


# ***PR 2007/104 - Income tax: WA Blue Gum Project 2008 (Growers not in Joint Venture)***

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## Product Ruling

### Income tax: WA Blue Gum Project 2008 (Growers not in Joint Venture)

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**ⓘ This publication provides you with the following level of protection:**

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

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

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

### **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. 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.

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

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as the WA Blue Gum Project 2008 or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as initial participants<sup>1</sup> on or after the date this Product Ruling is made and who have executed the relevant Project Agreements as set out in paragraph 36 of this Ruling on or before 30 June 2008.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- participate in the scheme other than as initial participants;
- are accepted into this Project after 30 June 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS);
- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- enter into finance arrangements with Albany Financial Pty Ltd other than those described at paragraphs 76 to 83 of this Ruling;

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<sup>1</sup> For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

- are Joint Venture Growers. Entities who participate as Joint Venture Growers should refer to Product Ruling PR 2007/103; or
- opt to Harvest and Deliver the Wood grown on their Leased Area and/or opt to sell their Wood other than to the Purchaser under the Wood Purchase Agreement.

### **Qualifications**

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 36 to 83 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product 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 Product Ruling may be withdrawn or modified.

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### **Superannuation Industry (Supervision) Act 1993**

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

## Date of effect

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10. This Product Ruling applies prospectively from 19 December 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 19 December 2007 until 30 June 2008, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2010.

11. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

14. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

### Changes in the law

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

16. Entities who are considering participating in the scheme 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**

17. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

**Goods and Services Tax**

18. All fees and expenditure referred to in this Product 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.

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**Ruling**

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**Application of this Ruling**

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 36 to 83 of this Ruling.

20. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Project Management Contract, Sub-lease (or if relevant, an Agreement to Sub-lease) and Wood Purchase Agreement.

21. 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.

**Concessions for 'small business entities'<sup>2</sup>**

22. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

23. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

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<sup>2</sup> The meaning of 'small business entity' is explained in section 328-110.

**Deductions for the Establishment fee****Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936**

24. Other than where a 'CGT event'<sup>3</sup> happens to their interest within 4 years of 30 June 2008 (see paragraph 25 of this Ruling), a Grower who is an initial participant in the scheme may claim tax deductions for the following amount on a per hectare basis.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
<b>Establishment fee</b>	\$5,225 See Notes (i) & (ii)	Nil	Nil

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Under section 82KZMG of the *Income Tax Assessment Act 1936* (ITAA 1936) the Establishment fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 98 to 103 of this Ruling) and is deductible in the income year in which it is incurred.

**'CGT event' within 4 years for Growers who are 'initial participants'****Section 82KZMGA**

25. A deduction for the Establishment fee is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

26. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

27. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 104 to 106 of this Ruling).

<sup>3</sup> Defined in section 995-1.

**Deductions for annual management fees, rent and loan interest****Section 8-1 and Division 27**

28. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a per hectare basis, as set out in the table below.

<b>Fee Type</b>	<b>Year ending 30 June 2008</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>
<b>Annual management fees</b>	Nil	\$110 Indexed See Notes (i) and (iii) & (v)	\$110 Indexed See Notes (i) and (iii) & (v)
<b>Rent for Sub-lease executed on or before 30 June 2008</b>	Nil	\$440 Indexed See Notes (i) and (iii) & (v)	\$440 Indexed See Notes (i) and (iii) & (v)
<b>Rent for Sub-lease executed after 30 June 2008</b>	Nil	As incurred See Notes (i) and (iii) & (v)	\$440 Indexed See Notes (i) and (iii) & (v)
<b>Interest on loans with Albany Financial Pty Ltd</b>	As incurred See Notes (iv) & (v)	As incurred See Notes (iv) & (v)	As incurred See Notes (iv) & (v)

**Notes:**

- (iii) The annual management fees and rent set out in the Project Management Contract and the Sub-lease Agreement are deductible in full in the year that they are incurred.
- (iv) Interest on loans with Albany Financial Pty Ltd is deductible in the year in which it is incurred. However, the deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Albany Financial Pty Ltd, is outside the scope of this Ruling. Growers who borrow from lenders other than Albany Financial Pty Ltd may request a private ruling on the deductibility of the interest incurred.

