



PR 2013/17 - Income tax: AgriWealth 2014 Softwood Timber Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *27 November 2013*



Product Ruling

Income tax: AgriWealth 2014 Softwood Timber Project

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! This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, 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

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

This Product Ruling has been given on the basis that the entity 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 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.
2. In this Product Ruling this scheme is referred to as the AgriWealth 2014 Softwood Timber Project or simply as 'the scheme' or 'the Project'.
3. This Ruling does not rule on the tax consequences of investing in the Land Trust described in the Information Memorandum (IM) issued for the Project.
4. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936) and terms defined in the Project agreements have been capitalised.

Class of entities

5. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as 'Growers'.
6. 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.
7. A Grower will have executed the relevant Project agreements set out in paragraph 51 of this Ruling by 30 June 2014, except the Timberlot Agreement which must be executed by 30 September 2015, and will hold a 'forestry interest' in the Project as defined in subsection 394-15(3). In this Ruling, each of the Growers will be wholesale clients for the purpose of the *Corporations Act 2001*.

8. 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:

- are accepted into this Project before the date of this Ruling or after 30 June 2014;
- participate in the scheme through offers made other than through the IM or who enter into an undisclosed arrangement with:
 - the promoter or their associate; or
 - an independent adviser, that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest proceeds) in any way;
- whose Application Price, including all loan money, is not paid in full to AgriWealth Capital Limited by 30 June 2014, either by the Grower, and/or on the Grower's behalf by a lending institution; or
- who enter into a finance arrangement with AgriWealth Capital Limited ('the Manager') other than the finance arrangement described at paragraphs 100 to 103 of this Ruling.

Superannuation Industry (Supervision) Act 1993

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). 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.

Qualifications

10. 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 51 to 104 of this Ruling.

11. 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.

Date of effect

12. This Product Ruling applies prospectively from 23 October 2013, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 23 October 2013 until 30 June 2014, 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 the income year in which the scheme is terminated in accordance with the Tree Constitution, being its period of application.

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 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.

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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Goods and Services Tax

17. All fees and expenditure referred to in this Product Ruling exclude the Goods and Services Tax (GST) where applicable. The transactions in respect of this scheme may, where appropriate, have GST implications.

Ruling

Structure of the Project

18. The AgriWealth 2014 Softwood Timber Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of Radiata pine trees (Trees) for felling in Australia.

19. However, the Put Option, the associated Put Option Fee and investment in Units in the associated Land Trust do not form part of the scheme to which subsection 394-15(1) applies.

20. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for Growers (as described in paragraphs 6 to 8 of this Ruling) who are accepted to participate in the 'forestry managed investment scheme' described at paragraphs 51 to 104 of this Ruling.

21. An entity that takes part in the Project as a 'subsequent participant'¹ 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 an enterprise

22. Although not relevant for the purposes of Division 394, Growers who enter into the arrangement described in this Ruling will be carrying on an enterprise for the purposes of subsection 9-20(1) of the *A New Tax (Goods and Services Tax) Act 1999* (GST Act) subject to the exclusions listed in subsection 9-20(2) of the GST Act.

Carrying on a business

23. Although not relevant for the purposes of Division 394, a Grower who will stay in the Project until it is completed and does not obtain finance other than the finance arrangement described at paragraphs 100 to 103 of this Ruling will be considered to be carrying on a business of primary production for income tax purposes. Such Growers, who are individuals, alone or in partnership, will be subject to the operation of Division 35 (see paragraphs 46 to 49 and 149 to 155 of this Ruling).

24. Growers who enter into finance arrangements other than the arrangement described in paragraphs 100 to 103 of this Ruling may request a private ruling on whether they will be carrying on a business of primary production for income tax purposes.

¹ See section 394-30

Concessions for ‘small business entities’²

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

26. 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.

The ‘70% DFE rule’ and the establishment of the Trees

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

27. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by AgriWealth Capital Limited (‘the Manager’). The Commissioner has decided that on 30 June 2014 it will be reasonable to expect that the ‘70% DFE rule’³ will be satisfied. The Australian Taxation Office (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’.

28. This Ruling will only apply if the Manager 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’⁴ in the Project is accepted.⁵ For this Project, the Trees must be established by 31 December 2015.

29. The Trees will be established when they are planted on the land acquired for the purposes of the Project (Plantation Land) at an average rate of 850 stems per Plantable Hectare. The Manager is required by section 394-10 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) to notify the ATO if the Trees are not established by 31 December 2015.

