



# ***PR 2008/3 - Income tax: Australian Bight Abalone Project 2008***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *11 June 2008*



## Product Ruling

### Income tax: Australian Bight Abalone Project 2008

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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.

**[Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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

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

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

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

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

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant 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 Australian Bight Abalone Project 2008 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 Project Agreements set out in paragraph 35 of this Ruling on or before 15 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 Project before the date of this Ruling or after 15 June 2008;
- finance their involvement through a financier and the application monies are not paid on or before 30 June 2008; or
- participate in the scheme through offers made other than through the Product Disclosure Statement.

### 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 35 to 90 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

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9. This Product Ruling applies prospectively from 16 January 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 16 January 2008 until 15 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. This Product Ruling will continue to apply to those entities even after its period of application for schemes entered into during the period of application.

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**

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## **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 35 to 90 of this Ruling.

19. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Management Agreement and Aquaculture and Cage Rental Agreement, on or before 15 June 2008.

#### **Minimum subscription**

20. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Product Disclosure Statement (PDS), a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 interests is achieved.

#### **Concessions for 'small business entities'**

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

22. 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, unless otherwise stated, application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

#### **Assessable income**

##### ***Section 6-5 and section 17-5***

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

#### **Allowable deductions**

##### ***Section 8-1, section 25-25, Division 27 and Division 70 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936***

24. A Grower may claim tax deductions for the following fees and expenses on a per Interest basis, as set out in the table below.

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<b>Fee Type</b>	<b>Year ending 30 June 2008</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>
<b>Initial Management Fees (excluding Spat &amp; Abtrays)</b>	\$4,290 See Notes (i) & (ii)	Nil See Notes (i) & (ii)	Nil See Notes (i) & (ii)
<b>Provision of 4,400 Abalone Spat</b>	Must be calculated See Notes (i) & (v)	Nil See Notes (i) & (v)	Nil See Notes (i) & (v)
<b>RE Fee</b>	Nil as \$138 included in Initial Management Fee See Notes (i), (ii), (iii) & (vi)	Nil See Notes (i), (ii), (iii) & (vi)	Nil See Notes (i), (ii), (iii) & (vi)
<b>Cage Rental Fee</b>	Nil as \$220 included in Initial Management Fee See Notes (i), (ii), (iv) & (vi)	\$2,035 + CPI See Notes (i), (ii), (iv) & (vi)	\$2,035 + CPI See Notes (i), (ii), (iv) & (vi)
<b>Annual Management Fee</b>	Nil See Notes (i), (ii), (iv) & (vi)	Nil See Notes (i), (ii), (iv) & (vi)	Nil See Notes (i), (ii), (iv) & (vi)
<b>Abtrays</b>	Must be calculated See paragraphs 25 to 32	Must be calculated See paragraphs 25 to 32	Must be calculated See paragraphs 25 to 32
<b>Interest on loans with the Preferred Financier</b>	As incurred See Note (vii)	As incurred See Note (vii)	As incurred See Note (vii)
<b>Loan Establishment Fee</b>	Must be calculated See Note (viii)	Must be calculated See Note (viii)	Must be calculated See Note (viii)

