


# ***PR 2009/22 - Income tax: Australian Bight Abalone Project 2009***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 May 2009*



## Product Ruling

### Income tax: Australian Bight Abalone Project 2009

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Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
What this Ruling is about	1
Date of effect	9
Ruling	15
Scheme	37
<b>NOT LEGALLY BINDING SECTION:</b>	
Appendix 1:	
Explanation	110
Appendix 2:	
Detailed contents list	132

#### **! 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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**

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The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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**

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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 Australian Bight Abalone Project 2009 or simply as 'the Project'.

### Class of entities

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

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

set out in the Ruling section of this Product Ruling.

3. The 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 37 of this Ruling on or before 15 June 2009. They will stay in the scheme until its completion and derive 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:

- terminate their involvement in the scheme prior to its completion, or do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 15 June 2009;
- finance their involvement through a financier and the application monies are not paid on or before 30 June 2009;
- intend to harvest and take as their own any abalone during the term of the Project; or
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS); or who enter into an undisclosed arrangement with:
  - the promoter;
  - promoter associate; or
  - an independent adviser
  - that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way.

**Superannuation Industry (Supervision) Act 1993**

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Commissioner gives no assurance that the scheme 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 scheme 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 37 to 109 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 6 May 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from the 6 May 2009 until 15 June 2009, 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 2011, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme 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.

## **Changes in the law**

11. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

12. 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**

13. 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**

14. 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 any creditable acquisition it makes, 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**

15. 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 below at paragraphs 37 to 109 of this Ruling.

16. 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 their Aquaculture and Cage Rental Agreement.

**Minimum subscription**

17. 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.

**Small business concessions**

18. 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').

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

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

20. 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.

**Deduction for management fees, rent, borrowing expenses, and interest*****Sections 8-1, 25-25 and 40-880 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936***

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

Fee Type	Year ending 30 June 2009	Year ending 30 June 2010	Year ending 30 June 2011
<b>Initial Management Fee (excluding spat and Abtrays)</b>	\$2,092 See Notes (i) and (ii)	Nil	Nil

<b>Provision of 3,180 abalone spat</b>	Must be calculated. See paragraphs 30 to 33. See Note (i)	Must be calculated. See paragraphs 30 to 33. See Note (i)	Must be calculated. See paragraphs 30 to 33. See Note (i)
<b>Abtrays</b>	Must be calculated. See paragraphs 22 to 29. See Notes (i) & (v)	Must be calculated. See paragraphs 22 to 29. See Notes (i) & (v)	Must be calculated. See paragraphs 22 to 29. See Notes (i) & (v)
<b>RE Fee</b>	Nil (\$138 included in the application fee)	Nil See Note (iii)	Must be calculated. See Notes (i), (ii) and (iii)
<b>Annual Management Fee</b>	Nil	Nil See Note (iii)	Must be calculated. See Notes (i), (ii) and (iii)
<b>Cage Rental Fee</b>	Nil (\$110 included in the application fee)	Must be calculated. See Notes (i) and (iv)	Must be calculated. See Notes (i) and (iv)
<b>Harvest Fee</b>	Nil	Nil	Must be calculated. See paragraphs 88 to 89. See Note (i)
<b>Subsequent Cycle Fee</b>	Nil	Nil	Must be calculated. See paragraph 92. See Note (i)
<b>Interest on loans with the Preferred Financier</b>	As incurred See Notes (vi) & (vii)	As incurred See Notes (vi) & (vii)	As incurred See Notes (vi) & (vii)
<b>Loan Establishment Fee</b>	Must be calculated See Note (viii)	Must be calculated See Note (viii)	Must be calculated See Note (viii)
<b>Terms Payment Administration Fee</b>	Must be calculated See Note (ix)	Must be calculated See Note (ix)	Must be calculated See Note (ix)