² The meaning of ‘small business entity’ is explained in section 328-10

³ The ‘70% DFE rule’ is set out in section 394-35

⁴ The term ‘participant’ is defined in subsection 394-15(3)

⁵ See paragraph 394-10(1)(f) and subsection 394-10(4)

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

30. A Grower can claim deductions for the amounts shown in the Table below when they are paid to the Manager (sections 8-5 and 394-10).

Fee	Amount	Year(s) deductible
Establishment Services Fee	\$28,500	Income year ending 30 June 2014
Insurance during the first seven (7) years of the Project	Determined annually	When paid out of the Sinking Fund
Council rates and other applicable statutory charges	Determined annually	When paid out of the Sinking Fund

Note: A deduction will not be available to Growers until the Manager pays for the insurance and council rates and other applicable statutory charges from the Sinking Fund. The Manager will advise Growers of the amounts paid from the Sinking Fund and each Grower's proportion.

31. The deductibility of these amounts remains subject to:

- all the Trees in the Project being established by 31 December 2015 (see paragraph 28 of this Ruling); and
- the requirement that a capital gains tax (CGT) event does not happen in relation to a Grower's 'forestry interest' before 1 July 2018 (see paragraphs 35 to 38 of this Ruling).

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

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

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

‘CGT event’ within four years for Growers who are ‘initial participants’

Subsections 394-10(5), 394-10(5A) and 394-10(6)

35. Deductions are not allowable under Division 394 where a ‘CGT event’ happens to a Grower’s ‘forestry interest’ before 1 July 2018 (subsection 394-10(5)).

36. 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)). The Commissioner’s power to amend in these circumstances applies despite section 170 of the ITAA 1936.

37. Growers whose deductions are disallowed because of subsection 394-10(5) are still required to include in their assessable income either the market value of their ‘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’, in the income year the ‘CGT event’ happens (section 394-25).

38. However, deductions will not be affected where the ‘CGT event’ happens because of circumstances outside the Grower’s control and the Grower could not reasonably have foreseen the ‘CGT event’ happening when they acquired the ‘forestry interest’ (subsection 394-10(5A)).

Put Option Fee

39. The Put Option Fee is capital in nature and not deductible under section 8-1 or section 394-10. The Put Option Fee forms part of the first element of the cost base for CGT purposes (subsection 110-25(2)). The Put Option Fee does not form part of the ‘forestry managed investment scheme’ for the purposes of subsection 394-15(1).

Assessable income, ‘CGT events’ and the ‘forestry interests’ of Growers who are ‘initial participants’

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

40. Where a ‘CGT event’ other than a ‘CGT event’ in respect of a Thinning⁶ (see paragraphs 147 to 148 of this Ruling) happens to a Grower’s ‘forestry interest’, the market value or, decrease in market value, of the ‘forestry interest’ is included in the Grower’s assessable income in the income year the ‘CGT event’ happens (sections 6-10 and 394-25) less any GST payable on those proceeds (section 17-5).

⁶ 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

41. '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 a Grower's 'forestry interest'; or
- any other 'CGT event' that results in a reduction of the market value of a Grower's 'forestry interest'.

Exercise of Put Option by the Grower

42. The exercise of the 100% Put Option is a 'CGT event' that will constitute the sale of the Grower's 'forestry interest' to the Manager. The Put Option grants the Grower an option to require the Manager to purchase the whole of the Put Option Property from the Grower for the Sale Consideration. The Sale Consideration paid by the Manager to the Grower will be equal to the market value of the Put Option Property ('forestry interest') at the time the Put Option is exercised. If the Grower exercises the Put Option the Grower will include the market value of their 'forestry interest' in their assessable income in the income year the 'CGT event' happens (sections 6-10 and 394-25).

Amounts received by Growers as Ordinary Income

43. The Timberlots will be thinned twice during the term of the Project when the Trees are around age 12 and 20 years. An amount received or entitled to be received by a Grower in respect of a Thinning 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 an incident of a Grower holding a 'forestry interest' in the Project. Growers should include the amount received from a Thinning in their assessable income in the income year the amount is derived (section 6-5) less any GST payable on those proceeds (section 17-5).

44. An amount received or entitled to be received by a Grower in respect of the sale of Carbon Sequestration Rights and Salinity Credits, insurance proceeds or interest from the Sinking Fund also constitutes a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers should include such amounts in their assessable income in the income year those amounts are derived (section 6-5) less any GST payable on those proceeds (section 17-5).

