PR 2007/71 - The Product Rulings system

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Product Ruling

The Product Rulings system

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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.

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What this Ruling is about

1. This Ruling outlines the system of Product Rulings. Product Rulings are binding public rulings made under Division 358 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

2. This Ruling outlines:

- what constitutes a Product Ruling (paragraphs 5 to 16);
- the extent to which a Product Ruling is binding on the Commissioner (paragraphs 17 to 28);
- the extent of certainty provided by a Product Ruling (paragraphs 29 to 30);
- Product Rulings and the promoter penalty laws (paragraphs 31 to 33);
- the 'Date of effect' paragraph (paragraphs 34 to 38);
- the income years to which the Product Ruling applies (paragraphs 39 to 43);
- numbering of Product Rulings (paragraph 44);
- publication (paragraph 45 to 46);

- the entities covered by a Product Ruling (paragraphs 48 to 52);
- the impact of legislative amendment on Product Rulings (paragraphs 53 to 54);
- applying for a Product Ruling (paragraphs 55 to 81);
- when the Commissioner may refuse to issue a Product Ruling (paragraphs 82 to 88);
- obligations after the issue of a Product Ruling (paragraphs 89 to 101);
- withdrawal of a Product Ruling (paragraphs 102 to 108);
- the effect of inconsistent rulings (paragraph 109); and
- accessing information about Product Rulings (paragraph 112).

Date of effect

3. This Product Ruling applies from 25 July 2007.

Previous Rulings

4. This Ruling replaces Product Ruling PR 1999/95, which is withdrawn on and from the date this Ruling takes effect.

Ruling

What constitutes a Product Ruling

5. Division 357 of Schedule 1 to the TAA contains the object and the common rules for rulings on the provisions set out in section 357-55 of Schedule 1 to the TAA (see paragraph 12 of this Ruling) and Division 358 of Schedule 1 to the TAA contains the provisions that are specific to public rulings. Together these provisions of the TAA set out what is necessary for a published opinion of the Commissioner to be a public ruling. As a type of public ruling, the Commissioner derives the power to issue Product Rulings from Division 358 of Schedule 1 to the TAA.[1A]

[1A] Taxation Ruling TR 2006/10 provides further information on the public rulings system.

6. Although Product Rulings have some similarities with private rulings, there is an important difference between private rulings and Product Rulings. Section 359-35 of Schedule 1 to the TAA states that, subject to certain qualifications, the Commissioner 'must comply with an application for a private ruling and make the ruling'.

7. In contrast, under Division 358 of Schedule 1 to the TAA the Commissioner retains the discretion to decide whether or not to issue public rulings, including Product Rulings in relation to particular 'products'. The exercise of this discretion by the Commissioner will have regard to the policy that underpins the rulings system generally (see section 357-5 of Schedule 1 to the TAA).[1]

8. Product Rulings were introduced by the Commissioner to rule publicly on the availability of claimed tax benefits from 'products' and thereby provide certainty to entities who participate or may be considering participating in such a 'product'. Therefore, the Commissioner will only exercise the discretion to issue a Product Ruling where, for those entities that will rely on it, the Ruling can provide certainty on how the tax laws apply to the scheme set out in the Ruling:

> [A] public ruling is to be made in accordance with the Act as interpreted by the Commissioner and not in accordance with some practice which the Commissioner may have adopted, to the extent that that is inconsistent with the Assessment Act (see *Bellinz Pty Ltd v. FCT* (1998) 84 FCR 154, at 168-9 (A-B) (Full Court).

9. A 'product' is a scheme in which a number of participants enter into substantially the same contractual arrangements and transactions with a common entity or a common group of entities in return for fees or other consideration.

10. A 'product' includes schemes that may be described as an investment scheme, a tax effective investment, a financial scheme, or an insurance scheme. Often, a 'product' is offered to the general public by way of an Information Memorandum, a Product Disclosure Statement or a prospectus, but it may also be put forward to individuals on an invitation basis.

11. A Product Ruling sets out the Commissioner's opinion as to the way in which the relevant provisions would apply to a class of entities in relation to a scheme (see section 358-5 of Schedule 1 to the TAA). Such a Ruling may cover any matter involved in the application of the provisions (see subsection 358-5(2) of Schedule 1 to the TAA).

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[1] In *Re Delandro and Commissioner of Taxation* [2006] AATA 859, Block DP said, in respect of an application under Division 35 of the *Income Tax Assessment Act 1997*: '… a discretionary power should not be exercised where to do so would defeat the policy of the relevant statute.'

12. Provisions that are relevant to rulings are defined in section 357-55 of Schedule 1 to the TAA. Relevant provisions are provisions of Acts or regulations administered by the Commissioner that are about any of the following:

- income tax;
- Medicare levy;
- fringe benefits tax;
- franking tax (that is, franking deficit tax, over-franking tax and venture capital deficit tax);
- withholding taxes (including non-resident withholding taxes and mining withholding tax);
- petroleum resource rent tax;
- indirect tax (including goods and services tax (GST), wine tax and luxury car tax (LCT));
- excise duty;
- the major bank levy;
- the administration or collection of the above taxes levies and duties;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* (including energy grants, cleaner fuel grants and product stewardship (oil) benefits) or the administration or payment of the above grants and benefits;
- net fuel amount, or the administration, collection or payment of a net fuel amount;
- a net amount, or the administration, collection or payment of a net amount; and
- a wine tax credit, or the administration or payment of a wine tax credit.

