


# ***PR 2007/89 - Income tax: Gunns Plantations Walnut Project No. 2 - Late Growers***

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## Product Ruling

### Income tax: Gunns Plantations Walnut Project No. 2 – Late Growers

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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

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the 'Gunns Plantations Walnut Project No. 2' or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Scheme Agreements set out in paragraph 33 of this Ruling on or before 13 June 2008. They must have a purpose of staying in the scheme until it is completed (that is being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

4. 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:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into this Scheme before the date this Product Ruling is made and after 13 June 2008;
- are accepted into this Scheme prior to the Lease being executed between GPL and Gunns in respect of the Leeton Property where those entities are to be granted an Orchard Right at the Leeton Property;
- participate in the scheme through offers made other than through the Product Disclosure Statement;
- finance their participation in the Scheme with loans other than from Gunns Finance Pty Ltd or Allco Managed Investments, or other than as described at paragraphs 75 to 84 of this Ruling; and
- are Gunns Plantations Limited (GPL or Responsible Entity) or its associates.

**Superannuation Industry (Supervision) Act 1993**

5. 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.

**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 33 to 85 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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**Date of effect**

9. This Product Ruling applies prospectively from 24 October 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 24 October 2007 until 13 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.

10. 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.

11. 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)).

12. 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.

13. 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**

14. 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.

15. 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**

16. 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**

17. 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.

**Ruling****Application of this Ruling**

18. 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 33 to 85 of this Ruling.

19. The Grower's participation in the Scheme must constitute the carrying on of business of primary production. Provided the Scheme is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Management Agreement and an Orchard Right Agreement, on or before 13 June 2008.

**Concessions for 'small business entities'<sup>1</sup>**

20. From the 2007-08 income year, a range of concessions previously available under the 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').

21. 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. Accordingly application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt within this Ruling.

**Assessable income****Sections 6-5 and 17-5**

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

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<sup>1</sup> The meaning of 'small business entity' is explained in section 328-110.

**Deductions for Initial Services Fee, Operating Fee, Orchard Right Fee, Loan Establishment Fee and Interest*****Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936***

23. A Grower may claim tax deductions for the expenditure set out in the table below on a per Walnut Lot basis.

<b>Expenditure</b>	<b>Year ending 30 June 2008</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>
<b>Initial Services Fee</b>	\$6,117.47 See Notes (i) & (ii)	Nil	Nil
<b>Operating Fee</b>	Nil	\$990 (Varied by Indexation) See Notes (i), (iii) & (iv)	\$990 (Varied by Indexation) See Notes (i), (iii) & (iv)
<b>Orchard Right Fee</b>	\$18.33 See Notes (i) & (iii)	\$220 (Varied by Indexation) See Notes (i), (iii) & (iv)	\$220 (Varied by Indexation) See Notes (i), (iii) & (iv)
<b>Interest</b>	Amount incurred See Notes (iv) & (v)	Amount incurred See Notes (iv) & (v)	Amount incurred See Notes (iv) & (v)
<b>Loan Establishment Fee</b>	Must be calculated See Note (vi)	Must be calculated See Note (vi)	Must be calculated See Note (vi)

**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) For the year ended 30 June 2008, \$6,117.47 of the Initial Services Fee of \$6,405.67 payable under the Management Agreement is deductible in full in the year incurred under section 8-1.
- (iii) The Operating Fees under the Management Agreement and the Orchard Right Fees under the Orchard Right Agreement are deductible in full under section 8-1 in the income year that the relevant fee is incurred.

- (iv) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 75 to 84 of this Ruling). Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Scheme.
- (v) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Gunns Finance and Allco Managed Investments is outside the scope of this Ruling. Prepayments of interest to any lender, including Gunns Finance and Allco Managed Investments, are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.
- (vi) The Loan Establishment Fee payable to either Gunns Finance or Allco Managed Investments is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Gunns Finance or Allco Managed Investments is outside the scope of this Ruling.