**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 and Abtrays), RE Fee, Cage Rental Fee and Annual Management Fee are deductible under section 8-1 in the income year that the relevant fee is incurred.
- (iii) The RE Fee for periods after 30 June 2009 is \$550 per Interest per annum indexed by CPI. The Annual Management Fee for periods after 30 June 2009 is \$1,210 per Interest indexed by CPI. These fees are not incurred until invoiced following the sale of Abalone Produce by the Responsible Entity. No amounts will be deductible for the year ending 30 June 2010, as the first harvest and sale of Abalone Produce is not forecast to occur until the year ending 30 June 2011.
- (iv) The Cage Rental Fee for periods after 30 June 2009 is \$1,018 per Interest per annum indexed by CPI. This fee will be invoiced annually and is payable irrespective of Harvest Proceeds.
- (v) The Initial Application Fee of \$13,827 includes the provision of 3,180 Abalone Spat. \$954 of the Application Fee is for the supply of 3,180 Abalone Spat. The 3,180 Abalone Spat acquired per Interest is the cost of acquiring juvenile Abalone that 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. 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 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 five years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than the Preferred Financier is outside the scope of this Ruling.
- (ix) The administration fee payable to Australian Bight Abalone Ltd in respect of a Terms Payment Agreement is not deductible in full when it is incurred. Under section 40-880, it is deductible on a straight-line basis over five income years.

**Deductions for capital expenditure (non-small business entities)*****Division 40***

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

23. The Initial Management Fee of \$13,827 per Interest includes \$10,780 for the purchase of ten 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.

24. 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 Abalone Aquafarm and first used during the year ended 30 June 2009. The Responsible Entity will advise Growers when that occurs to enable Growers to calculate the deduction for the decline in value.

25. Where a Grower is registered for GST, each Abtray in which they hold an interest is a 'low-cost asset' (see paragraph 27 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***

26. 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.

27. 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.

28. 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 Abalone Aquafarm and first used during the year ended 30 June 2009.

29. Under Division 27, 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).

## **Treatment of trading stock**

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

30. A Grower who is a 'small business entity' may, in some years, hold Abalone Produce 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)).

31. 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 stocktake and account for the change in the value of all their trading stock (Subdivision 70-C).

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

32. A Grower who is not a 'small business entity' may, in some years, hold Abalone Produce 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.

33. 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.

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

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

34. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals and accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

35. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009, 30 June 2010, 30 June 2013, and 30 June 2015. However, exercise of the discretion in this case is also conditional on the Project being carried out in the manner described in paragraphs 37 to 109 of this Ruling. Exercise of the discretion will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

**Prepayment provisions and anti-avoidance provisions*****Sections 82KZME, 82KZMF and 82KL and Part IVA***

36. For a Grower who commences participation in the Project and incurs expenditure as required by the Aquaculture and Cage Rental Agreement, Management Agreement, and Constitution, 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 120 to 124 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**

37. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling received on 17 February 2009 as constituted by documents provided on 25 March 2009 and additional correspondence, email and telephone conversations on 6 March 2009 and 25 March 2009;
- Draft undated **Aquaculture and Cage Rental Agreement** between Australian Bight Infrastructure Pty Limited (Marine Lease Owner), Australian Bight Abalone (Responsible Entity), and the Grower, received on 25 March 2009;
- Draft undated **Management Agreement** between the Responsible Entity and the Grower, received on 25 March 2009;
- Draft undated **Constitution** received on 25 March 2009;
- Draft undated Product Disclosure Statement (PDS) received on 25 March 2009, including the **Application and Power of Attorney Form**;
- Draft undated Compliance Plan received on 17 February 2009;
- Draft undated **Loan Application and Agreement** between the Preferred Financier and the Grower, received on 17 February 2009;

- Draft Application for a **Terms Payment Arrangement** form between Australian Bight Abalone Limited and Growers received on 17 February 2009;
- Five Aquaculture Leases granted by the Department of Primary Industries and Resources of South Australia to Australian Bight Infrastructure Pty Ltd that, together, form the total available area for the Australian Bight Abalone Project 2009; and
- Five Aquaculture Abalone Licences granted by the Department of Primary Industries and Resources of South Australia to Australian Bight Infrastructure Pty Ltd allowing the farming of Abalone in the five leased areas above.