45. Where a Grower who is carrying on a business is entitled to receive, and receives, a rebate, Referral Fee or similar payment from the Manager, Distributor or any other entity, or directs the payment of such an amount to be made to another entity, this amount will be ordinary assessable income of the business under section 6-5. Growers should include such amounts in their assessable income in the income year they are received, or entitled to be received (section 6-5) less any GST payable on that rebate (section 17-5).

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

Section 35-55 – annual exercise of Commissioner’s discretion

46. For each of the income years from 2013-14 to 2038-39 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;
- the business activity that is carried on is not materially different to the scheme described in this Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

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

48. 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 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.

49. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner’s discretion in subsection 35-55(1) for any income year.

Prepayment provisions and anti-avoidance provisions***Section 82KL and Part IVA of the ITAA 1936***

50. Where a Grower is accepted to participate in the Project set out at paragraphs 51 to 104 of this Ruling, the following provisions of the ITAA 1936 have application as indicated:

- sections 82KZL to 82KZMF of the ITAA 1936 do not apply to affect the timing of amounts deductible under section 394-10;
- section 82KL of the ITAA 1936 does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA of the ITAA 1936 will not apply to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

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

- application for a Product Ruling as constituted by documents provided on 1 July 2013 and additional correspondence, including emails and documents provided by the Product Ruling applicant between 1 July 2013 and 8 July 2013;
- Information Memorandum of the AgriWealth 2014 Softwood Timber Project, received on 1 July 2013;
- Application form for the AgriWealth 2014 Softwood Timber Project, received on 1 July 2013;
- Tree Constitution of the AgriWealth 2014 Softwood Timber Project, received on 1 July 2013;
- **Forestry Management Agreement** of the AgriWealth 2014 Softwood Timber Project, received on 1 July 2013;
- AgriWealth Management Agreement of the AgriWealth 2014 Softwood Timber Project between the Manager and AgriWealth Pty Ltd (AgriWealth), received on 1 July 2013;
- Forestry Management Contract of the AgriWealth 2014 Softwood Timber Project between AgriWealth and the Independent Forestry Contractors received on 1 July 2013;
- **Timberlot Agreement** of the AgriWealth 2014 Softwood Timber Project between the Grantor, the Manager and the Grower, received on 1 July 2013;

- **Put Option Deed** of the AgriWealth 2014 Softwood Timber Project between the Manager and the Grower, received on 1 July 2013;
- Rooding Harvest, Haulage and Pruning Trust of the AgriWealth 2014 Softwood Timber Project between the Settlor and the Trustee, received on 1 July 2013;
- **Deed of Novation** of the AgriWealth 2014 Softwood Timber Project between AgriWealth and the Trustee of the Rooding Harvest, Haulage and Pruning Trust and Growers (Continuing Parties), received on 1 July 2013;
- Distribution Agreement in relation to the AgriWealth 2014 Softwood Timber Project between the Manager and the Distributors, received on 1 July 2013;
- Land Trust Constitution of the AgriWealth 2014 Softwood Timber Project between the Trustee and AgriWealth, received on 1 July 2013;
- **Manager Loan Agreement – 1 Year Interest Free** in relation to the AgriWealth 2014 Softwood Timber Project between the Manager, the Grower and the Guarantor, received on 1 July 2013; and
- Definitions and Interpretations Deed of the AgriWealth 2014 Softwood Timber Project, received on 1 July 2013.

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

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

53. In accordance with the above documents, a Grower must be a wholesale client. **This Ruling does not apply** unless the Grower is a wholesale client as defined in section 761G of the *Corporations Act 2001*. The meaning of wholesale client is explained in the IM for this Project.

54. 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 below.

Overview

55. The main features of the AgriWealth 2014 Softwood Timber Project are as follows:

Location	Braidwood and Southern Tablelands (New South Wales), Tallangatta and Upper Murray (Victoria) and such other land as required for the Project satisfying the Land Selection Protocols
Species to be planted under the scheme	Radiata pine (<i>pinus radiata</i>)
Term of the Project	26 years
Date all Trees are required to be planted on scheme land	31 December 2015
Number of Trees per hectare	Minimum of 850
Number of hectares offered for cultivation	Initially, up to 1,000 subject to the Manager deciding to either increase or decrease the project size
Size of each 'forestry interest'	0.5 hectares
Minimum allocation of 'forestry interests' per Grower	One
Initial cost	\$28,500 Establishment Services Fee \$122 Sinking Fund Unit subscription
Other costs	<ul style="list-style-type: none"> Insurance after the first seven (7) years of the Project; Rehabilitation costs in excess of those included at A-21 Schedule 4 of the Definitions and Interpretation Deed; \$183 Sinking Fund Unit subscription payable on the Interim Payment Date after first Thinning; and Additional amounts called upon by the Manager to cover any shortfall in the Sinking Fund.

