



# ***PR 2010/15 - Income tax: Australia Wide Timbers Project***

 This cover sheet is provided for information only. It does not form part of *PR 2010/15 - Income tax: Australia Wide Timbers Project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *16 June 2010*



## Product Ruling

### Income tax: Australia Wide Timbers Project

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Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
What this Ruling is about	1
Date of effect	12
Ruling	18
Scheme	45
<b>NOT LEGALLY BINDING SECTION:</b>	
Appendix 1:	
Explanation	104
Appendix 2:	
Detailed contents list	144

**! 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

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the 'Australia Wide Timbers Project', or simply as 'the Project'.
2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product Ruling, terms defined in the Project agreements have been capitalised.

### Class of entities

3. 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.
4. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to in this Product Ruling as Growers.
5. Growers are those entities that:
  - meet the definition of 'initial participant' in subsection 394-15(5); and
  - are accepted to take part in the scheme specified below on or after the date this Product Ruling is made.
6. A Grower will have executed the relevant Project Agreements set out in paragraph 45 of this Ruling on or before 30 June 2010 and will hold a 'forestry interest' in the Project.
7. The class of entities who can rely on this Product Ruling does **not** include:
  - entities who are accepted into this Project before the date of this Product Ruling or after 30 June 2010;
  - entities who participate in the scheme through offers made other than through the Australia Wide Timbers Project Combined Product Disclosure Statement (PDS) and Financial Services Guide; or who enter into an undisclosed arrangement, including finance arrangements, with:
    - the promoter or a 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;
- entities whose Application Money is not paid in full to WA Blue Gum Limited by 30 June 2010, either by the entity and/or on the entity's behalf by a lending institution.

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

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Australian Taxation Office (ATO) 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**

9. 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 45 to 104 of this Ruling.

10. 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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12. This Product Ruling applies prospectively from 16 June 2010, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 16 June 2010 until 30 June 2010, 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 all income years up to the income year in which the scheme is terminated in accordance with the Project Constitution.

13. 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

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 ATO 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 Product Ruling as a Grower) to be entitled to claim input tax credits for the GST included in any creditable acquisition that it makes, it must be registered or required to be registered for GST and hold a valid tax invoice.

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## Ruling

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### Structure of the Project

18. The Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of *eucalyptus globulus* (Tasmanian blue gum), *eucalyptus cladocalyx* (sugar gum) and *eucalyptus tricarpa* (red ironbark) trees for felling in Australia.

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an 'initial participant'<sup>1</sup> in the defined class of entities (see paragraphs 3 to 7 of this Ruling) who is accepted to participate in the 'forestry managed investment scheme' described below at paragraphs 45 to 104 of this Ruling on or after 16 June 2010 and on or before 30 June 2010 inclusive.

20. An entity that takes part in the Project as a 'subsequent participant'<sup>2</sup> is not covered by this Product Ruling but may request a private ruling on their participation in the Project. A 'subsequent participant' is an entity that does not meet the definition of 'initial participant' in subsection 394-15(5).

### Carrying on a business

21. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 (see paragraphs 39 to 42 and 134 to 140 of this Ruling).

### Concessions for 'small business entities'<sup>3</sup>

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

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

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<sup>1</sup> See subsection 394-15(5).

<sup>2</sup> See section 394-30.

<sup>3</sup> The meaning of 'small business entity' is explained in section 328-110.

## The '70% DFE rule' and the establishment of the Trees

### **Section 394-35 and subsection 394-10(4)**

24. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by WA Blue Gum Limited (WABG). On the basis of that information the Commissioner has decided that on 30 June 2010 it will be reasonable to expect that the '70% DFE rule'<sup>4</sup> will be satisfied. The ATO may undertake review activities during the term of the Project to verify the information relied on for the purposes of the '70% DFE rule'.

25. The Ruling will only apply if WABG establishes all of the Trees that were intended to be established under the Project within 18 months of the end of the income year in which the first 'participant' in the Project is accepted.<sup>5</sup> For this Project the Trees must be established no later than 31 December 2011.

26. In the context of this Project the trees will be established when they are planted on the land acquired for the purposes of the Project at the average rate of 1,000 trees per hectare. WABG is required by section 394-10 of Schedule 1 of the TAA to notify the ATO if the Trees are not established by 31 December 2011.

## Allowable deductions

### **Sections 8-5, 394-10, 394-20 and Division 27**

27. A Grower in the Project can claim deductions, on a **per Woodlot** basis for the amounts shown in the Table below that are paid to WABG Plantations (sections 8-5 and 394-10).

28. The deductibility of these amounts remains subject to a requirement that a CGT event<sup>6</sup> does not happen in relation to the Grower's 'forestry interest' before 1 July 2014 (see paragraphs 32 to 34 of this Ruling).

29. Each amount is deductible in the income year in which it is paid, or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). This requires cash to flow from the Grower, or from another entity on the Grower's behalf, to WABG's bank account in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into WABG's bank account will not qualify for a deduction under subsection 394-10(2).

30. Where a Grower does not fully pay an amount, or it is not fully paid on their behalf in an income year, it is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

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<sup>4</sup> The '70% DFE rule' is set out in section 394-35.

<sup>5</sup> See subsection 394-10(4).

<sup>6</sup> Defined in section 995-1.

31. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

<b>Fee</b>	<b>Amount</b>	<b>Income year(s) deductible (see Note)</b>
<b>Application Fee</b> <sup>7</sup>	\$10,000	2009-10 See Note (i), (ii) and (iii)
<b>Management and Rental Fees</b>	Management Fees years 1 to 10 <sup>8</sup>  Management Fees years 11 to 22 <sup>9</sup>  Rental Fees years 1 to 10 <sup>10</sup>  Rental Fees year 11 <sup>11</sup>  Rental Fees years 12 to 22 <sup>12</sup>	The year in which these amount are paid. See Note (i) and (ii)  See Note (i) and (iii)
<b>Harvesting and transportation expenses</b>	Actual cost at time of harvest	The year in which this amount is paid

<sup>7</sup> This fee consists of the Establishment Fees in respect of each Location, the Management Fees for years 1 to 10 in respect of the Green Triangle and Central Victorian locations and the Prepaid Rental Fees in respect of the Green Triangle and Central Victorian Locations (all of which are payable on application). Refer to paragraphs 92 to 103 of this Ruling for further details.

<sup>8</sup> Note these management fees are in respect of the Western Australian Location (\$40.34 per annum indexed) and are payable until the completion of the Harvesting of the Plantation which is expected to take place in years 10 or 11 of the Project. (Note it does not include fees for the central Victoria Location or Green Triangle Location as these are prepaid on application).

<sup>9</sup> These fees are in respect of the Green Triangle and Central Victorian Locations. The Project Manager may direct that these fees be paid in advance out of the proceeds of Harvest Events.

<sup>10</sup> Note these fees consist of the rental fees for the Western Australian Location at \$168.66 per annum Indexed, rental fees for the Green Triangle Location of \$57.75 per annum Indexed and rental fees for the Central Victorian Location of \$57.75 per annum Indexed.

<sup>11</sup> These are annual rental fees for the Green Triangle Location and Central Victorian Location. Note if the Western Australian Location has not been completely Harvested by year 11 the annual rental fee of \$168.66 Indexed in respect of the Western Australian Location will also apply.

<sup>12</sup> Previous year's fee x 1.03

<b>Harvest Supervision Fee</b> <sup>13</sup>	4% of net Harvest Income	The year in which this amount is paid
<b>Incentive Fee</b>	15% of the amount by which the net proceeds from the sale of timber exceeds \$17,600 per hectare indexed from 30 June 2010.	The year in which this amount is paid

**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 tending services will commence from when the trees are planted and continue until the trees have been harvested. No Management Fee is payable in respect of any year ended 30 June for any hectare upon which no trees have yet been planted. WABG will refund any Management Fee, or portion thereof, paid in respect of any unplanted hectare.
- (iii) The Rent is payable under the terms of the Sub-lease agreements which will commence on or after the execution of the respective head lease held by WABG. WABG will refund any Rent, if the Grower fails to enter into a Sub-Lease on or before 30 June 2011.

**'CGT event' within 4 years for Growers who are 'initial participants'*****Subsections 394-10(5) and 394-10(6)***

32. Deductions for the establishment fees, tending fees, rent and unforeseen expenses that have been allowed as deductions under 394-10 in the first four years are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of a Grower before 1 July 2014 (subsection 394-10(5)).

33. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years of the 'CGT event' happening (subsection 394-10(6) of the ITAA 1997). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

<sup>13</sup> The Harvest Supervision Fee only relates to the Western Australian and Green Triangle Locations.

34. Growers whose deductions are disallowed because of subsection 394-10(5) are still required to include in assessable income the market value of the 'forestry interest' at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event'.

### **Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'**

#### ***Sections 6-10, 17-5 and 394-25***

35. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning<sup>14</sup> – see paragraph 38 of this Ruling) happens to a 'forestry interest' held by a Grower in this Project the market value of the 'forestry interest', or the decrease in the market value of the 'forestry interest', is included in the assessable income of the Grower (sections 6-10 and 394-25) less any GST payable on those proceeds (section 17-5).

36. The relevant amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 394-25(2)).

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

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

### **Amounts received by Growers where the Project trees are thinned**

#### ***Section 6-5***

38. An amount received by a Grower in respect of a thinning of the trees grown in this Project is not received as a result of a 'CGT event' and is not otherwise assessable under Division 394. The amount is a distribution of ordinary income that arises as a result of a Grower holding a 'forestry interest' in the Project. Growers include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5) less any GST payable on those proceeds (section 17-5)

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<sup>14</sup> A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

## **Amounts received by Growers for Carbon and other environmental credits and refund of fees**

### ***Section 6-5***

39. An amount received by a Grower in respect of carbon and/or other environmental credits or from the repayment of fees under this Project are not received as a result of a 'CGT event' and is not otherwise assessable under Division 394. The amount(s) are a distribution of ordinary income that arises as an outcome of a Grower holding a 'forestry interest' in the Project. Growers include amounts received in their assessable income in the income year in which the amounts are derived (section 6-5).

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

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

40. The Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of afforestation during the income year; and
- the business activity that is carried on is not materially different to that in the scheme described in this Product Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

41. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

42. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised, losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

43. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in sub-section 35-55(1) for any income year.

**Prepayment provisions, non commercial losses and anti-avoidance provisions*****Sections 82KL and Part IVA***

44. Where a Grower is accepted to participate in the Project set out at paragraphs 45 to 103 of this Ruling, the following provisions of the ITAA 1936 have application as indicated:

- 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.

