



# ***PR 2000/5 - Income tax: Plantation Forestry Hardwood Project No.2***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 February 2000*



# Product Ruling

## Income tax: Plantation Forestry Hardwood Project No.2

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### Preamble

*The number, subject heading, and the What this Product Ruling is about (including Tax law(s), Class of persons and Qualifications sections), Date of effect, Withdrawal, Previous Rulings, Arrangement and Ruling parts of this document are a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

## No guarantee of commercial success

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

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities in future years to confirm the arrangement has been implemented as described below and to ensure that participants in the arrangement include in their income tax returns income derived in those future years.

## Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

## What this Product Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Plantation Forestry Hardwood Project No. 2, or just simply as 'the Project'.

### Tax law(s)

2. The tax law(s) dealt with in this Ruling are:

- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- section 27-5 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM (ITAA 1936); and
- Part IVA (ITAA 1936).

3. On 21 September 1999, the Government announced a number of changes to the tax system as part of the New Business Tax System. A number of those changes could affect the tax laws dealt with in this Ruling. On 11 November 1999 the government announced further changes, some of which could also affect the tax laws dealt with in this Ruling, especially those to do with 'tax shelters'. Some of the changes apply from the date of the announcement and others are proposed to apply from nominated dates in the future.

4. This Ruling does not deal with the Goods and Services Tax or any associated 'A New Tax System' legislative reforms, including the proposed changes announced as part of the New Business Tax System, except those legislative reforms which have now been enacted.

5. This Ruling does not deal with the announced changes which have not been enacted. We cannot give a legally binding ruling on those changes until the relevant legislation is enacted.

### Class of persons

6. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant

agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

7. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

### **Qualifications**

8. If the arrangements described in the Ruling are materially different from the arrangements that are actually carried out:

- the Ruling has no binding effect on the Commissioner as the arrangements entered into are not the arrangements ruled upon; and
- the Ruling will be withdrawn or modified.

9. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

### **Date of effect**

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10. This Ruling applies prospectively from 23 February 2000, the date the Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Previous Rulings

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13. This Ruling replaces Product Ruling PR 1999/63, which is withdrawn on and from the date this Ruling is made. Product Ruling PR 1999/63 will continue to apply to investors who entered into the Project on or before 20 December 1999.

## Arrangement

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14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Correspondence dated 22 December 1999;
- The Plantation Forestry Hardwood Project No. 2 replacement Prospectus, dated 13 January 2000;
- Constitution between Plantation Forestry Managers Ltd (the 'Manager'), Plantation Forestry Land Pty Ltd ('PF Land') and each Grower, undated;
- **Licence and Management Agreement between Plantation Forestry Managers Ltd ('PF Land') and the Grower, undated;**
- Compliance Plan for Plantation Forestry Managers Ltd as the Responsible Entity, undated;
- draft leases between existing land owner(s) and PF Land; sublease between PF Land and Australian Rural Group Limited ('the Custodian') as agent for the Manager.

**Note:** certain information received from Plantation Forestry Managers Limited has been provided on a commercial-in-

confidence basis and will not be disclosed or released under Freedom of Information legislation.

15. The documents highlighted are those the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, will be a party to, with the exception of finance agreements, to which paragraphs 36 to 38 apply. The effect of these agreements is summarised as follows.

### Overview

16. This arrangement is called the Plantation Forestry Hardwood Project No.2.:

Location	Great Southern Region of Western Australia and Kangaroo Island, South Australia
Type of business each participant is carrying on	Commercial growing, and cultivation of <i>Eucalyptus globulus</i> trees (Tasmanian Blue Gums) for the purpose of producing timber for woodchipping and any other suitable product.
Number of hectares under cultivation	8 367
Names used to describe the product	Plantation Forestry Hardwood Project No. 2
Size of each woodlot	1 hectare
Number of trees per hectare	1 000
Expected production	250 cubic metres / hectare
The term of the investment in years	12
Initial cost	\$5,000
Initial cost per hectare	\$5,000
Ongoing costs	\$200 (indexed per year)

17. Growers applying under the Prospectus dated 13 January 2000 enter into a Licence and Management Agreement, which is contained in Schedule Three of the Constitution. This Agreement gives a

Grower a licence from PF Land, over an identifiable area of land called a 'woodlot', for 12 years, or up until the trees are harvested and sold, and net income distributed, whichever happens first.