56. The Project will be an unregistered managed investment scheme under the *Corporations Act 2001*. AgriWealth Capital Limited will be the Manager for the Project.

57. The Project will involve the establishment and tending of *pinus radiata* trees for felling in Australia over a 26 year period. However, the Project may be extended for approximately 5 years.

58. An offer to participate in the Project will be made through an IM. The offer under the IM is initially for up to 1,000 hectares, which equates to 2,000 Timberlots of 0.5 hectares. However, the Manager may increase or decrease the size of the Project. **The IM for the Project also contains an offer to invest in Units in a Land Trust. This Ruling does not address the tax consequences of an investment in the Land Trust.**

59. An entity that participates in the Project as a Grower will do so by acquiring a 'forestry interest', which will consist of a minimum of one Timberlot, by 30 June 2014.

60. To acquire a 'forestry interest' each Applicant must complete the 2014 Application Form attached to the IM and pay the Application Price in full. Under the Tree Constitution, the Manager is appointed as agent, attorney and/or trustee in relation to the Project. Upon acceptance of an Application, the Manager will be authorised to execute a Timberlot Agreement, Put Option Deed, Deed of Novation, Definitions and Interpretations Deed and Forestry Management Agreement on behalf of the Grower.

61. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Put Option Deed, Deed of Novation, Definitions and Interpretations Deed and Forestry Management Agreement (Project Documents) by 30 June 2014 and the Timberlot Agreement by 30 September 2015 will become Growers in the Project.

62. The Manager will source land required for the Project, which must comply with the Project's Land Selection Policy and be acquired by the Manager by 30 September 2015. The Project Land will be divided into 0.5 hectare lots and licensed to the Growers via the Timberlot Agreements.

Tree Constitution

63. The Tree Constitution establishes the Project and operates as a deed binding all Growers and the Manager (clause 1.3). The Tree Constitution sets out the terms and conditions under which the Manager agrees to act in that capacity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Tree Constitution by virtue of their participation in the Project.

64. The Application Price in respect of a Timberlot comprises the Establishment Services Fee, Put Option Fee and Sinking Fund Unit subscription (clause 2.3). Until the Grower's Application is accepted, the Manager holds the Application Price in the Application bank account in its own name (clause 3.4).

65. Once the Manager has accepted the Application and each of the Project Documents have been executed, the Application Price will be dealt with as follows:

- the amount of the Establishment Services Fee and Put Option Fee will be transferred to the Manager on its own behalf; and
- the amount of the Sinking Fund Unit subscription will be transferred into a separate bank account in the name of the Manager as trustee of the Sinking Fund (clauses 3.4.2 and 4.2).

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

- the nature of Grower's interest in the Project (clause 1.2);
- other amounts payable by Growers under the Agreements (clause 7);
- the keeping of an up-to-date register of all deposits (clause 9) and an up-to-date register of all Growers (clause 17);
- the duties, powers and obligations of the Manager (clause 10);
- change of Manager (clause 13);
- the Manager's entitlement to fees and expenses (clause 23);
- termination of the Project (clauses 25 and 26); and
- distribution of the Harvest Proceeds (clause 26.5).

Forestry Management Agreement

67. Under the Forestry Management Agreement the Grower engages the Manager as an independent contractor to perform the Establishment Services (clause 1.1) and acknowledges that this engagement is not exclusive to the Project (clause 1.2).

68. The Establishment Services to be provided by the Manager (clause 4) are listed in Item A of Schedule 4 of the Definitions and Interpretations Deed. Services which are not provided by the Manager, but which may be able to be provided by separate agreement, are listed at Item B of Schedule 4 of the Definitions and Interpretations Deed. The Manager intends to sub-contract the Establishment Services to AgriWealth.

69. The Establishment Services include:

- site preparation, application of fertiliser, planting and replanting areas, to meet a minimum stocking rate of 850 stems per Plantable Hectare;

- managing and maintaining the Plantation;
- arranging for the Harvest of Plantation Produce at First and Second Thinnings and Final Harvest;
- paying the Roding, Harvest and Haulage Costs and Pruning Costs; and
- Rehabilitation of the Plantation Land after Final Harvest.