- (v) This Ruling will not apply to any Grower who prepays annual management fees, rent or interest. A prepayment of annual management fees, rent or interest will occur where an amount is paid by a Grower for annual management fees, rent or interest for a period that extends beyond the income year in which the annual management fees, rent or interest are incurred. Such Growers may seek a private ruling on the tax implications of their participation in the Project.

## **Deduction for lease document expenses**

### ***Section 25-20***

29. A Grower may claim a tax deduction under section 25-20 for the expense incurred in relation to registering or stamping the Sub-lease over property used solely for the purposes of producing assessable income.

## **Assessable income from 'CGT events' for Growers who are initial participants**

### ***Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936***

30. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning)<sup>4</sup> happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower's assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

31. The amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 82KZMGB(2) of the ITAA 1936).

32. 'CGT events' for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown on the Grower's Plantation Allotment;
- the **sale, or any other disposal** of all or part of the 'interest' in the Project held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'interest' in the Project held by the Grower.

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<sup>4</sup> A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

33. Where an amount arising from a 'CGT event' is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936 anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

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

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

34. A Grower who is an individual accepted into the Project in the year ended 30 June 2008 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 Growers for the income years ended **30 June 2008 to 30 June 2017**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

### **Prepayment provisions and anti-avoidance provisions**

#### ***Sections 82KZME, 82KZMF and 82KL and Part IVA***

35. For a Grower who commences participation in the Project and incurs expenditure as required by Project Management Contract and the Sub-lease Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (refer to paragraphs 95 to 97 of this Ruling);
- 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.

## **Scheme**

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

- Application for a Product Ruling received on 29 August 2007 and additional correspondence dated 11 October, 9 and 16 November 2007;

- **Draft Combined Product Disclosure Statement and Financial Services Guide** for the WA Blue Gum Project 2008 issued by WA Blue Gum Limited (WABG or the Responsible Entity), received on 29 August 2007;
- **Constitution of the WA Blue Gum Project 2008**, dated 23 May 2006;
- The Compliance Plan for the WA Blue Gum Project dated 31 March 2005;
- Draft Sub-Lease, to be entered into by WABG and Sub-Lessor, received on 29 August 2007;
- Draft **Sub-Lease 2008**, to be entered into by each Grower and WABG (the Landholder), received on 29 August 2007;
- Draft **Agreement to Sub-lease 2008**, which may be entered into by each Grower and WABG, received on 29 August 2007;
- Draft **Project Management Contract 2008**, to be entered into by each Grower and WABG (the Project Manager), received on 29 August 2007;
- Draft **Wood Purchase Agreement 2008**, to be entered into by each Grower, WABG (the Authorised Vendor) and WA Chip & Pulp Co Pty Ltd (the Purchaser), received on 29 August 2007;
- Draft Plantation Services Agreement 2008 to be entered into between WABG and WACAP Treefarms Pty Ltd (the Contractor), received on 29 August 2007;
- Draft Agreement for the Provision of Consulting Services to be entered into between WABG and URS Australia Pty Ltd, received on 29 August 2007;
- The Scheme Property Custody Agreement between WABG and Sandhurst Trustees Ltd (the Custodian) dated 12 April 2000; and
- Draft **Loan Agreement 2008**, which may be entered into by a Grower and Albany Financial Pty Ltd, an entity associated with WABG, received on 29 August 2007.

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

37. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

38. 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.

39. The main features of the WA Blue Gum Project 2008 are as follows:

Location	South west region of Western Australia
Type of business to be carried on by each Grower	Commercial growing and cultivation of <i>Eucalyptus globulus</i> (Tasmanian blue gum) trees for the purpose of harvesting and selling timber for woodchips
Term of the Project	Approximately 10 years The Project will terminate when the plantation crop is harvested for the first time.
Number of hectares offered for cultivation	500 (oversubscriptions may be accepted)
Size of each interest	1 hectare
Minimum allocation per Grower	Three hectares
Number of trees per hectare	1,000 to 1,250 trees
Minimum subscription	There is no minimum subscription for the Project to commence.
Initial cost per hectare	\$5,225 for the establishment of the plantation
Ongoing costs	Growers will pay a management fee of \$110 per hectare per annum increased by the Consumer Price Index (CPI) and rent of \$440 per hectare per annum indexed by CPI.
Other costs	<ul style="list-style-type: none"> <li>• Harvest, Delivery and processing fees;</li> <li>• fire insurance; and</li> <li>• an incentive fee of 16.5% when the Relevant Harvest Income due to the Grower exceeds \$15,400 per hectare indexed annually in accordance with CPI.</li> </ul>

40. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. WABG has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

41. An offer to participate in the Project will be made through a Product Disclosure Form (PDS). The offer under the PDS is for 500 hectares in the Project and will invite participants to subscribe for at least three hectares in the Project on or before 30 June 2008.