13. All agreements between the parties and the main details of those agreements and of the scheme itself are outlined in each Product Ruling. The Commissioner rules only on the precise scheme that is identified in the Ruling: see *Bellinz Pty Ltd v. FCT* (1998) 98 ATC 4399 at 4413 (Merkel J), *Bellinz Pty Ltd v. FCT* (1998) 84 FCR 154 at 169 (C-D) (Full Court).

14. This highlights the importance of ensuring that the scheme or class of schemes for which a ruling is being sought and which is ruled on in the Product Ruling accurately reflects the scheme that will be carried out by the implementer of the scheme.

15. A Product Ruling that is inconsistent with a prior Product Ruling may be made if the Commissioner decides that the law is otherwise than as stated in the earlier Ruling: see *Bellinz Pty Ltd v. FCT* (1998) 84 FCR 154 at 169 (A-B) (Full Court). Where the Commissioner decides that the law applies differently to that stated in a prior Product Ruling or in a number of prior Product Rulings, the Commissioner may decide not to issue further Rulings for schemes with the same features or may, in future Product Rulings, change the way the law was applied in the earlier Ruling or Rulings. The Commissioner will also consider whether an existing Ruling or Rulings should be withdrawn to ensure that the integrity of the tax system is protected while still achieving the certainty objective of the Product Rulings system (see paragraphs 102 to 108 of this Ruling).

16. Each application for a Product Ruling is considered on its merits and the law is applied to the scheme as the Commissioner understands it to apply at that time. Paragraphs 53 to 54 of this Ruling consider how legislative change affects a Product Ruling.

The extent to which a Product Ruling is binding on the Commissioner

17. As a public ruling, Product Rulings are binding on the Commissioner to the extent provided for by Subdivision 357-B of Schedule 1 to the TAA (see paragraphs 30 to 38 of Taxation Ruling TR 2006/10).

18. Product Rulings consequently provide certainty to those entities covered by the Ruling by confirming that the tax benefits set out in the Ruling part of the Product Ruling are available. This is provided that the scheme is carried out in accordance with the information provided by the applicant and described in the Scheme part of the Product Ruling.

19. If the scheme that is actually carried out is materially different to the scheme described in a Product Ruling entities participating in the scheme are not able to rely on the Product Ruling. This is because the Ruling has no binding effect on the Commissioner, as the scheme entered into is materially different to the scheme ruled upon: see *Bellinz Pty Ltd v. FCT* (1998) 98 ATC 4399 at 4413 (Merkel J), *Bellinz Pty Ltd v. FCT* (1998) 84 FCR 154 at 169 (C-D) (Full Court), *Carey v. Field* [2002] FCA 1173 (Merkel J) at [47]. Subject to the rules of natural justice, where the Commissioner becomes aware of, or is made aware of a scheme being carried out in a materially different way to the scheme set out in the Product Ruling, the Ruling will be withdrawn. A difference will be material if it results in a tax outcome being different to that set out in the Product Ruling: see *Carey v. Field*, supra, generally.

20. Where an implementer of a scheme proposes to implement that scheme differently than set out in a Product Ruling, they should notify the Commissioner in writing before the change occurs, providing full details of:

- the nature and extent of the change;
- the reasons for the change; and
- implications that result from the change.

21. Where a scheme is implemented differently than set out in the Product Ruling due to changes outside the implementer's control or knowledge, then this notification should be made within 14 days of the implementer becoming aware of the difference in implementation.

22. Where a scheme has been implemented differently than set out in the Product Ruling, the Commissioner will consider:

- what effect, if any, the differently implemented scheme will have on the Product Ruling (that is, whether it should be withdrawn or amended);
- whether the 'promoter penalty laws' should be applied (see paragraphs 31 to 33 of this Ruling); and
- whether any action can be taken to ensure that certainty for the participating entities can be maintained (for example, by the implementer undertaking to remedy the change).

23. It is important to note that each Product Ruling is confined to its specific terms and it cannot be relied upon as a precedent for similar schemes or for a future Product Ruling application regardless of how similar the facts of that application may be to the issued Product Ruling.

24. Both the implementer of the scheme and entities participating in that scheme are responsible for ensuring that the scheme is carried out in accordance with the Product Ruling that has been issued. Entities who are considering participating in a particular scheme may wish to seek assurances from the implementer of the scheme that the scheme will be carried out as described in the relevant Product Ruling. However, the responsibility of participating entities goes beyond an initial enquiry. The Constitution of the scheme, or the equivalent founding deed, sets out the rights and obligations of all the parties to the scheme and should be fully understood by all participating entities.

25. During the course of the scheme participating entities should monitor the governance of the scheme and take appropriate action to ensure that the scheme is carried out in accordance with the Product Ruling. For example, the *Corporations Act 2001* allows entities participating in registered managed investment schemes to call meetings,[2] and, in certain circumstances, to remove the responsible entity.[3] Similar rights are usually contained in the founding deeds of schemes that are not registered managed investment schemes.

26. Potential participating entities are cautioned to exercise particular care where the investment that they are being offered contains a feature or features that are not set out in the Scheme part of the Product Ruling or in an addendum to that Product Ruling, or where the investment omits a feature or features set out in the Ruling. In these circumstances the Ruling is unlikely to apply to the scheme and may not offer participating entities any certainty of how the tax laws apply to the scheme.

27. [Omitted.]

28. It should also be noted that a Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Commissioner gives no assurance that the scheme set out in a Product Ruling is an appropriate investment for a superannuation fund and the trustees of superannuation funds are advised that a Product Ruling has given no consideration as to whether investment in the particular scheme may contravene the provisions of SISA 1993. This will be the case even where a Product Ruling does not exclude superannuation funds from the class of entities that may participate in the particular scheme.

