 15 years. Features of the finance packages are:

- the Grower's application to participate in the Project has been accepted by Gunns Plantations;

- the Grower pays a loan 'Establishment Fee' of \$150, which is to be paid at the time that the loan is established;
- Gunns Finance will take security over the Grower's 'Vinelot';
- a deposit of 20% of the Application Fee is required;
- Interest is charged at 10.5% per annum for the first 5 years of the loan. The interest rate will be reviewed at the end of each 5 year period and fixed for each following 5 year period at a rate 4% above the 5 year swap reference rate of the ANZ Bank (or Gunns Limited's banker at the time); and
- an additional 2% interest per annum applies to repayments or payments in arrears.

60. The deposit required to fund the loan may be varied, at the absolute discretion of Gunns Finance, between 0-20% of the Application Fee.

61. The Borrower agrees to repay the Loan, and pay interest and all Outstanding Monies by paying by direct debit the Repayment Amount, to Gunns Finance, on the Repayment Date of each month during the term as detailed in the Loan Schedule, and all other Outstanding Monies on the Final Repayment Date.

## **Finance by Allco Managed Investments**

62. Allco Managed Investments offers 3 types of loans. The first type is a 'Loan' with monthly principal and interest repayments and may be for 3, 5, 10 or 15 years. The second type of 'Loan' involves a two year interest only period followed by monthly principal and interest repayments and may be for 5, 7 or 10 years duration in total. The third type of 'Loan' is for a three year interest only period followed by monthly principal and interest repayments and may be for 6, 10 or 15 years duration in total. Common features contained in each of these loans are that:

- the Grower's application to participate in the Project has been accepted by Gunns Plantations subject to the finance approval;
- the Grower pays a loan 'Establishment Fee' of \$250 plus 0.5% of the amount financed;
- Allco Managed Investments will take security over the Growers 'Vinelot';
- an initial deposit of between 0% and 50% of the 'Application Fee' applies;
- interest rates will vary between 10% and 11% and will be fixed for the term of the loan at the time of approval;

- an additional 3% interest per annum applies to overdue amounts due and payable;
- Growers who enter into these finance arrangements will be required to make equal monthly repayments of the outstanding balance, commencing at the end of the interest only period; and
- Growers who break the term of the loan will be liable for break costs.

63. A Grower cannot rely on any part of this Product Ruling if the 'Application Fee', other than an 'Application Fee' payable subject to a finance arrangement or a 'Terms Agreement', is not paid in full by 31 May 2006. Where an application is accepted by Gunns Plantations, subject to finance approval by any lending institution, a Grower cannot rely on this Ruling if written evidence of that approval has not been given to Gunns Plantations by 31 May 2006.

64. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Gunns Finance or Allco Managed Investments, are involved or become involved in the provision of finance to any Grower in the Project.

## Ruling

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### Application of this Ruling

65. This Ruling will only apply to a Grower who is accepted to participate in the Project on or before 31 May 2006 and who has executed a Management Agreement and a Vine Right Agreement on or before that date.

66. The Grower's participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

### The Simplified Tax System (STS)

#### *Division 328*

67. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a Grower who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

68. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

#### **25% entrepreneurs tax offset**

##### *Subdivision 61-J*

69. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

### Assessable income

#### **Section 6-5**

70. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), when derived will be assessable income of the Grower under section 6-5.

**Deductions for the 'Loan Establishment Fee' payable to Gunns Finance or Allco Managed Investments****Section 25-25**

71. The 'Loan Establishment Fee' payable to Gunns Finance or Allco Managed Investments is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used, or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Gunns Finance or Allco Managed Investments is outside the scope of this Ruling.

**Deductions for the 'Initial Service Fee', the Maintenance and Harvest Fee, the 'Vine Right Fee' and 'Interest'****Sections 8-1**

72. A Grower who is accepted to participate in the Project on or before 31 May 2006 may claim tax deductions under section 8-1 of the ITAA 1997, on a per 'Vinelot' basis, for the following expenditure.

<b>Fee Type</b>	<b>Year ended 30 June 2006</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>
<b>'Initial Services Fee'</b>	\$10,269 See Notes (i) & (ii)	Nil	Nil
<b>'Maintenance and Harvest Fees'</b>	Nil	\$2,035 See Notes (i) & (iii)	\$2,035 See Notes (i), (iii) & (iv)
<b>'Vine Right Fee'</b>	\$46 See Notes (i) & (iii)	\$550 See Notes (i) & (iii)	\$550 See Notes (i) & (iii)
<b>Interest</b>	As incurred See Note (v)	As incurred See Note (v)	As incurred See Note (v)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted for GST (for example, input tax credits) Division 27.
- (ii) For the year ended 30 June 2006, the 'Initial Services Fee' payable on application is deductible to the extent shown in the table above in the year that it is incurred. The Initial Services Fee payable on application is not deductible in full under section 8-1 as it consists of an amount of \$316 relating to landcare operations, which is capital in nature (see paragraph 73).