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

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

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

## Overview

40. The main features of the Australian Bight Abalone Project 2009 are as follows:

Location	Waldegrave Island, Anxious Bay near Elliston on the Eyre Peninsula, South Australia
Type of business to be carried on by each Grower	Commercial Aquaculture of Greenlip Abalone
Term of the Project	7½ years from the date of commencement
Maximum number of Interests offered	3000
Minimum allocation per Grower	One Interest (which is the equivalent of 10 Abtrays)
Minimum subscription	100 Interests
Initial cost	\$13,827

Ongoing costs	Responsible Entity (RE) Fee Cage Rental Fee Annual Management Fee
Other costs	Harvest Fee Subsequent Cycle Fee Sales Incentive Fee

41. 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 number 282113 and is the Responsible Entity for the Project.

42. The Project will involve growing abalone in Abtrays that are located inside an in-sea cage or 'Abalone Aquafarm'. An Interest equates to 10 Abtrays stocked, in total, with 3,180 abalone spat. Approximately 80% of these are juvenile abalone, with the remaining 20% being around 12 months old. A Grower will be involved in the Project for a term of 7½ years. There will be four harvests forecast to occur in the income years ending 30 June 2011, 30 June 2012, 30 June 2014, and 30 June 2016.

43. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for a minimum of one Interest, which corresponds to 10 Abtrays and 3,180 abalone spat.

44. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Australian Bight Abalone Limited, on behalf of the Grower, to enter into an Aquaculture and Cage Rental Agreement, and a Management Agreement.

45. For the purposes of this Ruling, Applicants who are accepted to participate in the Project, and who execute the Aquaculture and Cage Rental Agreement and the Management Agreement, on or before 15 June 2009 will become 2009 Growers.

46. Under the terms of the PDS, 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 2009.

47. Each Grower will use their Interest for carrying on a business involving growing and harvesting abalone for sale.

### **Project Entities**

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

49. 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 (PIRSA). 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 Abalone Aquafarms. Under the Aquaculture and Cage Rental Agreement, each Grower will be granted aquaculture rights that include the right to use an Abalone Aquafarm.

50. 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**

51. In South Australia, under the *Aquaculture Act 2001* (SA), a person must not carry on aquaculture except as authorised by an aquaculture licence. PIRSA has advised the Tax Office that Growers participating in the Australian Bight Abalone Project 2009 are not required to hold an aquaculture licence under the terms of the *Aquaculture Act 2001* (SA). 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**

52. 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 and Cage Rental Agreement and the Management Agreement on behalf of a Grower.

53. The Application Form, along with the Application Fee of \$13,827 per Interest applied for, is required to be received by the Responsible Entity by 15 June 2009. The Responsible Entity will not execute the Aquaculture and Cage Rental Agreement or the Management Agreement after 15 June 2009. For applications accepted subject to finance (clause 3.7.2 of the Constitution), the application funds may be received after 15 June 2009 but no later than 30 June 2009 (see paragraph 99 of this Ruling).

54. Where the Responsible Entity accepts a Grower's Terms Application Form for a Terms Payment Arrangement, a deposit of 10% of the Application Fee must be received by the Responsible Entity no later than 15 June 2009.

55. Applications will not be accepted before the minimum subscription level of 100 Interests has been achieved. Applications will not be accepted after 15 June 2009.

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

57. All Growers who acquire an Interest in the Project will pool their Abalone Produce (Pooled Growers) unless they make an election that they wish to personally harvest, market and sell their Abalone Produce. The election must be made in writing prior to entering into the Management Agreement. This Product Ruling has no application to Growers who elect to harvest, market and sell their Abalone Produce.

### **Constitution**

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

59. In order to acquire an Interest in the Project, the Grower must make an application for an Interest in accordance with clauses 2.1 and 2.2. Among other things, the application must be:

- in the form attached to the PDS issued by the Responsible Entity;
- signed or executed by or on behalf of the Applicant;
- lodged at the registered office of the Responsible Entity; and
- accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

60. Under clause 2.5.1 of the Constitution, the Responsible Entity holds the Application Money on trust. Until an Application is accepted, the relevant Application Money will be paid into a designated trust account with a bank in the name of the Responsible Entity (clause 2.5.1).

61. Once the Responsible Entity has accepted the application and all of the Project documents have been executed, and remain in force, the Application Money may be paid as required under each Grower Aquaculture and Cage Rental Agreement and Management Agreement (clause 4.2).