The extent of certainty provided by a Product Ruling

29. While a Product Ruling provides entities covered by the Product Ruling with certainty as to the tax consequences of participating in the scheme described in the Product Ruling, the Product Ruling provides no assurance that:

- the scheme is commercially viable;
- the fees, charges and other costs are reasonable or they represent industry norms; or
- the projected returns will be achieved or are reasonably based.

30. Potential participating entities must form their own view about the commercial and financial viability of the scheme.

[2] See Part 2G.4 of the *Corporations Act 2001*.
[3] See section 601FM of the *Corporations Act 2001*.

Product Rulings and the promoter penalty laws

31. Division 290 of Schedule 1 to the TAA contains provisions which are referred to, generally, as the 'promoter penalty laws'. The object of these laws is to deter:

- the promotion of tax avoidance schemes and tax evasion schemes (called 'tax exploitation schemes');[4] and
- the promotion of schemes on the basis that they conform with a Product Ruling but which are instead implemented in a way that is materially different to that described in the relevant Product Ruling.

32. To redress conduct that falls within these laws the Commissioner is able to:

- accept voluntary undertakings and apply to the Federal Court for the undertakings to be enforced;
- apply to the Federal Court for injunctions; or
- apply to the Federal Court for the imposition of a civil penalty.[5]

33. The Commissioner has issued two practice statements setting out the administrative procedures that will be used in applying the promoter penalties laws, Law Administration Practice Statements PS LA 2008/7 and PS LA 2008/8. Applicants and potential applicants for Product Rulings are advised to consult these important practice statements and ensure that they are aware of how the promoter penalty laws operate, the exceptions that apply, and in what circumstances they will be applied against conduct that the laws are designed to deter.

The 'Date of effect' paragraph

34. All Product Rulings carry a paragraph setting out a specific date of effect.

35. Except in limited circumstances Product Rulings that relate to agribusiness or 'forestry managed investment schemes' have prospective application only. Therefore, unless the relevant agribusiness or 'forestry managed investment scheme' Product Ruling clearly states that it will apply from a different date, an agribusiness or 'forestry managed investment scheme' Product Ruling applies only to entities that:

- are within the specific class of entities set out in the Ruling (see paragraphs 48 to 52 of this Ruling); and

[4] Defined in section 290-65 of Schedule 1 to the TAA.
[5] The civil penalty procedural provisions are in Subdivision 298-B of Schedule 1 to the TAA.

- enter into the scheme on or after the date the Product Ruling has issued.

35A. Product Rulings that relate to financial products may, in certain circumstances, have a prospective and/or retrospective application. Therefore, unless the relevant financial Product Ruling clearly states that it will only apply to entities that enter into the scheme on or after the date the Product Ruling has issued, it may apply to entities that enter into the scheme before the date the Product Ruling has issued. Financial Product Rulings that have retrospective application will be limited to Rulings that issue in the same financial year as an entity's entrance into the scheme. For the purposes of this Product Ruling, a financial Product Ruling is any Product Ruling that is not in respect of agribusiness or 'forestry manages investment scheme' products and may include real property investment schemes and insurance schemes.

36. Entities that enter into a scheme outside of the date of effect set out in the Product Ruling cannot rely on the Ruling and should consider whether it is appropriate to apply to the Commissioner for a private ruling.

37. An example of when a Product Ruling that relates to an agribusiness or 'forestry managed investment scheme' product might not have a prospective application is where the Ruling considers the operation of a tax law that has been enacted or amended after the date on which participating entities were first able to enter into the scheme and the new or amended law is relevant to their liability to tax after that date. This occurred, for example, when Division 35 of the *Income Tax Assessment Act 1997* (ITAA 1997) introduced the non-commercial loss measures.

37A. An example of when a Product Ruling that relates to a financial product might have a retrospective application is where an entity enters into the scheme in January of a particular financial year and the product issuer subsequently applies for a product ruling in March of the same financial year. The Commissioner may consider, in these circumstances, ruling for a retrospective period to provide certainty to the investor who entered into the scheme in January.

38. A Product Ruling issued in the circumstances set out in paragraph 37 of this Ruling will only deal with the application of the new or amended tax law and may be expressed to apply to entities which entered into the scheme from a specified date (usually the date from which participants were first able to enter into the scheme or from the date the new or amended provision first applies from), even if that date precedes the date that the Product Ruling issues.

The income years to which the Product Ruling applies

39. Product Rulings about Division 394 of the ITAA 1997 are issued for 'forestry managed investment schemes' and require the Commissioner to determine whether it is 'reasonable to expect' that the '70% DFE rule' has been satisfied. The '70% DFE rule' is based

on 'direct forestry expenditure' as a percentage of all amounts paid by 'participants' under the scheme. In such circumstances the Commissioner will issue a Product Ruling for all years to which the scheme applies.

40. Product Rulings that deal with the exercise of the Commissioner's discretion[6] in section 35-55 of the ITAA 1997 may rule for a greater number of income years than for other tax laws covered by the same Product Ruling.

41. For certain financial products a Product Ruling, generally, will have a three year application period for entering into the scheme covered by the Ruling. However, the Ruling will continue to apply to schemes entered into before the end of the application period. For example, a Product Ruling may deal with a scheme involving a loan arrangement of, say, 5 years. While the application period for entering the scheme may be limited in the Product Ruling to three income years the Ruling will set out how the tax laws apply to the loan product over its full 5 year term provided the scheme was entered into before the end of the application period.