**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) The Initial Management Fee (excluding the Abalone Spat & Abtrays) RE Fee, Cage Rental Fee and Annual Management Fee, shown in the Constitution, Aquaculture & Cage Rental Agreement and the Management Agreement are deductible under section 8-1 in the income year that the relevant fee is incurred.
- (iii) The RE Fee and the Annual Management Fee are not incurred until invoiced following the sale of Abalone by the Responsible Entity. The Actual amount incurred and payable in respect to the RE Fee and Annual Management Fee will depend on the amount of harvest proceeds. Therefore, no amounts will be deductible for the years ending 30 June 2009 and 30 June 2010, as the first harvest will not occur until the year ending 30 June 2011.
- (iv) The Cage Rental Fee is \$2,035 per Interest per annum indexed by CPI from 30 June 2008. This fee will be invoiced annually and is payable irrespective of harvest proceeds.
- (v) The Initial Application Fee of \$27,500 includes the provision of 4,400 Abalone Spat and \$1,650 of the Application Fee is for the supply of 4,400 Abalone Spat. The 4,400 Abalone Spat acquired per Interest for each growth cycle, is the cost of acquiring juvenile Abalone which is the trading stock of the Grower. The timing of the deduction for the outgoing is the year the Abalone becomes part of the Grower's trading stock (section 70-150). Section 70-35 adjusts the amount of the deduction by comparison of the value of the trading stock at the start of the income year with the value of the trading stock on hand at the end of the income year.
- (vi) 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 100 to 104 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 Project.
- (vii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than the Preferred Financier, is outside the scope of this Ruling. Prepayments of interest to any lender, including the Preferred Financier, 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.

- (viii) The Loan Establishment Fee payable to the Preferred Financier 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 cost arising from loan agreements entered into with financiers other than the Preferred Financier is outside the scope of this Ruling.

### **Deductions for capital expenditure (non-‘small business entities’)**

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

25. A Grower, who is not a ‘small business entity’, will also be entitled to tax deductions relating to Abtrays determined under Division 40.

26. The Initial Management Fee of \$27,500 per Interest includes \$21,560 for the purchase of 20 Abtrays. Each Abtray is a ‘depreciating asset’. The ‘cost’ of the asset is the amount paid by each Grower, which is \$1,078 GST inclusive (\$980 GST exclusive) per Abtray. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (‘diminishing value method’) or subsection 40-75(1) (‘prime cost method’). Both formulas rely on the ‘effective life’ of the Abtray.

27. Growers can either self-assess the ‘effective life’ (section 40-105) or use the Commissioner’s determination of ‘effective life’ (section 40-100). As there has been no determination of the ‘effective life’ of an Abtray by the Commissioner, Growers must self-assess an ‘effective life’ (section 40-105). The Abtrays will be placed in an in-sea cage and first used during the year ended 30 June 2008. The Responsible Entity will advise Growers when that occurs to enable Growers to calculate the deduction for the decline in value.

28. Where a Grower is registered for GST each Abtray in which they hold an interest is a ‘low-cost asset’ (see paragraph 26 of this Ruling) and can be allocated to a ‘low-value pool’. Once any ‘low-cost asset’ of a Grower is allocated to a ‘low-value pool’, all other ‘low-cost assets’ the Grower starts to ‘hold’ in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a ‘low-value pool’, the Abtray assets must also be allocated to that pool. Otherwise, the Grower must decide whether to create a ‘low-value pool’. If the assets are allocated to a ‘low-value pool’, the capital expenditure on the Abtray will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the Abtrays are first used and a rate of 37.5% in subsequent years (section 40-440).

**Deductions for capital expenditure ('small business entities')*****Subdivision 328-D***

29. A Grower, who is a 'small business entity', will also be entitled to tax deductions relating to Abtrays. Deductions relating to the 'cost' of Abtrays must be determined under Division 328.

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

31. An Abtray is a 'depreciating asset'. Each Grower holds an interest in an Abtray which is a 'low-cost asset' as defined in subsection 40-425(2). It cannot be allocated to a 'general small business pool' (section 328-180). A deduction equal to the amount of the Grower's expenditure for the Abtray is available in the income year in which they are used or 'installed ready for use'. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. The Abtrays will be placed in an in-sea cage and first used during the year ended 30 June 2008.

32. 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.