### **Joint Venturers**

24. If a Joint Venturer 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.

25. A Joint Venturer may claim deductions under sections 8-1, 25-25 and 40-630 for the expenditures, set out in the table and Notes in paragraph 23 and paragraph 30 of this Ruling, as follows:

#### ***First Joint Venturer***

- for the year ending 30 June 2008, \$6,117.47 incurred in respect of Initial Services Fee;



- for the year ending 30 June 2008, \$288.20 in respect of that part of the Initial Services Fee that relates to a landcare operation (refer to paragraph 30 of this Ruling);
- for the year ending 30 June 2008, \$18.33 incurred in respect of the Orchard Right Fee;
- for the years ending 30 June 2008, 2009 and 2010, any interest incurred on funds borrowed from Gunns Finance or Allco Managed Investments.
- for the years ending 30 June 2008, 2009 and 2010 deductions in respect of the Loan Establishment Fee, payable to Gunns Finance or Allco Managed Investments, under subsection 25-25(1) (see Note (vi), paragraph 23 of this Ruling).

### ***Second Joint Venturer***

- for the year ending 30 June 2009 \$990 (varied by indexation) incurred in respect of Operating Fee;
- for the year ending 30 June 2010 \$990 (varied by indexation) incurred in respect of Operating Fee;
- for the year ending 30 June 2009 \$220 (varied by indexation) incurred in respect of Orchard Right Fee;
- for the year ending 30 June 2010 \$220 (varied by indexation) incurred in respect of Orchard Right Fee;
- for the years ending 30 June 2010, any interest incurred on funds borrowed from Gunns Finance.

26. Each Joint Venturer can also claim deductions for 50% share of the horticultural plant write-off as explained in paragraphs 27 to 29 of this Ruling.

## **Deductions for capital expenditure**

### ***Division 40***

27. A Grower will be entitled to tax deductions relating to the cost of establishing the Walnut Trees under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. 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.

28. A Walnut Tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds an Orchard Right to cultivate the Walnut Trees on a designated area of land called a Walnut Lot for the growing of Walnuts for commercial gain. As a Grower holds an Orchard Right over the land, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value.

29. The deduction is determined using the formula in section 40-545. Walnut Trees have an 'effective life' of 25 years and for the purposes of section 40-545, the result is a straight-line write-off at a rate of 13%. The deduction is allowable when the Walnut Trees enter their first commercial season (section 40-530, item 2). GPL will advise Growers about the amount of tax deduction that they are entitled to each year in relation to the establishment of Walnut Trees.

30. The capital expenditure of \$288.20 incurred in respect of native vegetation management is considered a 'landcare operation' (as defined in section 40-635) and is fully deductible in the year it is incurred under section 40-630.

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

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

31. A Grower, who is an individual accepted into the Project by **13 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 individual Growers as follows:

- Second Joint Venturers, who fund their Ongoing Fees through a fee facility with Gunns Finance, for the income years ending **30 June 2009 to 30 June 2014**; and
- for all other Growers, for the income years ending **30 June 2008 to 30 June 2013**.

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***

32. For a Grower who commences participation in the Project and incurs expenditure as required by the Orchard Right Agreement and Management 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 (but see paragraphs 97 to 98 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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33. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following documents:

- Application for a Product Ruling received on 10 January 2007; as constituted by documents received on 11, 31 January 2007, 7, 28 February 2007, 1, 2, 7, 13, 15, 22, 30 March 2007, 3, 5 April 2007, 13 July 2007, 23, 28 August 2007, 14, 21 September 2007, 11, 16 October 2007 and additional correspondence dated 28 February 2007, 7, 13, 15, 22, 30 March 2007, 3, 5, 11, 12, 16, 19, 23, 24 April 2006, 13 July 2007, 23, 28 August 2007, 14, 21, 24 September 2007, 2, 5, 12, 16 October 2007;
- Draft Product Disclosure Statement (PDS) for the Scheme, received on 24 April 2007;
- Draft Supplementary Product Disclosure Statement (Supplementary PDS) for the Scheme, received on 11 October 2007;
- Draft **Constitution** of Gunns Plantations Walnut Project No. 2, received on 13 March 2007;
- Draft Compliance Plan for Gunns Plantations Walnut Project No. 2, received on 10 January 2007;
- Draft Custody Agreement for Gunns Plantations Walnut Project No. 2 between GPL and Gunns Limited (Gunns), and draft Variation of Custody Agreement for the Project between GPL and Gunns, received on 10 January 2007;
- Draft **Management Agreement** for Gunns Plantations Walnut Project No. 2 between GPL and a Grower, as amended, received on 11 October 2007;
- Contract of Sale between Rialec Pty Limited and Gunns in respect of the Leeton Property (New Orchard), received on 28 February 2007;
- Draft Lease between Gunns and GPL in respect of the Leeton Property, received on 11 October 2007;
- Executed Lease between Gunns and GPL in respect of the Tabitta Lane Property, received on 28 February 2007;

- Draft **Orchard Right Agreement** between GPL and a Grower, received on 11 October 2007;
- Draft Initial Services Sub-contracting Agreement between GPL and Gunns, received on 10 January 2007;
- Draft Maintenance and Harvest Services Sub-contracting Agreement between Gunns and GPL, received on 10 January 2007;
- Draft Walnut Sale Agreement between GPL and Purchaser, received on 10 January 2007 and associated Deed Poll to be executed by Webster Limited (Webster) in favour of Growers, received on 10 January 2007;
- Draft **Walnut Finance Package** for the Scheme between Gunns Finance Pty Ltd (Gunns Finance) and a Grower, received on 13 March 2007;
- Draft **Finance Application** for the Scheme between Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1 (Allco Managed Investments) and a Grower, received on 15 March 2007; and
- Draft **Fee Facility Deed** for the Scheme between Gunns Finance Pty Ltd (Gunns Finance) and a Grower, received on 13 March 2007; and
- Draft **Terms Arrangement** for the Scheme between GPL, a Grower and a Guarantor, received on 10 January 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.

34. 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.

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

### Overview

36. The main features of the Gunns Plantations Walnut Project No. 2 are as follows.

Location	Goolgowi and Leeton in the Riverina District of New South Wales
Type of business to be carried on by each participant	Commercial growing and cultivation of Walnut trees for the purpose of harvesting Walnuts for sale
Number of hectares offered for cultivation	1,200 hectares
Size of each Walnut Lot	0.2 hectares
Minimum Subscription	None
Minimum allocation	1 Walnut Lot
Number of trees per hectare	310
Term of the Scheme	25 years, may be extended by a period of 2 years at the Manager's discretion
Initial cost	\$6,424
Ongoing costs per Walnut Lot	Orchard Right Fee and Operating Fee Deferred management fees for years 1 and 2

37. The Scheme will be a registered as a managed investment scheme under the *Corporations Act 2001*. Applications to participate in the Scheme must be made during the offer period which is:

- for applications received on or before 15 June 2007, the period commencing from date of issue of the PDS to 15 June 2007; and
- for applications received on or after 24 October 2007, the period commencing from 24 October 2007 to 13 June 2008.

38. For the purposes of this Ruling, Growers whose applications are accepted on or after 24 October 2007 and on or before 13 June 2008 will become 'Late Growers'. **This Ruling only applies to 'Late Growers'. In this Ruling 'Late Growers' are referred to as 'Growers'. Note that a separate Product Ruling PR 2007/41 has issued for 'Early Growers' who were accepted into the Scheme on or before 15 June 2007.**

39. An offer to participate in the Scheme will be made through a Product Disclosure Statement (PDS) for 6,000 Walnut Lots which comprises of 1,200 hectares of land. The offer to participate in the Scheme must be made through an 'Application and Power of Attorney Form' in the PDS.