42. Other than in these specific circumstances, a Product Ruling will generally only rule on how the tax laws apply to an entity for the first income year in which the entity participates in the scheme and then for the following two income years.

43. Regardless of the number of years for which it rules a Product Ruling only applies to the extent that a law covered by the Ruling remains unchanged. Where the Commissioner issues a Product Ruling, including a Ruling for a long-term 'forestry managed investment scheme' under Division 394 of the ITAA 1997, and a law is amended that is relevant to the Ruling, the Product Ruling is superseded by that amended law (see paragraphs 53 to 54 of this Ruling).

Numbering of Product Rulings

44. Product Rulings are:

- grouped as the 'PR' series;
- prefixed for the particular calendar year in which they issue; and
- numbered in order of issue.

For example, Product Ruling PR 2008/10 will identify the tenth Product Ruling that issued in the 2008 calendar year.

Publication

45. As a Product Ruling is a type of public ruling, the Ruling must be published and notice of it must be published in the *Gazette*

[6] See Division 35 of the ITAA 1997.

(section 358-5 of Schedule 1 to the TAA). However, if the Commissioner issues a public ruling but fails to publish a notice in the *Gazette*, an entity to which it applies may nevertheless rely on the ruling and it will bind the Commissioner.[7]

46. If the Commissioner withdraws a Product Ruling (see paragraphs 102 to 108 of this Ruling) the notice of withdrawal must be published, and notice of it must also be published in the *Gazette* (section 358-20 of Schedule 1 to the TAA).

Copyright

47. [Omitted.]

The entities covered by a Product Ruling

48. Each Product Ruling will define the class of entities to which the Ruling applies and will also set out those entities, if any, which are specifically excluded. Entities that do not fall within the defined class of entities, or that are excluded from the defined class of entities cannot rely on the Product Ruling.

49. Each Product Ruling will also contain a statement that the Ruling will only apply to participants who are within the defined class of entities entering the relevant scheme within specific dates of a particular income year or years. Entities that enter the scheme other than in accordance with these dates are not covered by the Product Ruling.

50. For example, a Product Ruling for a forestry project will usually state that the Ruling applies to entities that enter the scheme from the 'date of effect' of the Ruling to 30 June of the same income year or, alternatively, from 1 July to the following 30 June (that is, the Ruling will apply to entities that enter the scheme in the income year immediately after the 'date of effect' of the Product Ruling).

51. Whether an entity is covered by a Product Ruling, and whether the Product Ruling is legally binding on the Commissioner in relation to the entity, will depend upon a reading of the whole Product Ruling. For example, there may be some specific qualification in the description of the scheme which, if breached, means that the Product Ruling is of no operation or effect, for a particular entity or for all entities participating in the scheme.

52. An entity within the relevant class that has entered into the scheme within the specified dates set out in the Product Ruling need not seek a private ruling about the tax consequences of their participation in the scheme that is the subject of that Product Ruling. If there are any particular tax consequences for a participant in the Project that are not addressed in the Product Ruling, the entity can seek a private ruling about those specific matters. For example, a

[7] See paragraph 3.35 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

Product Ruling may not deal with the deductibility or otherwise of interest on borrowings because the implementer of the scheme is not offering finance as part of the scheme. In such a case, participants in the scheme who borrow from external financiers may wish to apply for a private ruling on the deductibility of interest incurred on loans used to fund their participation in the scheme.

The impact of legislative amendment on Product Rulings

53. Although each Product Ruling deals with taxation legislation enacted as at the time it is issued, later legislative amendments may impact on the Ruling. If the later legislation expresses the same ideas as the original legislation and the tax outcomes are unaltered then the Product Ruling continues to apply, as issued. However, if the law changes the ideas expressed in the original legislation and the tax outcomes are altered then the later legislation takes precedence over the application of the Ruling and, to that extent, the Ruling is superseded (section 357-85 of Schedule 1 to the TAA).

54. Where a legislative change occurs that affects an existing Product Ruling, the implementer of the scheme is encouraged to contact the ATO and discuss the matter. Where possible, action to deal with the change will be taken. This may involve the issue of an addendum to the Ruling or it may require withdrawal and re-issue of the Ruling. An addendum or a re-issue of the Product Ruling would be subject to there being no material change in the scheme and to the consent of the implementer of the scheme. In keeping with the intention that Product Rulings provide certainty about the tax consequences for entities in a scheme, the ATO suggests that the implementer of the scheme ensures that participating entities are fully informed of any relevant legislative changes enacted after the Ruling is issued.

Applying for a Product Ruling

Who can apply for a Product Ruling?

55. A Product Ruling will only be issued on application by, or on behalf of, an entity that is a principal of the scheme or is the implementer of the scheme. An entity who applies for a Product Ruling must be able to sign and give the Commissioner each of the assurances required by the Product Ruling 'Agreement on Terms of Use' available on ato.gov.au (see paragraph 112 of this Ruling).

56. Product Rulings will not be issued to either scheme participants or to potential scheme participants, or to brokers or similar entities whose business involves promoting or marketing the 'products' of other entities who are the implementers of the scheme being promoted or sold.

Submitting an application for a Product Ruling

57. In the first instance an entity intending to apply for a Product Ruling is encouraged to contact the ATO prior to submitting a formal application. Search for 'applying for a Product Ruling' on ato.gov.au (see paragraph 112 of this Ruling) to obtain details of the application process, information requirements (as detailed in an Application Checklist) and how to obtain assistance if required.