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

33. A Grower who is an individual accepted into the Project by 15 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 below, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **30 June 2008 to 30 June 2010, 30 June 2012 and 30 June 2014**. 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*

34. For a Grower who commences participation in the Project and incurs expenditure as required by the Lease 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 100 to 104 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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35. 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 30 October 2007 as constituted by documents provided on 29 November 2007 and 7 December 2007 and additional correspondence, email and telephone conversations dated 29 November 2007, 7 December 2007, 13 December 2007, 17 December 2007, 21 December 2007, 8 January 2008, 15 April 2008, 29 April 2008, 12 May 2008, 14 May 2008 and 28 May 2008;
- Draft undated **Product Disclosure Statement (PDS)** received on 30 October 2007;
- Draft undated **Constitution** received on 30 October 2007 and amendments to the Constitution received on 28 May 2008;
- Draft undated **Aquaculture and Cage Rental Agreement** between Australian Bight Infrastructure Pty Ltd (Marine Lease Owner), Australian Bight Abalone Limited (Responsible Entity) and the Grower received on 30 October 2007;
- Draft undated **Management Agreement** between the Responsible Entity and the Grower received on 30 October 2007;
- Draft undated Compliance Plan received on 30 October 2007;

- Draft undated **Loan Application and Agreement** between the Preferred Financier and Growers, received 15 April 2008; and
- Draft **Application for a Terms Payment Arrangement** form between Australian Bight Abalone Limited and Growers received 28 May 2008.

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

36. The documents highlighted are those that the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the scheme to which this Ruling applies.

37. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

### Overview

38. The main features of the Australian Bight Abalone Project 2008 are as follows:

Location	Waldegrave Island, Anxious Bay near Elliston on the Eyre Peninsula, South Australia
Type of business each participant is carrying on	Commercial Aquaculture of Greenlip Abalone
Maximum number of Interests offered	1400
Minimum Subscription	100 Interests
Size of a minimum Interest	One Interest (which is the equivalent of 20 Abtrays)
The term of the Project	7½ years from the date of commencement
Initial cost per Interest	\$27,500
Ongoing costs	Responsible Entity (RE Fee) Cage Rental Fee Annual Management Fee Harvest Fee Subsequent Cycle Settling Fee Sales Incentive Fee

39. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Australian Bight Abalone Limited has been issued with an Australian Financial Service Licence 282113 and will be the Responsible Entity for the Project.

40. The project will involve growing abalone in Abtrays that are located inside an in-sea cage. Each in-sea cage can hold up to 600 Abtrays. A Grower will acquire 20 Abtrays and 4,400 Abalone Spat per Interest they are allocated in the Project. The Project will not proceed until the minimum subscription level of 100 Interests is achieved. No applications for Interests in the Project will be accepted after 15 June 2008.

41. A Grower will be involved in the Project for a term of 7½ years which allows for three growth cycles of 2-3 years each plus a sales period. There will be a harvest for each of the three growth cycles. Harvests are forecast to occur in the income years ending 30 June 2011, 30 June 2013 and 30 June 2015 for growth cycles 1, 2 and 3 respectively.

## **Project Entities**

42. The Responsible Entity is the holding company of both the Marine Lease Owner and the Operations Manager and will enter into the Aquaculture & Cage Rental Agreement on behalf of each Grower and the Management Agreement in its own capacity and on behalf of each Grower. A Grower will purchase the Abtrays and Abalone Spat from the Responsible Entity.

43. Australian Bight Infrastructure Pty Ltd (Marine Lease Owner) is the holder of a Marine Lease and attached aquaculture licence issued by the Department of Primary Industries and Resources of South Australia. The aquaculture licence enables the aquaculture licence holder to carry out aquaculture activities on the leased site. The Marine Lease Owner is the owner of the in-sea cages. Under the Aquaculture & Cage Rental Agreement each Grower will be granted aquaculture rights which include the right to use the in-sea cages.

44. Australian Bight Abalone Management Pty Ltd will be the Operations Manager for the Project and will provide aquaculture services for each Grower as directed by the Responsible Entity.

## **Aquaculture licence**

45. In South Australia under the *Aquaculture Act 2001*, a person must not carry on aquaculture except as authorised by an aquaculture licence. The Department of Primary Industries and Resources South Australia (PIRSA) has advised the Tax Office that Growers participating in the Australian Bight Abalone Project 2008 are not required to hold an aquaculture licence under the terms of the Aquaculture Act. In this particular case, the responsibility to hold a licence rests with Australian Bight Infrastructure Pty Ltd, being the person(s) actually carrying on aquaculture.