42. To participate in the Project participants must complete the Application and Power of Attorney Form in the PDS and pay \$5,225 per hectare with their Application by 30 June 2008. The Application Money will be banked into the relevant Application Fund and released to WABG when the Grower's application to acquire an Interest has been accepted by WABG.

43. Growers will establish, manage, harvest and sell a commercial plantation of *Eucalyptus globulus* trees and carry on a commercial business of afforestation during the Term of the Project.

44. On or before 30 June 2008, Growers participating in the scheme will execute a Sub-lease (and if relevant, an Agreement to Sub-Lease where there is no Project Land available for Growers on or before 30 June 2008), a Project Management Contract and a Wood Purchase Agreement.

45. The Sub-lease gives a Grower an interest in an identifiable area of land, called a Leased Area. Each Leased Area is made up of one hectare allotments. The minimum area of land that can be leased by a Grower in the Project is three hectares.

46. Where there is no Project Land available for a Grower on or before 30 June 2008, the Project Manager may still accept the Grower's Application subject to a Sub-lease being entered into on behalf of the Grower and lodged for registration within nine months of the date of acceptance of the Grower's Application. Acceptance of the Grower's Application will also be subject to the Project Manager's ability to complete the Establishment of the Plantation within the Establishment Period. In these circumstances, the Grower will be required to enter into an Agreement to Sub-lease with the Project Manager.

47. The Growers enter into a Project Management Contract with the Project Manager. The Project Management Contract sets out the services to be provided by the Project Manager, in establishing and maintaining Tasmanian blue gum (*Eucalyptus globulus*) seedlings planted on the leased land for the purpose of felling and sale.

48. A Custodian has been appointed under the Scheme Property Custody Agreement to protect the interests of the Growers in their dealings with WABG.

49. There is no minimum amount that must be raised under the PDS. WABG has the right to accept oversubscriptions and additional land will be secured if necessary. The Land that will be used for the Project will be leased by WABG from various farmers or alternatively, WABG will lease the Project Land from WA Chip & Pulp Co Pty Ltd or WACAP Treefarms Pty Ltd.

### **Constitution**

50. The Constitution establishes the Project and operates as a deed binding all Growers and WABG. The Constitution sets out the terms and conditions under which WABG agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

51. All Application Money received from Applicants will be paid to the Custodian. The Custodian shall open, or cause to be opened, an account designated Application Fund, into which all money received from Applicants and accrued interest will be deposited. If the Application Money is held in the Application Fund for more than 12 months, the money shall be refunded, along with any interest earned on it, to the Applicant, unless the Applicant directs WABG otherwise (clause 6).

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

- the Responsible Entity's entitlement to receive fees and rents (clause 8);
- a Register of Growers is to be maintained which sets out each Grower's personal details, a description of their Plantation Allotments, and relevant dates (clause 9);
- the assignment of Grower's interest (clause 10);
- the Responsible Entity's powers to invest in and deal with any investments which are authorised by law (clause 11);
- the Responsible Entity's ability to borrow for the purpose of the Project and its protections and indemnities (clauses 12 and 13);
- additional powers and other activities of the Responsible Entity (clauses 14 and 15);
- convening a meeting of Growers and voting requirements (clause 19);
- complaints handling and dispute resolution (clauses 20 and 21); and
- the termination of the Project (clause 23).

## **Compliance Plan**

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

## **Scheme Property Custody Agreement**

54. WABG, as Responsible Entity, has engaged Sandhurst Trustee Ltd to act as the Custodian of the Property, as defined in Item 1 of the Schedule of this Agreement. The Property includes all Application Money and Relevant Harvest Income until disbursed or distributed in accordance with the Constitution, the Project Agreements and the Head Lease, but does not include property legally vested in a Grower.

## **Sub-lease Agreement 2008**

55. Growers will enter into a sub-lease of land with the Landholder. The Grower is to establish, tend and harvest a Plantation of eucalyptus trees for commercial wood production on the Leased Area. The term of the Sub-lease is 12 years or, until the completion of the first rotation, being the first Harvesting of the Plantation. The Grower may extend the Term by giving written notice to the Landholder (clause 5).