70. In consideration of the Manager agreeing to carry out the Establishment Services, the Grower agrees to pay the Manager the Establishment Services Fees set out in Part 1 of the Definitions and Interpretation Deed (clause 8.1). The Establishment Services Fees will be the only fees paid by the Grower to the Manager in return for the Establishment Services (clause 8.2).

71. The Manager will act as agent of the Grower in relation to:

- insurance for the first seven (7) years of the Project (clause 10.2); and
- council rates and other applicable statutory charges in relation to the Grower's Forestry Right Land (clause 8.13).

The Manager will establish a Sinking Fund for the purposes of meeting these costs. The Grower agrees to pay the Manager the Sinking Fund Unit subscription applicable to their Forestry Right Land and additional amounts called upon by the Manager to cover any shortfall in the Sinking Fund (clause 8.14 and Part 1 of the Definitions and Interpretations Deed).

72. The Grower is entitled to all Carbon Sequestration Rights, Carbon Sequestration Benefits, Salinity Credits and Salinity Credit Benefits produced by or derived from their Forestry Rights and related Plantation Produce. These Rights and Benefits are calculated by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers (clause 5).

73. The Grower will own the Trees and Timber on the Planted Land and all of the Plantation Produce for that land (clause 6.1). The Grower will also be entitled to all proceeds from the sales of Plantation Produce gross of all costs of Harvest, transportation and other associated costs for a Thinning or Final Harvest (clause 6.2).

74. The Manager will notify the Grower when the Planted Land is ready for any Thinning or Final Harvest (clause 6.4) and will act as agent for the Grower to market the Plantation Produce (clause 6.7). After deducting certain amounts owed to the Manager the Grower will be entitled to a pro rata sum referable to the Grower's entitlement to the Plantation Produce (clause 6.12). The Manager will provide the Grower with a reconciliation of the amounts owed as soon as reasonably practicable after the sale of the Plantation Produce (clause 6.13) and distribute the proceeds of sale within 30 days after receiving the last receipt attributable to the relevant Harvest activity (clause 6.14).

AgriWealth Management Agreement

75. Under this Agreement the Manager engages AgriWealth in a non-exclusive arrangement as an independent contractor to provide the Forestry Services to the Manager for the purposes of establishing and managing the Growers' Plantations (clause 1.1).

76. AgriWealth intends to sub-contract the Forestry Services to Independent Contractors (recital E).

77. The Manager and Growers have certain rights or obligations under the Timberlot Agreement and Forestry Management Agreement. Under the AgriWealth Management Agreement, AgriWealth will have the right to carry out these rights or obligations on their behalf (clause 2.4).

Forestry Management Contracts

78. In respect of each Plantation AgriWealth will engage Independent Contractors in a non-exclusive arrangement to perform the Forestry Services as described in Schedule 1 and as a disclosed agent to perform the Agency Services in Schedule 3 (clauses 3.1 and 3.2).

79. The Contracts commence on the date the Contracts are executed and will terminate upon completion of all Forestry Services and final settlement of accounts between the Parties after Final Harvest of all Plantations unless terminated earlier as provided in the Contracts. However, the Contracts should not continue after 30 June 2047 (clause 4.1).

80. The Contracts shall apply only to the Plantation Establishment and Management Plans agreed by AgriWealth and the Independent Contractors for the Plantations intended to be established during the 2015 calendar year (clause 4.2).

Timberlot Agreement

81. Under the Timberlot Agreement, the Manager grants the Grower an interest in and a forestry right over the Forestry Right Land.
82. The Grower must punctually pay all rates, taxes and other charges levied on the Forestry Right Land (clause 6.7).
83. Under the Forestry Right (Timber) and Forestry Right (Carbon Sequestration) the Grower is granted:
- the right to enter the Forestry Right Land;
 - the right to establish, maintain and Harvest a crop of Trees on the Forestry Right Land;
 - the right to construct and use such buildings, works and facilities as may be necessary or convenient to enable the Grower to establish, maintain and Harvest a crop of Trees on the Forestry Right Land; and
 - the right to any Salinity Credits and Carbon Sequestration Rights and any benefit to be derived from such Salinity Credits and Carbon Rights that may attach to the Forestry Right Land.
84. The Forestry Right shall commence on the date of execution of the Timberlot Agreement and continue for a maximum term of 31 years.