40. Growers will enter into an Orchard Right Agreement with GPL. The Orchard Right will comprise contractual rights in relation to a parcel of land of 0.2 hectares called a Walnut Lot.

41. Each Walnut Lot will have approximately 62 Walnut Trees on it. Approximately 0.07 hectares of each Walnut Lot will be Existing Orchard (trees planted prior to 1 January 2007) and 0.13 hectares will be New Orchard (trees planted by 30 September 2007).

42. GPL has undertaken to execute and register a lease over the Leeton Property prior to the allocation of an interest to a Late Grower in the land from that property. Gunns and GPL further undertake that any such lease will be executed and lodged for registration prior to the earlier of:

- the allocation of an interest to a Late Grower; or
- 1 May 2008.

43. Growers will also enter into a Management Agreement to contract with GPL to undertake Initial Services, Maintenance Services and Harvest and Processing Services.

44. As an alternative to participation by a Grower as a single entity, the terms of the Constitution, the Management Agreement, and the Orchard Right Agreement provide that two entities may participate in the Scheme as Joint Venture Growers on the terms specified in the Constitution.

### **Constitution**

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

46. On acceptance of an application, the Responsible Entity will allocate the Walnut Lot(s) to the Grower and prepare the Orchard Right Agreement and Management Agreement in accordance with clause 7.

47. Before authorising or instructing the Custodian to release the Application Money, the Responsible Entity in accordance with clause 8 must be satisfied, among other things, that:

- the Orchard Right Agreements have all been duly completed and executed;
- it has the capacity to grant the rights referred to in the Orchard Right Agreement;
- all necessary consents have been obtained;

- the property that is the subject of the rights referred to in the Orchard Right Agreement is not subject to any encumbrance or restrictions which detrimentally affects the interests of Growers; and
- the Leases are registered prior to, or immediately after the acceptance of an application in respect of the Orchard Right Agreement.

48. The Responsible Entity is entitled to receive fees in accordance with clause 12 and may instruct the Custodian to invest all or part of the 'Proceeds Portion' and 'Application Portion' in accordance with clause 13.

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

- general functions, powers and duties (clause 14);
- complaints procedures (clause 15);
- Compliance Committee requirements under the Corporations Act (clause 16);
- the requirement for the Responsible Entity to procure a written report from the Independent Horticulturist and for Growers to receive copies of the Horticulturist's Report (clause 17);
- the transfer and transmission of a Growers' interest (clauses 19 and 20);
- the retirement or removal of the Responsible Entity (clause 23);
- the issue of a Walnut Lot Statement (clause 24);
- Register of Members (clause 25) and meetings of Members (clause 26);
- Collections and payments (clause 27);
- the distribution from the Late Growers Proceeds Portion of the Fund (clause 28);
- Deductions from Income or Profit (clause 29); and
- termination of the Scheme (clause 33).

## Joint Venture

50. The Constitution also provides for two entities to enter the Scheme as Joint Venturers in an unincorporated joint venture (clause 5). Each of the Joint Venturers will be entitled to their Prescribed Proportion of the Joint Venture and any losses realised will be as tenants in common in their Prescribed Proportions. The First Joint Venturer has a 50% Prescribed Proportion and the Second Joint Venturer has a 50% Prescribed Proportion. This Ruling will not apply to Joint Venturers comprised of more than two entities.

**Compliance Plan**

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

**Lease Agreements**

52. GPL has provided a copy of the Lease Agreement executed with Gunns in respect of Tabbita Lane Property. The Tabbita Lane Property comprises of the Existing Orchard (trees planted prior to 1 January 2007) and about 75 hectares of New Orchard (trees planted by 30 September 2007).

53. GPL has also provided a draft copy of the Lease Agreement to be executed in respect of the Leeton Property which is also referred to as New Orchard. Under this Agreement Gunns as Landowner will lease the land to GPL. Gunns undertakes to carry out all Establishment Works.