**Application for interests**

46. To participate in the Project an applicant needs to complete and sign the Application Form accompanying the PDS. A signed Application Form gives the Responsible Entity a Limited Power of Attorney to execute the Aquaculture & Cage Rental Agreement and Management Agreement on behalf of a Grower.

47. The Application Form, along with the Application Fee of \$27,500 per Interest applied for, needs to be received by the Responsible Entity by 15 June 2008. The Responsible Entity will not execute the Aquaculture & Cage Rental Agreement or the Management Agreement after 15 June 2008. For applications accepted subject to finance (clause 3.7.2 of the Constitution) the application funds may be received after 15 June 2008 but no later than 30 June 2008. Where the Responsible Entity accepts a Grower's Application for Terms Payment Arrangement a deposit of 10% of the Application Fee must be received by the Responsible Entity no later than 15 June 2008.

48. Applications will not be accepted before the minimum subscription level of 100 Interests has been achieved. Applications will not be accepted after 15 June 2008.

49. Each in-sea cage and Abtray used in the Project will have an identification number. Each Abtray will have a unique number identifying the lease site and in-sea cage. The Responsible Entity will record each Grower's Abtray number in the Growers register as per clause 17.1 of the Constitution.

50. All Growers who acquire an Interest in the Project will pool their Abalone Produce (Pooled Growers) unless they make an election in writing on application that they wish to personally harvest, market and sell their Abalone Produce. This Product Ruling has no application to Growers who elect to harvest, market and sell their Abalone Produce.

**Constitution**

51. Under clause 1.1 the Responsible Entity is appointed to act as agent, attorney and/or trustee in relation to the Project. The Responsible Entity will establish a bank account into which Application Fees and harvest proceeds from the sale of Abalone will be deposited (clauses 2.5 and 8.1).

52. All amounts payable by a Grower under the Aquaculture & Cage Rental Agreement, the Management Agreement and the Constitution must be paid to the Responsible Entity (clause 6.1). The Responsible Entity will make payments of amounts owing by a Grower under the Aquaculture & Cage Rental Agreement and Management Agreement and the Constitution from the bank account prior to distribution of harvest proceeds to a Grower (clause 8.2 of the Constitution and clause 8.6 of the Management Agreement). Harvest proceeds are to be paid to a Grower no later than 90 days from the receipt of funds from the sale of a Grower's Abalone (clause 8.2.1).

53. Under clause 23.1 the Responsible Entity is entitled to a fee of \$550 per Interest per annum plus CPI from 30 June 2008 (RE Fee) for services provided under the Constitution. The RE Fee from the date of acceptance to 30 June 2008 is \$138 per Interest and is incorporated into the Application Fee (refer to the table at paragraph 68 of this Ruling). The RE Fee for later years is only payable after invoicing. Invoicing will occur following the sale of abalone from each harvest. Harvests are forecast to occur in 2011, 2013 and 2015 (refer to paragraph 41 of this Ruling).

## **Compliance Plan**

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

## **Aquaculture and Cage Rental Agreement**

55. Under clause 1 of this agreement the Marine Lease Owner grants a Grower the following aquaculture rights:

- (a) the right to enter the Marine Lease Area;
- (b) the right to settle, maintain and harvest Abalone in the Marine Lease area;
- (c) the right to use such works and facilities provided by the Marine Lease Owner to enable the Grower to settle, maintain and harvest Abalone in the Marine Lease Area;
- (d) the right of use of the Abalone Cage; and
- (e) the ownership of the Abtrays.

56. In consideration for granting the above aquaculture rights the Marine Lease Owner will be entitled to a fee of \$1. This fee is included in the Application Fee (Initial Management Fee) paid to the Responsible Entity (clauses 3.1 and 3.1.1).