62. Under clause 23.1 the Responsible Entity is entitled to a fee (RE Fee) of \$550 per Interest per annum plus CPI for periods after 30 June 2009 for services provided under the Constitution. The RE Fee from the date of acceptance to 30 June 2009 is \$138 per Interest and is incorporated into the Application Fee (refer to the table at paragraph 81 of this Ruling). The RE Fee for later years is only payable after invoicing. Invoicing will occur following the sale of Abalone Produce from each harvest. Harvests are forecast to occur in the income years ending 30 June 2011, 30 June 2012, 30 June 2014, and 30 June 2016 (refer to paragraph 42 of this Ruling).

63. In summary, the Constitution also sets out provisions relating to:

- Nature of Grower interests in the Scheme (clause 1.2);
- Duties and Powers of the Responsible Entity (clauses 10.1 and 10.3);
- Growers' ability to remove the Responsible Entity (clause 13);
- Fees payable to the Responsible Entity (RE Fee) (clause 23.1);
- Deductions and Distributions (clauses 24 and 8.2);
- Modification of the Aquaculture and Cage Rental Agreement and Management Agreement (clause 33);
- Other fees payable (Schedule 1A); and
- A Grower's right to:
  - receive reports including reports on Grower's sales, marketing figures and Annual Project reports (clause 14.6);
  - attend and vote at Grower meetings (clause 18);
  - transfer their Interests (clause 20);
  - participate in a winding up of the Project (clause 25); and
  - distributions of income from the Project (clause 26).

### **Compliance Plan**

64. As required by the Corporations Act, Australian Bight Abalone Limited has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Australian Bight Abalone Limited 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**

65. 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 an Abalone Aquafarm; and
- (e) the ownership of the Abtrays.

66. The Marine Lease Owner grants the Aquaculture Rights listed above for consideration of \$1.00 per Interest. This fee is included in the Application Fee (Initial Management Fee) paid to the Responsible Entity (clauses 3.1 and 3.1.1).

67. The Marine Lease Owner will also be entitled to a Cage Rental Fee, payable by the Grower. The Cage Rental Fee from the date of acceptance to 30 June 2009 is \$110 per Interest and is incorporated into the Application Fee (refer to the table at paragraph 81 of this Ruling). For periods after 30 June 2009, the Cage Rental Fee will be calculated as \$1,018 per Interest per annum plus CPI and 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).

68. 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 expiry or termination of the Aquaculture and Cage Rental Agreement, or the Management Agreement, the ownership of the Abtrays will revert to the Marine Lease Owner. The Marine Lease Owner will pay the Grower \$1 per Abtray (clauses 8.1 and 8.1.1).

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

70. The Grower is entitled to re-establish Abalone in the Abalone Aquafarms when a Harvest, other than after Final Harvest, occurs (clause 9.4).

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

## Management Agreement

72. Under the Management Agreement, the Grower appoints the Responsible Entity to manage the Interest and to carry out the management services subject to the terms and conditions of the Agreement. The Agreement will commence on the date the Responsible Entity accepts the Grower's application under the PDS and shall continue until its termination under clause 3.1.

73. The Aquaculture Services to be provided by the Responsible Entity, and the Management Fees payable to the Responsible Entity are detailed in Schedules 2 and 3 of the agreement.

74. A Grower acknowledges that the Responsible Entity has the exclusive right to carry out all of the functions set out in the Aquaculture and 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 biannual progress reports from the Responsible Entity (clauses 2.9 and 2.10).

75. A Grower is entitled to Harvest Proceeds from the sale of Abalone Produce after deducting all costs owing by the Grower under the Management Agreement, the Aquaculture and Cage Rental Agreement, and the Constitution (clause 6.12).

76. 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).

77. A Pooled Grower's share of Project costs will be calculated pro rata by reference to the number of the Grower's Abtrays compared with the overall number of the Abtrays in the Abalone Aquafarm of all Pooled Growers (clause 6.12).

78. The agreement ends after the Final Harvest of the entirety of the Abalone together with the 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).

79. The agreement can be terminated where either party materially breaches any of its obligations under the agreement, unless the breach has, in certain circumstances, been remedied. 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 Grower's Aquaculture and Cage Rental Agreement, is terminated by the Marine Lease Owner or the Responsible Entity. The Responsible Entity may terminate the agreement if all, or substantially all, of the Abalone Produce of the Pooled Growers, and infrastructure used by Pooled Growers is destroyed (clause 12).