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**Scheme**

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

- Application for a Product Ruling as constituted by documents and correspondence received on 29 March 2010, and additional correspondence and documents received 9 April 2010, 5 May 2010, 10 May 2010, 11 May 2010, 12 May 2010, 13 May 2010, 14 May 2010, 18 May 2010, 19 May 2010 and 4 June 2010.
- Draft Combined Product Disclosure Statement and Financial Services Guide for the Australia Wide Timbers Project 2010, received 18 May 2010;
- Independent forestry report, dated 29 March 2010;
- Draft **Constitution** for the Australia Wide Timbers Project 2010, received 29 March 2010;
- Draft Compliance Plan for Australia Wide Timbers Project 2010, received 29 March 2010;
- Scheme Property Custody Agreement between WABG and Sandhurst Trustees Limited (the Custodian), received on 9 April 2010;
- Draft Headlease to be entered into by WABG in respect of the project land (Western Australia), received on 29 March 2010;
- Draft Headlease to be entered into by WABG in respect of the project land (Green Triangle), received on 29 March 2010;
- Draft Headlease to be entered into by WABG in respect of the project land (Central Victoria), received on 29 March 2010;

- Draft **Sub-lease** 2010 (Western Australia), between each Grower and WABG, received on 18 May 2010;
- Draft **Sub-lease** 2010 (Green Triangle), between each Grower and WABG, received on 18 May 2010;
- Draft **Sub-lease** 2010 (Central Victoria), between each Grower and WABG, received on 18 May 2010;
- Draft **Agreement to Sub-lease** 2010 (Western Australia) between each Grower and WABG, received on 29 March 2010;
- Draft **Agreement to Sub-lease** 2010 (Green Triangle), between each Grower and WABG, received on 29 March 2010;
- Draft **Agreement to Sub-lease** 2010 (Central Victoria), between each Grower and WABG, received on 29 March 2010;
- Draft **Project Management Contract** (Western Australia), between each Grower and WABG, received on 18 May 2010;
- Draft **Project Management Contract** (Green Triangle), between each Grower and WABG, received on 18 May 2010;
- Draft **Project Management Contract** (Central Victoria), between each Grower and WABG, received on 18 May 2010;
- Draft **Wood Purchase Agreement** (Western Australia), between each Grower, WABG and WA Chip & Pulp Co Pty Ltd, received on 29 March 2010;
- Draft **Wood Purchase Agreement** (Central Victoria), to be entered into by each Grower, WABG and Stargrow (Australia) Pty Ltd, received on 29 March 2010;
- Draft **Wood Harvest Agreement** (Green Triangle) to be entered into by each Grower, WABG and Plantation Timbers Group Pty Ltd, received on 29 March 2010;
- Draft Plantation Services Agreement (Western Australia) to be entered into between WABG and WACAP Treefarms Pty Ltd, received on 29 March 2010;
- Draft Plantation Services Agreement (Green Triangle) to be entered into between WABG and Plantation Timbers Group Pty Ltd, received on 29 March 2010;
- Draft Plantation Services Agreement (Central Victoria) to be entered into between WABG and Stargrow (Australia) Pty Ltd, received on 29 March 2010;

- Draft Agreement for the Provision of Consulting Services to be entered into between WABG and URS Australia Pty Ltd, received on 9 April 2010;
- Draft Guarantee Agreements for WABG which is required where the Grower is a company, received on 29 March 2010.

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

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

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

### Overview

48. The main features of the Project are as follows:

Location	The Project is to be established on land situated in three locations: <ul style="list-style-type: none"> <li>• South west region of Western Australia;</li> <li>• South east South Australia and southwest Victoria in the area known as the 'Green Triangle'; and</li> <li>• Central Victoria.</li> </ul> (each is referred to as a 'Location' and collectively as the 'Project Land')
Species of trees to be planted	<ul style="list-style-type: none"> <li>• <i>eucalyptus globulus</i> (Tasmanian blue gum);</li> <li>• <i>eucalyptus cladocalyx</i> (sugar gum); and</li> <li>• <i>eucalyptus tricarpa</i> (red ironbark).</li> </ul>
Term of the Project	Approximately 22 years
Date all Trees must be planted on scheme Land	31 December 2011
Number of Trees per hectare	Average of approximately 1,000
Number of hectares offered for cultivation	1,500 hectares Oversubscriptions may be accepted

Size of each 'forestry interest' (Woodlot)	1 hectare
Minimum allocation of 'forestry interests' per Grower	Two Woodlots
Minimum subscription	None
Initial cost	\$10,000 per Woodlot
Ongoing costs	Annual Management and Rental Fees
Other costs	<ul style="list-style-type: none"> <li>• Harvest Supervision Fee;</li> <li>• Harvest and transportation expenses; and</li> <li>• Incentive fee.</li> </ul>

49. The Project is a registered managed investment scheme under the *Corporations Act 2001*. WABG has been issued with an Australian Financial Service Licence 246264 and will be the Responsible Entity for the Project.

50. The Project will involve establishing, tending, felling and harvesting timber from several varieties of trees planted in a variety of locations around Australia, for the purposes of selling the timber.

51. An offer to participate in the Project will be made through a PDS. The offer under the PDS is for 1,500 hectares, which corresponds to 1,500 'forestry interests' in the project, although WABG reserves the right to accept oversubscriptions.