58. [Omitted.]

59. [Omitted.]

60. [Omitted.]

61. [Omitted.]

62. [Omitted.]

63. [Omitted.]

64. [Omitted.]

65. [Omitted.]

66. [Omitted.]

67. [Omitted.]

Valid application for a Product Ruling

68. Where all information required by the Application Checklist has been provided the Commissioner will acknowledge the receipt of a valid Product Ruling application.

69. If it becomes apparent that a product has features requiring detailed research and analysis or where additional information is necessary, the applicant will be contacted to discuss the issues and a time frame for the provision of the additional information.

70. Where the Commissioner has requested additional information and that information has not been provided within 28 days, or by some other mutually agreed time, the application will be finalised and the applicant notified. Later provision of the requested information will be treated as a fresh application at the time that the information has been provided.

71. Applicants should note that any revision of the scheme or the submission of additional material by the applicant that has not been requested by the Commissioner will be treated as a fresh application made at the time the revised or additional information is received. The original application will be finalised and the applicant notified.

72. An application will also be finalised and the applicant notified if, following a request for additional information, the Commissioner considers that the information provided is inadequate or insufficient for a Product Ruling to be issued.

72A. Falling within this category also are applications where the material provided in the original application is inconsistent, inaccurate or contains errors such that the scheme cannot be ascertained with sufficient particularity. It is not the role of the ATO to point out errors in drafting or inconsistencies between application documents.

72B. In situations where an application has been treated as a valid application and is later finalised for reasons outlined in paragraphs 70 to 72A of this Ruling, the finalised application will be treated as a refusal to rule. Refer to paragraphs 82 to 88 of this Ruling for further examples of when the Commissioner may refuse to rule.

Timing issues

73. Applicants are encouraged to submit applications early in the financial year to which the proposed Product Ruling relates. This should ensure sufficient time to finalise the Ruling.

73A. If your application is received by the ATO after 31 March of the income year that you want the product ruling there may be insufficient time available to consider the application and prepare a Product Ruling prior to the end of that income year.

73B. For all product ruling applications, other than applications for financial products, the ATO will not accept an application as valid any earlier than 1 July of the financial year to which the proposed ruling will apply. Applications received before 1 July will not be treated as being received until 1 July.

74. However, applicants should be aware that changes to taxation laws and/or the *Corporations Act 2001* may create unavoidable delays in the processing of Product Ruling applications. Where new laws are enacted, the impact of those changes on Product Rulings will need to be carefully considered. This may lead to delays in dealing with new Product Ruling applications affected by the new laws, or before existing Product Rulings can be amended.

75. Changes in interpretation of existing laws may also result in delays, for instance where the Commissioner is concerned that current interpretations are being applied in circumstances outside the policy intent. This may especially occur in circumstances where as a result of commercial changes, features of schemes are changed in small increments over time and eventually lead to a different result from the earlier interpretation of the law. The length of such delays will depend upon the complexity of the issue being considered. However, any delays that occur are necessary to ensure that the integrity of the tax system is protected while achieving the certainty objective of the Product Rulings system.

The draft Product Ruling

76. After considering all aspects of a proposed scheme the Commissioner will provide the applicant with a draft Product Ruling.

At the time it is issued to the applicant a draft Product Ruling is no more than a document prepared for the purposes of discussion and does not represent a commitment by the Commissioner that a Product Ruling will issue. The provision of the draft Product Ruling allows the applicant an opportunity to suggest changes for consideration by the Commissioner.

77. A draft Product Ruling is sent to the applicant to obtain certain statements and agreements. These include an agreement that the applicant abide by the terms of use of the Product Ruling and statements that the description of the scheme is accurate, covers all relevant features and that all parties named in the Ruling consent to be named.

78. A draft Product Ruling differs fundamentally from a draft Taxation Ruling. A draft Product Ruling offers no protection to the class of entities set out in the Ruling. It should not be provided to third parties until notice of the Product Ruling is published in the *Gazette* and the Product Ruling is published on the ATO Legal database. Further, it should not be referred to in marketing materials of the applicant or others until these events happen.

Conditions relating to the issue of a Product Ruling

79. The issuing of a Product Ruling in relation to a particular product is conditional on:

(a) the applicant acknowledging that the Commissioner will reveal in the Ruling:

- the name of each of the entities involved as principals in the carrying out of the scheme;
- the name and a description of the product; and
- a full list and a description of the material parts of each of the agreements, deeds and transactions to which the participants are parties;

(b) the applicant obtaining and providing the express consent from all parties, including all third parties, who are parties to the scheme set out the Product Ruling, to be named in the Ruling;

(c) the applicant acknowledging that the description of the Product contained in the proposed Ruling is accurate; and

(d) the applicant agreeing to personally sign and abide by the undertakings set out in the 'Agreement on Terms of Use' available on ato.gov.au (see paragraph 112 of this Ruling).

Testing the Commissioner's view

80. Product Rulings are only issued where the Commissioner and the applicant agree on all aspects of the Ruling. As a general proposition, negative Product Rulings or Product Rulings expressing adverse views to that of the applicant are unlikely to be issued.

81. Where the Commissioner is unable to rule favourably, he/she will, if the applicant wishes to test the Commissioner's views, issue a private ruling in response to a valid application by a proposed participating entity, enabling the relevant review processes to occur.

When the Commissioner may refuse to rule

82. Under Division 358 of Schedule 1 to the TAA the Commissioner will exercise the discretion to issue a Product Ruling or not to issue a Product Ruling for a particular product in a way that reflects the policy behind the rulings system generally.