57. The Marine Lease Owner will also be entitled to a Cage Rental Fee which will be calculated at \$2,035 per Interest per annum plus CPI from 30 June 2008. The Cage Rental Fee from the date of acceptance to 30 June 2008 is \$220 per Interest. A Cage Rental Fee of \$220 is incorporated into the Application Fee (refer to the table at paragraph 24 of this Ruling). The Cage Rental Fee for later years is payable annually after invoicing. It is intended that invoicing will occur prior to 31 March in each financial year (clauses 3.2 to 3.9).

58. Under clause 4 a Grower owns all of the Abalone in their Abtrays and is entitled to all harvest proceeds from the sale of Abalone from their Abtrays. Upon termination of this agreement or the Management Agreement the ownership of the Abtrays will revert to the Marine Lease Owner on payment of \$1 per Abtray (clauses 8.1 and 8.1.1).

59. The Grower must promptly repair any damage caused directly by the Grower, or any of its employees, agents or contractors, to any cages on the Marine Lease (clause 6.4).

60. The Grower is entitled to re-establish Abalone in the Grower's Abtrays when a harvest, other than a Final Harvest occurs (clause 9.4).

61. The agreement can be terminated where either party breaches any of its obligations under the agreement unless the breach has, in certain circumstances, been rectified. Either party may terminate the agreement if the other party undergoes a specified insolvency event. The Marine Lease Owner may terminate the agreement if the Responsible Entity terminates the Management Agreement (clause 10).

### **Management Agreement**

62. Under clause 1.1 a Grower engages the Responsible Entity as an independent contractor to perform the aquaculture services. The aquaculture services to be provided by the Responsible Entity and the Annual Management Fees payable to the Responsible Entity are detailed in Schedules 3 and 4 of the agreement.

63. A Grower acknowledges that the Responsible Entity has the exclusive right to carry out all of the aquaculture rights set out in the Aquaculture & Cage Rental Agreement on the Grower's behalf (clause 2.3). A Grower has the right to give general direction to the Responsible Entity including dates of harvest of the Grower's Abalone Produce and the right to receive quarterly progress reports from the Responsible Entity (clauses 2.8 and 2.10).

64. A Grower is entitled to all proceeds from the sale of produce net of all costs owing by the Grower under the Management Agreement, the Aquaculture & Cage Rental Agreement and the Constitution (clause 6.12).

65. A Pooled Grower's entitlement to Abalone Produce from the Project as a whole will be calculated by reference to the weight of the Abalone harvested by the Grower compared with the overall weight of the Abalone harvested from all Pooled Growers in the Project (clause 6.7.3). A Pooled Grower's share of Project costs will be calculated pro rata by reference to the number of the Abtrays they own compared with the overall number of Pooled Growers' Abtrays for the Project (clause 6.12).

66. Under clause 1.3 a Grower is able to remove the Responsible Entity and, as per clause 1.4, a Grower may appoint a new manager. To appoint a new manager the Grower needs to provide the Marine Lease Owner with evidence of a valid contractual relationship for the provision of aquaculture services to the Grower by a party suitably licensed by PIRSA. Australian Bight Abalone Ltd as Responsible Entity is under the licence of the Marine Lease Owner. Should a new manager be appointed then the new manager would need to obtain a licence from PIRSA.

67. The agreement ends after the final harvest, marketing and sale of all Abalone Produce, this is anticipated to be approximately 7½ years after the commencement date. The agreement must end within 10 years after its commencement (clause 3.1). The agreement can be terminated where either party breaches any of its obligations under the agreement unless the breach has, in certain circumstances, been rectified. Either party may terminate the agreement if the other party undergoes a specified insolvency event. The Responsible Entity may terminate the agreement if the scheme or the Aquaculture & Cage Rental Agreement is terminated by the Marine Lease Owner or Responsible Entity. The Responsible Entity may terminate the agreement where all, or substantially all, of the Abalone in the Abtrays is destroyed (clause 12).