52. An entity that participates in the Project as a Grower will do so by acquiring a 'forestry interest' in the Project on or before 30 June 2010. There is no minimum subscription level under the PDS

53. To participate in the Project Applicants must complete the Application and Power of Attorney Form contained in the PDS and pay the relevant Application Money on or before 30 June 2010. The Custodian has been appointed under the Scheme Property Custody Agreement to protect the interests of the Growers in their dealings with WABG.

54. The Power of Attorney irrevocably appoints WABG to enter into, on behalf of the Grower, an Agreement to Sub-lease (where necessary), three Sub-leases in respect of three separate areas of land in each of Western Australia, the Green Triangle and Central Victoria, a separate Project Management Contract for each Location, a separate Wood Purchase Agreement for each of the Western Australian and Central Victorian Locations, a Wood Harvest Agreement in respect of the Green Triangle Location and (where appropriate) a Guarantee.

55. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute either the Agreement to Sub-lease or the Sub-lease, and the Project Management Contract on or before 30 June 2010 will commence participation as Growers in the Project. This Ruling only applies in respect of Growers who are accepted into the Project during the period from the date of this Ruling to on or before 30 June 2010.

56. A Grower will Sub-lease from WABG at least two hectares of identifiable areas of land distributed equally between Western Australia, the Green Triangle and Central Victoria. Land utilised by the Project must meet the requirements set out in the Independent Forester's Report.

57. Pursuant to the Project Management Contracts Growers will engage WABG to manage the Project and be responsible for establishing and tending the Plantations of Tasmanian blue gum (*Eucalyptus globulus*), sugar gum (*eucalyptus cladocalyx*) and Red Ironbark (*eucalyptus tricarpa*) trees planted on the Land for the purpose of felling and sale on the Grower's behalf.

58. Growers are responsible for insurance to cover the standing timber on their Woodlots against loss or damage by fire and other risks. If requested, WABG will use its best endeavours to arrange plantation insurance cover annually for a Grower's Interest in the Project.

### **Constitution**

59. The Constitution establishes the Project and operates as a deed binding all Growers and WAGB. The Constitution sets out the terms and conditions under which WAGB 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.

60. In order to acquire an interest in the Project, the Grower must make an application for 'forestry interests' in accordance with clause 4. Among other things, the application to be completed in a form approved by the Responsible Entity, signed 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.

61. All moneys received from applications shall be held by the Responsible Entity in the Application Fund, for the purpose of depositing all money received from applicants and accrued interest and all income and other earnings from the Project on trust for the Growers (clause 6).

62. If the Application Money remains in the Application Fund for 12 months after it was received by the Responsible Entity then the Application Money must be refunded to the Applicant unless the Applicant directs the Responsible Entity in writing to hold the money for a further period (clause 6.5).

63. Once WAGB has accepted the application and all of the Project Agreements have been executed, the Application Money may be released against the Establishment Fee due to WAGB (clause 6.4).

64. The Constitution also sets out provisions relating to:

- the purpose of the Project (clause 2);
- the holding of the Project Property (clause 5);
- the form for payment of the Application Money and interest and refunds (clause 6);
- the distribution of Harvest Income and pooling (clause 7);
- the keeping of a register of Growers (clause 9);
- the assignment of Growers interests (clause 10);
- the powers of investment and power to borrow (clause 11 and 12 retrospectively);
- additional powers and other activities of the Responsible Entity (clauses 14 and 15 retrospectively);
- the meeting of Growers including voting requirements (clause 19);
- complaints handling and dispute resolution (clause 20 and 21 retrospectively);
- the period and termination of the project (clause 23);
- the winding up of the project (clause 24);
- amendments to the project agreements including the constitution (clause 25 and 26 retrospectively).

## **Compliance Plan**

65. As required by the *Corporations Act 2001*, the Responsible Entity has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the Interest of a Grower is protected.

**Scheme Property Custody Agreement**

66. WABG, as Responsible Entity, has engaged Sandhurst Trustees Limited to act as the Custodian of the Property. The Property includes all Application Money and Harvest Income until disbursed or distributed in accordance with the Constitution and Project Agreements, but does not include property legally vested in a Grower.

**Head Leases**

67. The land that will be used for the Project (the 'Project Land') will be leased or sub-leased by WABG from various landholders.

68. The Head Leases set out the terms and conditions under which the Lessor or Sub-lessor will lease or sub-lease the Project Land to WABG for the purpose of growing, tending and harvesting plantations of trees planted on the Sub-Leased Area.

69. The Lessor or Sub-lessor acknowledges that plantations of trees planted on the Sub-Leased Area and any rights, benefits and credits derived from such trees are the property of WABG.

**Sub-leases**

70. Either at the time their application is accepted or when sufficient suitable land is available prior to 30 June 2011, Growers will enter into a Sub-lease with WABG in respect of each of the three Locations to use the land to which the subleases relate for the purpose of establishing, tending and harvesting a plantation.

71. WABG warrants to the Grower that it is entitled to grant the Sub-leases to the Grower and that all relevant consents have been obtained.

72. WABG and the Grower acknowledge that the carbon environmental or any other credits derived from the Plantation are and shall remain the property of the Grower until the end of the Term and the Grower shall be entitled to Harvest the Plantation and to retain all income from the sale of the Wood.

73. If there is damage to or reduction in the viability of the Plantation, the Grower is required to reduce the Plantable Area by the area which has been damaged or is no longer viable or, where the whole of the Plantation is damaged or no longer commercially viable, to terminate the Sub-lease. The area which has been destroyed or is no longer viable will be deemed surrendered back to WABG and all obligations of the Grower in relation to that area under the Sub-lease shall end. The Grower's share of the Relevant Harvest Income will be proportionally reduced.