83. The paramount consideration in the Commissioner's decision will be whether the Product Ruling will provide certainty to the entities who participate in the scheme or who are considering participating in the scheme. Given that the purpose of a Product Ruling is solely to benefit participating entities it follows that any collateral benefits that flow to the implementer of the scheme are not taken into account when deciding whether a Product Ruling should be issued.

84. For example, Product Rulings are not given to assist the implementer of the scheme to market the scheme or for the implementer or an associate to raise finance for the 'product' from financiers. The level of certainty that Product Rulings are intended to provide to participating entities require that all aspects of the 'product', including the means to finance the product, should be settled and in place at the time that the application is submitted.

85. A Product Ruling is a ruling on a single settled 'product'. It is not a ruling on a basic set of principles or conditions where participating entities are able to depart from those principles and conditions to suit their particular individual needs. The presence of such choices within a scheme is indicative that, rather than a single settled 'product', it is more likely to be a series of sub-products built around a basic set of conditions. Where participants are able to make choices within a scheme a Product Ruling will not be issued because such a Ruling would not provide certainty. The private ruling system is a more appropriate way for a taxpayer to obtain legally binding advice in such circumstances.

86. Although the Commissioner will give the applicant an opportunity to provide their views before a decision is made, a Product Ruling will ordinarily not be issued if:

- there is any uncertainty about the scope of the scheme or how it may operate;

- there is any uncertainty about the application of the law to the scheme or the legal structure under which it is proposed to operate; or
- if the applicant and the Commissioner are unable to agree on any material aspect of the proposed Ruling.

87. Additionally, and without limiting the discretion to refuse to rule in relation to other instances, a Product Ruling will ordinarily not be issued in the following **specific** circumstances:

(a) in situations where an application has been treated as a valid application and is later finalised for reasons outlined in paragraphs 70 to 72A of this Ruling;[8] [9] [10]

(b) after 30 June 2007, where deductions are sought under Division 394 of the ITAA 1997 for expenditure paid under a 'forestry managed investment scheme' but, in the Commissioner's view, the scheme fails to satisfy the '70% DFE rule';[11]

(c) where an entity involved with the application for Product Ruling has failed to comply with their taxation obligations, for example, there are outstanding income tax returns or activity statements, or amounts of tax which are overdue for payment;

(d) where all, or a substantial majority of the scheme activities are to be undertaken outside of Australia;

(e) an applicant continues to present 'shifting scenarios', indicating that there is, in fact, no settled scheme on which the Commissioner may rule;

(f) the entities who may purchase the product are not an homogeneous group in either of the following respects:

- the tax result is not the same for all members of the group. This would be the case, for example, where the scheme includes options which, if exercised, would create a variety of different classes of participants or would be likely to change the tax outcome for some participating entities; or
- the tax result is dependent on the outcome of an unresolved issue (such as, for example, whether a participant is in business);

(g) there is a reasonable possibility that the Ruling, or circumstances associated with the Ruling, could be misleading to potential participants. Falling within this category are requests where:

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[8] [Omitted.]
[9] [Omitted.]
[10] [Omitted.]
[11] The '70% DFE rule' is set out in section 394-35 of the ITAA 1997.

- the Government has announced a change in the law on which the Commissioner has been asked to rule. This includes cases where the Commissioner is requested to rule on law that has not been enacted or that has not yet received Royal Assent. A Product Ruling can only deal with taxation legislation enacted at the time that it issues;
- the Commissioner cannot give a positive clearance on general anti-avoidance provisions;
- the material provided in support of the application, including the Product Disclosure Statement, cannot reasonably be relied upon, leading to, among other things, questions of the correct characterisation of the structure for tax purposes and/or certainty of the tax outcomes for participating entities; or
- past practices by the implementer of the scheme or its associates make it reasonable to suspect that the assurances required by the Product Ruling 'Agreement on Terms of Use' will not be complied with;

(h) the application is frivolous or vexatious. Falling within this category are requests where:

- the scheme is only hypothetical in that the scheme to which the application relates is not being carried out and is not seriously contemplated by the applicant; or
- there is no realistic chance of implementing the scheme;

(i) in the opinion of the Commissioner it is unreasonable to comply with the application given the extent of resources available and/or period of time available to consider the application or other relevant matters. For example, the Commissioner may refuse to issue a Product Ruling in the following circumstances:

- in the case of protracted and very time consuming matters to which the Commissioner cannot devote resources. An example may be the 'arm's length consideration' requirements in Division 13 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
- where the issues are sufficiently covered by a previously issued public ruling;
- where the matter sought to be ruled on is already being, or has been considered by the Commissioner, for example, in the course of a

review, an audit or in deciding an objection against an assessment;

- where statutory or other Government requirements (for example, prospectuses, licences, approvals) have not been met and are not expected to be met, have expired, have been withdrawn, or are expected to expire or be withdrawn in the near future;

(j) where the clear purpose of the scheme is to avoid or circumvent a policy intent of a law, especially, but not limited to, one administered by the Commissioner; or

(k) the class of entities to which the Ruling applies is so narrow that the anonymity of those entities cannot be guaranteed.

88. When considering an application for a Product Ruling the Commissioner will, as far as possible, take a 'whole of government' approach. For example, a Product Ruling will not be issued if aspects of it are contrary to the requirements of other regulatory or prudential agencies or bodies or with related legislation such as the *Corporations Act 2001*. However, it should not be assumed that each Product Ruling issued has considered all of the non-tax law aspects that might apply to the scheme or to participation in it.