Put Option Deed

85. The Manager will grant Growers a Put Option in respect of their Timberlot(s) (the Put Option Property). Growers must pay \$10 per Timberlot to the Manager on or before 30 June 2014 as consideration for this right. The Put Option (if exercised) will require the Manager to purchase the Put Option Property for the Sale Consideration, being the market value of the Put Option Property at the time of exercise of the option by the Grower. The Put Option Deed can be exercised per Timberlot by the Grower between 1 July 2018 and 16 July 2021. Clause 4.1 of the Put Option Deed allows the Manager to set off any amount payable by the Grower to the Manager against the Sale Consideration.

Deed of Novation and Roding Harvest Haulage and Pruning Trust

86. Under the Deed of Novation, AgriWealth will novate an amount of not less than \$9,877.97 to the Trustee of the AgriWealth 2014 Softwood Timber Roding Harvest Haulage and Pruning Trust ('Roding Trust') by 30 November 2014. The Trustee agrees to apply the amount on behalf of Growers to pay for Roding Harvest and Haulage costs that apply to any Thinning and Final Harvest and Pruning Costs as set out in the Forestry Management Agreement (clause 6.6.11 of the Forestry Management Agreement).

87. In accordance with the Deed of Novation, the Grower agrees that AgriWealth is no longer obligated to meet the Roding Harvest and Haulage Costs and Pruning Costs and is replaced by the Trustee of the Roding Trust to fulfil all obligations of clause 6.6 of the Forestry Management Agreement.

88. The Roding Trust has a vesting date of 30 June 2094 or a date specified by the Trustee under the vesting substitution provisions. Any money remaining in the Roding Trust at the vesting date will be distributed to the beneficiaries as identified at Schedule 1 of the Trust Deed.

Pooling of Timber and entitlement to Harvest Proceeds

89. The Forestry Management Agreement sets out provisions relating to the Grower's entitlement to Harvest Proceeds (clause 6).

90. In accordance with the Tree Constitution, the Grower authorises the Manager to collect for distribution to the Grower the Harvest Proceeds from sale of the Plantation Produce to which the Grower is entitled (clause 6.3 of the Forestry Management Agreement).

91. The Harvest Proceeds to which the Grower is entitled will be calculated by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers after deducting the Manager's reasonable estimate of all moneys owing by the Grower to the Manager or AgriWealth, including Rehabilitation expenses (in excess of those included at Item A-21 of Schedule 4 of the Definitions and Interpretations Deed) and any other costs for which the Grower is or will be liable in terms of the Forestry Management Agreement or the Timberlot Agreement. These costs will be calculated pro rata by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers.

Fees

Establishment Services Fee

92. Under the terms of the Forestry Management Agreement, the Establishment Services Fee is \$28,500 per Timberlot and is payable by Growers when the Application Form is lodged.

Sinking Fund Unit subscription

93. Under the terms of the Forestry Management Agreement, the Sinking Fund Unit subscription is comprised of:

- \$122 per Timberlot payable upon Application; and
- \$183 per Timberlot payable by Growers after First Thinning on the Interim Payment Date.

Additional Sinking Fund Payments may be called upon by the Manager to cover insurance for the first seven (7) years of the Project and council rates and other applicable charges for the life of the Project where there is a shortfall in the Sinking Fund.

Put Option Fee

94. Under the terms of the Put Option Deed, the Put Option Fee is \$10 per Timberlot and is payable by Growers upon Application.

Roading, Harvest, Haulage and Pruning Costs

95. The Manager is required to pay any Roding Harvest and Haulage Costs and Pruning Costs in relation to each Grower's Forestry Right Land. The Manager will satisfy this obligation by paying the Novation Amount under the Deed of Novation to the Roding Trust.

Rehabilitation Costs

96. Growers will be required to pay Rehabilitation Costs in excess of those included at Item A-21 of Schedule 4 of the Definitions and Interpretations Deed.

Finance

97. A Grower may enter into a finance arrangement with the Manager or borrow from an independent lender to finance all or part of the cost of their Timberlot.

98. This Product Ruling only covers the finance arrangement set out below. A Grower cannot rely on this Ruling if they enter into a finance arrangement with the Manager that materially differs from that set out in the documentation provided with the application for this Ruling (set out at paragraphs 100 to 103 of this Ruling). A Grower who enters into a finance arrangement not covered by this Ruling may request a private ruling on the deductibility of any interest or borrowing expenses they incur.