74. Each agreement shall operate on and from its commencement date until completion of Harvesting in the Location to which the Sublease relates. The Grower may extend the Term by giving written notice to WABG.

75. The Sub-leases also sets out provisions relating to:

- the Rent payable by Growers;
- the Grower's covenants, the Landholder's covenants and mutual covenants ;
- termination; and
- dispute resolution.

## **Agreements to Sub-lease**

76. Where there is no Project Land available for a Grower on or before 30 June 2010 in one or more of the three Locations, the Grower will be required to enter into an Agreement to Sub-lease with WABG for that Location(s).

77. Pursuant to the terms of the Agreement to Sub-lease the parties undertake to enter into a Sub-lease of the Land on or before the Starting Date, being a date no later than 30 September 2011, which will allow all the Establishment services referred to in the Project Management Contracts to be completed within the Establishment Period. The parties are bound by all the provisions of the Sub-leases from the Starting Date.

## **Project Management Contracts**

78. Growers engage WABG, as the Project Manager, for the term of the Project to carry out such services as are required to establish and tend the Plantation for felling in accordance with the Plantation and Tending Plan and sound silvicultural and environmental practices.

79. The Project Management Contracts will commence upon execution and terminate when the whole of the relevant Plantation has been Harvested.

80. Commencing on the date that a Sub-Lease is entered into by the Grower, WABG will perform or cause to be performed all the Plantation Services under the Project Management Contract in relation to the Land in the Location to which the Project Management Contract relates. The Plantation Services include the Establishment of the Plantation within the Establishment Period, ending no later than 31 December 2011.

81. The Establishment of the Plantation requires the planting of the seedlings at an average stocking rate of approximately 1,000 trees per hectare.

82. The Harvesting of the Plantation shall be conducted in accordance with the terms of the Wood Purchase Agreements (in the case of the Western Australian and central Victorian Locations) and the Wood Harvest Agreement (in the case of the Green Triangle Location).

83. At the cost of the Grower, WABG will keep current policies of fire insurance on behalf of the Grower with a reputable insurer, provided that such insurance is reasonably available.

84. The Project Management Contracts also set out provisions relating to:

- the rights and duties of the Project Manager;
- the Grower's ability to express opinions and give recommendations to the Project Manager, object to and disallow any changes to the Plantation Development and Tending Plan;
- the Project Manager's obligation to report to the Grower;
- carbon and other environmental credits and debits;
- the Project Manager's entitlement to fees;
- termination;
- dispute resolution; and
- in the case of the Central Victorian and Green Triangle Locations, the consequences of Forestry Contractor default.

### **Plantation Services Agreement**

85. The Project Manager will enter into separate Plantation Services Agreements with:

- WACAP Treefarms Pty Ltd (in respect of the Western Australian location);
- Plantation Timbers Group Pty Ltd (in respect of the Green Triangle location); and
- Stargrow (Australia) Pty Ltd (in respect of Central Victorian location)

as independent contractors to carry out the Plantation Services required to establish and tend the Plantation on the Land during the Term in accordance with the Plantation Development and Tending Plan and sound silvicultural and environmental practices for the purposes of felling and Harvesting the Plantation.

## **Wood Purchase Agreement (Western Australia) and Wood Purchase Agreement (Central Victoria)**

86. These Wood Purchase Agreements relate to the Wood Harvested in the Western Australian and Central Victorian Locations respectively. Under each of these Wood Purchase Agreements:

- Growers authorise WABG as the Project Manager to sell the Wood on their behalf;
- WABG agrees to sell and the Purchaser agrees to Purchase for the Purchase Price all Wood grown on the Land, Harvested and Delivered in accordance with the Harvest Plan and on terms and conditions set out in the Wood Purchase Agreement;
- the Purchasers may Harvest, Deliver and purchase the Wood for a price offered as being fair and reasonable at the relevant time;
- WABG may seek alternative prices for Harvest and Delivery and an alternative Purchase Price for the Wood; and
- where such alternatives prices are obtained the Purchaser retains the right to match the price offered by the other party.

## **Wood Harvest Agreement (Green Triangle)**

87. The Wood Harvest Agreement (Green Triangle) relates to the Harvesting of the Wood in the Green Triangle Location. The Harvesting and Delivery of the Wood is done in accordance with the Harvest Plan and the terms of the Wood Harvest Agreement (Green Triangle). The Contractor must provide a Quote for the Harvest and Delivery services. WABG has the choice whether:

- the Contractor provides the Harvest and/or Delivery services;
- WABG provides the Harvest and/or Delivery services; or
- an External Contractor provides the Harvest and/or Delivery services (provided the price charged by the External Contractor for the service(s) is less than the Quote provided by the Contractor).

**Pooling of Wood and Grower's entitlement to a distribution**

88. The Constitution (clause 7.1) sets out the circumstances relating to the pooling of Growers' timber and the distribution of Harvest Income. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Wood from their Leased Area to the pool making up the Relevant Harvest Income are entitled to benefit from distributions from those proceeds;
- Wood is only pooled with the Wood of Growers accepted to participate in the Australia Wide Timbers Project; and
- where a Grower's Interest is terminated as a result of default by the Grower, Wood from the Leased Area will cease to be a part of the pool.