Obligations after the issue of a Product Ruling

Obligations applicable to all Product Ruling applicants

89. A Product Ruling will only be issued if the entity who has applied for the Product Ruling (the applicant) gives an assurance to the Commissioner in the form of the Product Ruling 'Agreement on Terms of Use' or any other assurances as may be required.

90. Under the Product Ruling 'Agreement on Terms of Use', the applicant is required to inform the ATO if the scheme is implemented in a manner that is in any way different to the description of the scheme contained in the issued Product Ruling. In particular, the applicant must notify the Product Rulings area of the ATO[12] if any of the following occur:

(a) a supplementary Product Disclosure Statement or prospectus issues;

(b) a new Responsible Entity, or the equivalent manager of a non-registered managed investment scheme, is appointed;

(c) a receiver or administrator is appointed;

(d) there is a failure to meet a minimum subscription requirement;

[12] Notification should be to the Manager of the Product Rulings area at the Tax Office where the application was processed and which issued the Product Ruling.

(e) a contract for the supply of goods or services lapses or material changes are made to a contract for the sale of the scheme's produce or output;

(f) changes are made to the terms and conditions of the scheme agreements, for example, changes to:

- the services to be provided by any contracting entity, including by the implementer of the scheme, to the participating entities, or the timing of the provision of those services;
- the fees payable by participating entities including the time at which the fees are payable and/or the amount that is payable;
- (in relation to agricultural projects) the minimum number of allotments that a participant is required to take in the project; or
- the parties to the scheme agreements;

(g) a failure to complete a contract of sale for the purchase of land or a failure to execute a lease or licence agreement occurs;

(h) the project is abandoned; or

(i) upon becoming aware of arrangements or events introduced or effected by other parties (including related parties), that are outside of the terms of the scheme agreements, that may impact on the tax consequences for participants in agribusiness managed investment scheme.

91. Notification of such events should be provided to the Commissioner in writing before the relevant event occurs. However, where circumstances outside of the control of the implementer of the scheme prevent this occurring, the Commissioner should be notified no more than 14 days after the event occurs or the implementer becomes aware of it.

92. The *Corporations Act 2001* requires a company, a registered managed investment scheme and other prescribed entities to lodge with the Australian Securities and Investments Commission (ASIC) a directors' report.[13] The report must (among other requirements):

(a) give details of any significant changes in the entity's state of affairs during the financial year;

(b) state the entity's principal activities during the financial year and any significant changes in the nature of those activities during the financial year; and

[13] Sections 298 and 299 of the *Corporations Act 2001*.

(c) give details of any matter or circumstance that has arisen since the end of the financial year that has significantly affected, or may significantly affect:

- the entity's operations in future financial years;
- the results of those operations in future financial years; or
- the entity's state of affairs in future financial years.

93. If a report of the type described in paragraph 92 of this Ruling is required to be lodged, the applicant is also required to provide this information to the Commissioner within the time for lodgment of the report with ASIC. The Commissioner[14] must receive this information immediately upon it being provided to ASIC. If the information is not provided, the Ruling may be withdrawn.

Obligations specific to Product Rulings about Division 394 of the ITAA 1997

94. Division 394 of Schedule 1 to the TAA imposes certain **reporting requirements** on 'forestry managers'[15] of 'forestry managed investment schemes'.[16] These reporting requirements apply whether or not the 'forestry managed investment scheme' has been issued with a Product Ruling or whether it has not. The reporting requirements also apply whether or not the scheme is a managed investment scheme, registered or unregistered, under the *Corporations Act 2001*. A failure to comply with these requirements may give rise to an administrative penalty under section 286-75 of Schedule 1 to the TAA.

95. The first reporting requirement is in section 394-5 of Schedule 1 to the TAA. A 'forestry manager' must give the Commissioner a statement showing the initial amount of income that the 'forestry manager' (or an associate[17] of the 'forestry manager') receives and that is included in the assessable income of the 'forestry manager' (or the 'associate') under section 15-46 of the ITAA 1997.

96. The statement must be given in the approved form and must be given within three months after the income year in which the manager receives the amount. Information required by the statement includes:

- the name of the scheme;
- information relating to the identity of the 'forestry manager' (or the 'associate');

[14] The information should be addressed to the Manager of the Product Rulings area at the Tax Office which issued the relevant Product Ruling.
[15] Defined in subsection 394-15(2) of the ITAA 1997.
[16] Defined in subsection 394-15(1) of the ITAA 1997.
[17] Defined in subsection 995-1 of the ITAA 1997.

- information relating to amounts paid or payable under the scheme, by 'participants' in the scheme; and
- anything else that the Commissioner may consider relevant.

97. The second reporting requirement is in section 394-10 of Schedule 1 to the TAA. A 'forestry manager' must give the Commissioner a statement if the requirement in subsection 394-10(4) of the ITAA 1997 has not been satisfied. Subsection 394-10(4) of the ITAA 1997 requires that all trees under a 'forestry managed investment scheme' be established within 18 months of the end of the income year in which an amount is first paid under the scheme.

98. The statement must be given in the approved form and must be given within 3 months after the end of the 18 month period in which the trees were required to be planted. Information required by the statement includes:

- the name of the scheme;
- information relating to the identity of the 'forestry manager';
- information relating to the circumstances that gave rise to the trees not being established within 18 months; and
- anything else that the Commissioner may consider relevant.

99. Section 262A of the ITAA 1936 also imposes **record keeping requirements** on 'participants'[18] in 'forestry managed investment schemes' and 'forestry managers' of 'forestry managed investment schemes'.