#### **Initial Establishment Services and Initial Management Fee**

68. The Initial Establishment Services are to be completed on or before 30 June 2008. The Initial Management Fee for the provision of the Initial Establishment Services is \$27,500 per Interest. This amount is the Application Fee which is payable on application for each Interest in the Project. A breakdown of the costs attributed to the Application Fee is detailed in the table below.

<b>Application Fee</b>	<b>Amount</b>
Provision of 4,400 Abalone Spat settled on hatchery tray	\$1,650
Biologist controlled grading and removal of runts and transport to in-sea cage site. Biologist controlled transportation of Spat and tray to jetty site and vessel transport of tray to in-sea cage site	\$2,502
Provision of 20 Abtrays per Interest (post algae growth state)	\$21,560
Attachment of tray to Abtray and subsequent attachment to in-sea cage. Re-insertion/re-attachment of Abtrays as required	\$1,429
Payment of \$1.00 to the Marine Lease Owner for the granting of rights under the Growers Aquaculture & Cage Rental Agreement	\$1
RE Fee from acceptance to 30 June 2008	\$138
Cage Rental Fee from acceptance to 30 June 2008	\$220
<b>Application Fee (Initial Management Fee)</b>	<b>\$27,500</b>

**Annual Aquaculture Services and Annual Management Fee**

69. The Annual Aquaculture Services are the following services to be performed annually or monthly including:

- managing and maintaining the Abtrays (monthly);
- testing for disease and quality control;
- internal audit of operations and corporate services; and
- maintenance of related infrastructure.

70. The Annual Management Fee for the Annual Aquaculture Services is \$2,695 per Interest. This amount is to be indexed by CPI from 30 June 2008. The Annual Management Fee is payable from harvest proceeds and only after invoicing (deferred Management Fee). Invoicing will occur following the sale of abalone from each harvest. Harvests are forecast to occur each in 2011, 2013 and 2015 (refer to paragraph 41 of this Ruling).

71. In the case there is no harvest in a cycle or harvest proceeds do not meet the deferred Management Fee plus the Harvest Fee for that cycle, the Grower shall be liable for the higher of the harvest proceeds or a maximum contribution of \$8,500 in satisfaction for the full amount of deferred Management Fees and Harvest Fees, and RE Fees up to the end of that cycle (Schedule 4 clause 5.5 of the Management Agreement).

72. However where a Grower receives a payment in relation to an insurance policy covering the Abalone Produce for any amount, the Grower will be liable to pay all deferred Management Fees, Harvest Fees and RE Fees and clause 5.5 will not apply to that Grower (Schedule 4 clause 5.6 of the Management Agreement).

**Harvest Aquaculture Services and Harvest Fee**

73. The Harvest Aquaculture Services occur three (3) times in the life of the Project (year 3, 5 and year 7) and are to be performed on harvest of the Abalone Produce in accordance with Schedule 4 clause 3 of the Management Agreement. Activities include, for Pooled Growers:

- arranging for the harvesting of Abalone Produce, including preparation, supervision and all ancillary activities necessary for harvest with minimal damage to the Growers Abtrays;
- assistance with securing markets for Abalone and Abalone Produce. There is no obligation on the Responsible Entity to purchase or guarantee the purchase or sale of the Abalone or Abalone Produce; and
- rehabilitation of the Marine Lease after final harvest as required under the Marine Lease.

74. The Harvest Fee for the provision of the Harvest Aquaculture Services is \$3,630 per Interest and is subject to indexation by CPI from 30 June 2008. If harvest proceeds exceed \$36,346 a further fee will be payable in accordance with the formula set out in clause 6.1.2. If harvest proceeds are less than \$36,346 a reduced harvest fee is payable calculated in accordance with the formula in clause 6.1.3.

75. In the case there is no harvest per growth cycle or the harvest proceeds per growth cycle do not meet the deferred Management Fees and the Harvest Fee, the Grower shall be liable for a maximum contribution of \$8,500.