**Fees**

89. Under the terms of the Project Management Contracts and the Sub-leases, a Grower will make payments as described below on a Sub-Woodlot basis.

***Fees payable under the Project Management Contracts***

90. Each Project Management Contract requires a grower to make payments in respect of the following:

- An Establishment Fee;
- Management Fees;
- Harvest Supervision Fees;
- Harvest Expenses;
- Any Unforeseen Expenses;
- Insurance Expenses; and
- The Project Manager's Incentive Fees.

91. In addition to the above, a Harvest Supervision Fee of 4% of the net Harvest Income is payable by the Grower to the Project Manager in respect of the Western Australian and Green Triangle Locations.

*Establishment Fee*

92. Each Grower will pay an Establishment Fee on a per sub Woodlot basis in respect of each Location as follows:

- Western Australia \$2,291.83;
- Green Triangle \$2,328.48; and
- Central Victoria \$2,218.48.

*Management Fees*

93. The Grower pays to the Project Manager a management fee in respect of each Sub-Woodlot in each Location as follows.

Year	Western Australia	Green Triangle	Central Victoria
1-10	\$40.34 per annum indexed	\$1,241.94 (payable in advance on application)	\$931.47 (payable in advance on application)
11		\$88.53	\$38.07
12-22	N/A	Previous year's fee x 1.03	Previous year's fee x 1.03

**Note:** the tending services will commence from when the trees are planted and continue until the trees have been harvested. No Management Fee is payable in respect of any year ended 30 June for any hectare upon which no trees have yet been planted. WABG will refund any Management Fee, or portion thereof, paid in respect of any unplanted hectare.

94. In respect of the Western Australian Location, Management Fees will be payable by the Grower to the Project Manager on 30 November in Year 1 of the Project and on 30 September in each subsequent Year during the Term of the Project Management Contract (Western Australia) which expires when the whole of the Plantation has been harvested completely for the first time which will likely be in years 10 or 11.

95. In respect of the Green Triangle and Central Victorian Locations:

- Management Fees for Years 1 to 10 are payable on or before 30 June 2010;
- Management Fees in respect of Years 11 to the end of the Term are payable on 30 September of each year subject to a direction by the Project Manager that they be paid in advance out of the proceeds of a Harvest Event; and
- If the Term of the Project extends beyond 22 Years, the Management Fee in respect of such subsequent Years will be the amount of the Management Fee for the preceding Year, Indexed.

*Harvest Expenses & Supervision Fee*

96. The Project Manager shall be paid by way of reimbursement by the Grower the expenses incurred by the Project Manager in relation to the Harvest of the Plantation (including roading and supervision), Delivery and other expenses arising out of the sale of the Wood. In the case of the Western Australian and Green Triangle Locations, the Project Manager is entitled to charge a Harvest Supervision Fee of 4% of net harvest income.

*Unforeseen Expenses*

97. If unforeseen expenses arise (e.g. in relation to fertiliser and/or insect issues) and a meeting of all Growers in the Project approves further expenditure, the Grower will, within one month of such approval, pay to the Project Manager a proportion of such expenses in accordance with the Grower's proportional interest in the Project.

*Incentive Fee*

98. The Grower will (if required) pay to the Project Manager an incentive fee calculated in accordance with the following formula (provided that if the fee calculated is a negative amount, the fee shall be NIL):

$$\text{Incentive Fee} = 15\% \times [(A - B) \times C]$$

Where:

**A** is the amount due to the Grower from the Harvest Event (expressed on a per Sub-Woodlot basis).

**B** is in respect of each Harvest Event the sum specified in the table below (expressed on a per Sub-Woodlot basis).

**C** is the number of Sub-Woodlots in the Plantable Area.

***Fees payable under the Sub-leases****Western Australia*

99. A Grower will pay to the Project Manager Rent of \$168.66 per annum Indexed until the completion of the Harvesting of the Plantation. The first Rent is payable on 30 November 2010, and thereafter on 30 September in each year.

## *Green Triangle*

100. A Grower will pay the Project Manager Prepaid Rent of \$809.16 in respect of years 1 to 10 of the Project. Prepaid Rent is payable on or before 30 June 2010. A Grower will pay Annual Rent for years 1 to 10 of the project at \$57.75 per annum Indexed. The Annual Rent for year 11 is \$172.47. The Annual Rent for years 12 to the final year of the Term of the Sublease will be the Rent for the previous year multiplied by 1.03. Annual Rent is due on 30 November in year 1 and 30 September in each subsequent year of the Term of the Sublease.

## *Central Victoria*

101. A Grower will pay the Project Manager Prepaid Rent of \$178.64 in respect of years 1 to 10 of the Project. Prepaid Rent is payable on or before 30 June 2010. A Grower will pay Annual Rent for years 1 to 10 of the project at \$57.75 per annum Indexed. The Annual Rent for year 11 is \$98.55. The Annual Rent for years 12 to the final year of the Term of the Sublease will be the Rent for the previous year multiplied by 1.03. Annual Rent is due on 30 November in year 1 and 30 September in each subsequent year of the Term of the Sublease.

102. The Rent is payable under the terms of the Sub-lease agreements which will commence on or after the execution of the respective head lease held by WABG. WABG will refund any Rent, if the Grower fails to enter into a Sub-Lease on or before 30 June 2011.