100. A 'participant' is required to keep records for five years from the date of a relevant event, such as the claiming of a deduction under Division 394 of the ITAA 1997 (subsection 262A(2AAA) of the ITAA 1936).

101. A 'forestry manager' (or an associate of the 'forestry manager') is required to keep records for the term of the 'forestry managed investment scheme' plus five years showing:

- the basis of the 'forestry manager's reasonable expectation that the '70% DFE rule' will be satisfied for the duration of the project;
- expenditure on 'direct forestry expenditure' for the duration of the project; and
- amounts paid by participants for the duration of the project.

[18] Defined in subsection 394-15(4) of the ITAA 1997.

Withdrawal of Product Rulings

102. A Product Ruling can be withdrawn by the Commissioner following a request from the applicant or by the Commissioner's own action.

103. Product Rulings may be withdrawn where:

- there is a change in the Commissioner's view of how the law should be interpreted, or where a court decides that the law applies differently to that set out in a Product Ruling or a number of Product Rulings;
- they are no longer needed, such as where the scheme described in the Ruling will not be implemented or will cease being carried on or where a replacement Ruling has issued;
- the Commissioner becomes aware of circumstances which, had they been known to the Commissioner or been foreshadowed by the applicant prior to the issue of the Product Ruling, would have caused the Commissioner not to issue it;
- it may be inappropriate or unsafe for entities to continue rely on them; or
- the 'Agreement on Terms of Use' has not been observed.

104. A Product Ruling will be withdrawn where there is a material non-conformance with the scheme set out in the Ruling. Without limiting what the Commissioner may consider to be material for these purposes, the following scenarios are likely to lead to consideration of whether the Product Ruling should be withdrawn:

(a) where there is any difference that is considered to be capable of affecting the tax outcome of the scheme for any entity within the class of entities to whom the Ruling relates: see generally *Carey v. Field* [2002] FCA 1173; compare *Bellinz Pty Ltd v. FCT* (1998) 98 ATC 4399 especially at 4413; *Bellinz v. FCT* (1998) 84 FCR 154, at 169 (C-D);

(b) the offering of finance arrangements, including the provision of bridging finance or other short term finance to participating entities, where those finance arrangements have not been disclosed to the ATO; and

(c) the issue of a supplementary Product Disclosure Statement that has not been provided to the ATO.

105. A Product Ruling may also be withdrawn where the applicant has not complied with the disclosure obligations discussed in paragraphs 89 to 93 of this Ruling.

106. In making a decision to withdraw a Product Ruling, the Commissioner will take into account all relevant considerations. In order to ensure that all relevant matters are identified and considered, the Commissioner will generally provide an opportunity for submissions from the relevant scheme entity. Such submissions must be supplied within 28 days of the Commissioner informing the scheme entity that the withdrawal of the Ruling is being considered.

107. However, in circumstances of necessity or urgency, such as where a product is being aggressively marketed and it is the Commissioner's view that any delay in withdrawing the relevant Product Ruling may lead to potential participants being misled, the Commissioner may not give the applicant an opportunity to be heard prior to deciding whether to withdraw a Product Ruling. As to whether or when the Commissioner may be under a legal obligation to do so, see *Carey v. Field* [2002] FCA 1173 at [56]-[58] and compare with *Remuneration Planning Corporation Pty Ltd v. FCT* (2002) ATC 4130 at 4134-4135.

108. The Commissioner will issue a Notice of Withdrawal explaining the circumstances that have led to the withdrawal and the consequences of the withdrawal to participants. The Commissioner may also write to participants setting out a fuller explanation of the consequences of the withdrawal.

The effect of inconsistent rulings

109. Where there are inconsistent rulings that both apply to the entity, section 357-75 of Schedule 1 to the TAA sets out rules for determining which ruling may be relied upon, to the extent of the inconsistency. Refer to Taxation Ruling TR 2006/10 for an explanation of the Commissioner's view on how this provision applies.

110. [Omitted.]

111. [Omitted.]

Accessing information about Product Rulings

112. Forms for Product Rulings, and useful information for applicants and users of Product Rulings, including details of how to contact us for advice, are available on ato.gov.au. All published Product Rulings are available on the ATO Legal Database.

113. [Omitted.]

Commissioner of Taxation
25 July 2007

Appendix 1 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Previous Rulings/Determinations:

PR 1995/95

Legislative references:

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- ITAA 1936 262A
- ITAA 1936 262A(2AAA)
- ITAA 1997 15-46
- ITAA 1997 Div 35
- ITAA 1997 35-55
- ITAA 1997 Div 394
- ITAA 1997 394-10(4)
- ITAA 1997 394-15(1)
- ITAA 1997 394-15(2)
- ITAA 1997 394-15(4)
- ITAA 1997 394-35
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- TAA 1953 Sch 1 286-75
- TAA 1953 Sch 1 Div 290
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- TAA 1953 Sch 1 Div 357
- TAA 1953 Sch 1 357-5
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- Bellinz Pty Ltd v. FCT (1998) 98 ATC 4399
- Bellinz Pty Ltd v. FCT (1998) 84 FCR 154
- Carey v. Field [2002] FCA 1173
- Remuneration Planning Corporation Pty Ltd v. FCT (2002) ATC 4130
- Re Delandro and Commissioner of Taxation [2006] AATA 859; (2006) 2006 ATC 2451; (2006) 64 ATR 1129; [2007] ALMD 576

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005
- http://www.ato.gov.au
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