56. The Grower grants the Landholder, its employees and contractors the right to enter the Leased Area to carry out their duties under the Sub-lease in relation to the Leased Area (clause 4.3). The Landholder warrants that it is entitled to grant this Sub-lease to the Grower and that the relevant consents required under clauses 3 and 4 have been obtained.

57. As consideration for the granting of the Sub-lease the Grower pays rent per hectare of the Leased Area, indexed after the first year by the Consumer Price Index (CPI). The Leased Area is set out in Part 2 of the Schedule.

58. Grower's covenants, Landholder's covenants and mutual covenants are outlined in clauses 7, 8 and 9. The Parties acknowledge that the Plantation is and shall remain the property of the Grower until the end of the Term and the Grower shall be entitled to Harvest the Plantation and to retain all income from the sale of the Wood.

59. If there is damage to or reduction in the viability of the Plantation, the Grower is required by the Landholder to reduce the Plantable Area by the area which has been damaged or is no longer viable or, where the whole of the Plantation is damaged or no longer commercially viable, to terminate the contract (clause 10). The result of a reduction or termination under this clause is that the Grower is deemed to have surrendered the land back to the Landholder and all obligations in relation to that land under the Sub-lease end. The Grower's share of the Relevant Harvest Income will be proportionally reduced.

60. The terms of the termination in the event of default and dispute resolution are outlined in clauses 13 and 15 respectively.

### **Agreement to Sub-lease 2008**

61. Where there is no Project Land available for a Grower on or before 30 June 2008, the Grower will be required to enter into an Agreement to Sub-lease with WABG.

62. Pursuant to the terms of the Agreement to Sub-lease the parties undertake to enter into a Sub-lease of the land on or before the Starting Date, being a date no later than 31 March 2009, which will allow all the Establishment services referred to in the Plantation Management Contract to be completed within the Establishment Period. The parties are bound by all the provisions of the Sub-lease from the Starting Date.

### **Project Management Contract 2008**

63. Growers contract with the Project Manager to carry out such services as are required to establish, manage and maintain the Plantation on the Land until maturity in accordance with the Plantation Development and Management Plan and sound silvicultural and environmental practices.

64. These services include the Establishment of the Plantation on the Land during the Establishment Period (clause 4).

65. In consideration for the performance by the Project Manager of its duties and obligations, the Grower agrees to pay the Project Manager the amounts specified in the Schedule.

66. The Grower may express and give recommendations to the Project Manager, object to and disallow any changes to the Plantation Development and Management Plan (clause 8). The Project Manager shall provide to the Grower a report not later than 20 November of each year. Among other things, the report will detail any changes to the Plantation Development and Management Plan, and set out the actual operations performed on the Land (clause 9).

67. The termination of the Project Management Contract in the event of default and procedures for dispute resolution are described in clauses 15 and 17.

68. A second rotation plantation crop, through a coppice option is provided for. Growers who take up this option will be required to pay additional amounts at a future date and enter into arrangements to extend the effect of the Project agreements. This option may be taken up prior to the first Harvest of the Plantation. The coppice option is outside of the scope of this Product Ruling and the tax implications for Growers who participate in the coppice option do not form part of this Product Ruling.

## **Plantation Services Agreement 2008**

69. The Project Manager will engage the Contractor as an independent contractor to carry out the necessary Plantation Services to Establish, tend and maintain the Plantation of eucalyptus trees on the Land as set out in the Plantation Development and Management Plan.

70. The services will be in accordance with sound silvicultural and environmental practices adopted within the forestry industry.

## **Wood Purchase Agreement 2008**

71. Growers authorise the Authorised Vendor to enter into the Wood Purchase Agreement with the Purchaser on their behalf. All of the Growers' Wood is pooled together for sale to the Purchaser by the Authorised Vendor. Under the Agreement the Purchaser will Harvest, Deliver and purchase the Wood, for a price offered as being fair and reasonable at the relevant time.

72. Growers and the Authorised Vendor may seek alternative prices for Harvest and Delivery and an alternative price for the Wood. Where such alternatives are obtained the Purchaser retains the right to match the price offered by the other party.

73. The Agreement also provides for all or part of the Wood to be sold for higher value use other than that of woodchips.