103. A merchant fee for the use of a credit or similar card to pay the fees under the Project may also be incurred.

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**Commissioner of Taxation**

16 June 2010

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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.*

### Structure of the Project

104. In return for payment of the Establishment Fee, Annual Fees and required under the Project Management Contracts and Sub-leases during the term of the Project, Growers will hold a 'forestry interest' in a 'forestry managed investment scheme'. The Project qualifies as a 'forestry managed investment scheme' because its purpose is for 'establishing and tending trees for felling in Australia' (see subsection 394-15(1)).

105. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Grower a right to a share in the proceeds of the harvest and share of the proceeds of any thinning of the Trees grown on the Project Land. That share of proceeds is determined using the number of 'forestry interests' held by a Grower as a proportion of all 'forestry interests' held by 'participants'<sup>15</sup> in the Project.

### Is the Grower carrying on a business?

106. 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?

107. 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).

108. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 3 to 7 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving forestry activities.

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<sup>15</sup> The term 'participant' is defined in subsection 394-15(4).

## **Allowable deductions**

### ***Sections 8-5, 12-5, 394-10 and 394-20***

109. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a 'forestry managed investment scheme' that meet the requirements of subsection 394-10(1).

## **The '70% DFE rule'**

### ***Paragraph 394-10(1)(c) and section 394-35***

110. The threshold test for Growers in the Project to be entitled to deductions under subsection 394-10(1) is the '70% DFE rule' in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that on 30 June 2010, the amount of 'direct forestry expenditure'<sup>16</sup> under the scheme will be no less than 70% of the amount of payments under the scheme.<sup>17</sup>

111. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that WABG, as 'forestry manager'<sup>18</sup> of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

112. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (that is, initial contribution, annual contributions and expenses that all current and future 'participants' in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

113. Both of the above amounts are determined as at 30 June 2010 taking into account:

- the timing requirements in subsections 394-35(4) and (5);
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6));
- the discount rate in subsection 394-35(7); and
- the market value rule in subsection 394-35(8).

114. Applying all of these requirements to the information provided by the Responsible Entity of the Project the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2010.

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<sup>16</sup> See section 394-45.

<sup>17</sup> See subsection 394-35(1) and section 394-40.

<sup>18</sup> Defined in section 394-15(2).

***The other elements for deductibility under subsection 394-10(1)***

115. The requirement of paragraph 394-10(1)(d) that Growers in the Project not have day to day control over the operation of the Project is clear from the Project Agreements as are the alternative elements of paragraph 394-10(1)(e) relating to the number of Growers in the scheme and the Responsible Entity's role in other managed investment schemes.

116. The final requirement for deductibility requires all the Project Trees to be established within 18 months of 30 June 2010 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by the Responsible Entity indicates that all the Trees required to be established under the scheme will be planted on the Project Land no later than 31 December 2011.

117. Accordingly, subject to the qualifications set out below, amounts paid by Growers to WABG in relation their 'forestry interests' satisfy all requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

118. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

119. Where a Grower does not fully pay an amount, or the amount is not fully paid on their behalf in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the 'forestry manager' on or before 30 June in an income year.

***Loss of deductions previously allowed under subsection 394-10(1)***

120. Two situations may lead to a loss of deductions previously allowed to Growers.

121. The first of these situations will occur if WABG fails to establish the Trees on the Project Land within 18 months of the end of the income year in which the first Grower is accepted into the Project where this occurs, the Responsible Entity is required to notify the Commissioner within 3 months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

122. The second situation where a Grower may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within 4 years from 30 June of the income year they paid an amount under the scheme, for example, the Establishment Fee (see subsection 394-10(5)).

123. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower within 2 years of the relevant 'CGT event' happening. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6) of the ITAA 1997).

124. Where a 'CGT event' happens to the 'forestry interest' of a Grower within 4 years, the market value of the forestry interest at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event' is still included in the assessable income of the Grower by section 394-25. The amount must be included in assessable income even where an amendment has disallowed or may disallow the deductions previously allowed under section 394-10.

### **Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'**

#### ***Sections 6-10, 10-5 and 394-25***

125. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of 'initial participants' of a 'forestry managed investment scheme' by subsection 394-25(2).

#### ***Subsection 394-25(2)***

126. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)<sup>19</sup> happens to a 'forestry interest' held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted an amount under section 394-10; or
- the Grower would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 32 to 34 and paragraphs 121 to 125 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

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<sup>19</sup> A thinning under this scheme is not a 'CGT event'.

**Market value rule applies to 'CGT events'**

127. If, as a result of the 'CGT event' the Grower either:

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

then the market value of the 'forestry interest' at the time of the event, or the reduction of the market value of the 'forestry interest' as a result of the event, is included in the assessable income of the Grower in the income year in which the 'CGT event' happens (subsection 394-25(2)). A market value rule applies rather than the amount of money actually received from the 'CGT event' (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

128. The market value amount included in the assessable income of a Grower is the value of the 'forestry interest' just before the 'CGT event', or where the Grower continues to hold their interest after the event, the amount by which the market value of the 'forestry interest' is reduced as a result of the 'CGT event' (subsection 394-25(2)).

129. Section 394-25 will apply where the 'forestry interest' is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the 'forestry interest' or from a full or partial clear-fell harvest of the Trees grown under the Project.

**Amounts received by Growers for Carbon and other environmental credits and refund of fees****Section 6-5**

130. Carbon and/or other environmental credits or amounts from the refund of fees under this Project, received by a Grower do not arise as a result of a 'CGT event' and are not otherwise assessable under Division 394. The receipt of these amount(s) is a distribution that arises from a Grower holding a 'forestry interest' in the Project. It is an item of ordinary income and is assessable under section 6-5 in the year in which it is derived.