76. Harvest proceeds will be applied toward the payment of the Subsequent Cycle Settling Fee, the deferred Management Fee, the RE Fee, the Harvest Fee and the Sales Incentive Fee (Schedule 4 clause 9 of the Management Agreement).

## **Re-Seeding Aquaculture Services and Subsequent Cycle Settling Fees**

77. Re-Seeding Aquaculture Services occur twice over the life of the Project immediately following the harvest of Abalone Produce in accordance with Schedule 4 clause 4 of the Management Agreement and include the following:

- provision of 4,400 Abalone Spat settled on hatchery tray including grading and removal of runts and attachment of tray to Abtray;
- cleaning and re-preparation of 20 Abtrays per Interest (post algae growth state);
- transportation of Spat and baskets to in-sea cage site; and
- insertion/attachment of Abtray to Ring.

78. The Subsequent Cycle Settling Fee for the provision of the Re-Seeding Aquaculture Services is \$3,839 per Interest. This fee is payable from the harvest proceeds of the harvests of the first two growth cycles (refer to paragraph 41 of this Ruling).

## **Sales Incentive Fee and other costs**

79. A Sales Incentive Fee is payable when the harvest proceeds exceed \$36,346 per Interest. The Sales Incentive Fee equates to 33.33% of the proceeds in excess of \$36,346 per Interest for each harvest.

80. The Responsible Entity and Growers may agree from time to time for the Responsible Entity to provide services in addition to the aquaculture services listed above (clause 4.5 of the Management Agreement). For Pooled Growers the fees for additional services will be calculated by reference to the number of Abtrays owned by a Pooled Grower compared with the overall number of Abtrays of all Pooled Growers.

81. The Responsible Entity has a lien on the Abalone Produce and harvest proceeds in respect of all amounts payable to the Responsible Entity or the Marine Lease Owner by a Grower which are due and unpaid. The Responsible Entity may sell any property on which it has a lien (clauses 8.8 to 8.12 of the Management Agreement).

### **Finance**

82. A Grower who does not pay the \$27,500 per Interest in full on application can borrow from the Preferred Financier, or from an independent lender external to the Project.

83. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with the Preferred Financier that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling.

84. A Grower who enters into a finance arrangement with an independent lender external to the Project other than the Preferred Financier may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

85. Growers cannot rely on any part of this Ruling if the Application Fee of \$27,500 per Interest is not paid in full on or before **15 June 2008** by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution, other than the Preferred Financier, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by **15 June 2008**.

### ***Finance offered by the Preferred Financier***

86. Subject to the terms and conditions of the Loan Agreement a Grower can finance the cost of their Initial Application Monies by borrowing that amount from the Preferred Financier.

87. Subject to the Preferred Financier accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

88. The Preferred Financier offers 3 loan options:

- 72 months principal and interest repayments;
- 72 months with interest only repayments for 12 months and principal and interest repayments for the remaining 60 months; and
- 72 months with interest only repayments for first 18 months and principal and interest repayments for the remaining 54 months.

89. The common features contained in each of these loans are that:
- a Loan Establishment Fee is payable;
  - Growers will be required to make equal monthly repayments of the outstanding balance, commencing at the end of the relevant interest only period, if any; and
  - the financier is granted an equitable mortgage over the Grower's interest in the project.

### ***Terms Payment Arrangement***

89A. The Responsible Entity is offering a Terms Payment Arrangement whereby Growers may pay the Application Fee in 10 equal instalments. The first payment of 10% is due at the time of acceptance but no later than 15 June 2008. Thereafter, the remaining balance will be paid in 9 equal monthly instalments with the first being due on 31 July 2008. Growers may pay out their Terms Payment Arrangement at any time prior to the expiry of the Terms Payment period.

89B. Growers will only be considered for a Terms Payment Arrangement where they complete the required application form and the Responsible Entity is satisfied, on or prior to 15 June 2008, as to their capacity to pay the full amount of the Application Fee in accordance with the Terms Payment Arrangement.