54. The Establishment Works referred to in (a) to (i) of clause 1.1 which includes the installation of Orchard Infrastructure must be completed no later than 15 June 2008 (clause 9). The Orchard Infrastructure includes irrigation systems comprising of pumps, filters, main lines, sumps, dams, channels and drainage systems. GPL has confirmed that all Establishment Works were completed and all Trees planted on the Leeton Property by 30 September 2007.

**Orchard Right Agreement**

55. Growers will enter into the Orchard Right Agreement in respect of a Walnut Lot(s) with GPL for the 'Term' of the Scheme.

56. Under clause 3, GPL will grant to a Grower an Orchard Right over the Walnut Lot(s) which includes the following:

- access to the Walnut Lot(s);
- access to and use of the Orchard Infrastructure;
- exclusive right to access, use and enjoy the benefit of the Trees;
- exclusive right to harvest the Walnuts; and
- exclusive right to take all right, title and interest in the harvested Walnuts.

57. The Agreement also sets out:

- the Orchard Right Fee invoiced to Growers (clause 6 and item 2 of Schedule 1);



- the rights and obligations of the Grower (clause 4);
- the obligations and warranty of GPL (clause 5); and
- the termination provisions (clauses 5.3 and 9).

## **Management Agreement**

58. The Grower engages GPL as Manager to cultivate the Grower's Walnut Lot(s) and to carry out the Maintenance Services (clause 5) subject to the terms and conditions of this Agreement for the term of the Agreement.

59. The term of the Agreement may be extended by a period of 2 years at the Manager's discretion if the scheme does not reach an IRR of 9.5% (clause 2).

60. GPL will manage and cultivate the Walnut Lot(s) on behalf of the Grower in accordance with good horticultural practice (clauses 5 and 6).

61. GPL can delegate its obligations under this Agreement but delegation of the obligations does not release GPL from liability under this Agreement (clause 26).

62. GPL must complete all of the Initial Services in relation to the Grower's Walnut Lot(s) before 30 June 2008 (clause 4), in return for the Initial Service Fee (clause 9.1).

63. The Agreement also stipulates the services to be provided after 30 June 2008 and each subsequent year. GPL will perform the Maintenance Services in a proper and efficient manner (clause 5), in return for the Operating Fee (clause 9.3).

64. GPL must cause its obligations in relation to harvesting and processing of Walnuts to be carried out in a proper and efficient manner and in accordance with good horticultural practice (clause 6).

65. The Grower appoints GPL to sell Walnuts Harvested from the Grower's Trees (clause 10).

## **Pooling of amounts and distribution of Proceeds**

66. The Constitution and the Management Agreement set out provisions relating to the pooling of amounts held by Gunns on behalf of Growers. This Product Ruling only applies where the following principles apply to the pooling and distribution schemes:

- any pooled Walnuts or insurance proceeds must consist only of Walnuts or insurance proceeds contributed by Growers of this Scheme;
- only Growers who have contributed Walnuts or insurance proceeds to a pool are entitled to benefit from distributions of proceeds from the pool; and

- any pooled Walnuts or insurance proceeds must consist only of Walnuts and insurance proceeds contributed by Late Growers.

### **Initial Services Sub-contracting Agreement and Maintenance and Harvest Services Sub-contracting Agreement**

67. GPL engages Gunns as its sub-contractor, to perform Initial Services under Initial Services Sub-contracting Agreement, and Maintenance and Harvest Services under the Maintenance and Harvest Services Sub-contracting Agreement, in accordance with the terms and conditions set out in these Agreements. This is in accordance with clause 26 of the Management Agreement under which GPL can delegate its obligations under that Agreement.

### **Walnut Sale Agreement and Deed Poll**

68. GPL, as agent for each Grower will enter into a Walnut Sale Agreement for the sale of Grower's Walnuts. The Deed poll records Webster's commitment to enter into an agreement to purchase Walnuts on terms no less favourable than those in the Walnut Sale Agreement which among other conditions requires Webster to acquire at least 75% of the Walnut harvest.