**Amounts received by Growers where the Project trees are thinned****Section 6-5**

131. Section 394-25 specifically excludes from the operation of Division 394 a 'CGT event' that happens in respect of a thinning (see paragraph 394-25(1)(c)).

132. Thinning amounts received by a Grower in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under Division 394. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Grower holding a 'forestry interest' in the Project. It is an item of ordinary income and is assessable under section 6-5 in the year in which it is derived.

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

133. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the 2009-10 income year who carries on a business of afforestation individually is expected to incur losses from their participation in the Project which will be subject to Division 35. These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

134. The expectations to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

135. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion when exercising the discretion.

136. Where a Grower with income for non-commercial Loss (NCL) purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of the nature that the business activity of the Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2) and (2C)).

137. Where a Grower with income for NCL purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C))

138. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

139. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraphs 40 or 41 of this Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

### **Section 82KL – recouped expenditure**

140. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefit(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 deductions otherwise allowable under section 8-1 and section 8-5 of the ITAA 1997.

## **Part IVA – general tax avoidance provisions**

141. 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).

142. The Australia Wide Timbers Project will be a 'scheme' and a Grower will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions for the amounts detailed at paragraphs 27 and 34 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.

143. Growers to whom this Ruling applies will derive assessable income from holding or disposing of their 'forestry interest' in the Project. 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 Product 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 Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## **Appendix 2 – Detailed contents list**

144. 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	3
Superannuation Industry (Supervision) Act 1993	8
Qualifications	9
<b>Date of effect</b>	<b>12</b>
Changes in the law	14
Note to promoters and advisers	16
Goods and Services Tax	17
<b>Ruling</b>	<b>18</b>
Structure of the Project	18
Carrying on a business	21
Concessions for ‘small business entities’	22
The ‘70% DFE rule’ and the establishment of the Trees	24
<i>Section 394-35 and subsection 394-10(4)</i>	24
Allowable deductions	27
<i>Sections 8-5, 394-10, 394-20 and Division 27</i>	27
‘CGT event’ within 4 years for Growers who are ‘initial participants’	32
<i>Subsections 394-10(5) and 394-10(6)</i>	32
Assessable income, ‘CGT events’ and the ‘forestry interests’ of Growers who are ‘initial participants’	35
<i>Sections 6-10, 17-5 and 394-25</i>	35
Amounts received by Growers where the Project trees are thinned	38
<i>Section 6-5</i>	38
Amounts received by Growers for Carbon and other environmental credits and refund of fees	39
<i>Section 6-5</i>	39
Division 35 – deferral of losses from non-commercial business activities	40
<i>Section 35-55 – annual exercise of Commissioner’s discretion</i>	40
Prepayment provisions, non commercial losses and anti-avoidance provisions	44

<i>Sections 82KL and Part IVA</i>	44
<b>Scheme</b>	<b>45</b>
Overview	48
Constitution	59
Compliance Plan	65
Scheme Property Custody Agreement	66
Head Leases	67
Sub-leases	70
Agreements to Sub-lease	76
Project Management Contracts	78
Plantation Services Agreement	85
Wood Purchase Agreement (Western Australia) and Wood Purchase Agreement (Central Victoria)	86
Wood Harvest Agreement (Green Triangle)	87
Pooling of Wood and Grower's entitlement to a distribution	88
Fees	89
<i>Fees payable under the Project Management Contracts</i>	90
<i>Establishment Fee</i>	92
<i>Management Fees</i>	93
<i>Harvest Expenses &amp; Supervision Fee</i>	96
<i>Unforeseen Expenses</i>	97
<i>Incentive Fee</i>	98
<i>Fees payable under the Sub-leases</i>	99
<i>Western Australia</i>	99
<i>Green Triangle</i>	100
<i>Central Victoria</i>	101
<b>Appendix 1 – Explanation</b>	<b>104</b>
Structure of the Project	104
Is the Grower carrying on a business?	106
Allowable deductions	109
<i>Sections 8-5, 12-5, 394-10 and 394-20</i>	109
The '70% DFE rule'	110
<i>Paragraph 394-10(1)(c) and section 394-35</i>	110
<i>The other elements for deductibility under subsection 394-10(1)</i>	115

<i>Loss of deductions previously allowed under subsection 394-10(1)</i>	120
Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'	125
<i>Sections 6-10, 10-5 and 394-25</i>	125
<i>Subsection 394-25(2)</i>	126
Market value rule applies to 'CGT events'	127
Amounts received by Growers for Carbon and other environmental credits and refund of fees	130
<i>Section 6-5</i>	130
Amounts received by Growers where the Project trees are thinned	131
<i>Section 6-5</i>	131
Section 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion	133
Section 82KL – recouped expenditure	140
Part IVA – general tax avoidance provisions	141
<b>Appendix 2 – Detailed contents list</b>	<b>144</b>

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TR 97/11; TR 2007/6

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- 4 year holding period
- 70 per cent DFE rule
- carrying on a business
- DFE
- direct forestry expenditure
- forestry interest
- forestry MIS
- interest expenses
- managed investment schemes
- market value substitution rule
- non commercial losses
- payments under the scheme
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- product rulings
- reasonable expectation
- tax avoidance
- taxation administration

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