89C. If a Grower does not pay the required instalments under the Terms Payment Arrangement, the Responsible Entity will give the Grower a notice of default and the amount and any additional costs under the arrangement becomes immediately due and payable. The Responsible Entity may take legal proceedings to recover the amount due, including, taking legal possession of the Grower's interest in the project. Growers may pay out their Terms Payment Arrangement at anytime prior to the expiry of the Terms Payment period.

89D. The total maximum number of interests subject to the Terms Payment Arrangement will be 25% of the maximum number of interest offered in the Project.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;

- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than the Preferred Financier, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**16 January 2008

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## Appendix 1 – Explanation

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

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

91. For the amounts set out in paragraphs 24 to 32 of this Ruling to constitute allowable deductions the Grower's Abalone growing activities as a participant in the Australian Bight Abalone Project 2008 must amount to the carrying on of a business of primary production.

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

93. 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?

94. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Australian Bight Abalone Project 2008. As 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.

95. Having applied these principles to the arrangement set out above, a Grower in the Australian Bight Abalone Project 2008 is accepted to be carrying on a business of growing and harvesting Abalone for sale.

### **Deductibility of the Initial Management Fee, Annual Management Fee, Cage Rental Fees, RE Fees, Subsequent Cycle Settling Fee, Harvest Fees and interest on loans with the Preferred Financier**

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

96. The Initial Management Fee, Annual Management Fee, Cage Rental Fees, Subsequent Cycle Settling Fee, Harvest Fees and interest on loans 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 these fees (see paragraphs 49 to 51 of TR 2000/8).

97. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 100 to 104 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).

98. Some Growers may finance their participation in the Project through a Loan Agreement with the Preferred Financier. Applying the same principles as that used for the Management Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

99. Other than where the prepayment provisions apply (see paragraphs 100 to 104 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

### **Prepayment provisions**

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

100. 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.

101. For this Project, 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 Project***

102. Under the scheme to which this Product Ruling applies Initial Management Fees, Annual Management Fee, Cage Rental Fees, RE Fees, Subsequent Cycle Settling Fee and Harvest Fees are incurred annually or following the sale of Abalone Produce and the interest payable to the Preferred Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

103. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Management Agreement and/or the Aquaculture and Cage Rental Agreement, or prepays interest under a loan agreement (including loan agreements with lenders other than the Preferred Financier). Where such a prepayment is made these prepayment provisions will also apply to 'small business entities' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

104. 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 Project.

## **Expenditure of a capital nature – Division 40 and Division 328**

105. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the Abtray is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

106. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity'.

107. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 29 to 32 of this Ruling.

## **Treatment of trading stock**

### ***Section 328-285***

108. A Grower who is a 'small business entity' may, in some years, hold Abalone Spat that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they can choose not to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

109. Alternatively, where the 'small business entity' chooses to account for changes in the value of their trading stock for an income year, they will have to do a stock take and account for the change in the value of all their trading stock (Subdivision 70-C).

### ***Section 70-35***

110. A Grower who is not a 'small business entity' may, in some years, hold Abalone Spat that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

111. Alternatively, where the value of trading stock on hand at the start of an income year exceeds the value of trading stock on hand at the end of an income year, a Grower may claim the amount of that excess as an allowable deduction.

**Deferral of losses from non-commercial business activities and the Commissioner's discretion****Sections 35-10 and 35-55**

112. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for years ending **30 June 2008 to 30 June 2010, 30 June 2012 and 30 June 2014**, the Commissioner has determined that for those income years:

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

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

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

**Section 82KL – recouped expenditure**

115. 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**

116. 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).

117. The Australian Bight Abalone Project 2008 will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 24 to 32 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.

118. 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 Abalone. 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**

119. The following is a detailed contents list for this Ruling:

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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

*Subject references:*

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration
- trading stock

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
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- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D

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- ITAA 1997 17-5
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- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
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- ITAA 1997 Subdiv 70-C
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