### **Scheme Fees**

69. **Varied by Indexation** means where a fee is to be varied by indexation, the new fee will be the current fee:

- multiplied by the CPI published during the quarter ending immediately before the date the new fee is to take effect; and
- divided by the CPI published during the corresponding quarter of the previous year.

### **Application Fee**

70. The Grower must pay an Application Fee of **\$6,424** per Walnut Lot payable on Application which will be applied towards the following:

- **\$6,405.67** for the Initial Services to be provided from the Commencement Date to 30 June 2008; and
- **\$288.20** of the Initial Services Fee of \$6405.67 is in respect of native vegetation management;
- **\$18.33** for the Orchard Right Fee for the period ended 30 June 2008.

## Ongoing Fees

71. Ongoing Fees mean the fees payable under the Orchard Right Agreement and the Management Agreement from and including the year ending 30 June 2009. These are described under paragraphs 72 and 73 of this Ruling.

## *Orchard Right Agreement Fees*

72. For the year ending 30 June 2009, the Orchard Right Fee of **\$220** Varied by Indexation is payable by a Grower on 1 June 2009. Thereafter, the annual Orchard Right Fee will be the Orchard Right Fee on the immediately preceding 1 June, Varied by Indexation, and payable on 1 June of each subsequent year.

## *Management Agreement Fees*

73. Operating Fee payments payable by a Grower on a per Walnut Lot basis are as follows:

- (i) for the year ending 30 June 2009, a fee of \$990 Varied by Indexation payable on 1 June 2009, plus a further amount (called the deferred management fee). The deferred management fee is for additional maintenance expenditure incurred by the Manager equal to 5.5% of the Gross Proceeds Entitlement in each year of the Scheme where there is a harvest;
- (ii) for the year ending 30 June 2010, a fee of \$990 Varied by Indexation payable on 1 June 2010, plus a further amount (called the deferred management fee). The deferred management fee is for additional maintenance expenditure incurred by the Manager equal to 5.5% of the Gross Proceeds Entitlement in each Year of the Scheme where there is a harvest;
- (iii) for the years ending 30 June 2011 to 30 June 2015, an Operating Fee of \$1320, Varied by Indexation in each year and payable on 1 June in each of those years;
- (iv) for each subsequent year during the Term, an Operating Fee of \$1485, Varied by Indexation in each year and payable on 1 June in each of those years.

In addition from the year ending 30 June 2011:

- (v) a fee equal to 12.1% of the Gross Proceeds Entitlement of the Grower in respect of Harvest and Processing Services in each year of the Scheme where there is a harvest; and
- (vi) a Sales Commission of 5.5% of the Gross Proceeds Entitlement in each year of the Scheme where there is a harvest.

***Joint Venture – Fees***

74. The fees to which a Joint Venture Grower will be solely responsible for are stipulated in clause 5 of the Constitution and are expressed as percentages of the fees outlined in paragraphs 70 to 73 of this Ruling. These percentages are as follows.

***First Joint Venturer***

- 100% of the Application Fee in respect of Initial Services and Orchard Right set out in paragraph 70 of this Ruling for the year ending 30 June 2008;
- for the year ending 30 June 2013 and all subsequent years, 50% of the Orchard Right Fees set out in paragraph 72 of this Ruling for the duration of the Scheme;
- for the year ending 30 June 2013 and all subsequent years, 50% of the Operating Fees set out in subparagraphs 73(iii) and (iv) of this Ruling for the duration of the Scheme;
- for the year ending 30 June 2013 and all subsequent years in which there is a harvest, 50% of the fee in respect of Harvesting and Processing Services and Sales Commission set out in subparagraphs 73(v) and (vi) of this Ruling for the duration of the Scheme; and
- the First Joint Venturer will bear all other liabilities of the Joint Venture equally with the Second Joint Venturer.