**Pooling of Harvest Proceeds and Grower's Entitlement to Net Proceeds**

80. The Management Agreement sets out provisions relating to the Grower's Entitlement to Harvest Proceeds. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Abalone Produce are entitled to benefit from distributions of Harvest Proceeds from the pool; and
- any pooled Abalone Produce must consist only of Abalone Produce contributed by all Pooled Growers in the Project.

**Fees*****Initial Establishment Services and Initial Management Fee***

81. The Initial Establishment Services are to be completed on or before 30 June 2009. The Initial Management Fee for the provision of the Initial Establishment Services is \$13,827 per Interest. This amount is the Application Fee to be paid on application for each Interest in the Project. A breakdown of what is included in the Application Fee is detailed in the table below.

<b>Application Fee</b>	<b>Amount</b>
Provision of 3,180 Abalone Spat settled on hatchery tray.	\$954
Biologist controlled grading and removal of runts. Biologist controlled transportation of Spat and tray to jetty site and vessel transport of tray to Abalone Aquafarm site.	\$1052
Provision of 10 Abtrays per Interest (post algae growth state).	\$10,780
Attachment of tray to Abtray and subsequent attachment to Abalone Aquafarm. Re-insertion/re-attachment of Abtrays as required.	\$792
Payment to the Marine Lease Owner for the granting of rights under the Grower's Aquaculture and Cage Rental Agreement.	\$1
RE Fee from acceptance to 30 June 2009.	\$138
Cage Rental Fee from acceptance to 30 June 2009.	\$110
<b>Application Fee (Initial Management Fee)</b>	<b>\$13,827</b>

## ***Annual Aquaculture Services and Annual Management Fee***

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

- Managing and maintaining the Abtrays;
- Testing for disease;
- Quality control;
- Internal audit of operations;
- Corporate services;
- Inventory assessment; and
- Maintenance of related infrastructure.

83. For periods after 30 June 2009, the Annual Management Fee for the provision of Annual Aquaculture Services is \$1,210 per Interest. This amount is to be indexed by CPI. The Annual Management Fee is payable from Harvest Proceeds and only after invoicing (Deferred Annual Management Fee). Harvests are forecast to occur in the income years ending 30 June 2011, 30 June 2012, 30 June 2014, and 30 June 2016 (refer to paragraph 42 of this Ruling).

84. In the case there is no harvest, or Harvest Proceeds do not meet the Deferred Annual Management Fee plus the Harvest Fee for that Cycle, the Grower shall be liable for the higher of Harvest Proceeds or for a Maximum Contribution.

85. The Maximum Contribution is paid in satisfaction for the full amount of Deferred Annual Management Fees, Harvest Fees, and RE Fees up to the end of those Cycles. Clause 5.5 of Schedule 3 to the Management Agreement specifies the Maximum Contribution is:

- \$1,000 for the first Cycle;
- \$4,000 for the second Cycle; and
- \$5,000 for each of the third and fourth Cycles.

86. 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 Annual Management Fees, Harvest Fees and RE Fees and clause 5.5 will not apply to that Grower (clause 5.6 of Schedule 3 to the Management Agreement).

## ***Harvest Aquaculture Services and Harvest Fee***

87. The Harvest Aquaculture Services occur four times in the life of the Project. For Pooled Growers, these services include:

- 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 Area after Final Harvest as required under the Aquaculture Lease.

88. The Harvest Fee for the provision of the Harvest Aquaculture Services is:

- \$550 for the first Harvest;
- \$1,870 for the second Harvest; and
- \$3,097 for each of the third and fourth Harvests.

89. Harvest fees are CPI indexed. If Harvest Proceeds exceed the Sales Incentive Success Threshold, a further fee will be payable in accordance with the formula set out in clause 6.1.2 of Schedule 3 to the Management Agreement. If Harvest Proceeds are less than the Sales Incentive Success Threshold, a reduced Harvest Fee is payable calculated in accordance with the formula in clause 6.1.3.