- (iii) The 'Maintenance and Harvest Fee' and the 'Vine Right Fee' payable on application are prepayments and **not** deductible in full in the year incurred. Deductions for these amounts **must** be determined using the formula in subsection 82KZMF(1) of the ITAA 1936 (see paragraphs 73 to 113). This provision operates to apportion expenditure over the eligible service period. The eligible service period for the 'Maintenance and Harvest Services' extends from 1 July 2006 to 30 June 2008. Therefore an amount of \$2,035 per 'Vinelot' is deductible for 'Maintenance and Harvest Fee' in the year ending 30 June 2007 and 30 June 2008. The eligible service period for the 'Vine Right Fee' extends from 31 May 2006 to 30 June 2008. Therefore, an amount of \$46 per 'Vinelot' in the year ending 30 June 2006 and \$550 per 'Vinelot' for each of the years ending 30 June 2007 and 30 June 2008 is deductible.
- (iv) For the year ending 30 June 2008, each Grower will be invoiced for an additional amount equal to 10% of any 'Gross Proceeds Entitlement' being the GST on that component of the 'Maintenance and Harvest Fee'. This amount is fully deductible under section 8-1 in the year the expenditure is incurred.
- (v) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Gunns Finance or Allco Managed Investments is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with Gunns Finance or Allco Managed Investments, should read the discussion of the prepayment rules in paragraphs 104 to 113 as those rules may be applicable if interest is prepaid. A Grower who chooses, or who is required to prepay interest under a loan agreement is outside the scope of this Ruling and may request a private ruling on the taxation consequences of participation in the Project.

### **Deductions for capital expenditure (Non-'STS taxpayers')**

#### ***Division 40***

73. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to vineyards, water facilities (for example irrigation), a 'landcare operation' and 'vines'. All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
<b>Vineyards</b>	40-25	Nil	Amount must be calculated See Notes (vi) & (vii)	Amount must be calculated See Notes (vi) & (vii)
<b>Water facility (eg dam, irrigation)</b>	40-515	\$178 See Notes (vi) & (viii)	\$178 See Notes (vi) & (viii)	\$178 See Notes (vi) & (viii)
<b>Landcare Operation</b>	40-630	\$316 See Notes (vi) & (ix)	Nil	Nil
<b>Establishment of horticultural plants ('Vines')</b>	40-515	Nil See Notes (vi) & (x)	Nil See Notes (vi) & (x)	Nil See Notes (vi) & (x)

**Notes:**

(vi) If the Grower is registered or required to be registered for GST, amounts of capital expenditure would need to be adjusted for GST (for example input tax credits) Division 27.

(vii) A vineyard is a 'depreciating asset'. Each Grower holds an interest in each vineyard which is a 'low-cost asset' and can be allocated to a 'low-value pool'. Once any 'low-cost asset' of a Grower is allocated to a 'low-value pool', all other 'low-cost assets' the Grower start to 'hold' in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a 'low-value pool', the vineyard assets must also be allocated to that pool. Otherwise, the Grower must decide whether to create a 'low-value pool'. If the assets are allocated to a 'low-value pool', the capital expenditure on the vineyards will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the vineyards are first used and a rate of 37.5% in subsequent years (section 40-440).

If the assets are not allocated to a 'low-value pool', they can be written off based on the 'effective life' of the vineyards. As there has been no determination of the 'effective life' of a vineyard by the Commissioner, Growers must self-assess an 'effective life'.

Vineyards are not installed until after the 'Vines' are planted and no deduction for the decline in value is available until this installation occurs. The Manager will advise Growers of that date to enable them to calculate the deduction.

- (viii) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one third of the capital expenditure of \$534 per vinelot incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one third in each of the next 2 years of income (section 40-540).
- (ix) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.
- (x) 'Vines' are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold a 'Vine Right' over the land, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the 'Vines' is determined using the formula in section 40-545 and is based on the capital expenditure of \$598 per vinelot incurred by the Grower that is attributable to their establishment. If the 'Vines' have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Vines' enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the 'Vines' enter their first commercial season.

**Deductions for capital expenditure (STS taxpayers)*****Subdivision 328-D and Subdivisions 40-F and 40-G***

74. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to vineyards, water facilities (for example irrigation), a 'landcare operation' and 'vines'. Deductions relating to the 'cost' of vineyards must be determined under Division 328. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'water facility' or 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the 'vines' must be determined under Subdivision 40-F.

75. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (xiii) and (xiv).

76. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1,000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
<b>Vineguards</b>	328-180	Nil	Amount must be calculated See Notes (xii) & (xiii)	Amount must be calculated See Notes (xii) & (xiii)
<b>Water facility</b>	40-515	\$178 See Notes (xi) & (xiii)	\$178 See Notes (xi) & (xiii)	\$178 See Notes (xi) & (xiii)
<b>Landcare operations</b>	40-630	\$316 See Notes (xi) & (xiv)	Nil	Nil
<b>Establishment of horticultural plant</b>	40-515	Nil See Note (x)	Nil See Note (x)	Nil See Note (x)

**Notes:**

- (xi) If the Grower is registered or required to be registered for GST, amounts of capital expenditure would need to be adjusted for GST (for example input tax credits) Division 27.
- (xii) A vineyard is a 'depreciating asset'. Each Grower holds an interest in each vineyard which is a 'low-cost asset' as defined in subsection 40-525(2). It cannot be allocated to a 'general STS pool' (section 328-180). A deduction equal to the amount of the Growers' expenditure for the vineyards is available in the income year in which they are used or 'installed ready for use'. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. Vineyards are not installed until

after the vines are planted. The Manager will advise when that has occurred.

- (xiii) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. The irrigation fee is \$534 per vinelot. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2006 is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years the full pool rate will apply. If the expenditure is not on a 'depreciating asset', or if they choose to use Subdivision 40-F, Growers must claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (xiv) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and

the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

### **Division 35 – deferral of losses from non-commercial business activities**

#### **Section 35-55 – exercise of Commissioner's discretion**

77. A Grower who is an individual accepted into the Project by 31 May 2006 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for each Grower for the income years ending **30 June 2006 to 30 June 2009**. This conditional exercise of the discretion will allow those losses to be offset against the Growers other assessable income in the income year in which the losses arise.

#### **Section 82KL and Part IVA**

78. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the Vine Right Agreement the following provisions of the ITAA 1936 have application as indicated:

- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## Appendix 1 – Explanation

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

### **Is the Grower carrying on a business?**

79. For the amounts set out in the Tables above to constitute allowable deductions the Grower’s viticulture activities as a participant in the Project must amount to the carrying on of a business of primary production.

80. Where there is a business, or a future business, the gross proceeds from the sale of the ‘Grape’ will constitute gross assessable income in their own right. The generation of ‘business income’ from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

81. For schemes such as that of the Project, Taxation Ruling TR 2000/8 sets out in paragraph 88 the circumstances in which the Grower’s activities can constitute the carrying on of a business. As TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

82. Generally, a Grower will be carrying on a business of viticulture, and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or rights over the land (by licence) on which the Grower’s ‘Vines’ are established;
- the Grower has a right to harvest and sell the ‘Grapes’ each year from those ‘Vines’;
- the viticulture activities are carried out on the Grower’s behalf;
- the viticulture activities of the Grower are typical of those associated with a viticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

83. In this Project, each Grower enters into a Vine Right Agreement and a Management Agreement.

84. Under the Vine Right Agreement each Grower will have rights over the land on which the Vines will be planted. The Vine Right Agreement provides the Grower with an ongoing right to the ‘Vines’ for the term of the Project. Under the ‘Vine Right’ the Grower must use the land in question for the purpose of carrying out viticultural activities and for no other purpose. The ‘Vine Right’ allows the Manager to come onto the land to carry out its obligations under the Management Agreement.

85. Under the Management Agreement the Manager is engaged by the Grower to establish and maintain a 'Vinelot' during the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the 'Vinelot' on the Grower's behalf.

86. In establishing the 'Vinelot', the Grower engages the Manager to install vineyards, to procure and attach dripper lines, to carry out 'landcare operation' and to plant the 'Vines on the Grower's 'Vinelot'. During the term of the Project, these assets will be used wholly to carry out the Grower's viticulture activities. The Manager is also engaged to harvest and sell, on the Grower's behalf, the 'Grapes' grown on the Grower's 'Vinelot'.

87. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from 'the Projects' description for all the indicators.

88. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of its 'Grapes' that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

89. The pooling of 'Grapes' grown on the Grower's 'Vinelot' with the 'Grapes' of other Growers is consistent with general viticulture practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Grapes' will reflect the proportion of the 'Grapes' contributed from their 'Vinelot'.

90. The Manager's services and the installation of assets on the Grower's behalf are also consistent with general viticulture practices. The assets are of the type ordinarily used in carrying on a business of viticulture. While the size of a 'Vinelot' is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

91. The Grower's degree of control over the Manager as evidenced by the Management Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's 'Vinelot' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

92. The viticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Grower's viticulture activities in the Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

93. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

94. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

## **Deductions for the 'Initial Service Fee' and the 'Vine Right Fee'**

### ***Section 8-1***

95. Consideration of whether the 'Initial Service Fee' and 'Vine Right Fee' are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- (i) the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- (ii) the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- (iii) where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

96. The 'Initial Service Fee' and 'Vine Right Fee' associated with the viticulture activities will relate to the gaining of income from the Grower's business of viticulture (see above), and hence have a sufficient connection to the operations by which income (from the regular sale of 'Grapes') is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the scheme. The fee appears to be reasonable. Other than the Landcare expenditure, there is no capital component found in the 'Initial Service Fee' and 'Vine Right Fee'. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

**Interest deductibility****Section 8-1**

*(i) A Grower who uses Gunns Finance or Allco Managed Investments as the finance provider*

97. A Grower may finance their participation in the Project through a loan facility with Gunns Finance or Allco Managed Investments. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the 'Management and Harvest' and 'Vine Right Fees'.

98. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – growing of 'Grapes' and the lease (or licence) of the land on which the 'Vines' will have been planted – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

99. As with 'Maintenance and Harvest' and 'Vine Right Fees', in the absence of any application of the prepayment provisions (see paragraphs 104 to 113), the timing of deductions for interest will be different where a Grower is an 'STS taxpayer' who continues to use the 'STS accounting method'.

100. If the Grower is not an 'STS taxpayer' using the 'STS accounting method', interest is deductible in the year in which it is incurred.

101. If the Grower is an 'STS taxpayer' using the 'STS accounting method', interest is not deductible until it has been both incurred and paid. If interest that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is paid.

*(ii) A Growers who prepays interest or DOES NOT use Gunns Finance or Allco Managed Investments as the finance provider*

102. The deductibility of interest incurred by a Grower who finances their participation in the Project through a loan facility with a bank or financier other than Gunns Finance or Allco Managed Investments is outside the scope of this Ruling. Product Rulings only deal with schemes where all details and documentation have been provided to, and examined by the Tax Office.

103. While the terms of any finance agreement entered into between a Grower and financiers other than Gunns Finance or Allco Managed Investments are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Those Growers who choose, or who are required to prepay interest under a loan agreement are outside the scope of this Ruling and may request a private ruling on the taxation consequences of their participation in the Project (see paragraphs 104 to 113).

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMF***

104. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

105. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

#### ***Sections 82KZME and 82KZMF***

106. Where the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

107. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the agreement (or scheme) has the following characteristics:

- (i) the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- (ii) the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and
- (iii) either:
  - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - b) the entity who promotes, arranges or manages the agreement (or an associate of that entity) promotes similar agreements for other taxpayers.

108. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4) of the ITAA 1936). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier other than Gunns Finance or Allco Managed Investments. Although undertaken with an unrelated party, that financing would be an element of the scheme. The funds borrowed and the interest deduction are directly related to the activities under the scheme. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

109. There are a number of exceptions to these rules, but for a Grower participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of a Grower in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

110. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

111. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

*Application of the prepayment provisions to this Project*

112. The expenditure incurred by a Grower in the Project for the 'Maintenance and Harvest Fees' and 'Vine Right Fees' meets the requirements of subsections 82KZME(1) and (2) of the ITAA 1936 and is incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies, the amount and timing of tax deductions for those fees are determined under section 82KZMF of the ITAA 1936.

113. The prepaid 'Management and Harvest Fees' and 'Vine Right Fees' incurred by each Grower does not fall within any of the five exceptions to section 82KZME of the ITAA 1936. Therefore, the deduction for each year is determined using the formula in subsection 82KZMF(1) of the ITAA 1936. Section 82KZMF apportion the deduction for prepaid 'Management and Harvest Fees' and 'Vine Right Fee' over the period that the services for which the prepayment is made are provided.

**Expenditure of a capital nature**

***Division 40***

114. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to vineyards, water facilities, a 'landcare operation', and the establishment of the 'Vines' is of a capital nature. This expenditure falls for consideration under Division 40.

**Division 35 – deferral of losses from non-commercial business activities*****Section 35-55 – exercise of Commissioner’s discretion***

115. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2009** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2006 up to and including 30 June 2009:

- (i) it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- (ii) there is an objective expectation that within a period that is commercially viable for the viticulture industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- (iii) a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

116. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

**Section 82KL – recouped expenditure**

117. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

**Part IVA – general tax avoidance provisions**

118. For Part IVA of the ITAA 1936 to apply there must be a ‘scheme’ (section 177A), a ‘tax benefit’ (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

119. The 'Gunns Plantations Winegrape Project 2005 Supplementary Release 2006 Investors' will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 72 to 78 that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

120. Each Grower to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Grapes'. There are no facts that would suggest that a Grower has the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

**Appendix 2 – Detailed contents list**

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 92/20; TR 97/11; TR 98/22;  
TR 2000/8, TR 2001/14;  
TD 93/34; IT 360

*Subject references:*

- carrying on a business
- commencement of business
- non-commercial losses
- primary production
- primary production expenses
- management fee expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- taxation administration

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- ITAA 1997 35-55(1)(b)
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