## **Fees**

74. Growers who are accepted to participate in the Project on or before 30 June 2008 and who have executed the Project Management Contract, the Sub-lease (or if relevant, an Agreement to Sub-lease) and the Wood Purchase Agreement will pay the following fees per hectare:

- the Establishment fee of \$5,225 per hectare is payable under the Project Management Contract;
- an annual management fee of \$110 per hectare indexed from 30 June 2008 is payable from the period beginning 1 July 2008 until the Plantation has been Harvested. The first annual management fee will be payable on 30 November 2008, and thereafter on 30 September in each year;

- an amount equal to 16.5% of the amount that results when the Relevant Harvest Income due to the Grower exceeds \$15,400 per hectare, indexed annually from 30 June 2008;
- any unforeseen expenses in relation to fertiliser and/or insect issues, may be borne between the Growers in proportion to the number of hectares held by each Grower. The Growers may vote to meet such expenses at a meeting convened by WABG;
- if a Grower enters into the Sub-lease on or before 30 June 2008, an annual rent of \$440 per hectare indexed will be payable. The first rent is payable on 30 November 2008 in respect of the period from 1 July 2008 until 30 June 2009. Subsequently, it is payable annually on 30 September;
- if a Grower enters into the Sub-lease after 30 June 2008, the rent for the period from 1 July 2008 until 30 June 2009 will be 1/12 of \$440 indexed for each full and part calendar month payable on entry into the Sub-lease. After this period, an annual rent of \$440 per hectare indexed will be payable on 30 September each year; and
- the Grower's proportion of Harvest and Delivery fees, for services provided in accordance with the Harvest Plan.

### **Pooling of Growers timber and distribution of proceeds**

75. The Constitution sets out the circumstances relating to the pooling of Growers' timber and the distribution of Harvest Income (clause 7). This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Wood from their Leased Area to the pool making up the Relevant Harvest Income are entitled to benefit from distributions from those proceeds; and
- Wood is only pooled with the Wood of Growers accepted to participate in the WA Blue Gum Project 2008.

### **Finance**

76. A Grower who does not pay the Application Money in full upon application has an option to fund their involvement in the Project with finance packages offered on commercial terms. Growers may borrow from Albany Financial Pty Ltd, a lender associated with WABG. Alternatively, Growers may borrow from an independent lender external to the Project.

77. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Albany Financial Pty Ltd that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than with Albany Financial Pty Ltd may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

78. Growers cannot rely on any part of this Ruling if the Application Money is not paid in full on or before 30 June 2008 by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 30 June 2008.

### ***Finance offered by Albany Financial Pty Ltd***

79. A Grower can finance the cost of their Application Money by borrowing from Albany Financial Pty Ltd an amount of up to 80% of the Application Money. Subject to Albany Financial Pty Ltd accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

80. The terms of the finance offered by Albany Financial Pty Ltd include:

- a loan term ending on 15 June 2013;
- a requirement to pay equal monthly principal and interest instalments by way of direct debit; and
- an indicative fixed interest rate of approximately 11.5% per annum.

81. The security for the loan is provided by the assignment to Albany Financial Pty Ltd of the Grower's rights and interest in the Project Management Contract, the Sub-lease, the Wood Purchase Agreement and all monies payable to the Grower under those Agreements and the insurances. The assignment occurs upon default by the Grower or other events set out in clause 8 of the Loan Agreement.

82. The loan is provided by Albany Financial Pty Ltd on a full recourse basis and recovery action will be taken in respect of any default by the borrower. Overdue repayments will incur interest at the default rate of 15.5% per annum.

83. 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 Albany Financial Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**19 December 2007

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## Appendix 1 – Explanation

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?**

84. For the amounts set out in paragraphs 24 and 28 of this Ruling to constitute allowable deductions, the Grower's afforestation activity as a participant in the WA Blue Gum Project 2008 must amount to the carrying on of a business of primary production.

85. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on of a business of primary production.

86. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

87. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the WA Blue Gum Project 2008. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

88. Having applied these principles to the arrangement set out above, a Grower in the WA Blue Gum Project 2008 is accepted to be carrying on a business of growing and harvesting Wood for sale.

### **Deductibility of the Establishment fee, annual management fee, rent and interest on loans with Albany Financial Pty Ltd**

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

89. The Establishment fee, annual management fee and rent are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Establishment fee, annual management fee or rent (see paragraphs 49 to 51 of TR 2000/8).

90. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 93 to 103 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

91. Some Growers may finance their participation in the Project through a Loan Agreement with Albany Financial Pty Ltd. Applying the same principles as those used for the Establishment fee, annual management fee and the rent payments, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

92. Other than where the prepayment provisions apply (see paragraphs 93 to 103 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMG***

93. 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 income year, then it is not expenditure to which the prepayment rules apply.

94. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and section 82KZMG of the ITAA 1936 (an operative provision). References to sections 82KZME and 82KZMF of the ITAA 1936 are made only in respect their interaction with section 82KZMG and to confirm that these provisions have no application to expenditure incurred by Growers who participate in the scheme set out in this Ruling.

### **Application of the prepayment provisions to this Project**

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

95. Other than the Establishment fee (see below) the fees payable under scheme to which this Product Ruling applies are incurred annually for services to be wholly provided in the year in which those fees are incurred and the interest payable to Albany Financial Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to expenditure incurred by Growers under this scheme.

96. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses to prepay all or some of the expenditure payable under the Project Management Contract Agreement and/or the Sub-lease, or chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than Albany Financial Pty Ltd).

97. As stated in note (v) in paragraph 28 of this Ruling, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest.

## **Section 82KZMG**

98. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply.

99. Section 82KZMG of the ITAA 1936 provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

100. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

101. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

102. Under the Project Management Contract each Grower incurs an Establishment fee of \$5,225 per hectare in the income year ended 30 June 2008 for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the Trees.

103. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, a deduction is allowable in the income year ended 30 June 2008 for the full amount of expenditure incurred by the Grower for the Establishment fee.

**'CGT event' within 4 years for Growers who are initial participants****Section 82KZMGA**

104. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the Establishment fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$5,225 per 'interest' for the Establishment fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

105. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

106. A Grower whose deduction for the Establishment fee is disallowed because of section 82KZMGA of the ITAA 1936 is still required to include in their assessable income either the market value of the interest at the time of the 'CGT event', or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

**Assessable income from 'CGT events' for Growers who are initial participants****Sections 6-10, 10-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936**

107. Section 6-10 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

**Section 82KZMGB**

108. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)<sup>5</sup> happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted Establishment fee (shown in paragraph 24 of this Ruling); and

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<sup>5</sup> A thinning under this scheme is not a 'CGT event'.

- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of Establishment fee (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

### ***Market value rule applies to ‘CGT events’***

109. If, as a result of the ‘CGT event’ the Grower either:

- no longer holds the interest; or
- otherwise - where the Grower continues to hold the ‘forestry interest’ but there is a decrease in the market value of the interest,

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

110. The market value amount included in the assessable income of a Grower is the value of the interest just before the ‘CGT event’, or where the Grower continues to hold their interest after the ‘CGT event’, the amount by which the market value of the interest is reduced by the ‘CGT event’ (subsection 82KZMGB(2) of the ITAA 1936).

111. This provision will apply where the interest is sold, is extinguished, or ceases, and will include ‘CGT events’ such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

### **Anti-overlap provisions**

#### ***Section 118-20***

112. Generally, where as a result of a ‘CGT event’ a capital gain would otherwise be included in a taxpayer’s assessable income, section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA other than the CGT provisions includes an amount in the taxpayer’s assessable income.

113. In the case of interests held by Growers who are initial participants in this Project the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

**Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion**

114. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for 30 June 2008 to 30 June 2017, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner’s discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

115. 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 of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

**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 WA Blue Gum Project 2008 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 24 and 28 of this Ruling 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. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the Wood. There are no facts that would suggest that Growers have 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

*Previous Rulings/Determinations:*

TR 97/7; TR 97/11; TR 98/22;

TR 2000/8; TD 2003/12;

TR 2007/6; PR 2007/103

*Subject references:*

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- primary production
- producing assessable income
- product ruling
- public ruling
- seasonally dependent agronomic activity
- tax avoidance
- tax benefits
- tax shelter
- taxation administration

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF

- ITAA 1936 82KZMG
- ITAA 1936 82KZMG(1)
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- ITAA 1936 82KZMGB(2)
- ITAA 1936 82KZMGB(3)
- ITAA 1936 170
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 17-5
- ITAA 1997 25-20
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
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- TAA 1953 Sch1 357-75(1)
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- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

ATO references

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