90. In some circumstances, the Grower shall be liable for the higher of Harvest Proceeds or for a Maximum Contribution. This is explained in paragraphs 84 to 86 of this Ruling.

91. Harvest Proceeds will first be applied to Subsequent Cycle Fees, then to Deferred Annual Management Fees (including RE Fees), and then to Harvest Fees. Any remaining balance will be applied to Sales Incentive Fees (clause 9.1.1 of Schedule 3 to the Management Agreement).

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

92. Re-Seeding Aquaculture Services occur twice in the life of the Project and include the following:

- Provision of 4,175 Abalone SPAT settled on hatchery tray;
- Biologist controlled grading and removal of runts;
- Biologist controlled transportation of SPAT and tray to jetty site and vessel;
- Cleaning and re-preparation of 10 Abtrays per interest (post algae growth state);
- Attachment of tray to Abtray;
- Transport of tray to Abalone Aquafarm site;
- Insertion/attachment of Abtray to Abalone Aquafarm; and
- Re-insertion/re-attachment of Abtrays as required.

93. The Subsequent Cycle Fee for the provision of the Re-Seeding Aquaculture Services is \$1,898 per Interest. The Subsequent Cycle Fee is payable only after the Seeding and Settlement Services have been provided by the Responsible Entity and is intended to be deducted from Harvest Proceeds.

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

94. A Sales Incentive Fee is payable when the Harvest Proceeds exceed the Sales Incentive Success Threshold. The Sales Incentive Success Threshold is:

- \$3,747 for the first Harvest;
- \$12,879 for the second Harvest; and
- \$21,128 for the third and fourth harvests (clause 6.1.4 of Schedule 3 to the Management Agreement).

95. The Sales Incentive Fee equates to 50% of the Harvest Proceeds received in excess of the Sales Incentive Success Threshold in each harvest.

96. 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 owned by all Pooled Growers.

97. 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 that are due and unpaid. The Responsible Entity may sell any Abalone Produce on which it has a lien (clauses 8.7 to 8.11 of the Management Agreement).

### **Finance**

98. A Grower who does not pay the \$13,827 in full upon application can borrow from the Preferred Financier, or from an independent lender external to the Project.

99. Growers cannot rely on any part of this Ruling if the Application Amount is not paid in full on or before 15 June 2009 where there is no finance or 30 June 2009 where finance is being used. Where an application is accepted subject to finance, from any lending institution, the Grower cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution on or before 15 June 2009. The lending institution must provide the full amount of the loan monies to the Responsible Entity no later than 30 June 2009.

100. 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 those set out in the documentation provided to the Tax Office with the application for this Product Ruling and summarised below. A Grower who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements that are not covered by this Product Ruling.

### ***Terms Agreement***

101. The Responsible Entity is offering a Terms Payment Arrangement whereby Growers may pay the Application Fee in ten equal instalments. The first payment of 10% is due at the time of acceptance but no later than 15 June 2009. Thereafter, the remaining balance will be paid in nine equal monthly instalments with the first being due on 31 July 2009. Growers may pay out their Terms Payment Arrangement at any time prior to the expiry of the Terms Payment period.

102. 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 2009, as to their capacity to pay the full amount of the Administration Fee (\$250) in accordance with the Terms Payment Arrangement.

103. 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 plus 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.

104. A maximum of 750 Interests will be allocated under the Terms Payment Arrangement.

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

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

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

107. The Preferred Financier offers three 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.

108. 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 Preferred Financier is granted an equitable mortgage over the Grower's interest in the project.

109. 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 a 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.

## 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?**

110. For the amounts set out in paragraphs 21 to 29 of this Ruling to constitute allowable deductions, the Grower's abalone aquaculture activities as a participant in the Australian Bight Abalone Project 2009 must amount to the carrying on of a business of primary production.

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

112. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T*; *Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

113. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 3 and 4 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting abalone for sale.

### **Deductibility of the Management fee, Rent and interest on loans with the Preferred Financier**

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

114. The Initial Management Fee (excluding the Abalone Spat and Abtrays), RE Fee, Cage Rental Fee and Annual Management Fee are deductible under section 8-1 in the income year that the relevant fee is incurred. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the Initial Management Fee, RE Fee, Cage Rental Fee and Annual Management Fee.