99. A Grower cannot rely on any part of this Ruling if the Application Price is not paid in full on or before 30 June 2014 by the Grower or on the Grower's behalf by another entity. Payment in this context is explained in paragraphs 31 to 32 of this Ruling.

Finance offered by the Manager

100. A Grower can finance all or part of the cost of their Application Price by borrowing that amount from the Manager. The finance facility offered by the Manager is a one year interest free loan with terms and conditions as follows:

- amounts up to 100% of the Application Price;
- full recourse;
- no loan application fees;
- Growers will make repayments throughout the term of the loan;
- 100% of the Secured Money must be repaid by 30 June 2015; and
- If an Event of Default occurs, interest will accrue at the Specified Interest Rate.

101. Subject to the Manager accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement and the IM.

102. As security, Growers will charge all of their interests in the Project to the Manager. The charge will include the Put Option Sale Consideration.

103. Loans to Growers will be made from the Manager's own cash resources or from the Manager's credit facilities. The Manager will not use funds it receives from Growers entering the Project that it has previously lent to Growers to fund loans for other Growers to enter the project.

Other qualifications relating to finance

104. 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 principle and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project or the Manager 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.*

Structure of the Project

105. In return for payment of the Establishment Services Fee required under the Forestry Management Agreement, 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)).

106. However, the Put Option Fee and Units in the associated Land Trust do not form part of the scheme for the purposes of subsection 394-15(1) because these fees are not concerned with establishing and tending trees for felling in Australia.

107. Under the Project's Constitution and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Grower a right to a share in the Harvest Proceeds, which includes all gross proceeds for the sale of Plantation Produce for a Thinning or Final Harvest of the Trees grown on the Plantation 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' in the Project (Grower's Proportion).

Is the Grower carrying on an Enterprise?

108. An entity may be registered for GST if it is carrying on an 'enterprise' (section 23-10 of the GST Act).

109. The term 'enterprise' is defined in section 9-20 of the GST Act and includes an activity, or series of activities, done in the form of a business (paragraph 9-20(1)(a) of the GST Act). The use of the phrase 'in the form of' has been interpreted to indicate a wider meaning than the word 'business' in isolation.

110. However, subsection 9-20(2) provides that the term 'enterprise' does not include an activity, or series of activities, done in the form of a business (paragraph 9-20(1)(a) of the GST Act). The use of the phrase 'in the form of' has been interpreted to indicate a wider meaning than the word 'business' in isolation.

111. However, subsection 9-20(2) provides that the term 'enterprise' does not include an activity, or series of activities, done by an individual or partnership without a reasonable expectation of profit or gain.

112. *Miscellaneous Tax Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purpose of entitlement to an Australian Business Number* (MT 2006/1) sets out the Commissioner's views on when an entity is carrying on an enterprise for the purposes of section 9-20 of the GST Act.

113. *ATO Interpretative Decision ATO ID 2010/197 Goods and Services Tax: GST and agricultural managed investment scheme – Investor carrying on an enterprise* considers a managed investment scheme similar to that which is the subject of this Ruling. This decision applies the principles set out in MT 2006/1 to conclude that the 'Grower' in that scheme was carrying on an enterprise for the purpose of section 9-20 of the GST Act.

114. Application of these principles to the arrangement set out in this Ruling leads to the conclusion that a Grower (as described in paragraphs 5 to 8 of this Ruling) will be carrying on an enterprise for the purpose of section 9-20 of the GST Act where there is a reasonable expectation of profit or gain from their participation in the Project.

Is the Grower carrying on a business?

115. 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?*

116. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Product 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).

117. Application of these principles to the arrangement set out in this Ruling leads to the conclusion that Growers who stay in the Project until its completion and do not obtain finance to fund their participation in the Project other than the finance arrangement described at paragraphs 100 to 103 of this Ruling will be carrying on a business of primary production involving afforestation activities.

118. Growers who enter into a finance arrangement other than the arrangement described in paragraphs 100 to 103 of this Ruling are invited to apply for a private ruling on whether they will be considered to be carrying on a business for income tax purposes.

Allowable Deductions***Sections 8-5, 12-5, 394-10 and 394-20***

119. Section 8-5 allows 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***

120. The threshold test for Growers 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 2014 the amount of 'direct forestry expenditure'⁷ under the scheme will be no less than 70% of the amount of payments under the scheme⁸.

121. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that the Manager, as 'forestry manager'⁹ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

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

123. Both of the above amounts are determined as at 30 June 2014 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).

124. Having regard to these requirements and the information provided by the Manager the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2014.