***Second Joint Venturer***

- for the years ending 30 June 2009 to 30 June 2012, 100% of the Orchard Right Fees set out in paragraph 72 of this Ruling;
- for the years ending 30 June 2009 to 30 June 2012, 100% of the Operating Fees set out in subparagraphs 73(i), (ii) and (iii) of this Ruling;
- for the year ending 30 June 2013 and all subsequent years, 50% of the Orchard Right Fees set out in paragraph 72 of this Ruling for the duration of the Scheme;
- for the year ending 30 June 2013 and all subsequent years, 50% of the Operating Fees set out in subparagraphs 73(iii) and (iv) of this Ruling for the duration of the Scheme;

- for the years ending 30 June 2011 to 30 June 2012 in which there is a harvest, 100% of the fee in respect of Harvesting and Processing Services and Sales Commission set out in subparagraphs 73(v) and (vi) of this Ruling;
- for the year ending 30 June 2013 and all subsequent years in which there is a harvest, 50% of the fee in respect of Harvesting and Processing Services and Sales Commission set out in subparagraphs 73(v) and (vi) of this Ruling for the duration of the Scheme; and
- the Second Joint Venturer will bear all other liabilities of the Joint Venture equally with the First Joint Venturer.

## Finance

75. Each Grower can fund their Application Fee in the Scheme as follows:

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

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

## Terms Agreement

77. If GPL accepts that the Application Fee of \$6,424 can be paid under a Terms Arrangement the Grower must complete a terms application and Direct Debit Authority. The Grower will be required to pay their Application Fee as follows:

- 10% of the Application Fee on application;
- the balance (plus stamp duty) by 11 equal consecutive monthly instalments as set out in Schedule 4, with the first instalment to be made on the last business day of the month following the month in which the Grower's application is accepted and thereafter on the last business day of each successive month until fully paid;

- GPL will take security over the Grower's Walnut Lot(s); and
- there will be no interest levied to the Grower, unless instalments are not paid on time, then interest at a rate of 6% above the 5 year swap reference rate of the ANZ Bank (or Gunns Limited's banker at the time) will be levied.

### **Finance of the Application Fee by Gunns Finance**

78. The loans offered by Gunns Finance are Principal and Interest loans with terms of 3, 5, 10 or 15 years. The key features of the finance package are:

- the Grower's application to participate in the Scheme has been accepted by GPL;
- the Grower pays a loan Establishment Fee of \$150, which is to be paid at the time that the loan is established;
- loans will be established as soon as reasonably practicable following the date of Grower's acceptance into the Project or approval of finance whichever is later;
- Gunns Finance will take security over the Grower's Walnut Lot(s);
- a deposit of 20% of the Application Fee is required;
- interest is charged at 10.5% per annum for the first 5 years of the loan. The interest rate will be reviewed at the end of each 5 year period and fixed for each following 5 year period at a rate 4% above the 5 year swap reference rate of the ANZ Bank (or Gunns Limited's banker at the time); and
- an additional 2% interest per annum applies to repayments or payments in arrears.

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

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

81. In the event of an early repayment of some or all of the Outstanding Balance, a break fee of \$400 will become immediately due and payable.

**Finance by Allco Managed Investments**

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

- the Grower's application to participate in the Scheme has been accepted by GPL subject to the finance approval;
- the Grower pays a loan Establishment Fee of \$250 plus 0.5% of the amount financed;
- Allco Managed Investments will take security over the Growers 'Walnut Lot(s)';
- an initial deposit of between 0% and 50% of the 'Application Fee' applies;
- interest rates will vary between 8% and 13% and will be fixed for the term of the loan at the time of approval;
- an additional 3% interest per annum applies to overdue amounts due and payable;
- Growers who enter into these finance arrangements will be required to make equal monthly repayments of the outstanding balance, commencing at the end of any interest only period; and
- Growers who break the terms of the loan will be liable for administration and break fees.

83. A Grower cannot rely on any part of this Product Ruling if the Application Fee, other than an Application Fee payable subject to a finance arrangement or a Terms Agreement, is not paid in full by 13 June 2008. Where an application is accepted by GPL, subject to finance approval by any lending institution, a Grower cannot rely on this Ruling if written evidence of that approval has not been given to GPL by 13 June 2008.