115. 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 120 to 124 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.)

116. 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 Initial Management Fee, RE Fee, Cage Rental Fee and Annual Management Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

117. Other than where the prepayment provisions apply (see paragraphs 120 to 124 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

## **Administration Fee payable under a Terms Payment Agreement**

### ***Section 40-880***

118. Growers who elect to pay their Grower's contribution under the Terms Payment Agreement must pay an administration fee of \$250. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature, it is also not deductible under section 8-1.

119. However, section 40-880 will allow the Application Fee to be deducted on a straight-line basis over five income years. Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law.

## **Prepayment provisions**

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

120. 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.

121. 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***

122. Under the scheme to which this Product Ruling applies Management Fees, Rent and other fees are incurred annually 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.

123. 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 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.

124. 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.

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

125. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2009, 30 June 2010, 30 June 2013, and 30 June 2015, based on the evidence supplied, the Commissioner has determined that for those income years:

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

126. 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.

127. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion 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**

128. 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**

129. 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).

130. The Australian Bight Abalone Project 2009 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 21 to 29 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.

131. 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 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**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of entities	2
Superannuation Industry (Supervision) Act 1993	5
Qualifications	6
<b>Date of effect</b>	<b>9</b>
Changes in the law	11
Note to promoters and advisers	13
Goods and Services Tax	14
<b>Ruling</b>	<b>15</b>
Application of this Ruling	15
Minimum subscription	17
Small business concessions	18
Assessable income	20
<i>Sections 6-5 and 17-5</i>	20
Deduction for management fees, rent, borrowing expenses, and interest	21
<i>Sections 8-1, 25-25 and 40-880 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936</i>	21
Deductions for capital expenditure (non-small business entities)	22
<i>Division 40</i>	22
Deductions for capital expenditure (small business entities)	26
<i>Subdivision 328-D</i>	26
Treatment of trading stock	30
<i>Section 328-285</i>	30
<i>Section 70-35</i>	32
Division 35 – deferral of losses from non-commercial business activities	34
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	34
Prepayment provisions and anti-avoidance provisions	36
<i>Sections 82KZME, 82KZMF and 82KL and Part IVA</i>	36

<b>Scheme</b>	<b>37</b>
Overview	40
Project Entities	48
Aquaculture licence	51
Application for interests	52
Constitution	58
Compliance Plan	64
Aquaculture and Cage Rental Agreement	65
Management Agreement	72
Pooling of Harvest Proceeds and Grower's Entitlement to Net Proceeds	80
Fees	81
<i>Initial Establishment Services and Initial Management Fee</i>	81
<i>Annual Aquaculture Services and Annual Management Fee</i>	82
<i>Harvest Aquaculture Services and Harvest Fee</i>	87
<i>Re-Seeding Aquaculture Services and Subsequent Cycle Fees</i>	92
<i>Sales Incentive Fee and other costs</i>	94
Finance	98
<i>Terms Agreement</i>	101
<i>Finance offered by the Preferred Financier</i>	105
<b>Appendix 1 – Explanation</b>	<b>110</b>
Is the Grower carrying on a business?	110
Deductibility of the Management fee, Rent and interest on loans with the Preferred Financier	114
<i>Section 8-1</i>	114
Administration Fee payable under a Terms Payment Agreement	118
<i>Section 40-880</i>	118
Prepayment provisions	120
<i>Sections 82KZL to 82KZMF</i>	120
<i>Application of the prepayment provisions to this Project</i>	122
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion	125
Section 82KL – recouped expenditure	128
Part IVA – general tax avoidance provisions	129
<b>Appendix 2 – Detailed contents list</b>	<b>132</b>

## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

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

### *Subject references:*

- carrying on a business
- fee expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings

### *Legislative references:*

- ITAA 1936
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
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- ITAA 1997 17-5
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- ITAA 1997 35-10
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- ITAA 1997 40-880
- ITAA 1997 Div 70
- ITAA 1997 Subdiv 70-C
- ITAA 1997 70-35
- ITAA 1997 70-150
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-D
- ITAA 1997 328-180
- ITAA 1997 328-285
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- TAA 1953
- Copyright Act 1968
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### *Case references:*

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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