⁷ See section 394-45

⁸ See subsection 394-35(1) and section 394-40

⁹ Defined in section 394-15(2)

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

125. The requirement of paragraph 394-10(1)(d) that Growers 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 Manager's role in other managed investment schemes.

126. The final requirement for deductibility requires all of the Project Trees to be established within 18 months of 30 June 2014 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling indicates that all the Trees required to be established under the scheme will be planted on the Plantation Land by 31 December 2015.

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

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

129. 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 only deductible to the extent that it has been paid. The unpaid balance is then deductible in the year or years 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' by 30 June in an income year.

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

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

131. The first of these situations will occur if the Manager fails to establish the Trees on the Plantation Land within 18 months. Where this occurs the Manager is required to notify the Commissioner within three months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

132. The second situation in which a Grower may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within four years from 30 June of the income year they paid an amount under the scheme (see subsection 394-10(5)).

133. For the purposes of this provision, the Commissioner is able to amend a Grower's assessment within two 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).

134. Where a 'CGT event' happens to a Grower's 'forestry interest' within four 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 Grower's assessable income 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.

135. However, subsection 394-10(5) will have no application where the 'CGT event' happens because of circumstances outside the Grower's control and the Grower could not reasonably have foreseen the 'CGT event' happening when they acquired the 'forestry interest' (subsection 394-10(5A)).

Prepayment provisions

Sections 82KZL to 82KZMF

136. 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 that agreement that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and 82KZMF of the ITAA 1936.

137. However, subsection 394-10(7) specifically provides that sections 82KZMD and 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible 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

138. 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).

Application Price Rebate

139. To participate in the Project as a Grower each Applicant must complete the 2014 Application Form and pay the Application Price in full. Growers may be referred to the Project by a Distributor.

140. A Distributor will have executed the AgriWealth 2014 Softwood Timber Project Distribution Agreement. A Distributor is entitled to a Referral Fee from the Manager. The Referral Fee is a percentage of the Application Price paid by a Grower to the Manager.

141. Where the Distributor elects to rebate an amount of the Referral Fee to the Grower, and the Grower is carrying on a business of primary production as per this Ruling, then this amount will be ordinary income of the business under subsection 6-5 and included in the Grower's assessable income in the year of receipt. This includes where the Grower directs that the payment of the rebate be made to another entity.

Subsection 394-25(2)

142. Where a 'CGT event' other than in respect of a Thinning¹⁰ happens to a Grower's 'forestry interest', 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 35 to 38 and paragraphs 130 to 135 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

Market value rule applies to 'CGT events'

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

- no longer holds the 'forestry interest'; or
- 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 Grower's assessable income in the income year 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.

¹⁰ A thinning under this scheme is not a 'CGT event'

144. The market value amount included in the Grower's assessable income is:

- where the Grower no longer holds the 'forestry interest', 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)).

145. Section 394-25 applies where the 'forestry interest' is sold, extinguished or ceases and includes 'CGT events' such as a full or partial sale of the 'forestry interest' or a full or partial clear-fell Harvest of the Project Trees.

146. Based on the scheme set out in the Product Ruling application and as ruled upon herein, where the Put Option is exercised the Sale Consideration will be equal to the market value of the Put Option Property at the time of exercise.

Amounts received by Growers where the Project Trees are thinned

Section 6-5

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

148. Amounts received by a Grower from a Thinning 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.

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

149. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the 2013-2014 income year who carries on a business of afforestation individually (alone or in partnership) is expected to incur losses from their participation in the Project for each of the income years from 2013-14 to 2038-39 which will be subject to Division 35¹¹. 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.

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

151. 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.

152. 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 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 its 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 subsections 35-10(2) and (2C)).

¹¹ Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership)

153. 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 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 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)).

154. 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.

155. In each individual year where the Commissioner's discretion is exercised, a Grower 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

156. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny deductions otherwise allowable under section 8-1.

Part IVA – general tax avoidance provisions

157. 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).

158. The AgriWealth 2014 Softwood Timber 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 paragraph 30 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

159. Growers 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 Ruling. There are 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 subsection 177D(2) 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.

160. A Grower can rely on this Ruling and the Commissioner will not apply Part IVA of the ITAA 1936 to deny the tax deductions set out in paragraph 30 of this Ruling by reason of a Grower acquiring units in the Land Trust.

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References

Previous draft:

Not previously issued as a draft

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

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- product Rulings
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