**Fee Facility for Ongoing Fees by Gunns Finance**

84. Gunns Finance will also offer finance for 90 percent of the Ongoing Fees payable by the Grower in the financial years ending 30 June 2009 to 30 June 2012 inclusive. Gunns Finance will provide the Grower with the loan(s) on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the finance that will be offered to a Grower to fund the Ongoing Fees in those years by Gunns Finance are set out in the Fee Facility Deed. The key features of the Fee Facility Deed are:

- no application fee;

- the Grower's application to participate in the Scheme has been accepted by GPL;
- in each year a loan is provided for the Ongoing Fees, a Grower is required to pay a deposit of 10% of the Ongoing Fees in that year to GPL;
- Growers are required to make equal monthly principal and interest repayments of the outstanding balance;
- interest is charged at 10.5% per annum; and
- an additional 2% interest per annum applies to repayments on occurrence of an event of default.

85. 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 Scheme 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 Scheme;
- the funds borrowed, or any part of them, will not be available for the conduct of the Scheme 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 Scheme, other than Gunns Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Scheme.



## 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?**

86. For the amounts set out in paragraphs 23 to 30 of this Ruling to constitute allowable deductions the Grower's walnut cultivation activities as a participant in the Gunns Plantations Walnut Project No. 2 must amount to the carrying on of a business of primary production.

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

88. 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?

89. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Gunns Plantations Walnut Project No. 2. 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.

90. Having applied these principles to the arrangement set out above, a Grower in the Gunns Plantations Walnut Project No. 2 is accepted to be carrying on a business of growing and harvesting walnuts for sale.

### **Deductibility of Initial Services Fee, Orchard Right Fee, Operating Fee and interest on loans with Gunns Finance and Allco Managed Investments**

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

91. The Initial Services Fee (excluding the expenditure of \$288.20 on 'land care') and Orchard Right Fee 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 Initial Services Fee and Orchard Right Fee (see paragraphs 49 to 51 of TR 2000/8).

92. The tests of deductibility under the first limb of section 8-1 are met with the exception of the capital expenditure of \$288.20 on 'land care. Provided that the prepayment provisions do not apply (see paragraphs 97 and 98 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.)

93. Some Growers may finance their participation in the Scheme through a Loan Agreement with Gunns Finance or Allco Managed Investments. Applying the same principles as that used for the Initial Services Fee and Orchard Right Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

94. Other than where the prepayment provisions apply (see paragraphs 97 and 98 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

### **Prepayment provisions**

#### ***Sections 82KZME, 82KZMF and 82KZL***

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

96. For this Scheme, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

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

97. Under the scheme to which this Product Ruling applies Project fees under the Management Agreement and the Orchard Right Agreement are incurred annually and the interest payable to Gunns Finance or Allco Managed Investments is incurred monthly. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

98. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Scheme prepays all or some of the expenditure payable under the Management Agreement and the Orchard Right Agreement, or prepays interest under a loan agreement (including loan agreements with lenders other than Gunns Finance or Allco Managed Investments).

99. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Scheme.

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

100. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years referred to in paragraph 31 of this Ruling, the Commissioner has determined that based on the evidence supplied 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 walnut industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

101. A Grower who would otherwise be required to defer a loss arising from their participation in the Scheme under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

102. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Scheme being carried on in the manner described in this Ruling during the income years specified. If the Scheme 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**

103. 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**

104. 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).

105. The Gunns Plantations Walnut Project No. 2 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 23 to 30 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.

106. 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 Walnuts. 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

*Related Rulings/Determinations*

TR 97/7; TR 97/11; TR 98/22;  
TR 2000/8; PR 2007/41

*Subject references:*

- advance deductions and expenses for certain forestry expenses
- carrying on a business
- commencement of a business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activities
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

- ITAA 1936 177A
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