18. The Project Land is situated in the Great Southern Region of Western Australia and on Kangaroo Island in South Australia. PF Land owns the property situated in Bremer Bay Western Australia and has entered into agreements to acquire the land at Kangaroo Island, South Australia.

19. PF Land will lease the West Australian property to the Custodian as agent for the Manager. The South Australian landowners have agreed to lease their land to PF Land and PF Land, in turn, will sublease the same land to the Custodian in its capacity as agent for the Manager. The Manager will grant a licence of woodlots to each Grower to enable the Grower to carry on the Grower's business.

20. The Prospectus states that 8 367 hectares of land have been selected and further land may be acquired for planting if needed. There is no minimum subscription for this Project and applications made under the Prospectus will not be accepted after 30 May 2000. Each investor may subscribe for a minimum of one woodlot, of one hectare, at a cost of \$5,000 per woodlot. A minimum of 1 000 trees per woodlot (1 000 trees per hectare) will be planted on or before 30 June 2000 following the execution of the Licence and Management Agreement (cl 30.1 of the Constitution).

21. Possible projected returns for Growers are outlined on page 17 of the Prospectus. The projected returns depend on a range of assumptions and the Project Manager does not give any assurance or guarantee whatsoever in respect of the future success of or financial returns associated with entering into the Project. Based on the example set out on page 17 of the Draft Prospectus, a Grower could expect to achieve an after tax internal rate of return of 10.25% per woodlot. Growers will execute a Power of Attorney enabling the Custodian, Australian Rural Group Limited (ARG) to act on their behalf as required when they make an application for a woodlot.

## **Constitution**

22. The Constitution / Project Deed is between the Manager, PF Land and each Grower. It sets out the terms and conditions under which the Manager agrees to act for the Growers and to manage the Project. The Manager keeps a register of Growers (cl 15). A Grower is entitled to assign their Grower's Interest in certain circumstances (cl 16). The Licence and Management Agreements are annexed to the Constitution and will be executed on behalf of a Grower following them signing the Application and a Limited Power of Attorney Form

in the Prospectus. Growers are bound by the Constitution by virtue of their participation in the Project.

### **Compliance Plan**

23. The Manager has prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to ensure that the Manager meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

### **Interest in Land**

24. The licence is granted by the Manager to the Growers under the terms of the Licence and Management Agreement (cl 3). Growers are granted an interest in land in the form of a licence to use their woodlots for the purpose of conducting their afforestation business (cl 3). Growers must pay the Manager a fee of \$80 per woodlot per annum (cl 4) commencing 12 months after the initial licence fee is paid. This fee is indexed annually. The initial licence fee is \$50 for the period up until 30 June 2000. The term of their lease is until the earlier of 30 June 2012, or the date the trees upon the Woodlots have been harvested and sold and the Net Income distributed to the Growers.

### **Management Agreement**

25. A Licence and Management Agreement is entered into between the Project Manager and the Grower for each Woodlot. The term of the Agreement is until 30 June 2012, or the date the trees upon the Woodlots have been harvested and sold and the Net Income distributed to the Growers (cl 2.3). Growers contract with the Project Manager to establish and maintain the plantation until maturity. Growers pay the Management fees for the term of the Project. The initial Management fee is \$4,950 per woodlot for plantation preparation and establishment costs including the provision and planting of seedlings which will be performed by 30 June 2000 (cl.5). The annual Management fee is \$120 (indexed) per woodlot commencing 12 months after the initial Management fee is paid (cl.6).

26. The Manager will purchase and plant the *Eucalyptus globulus* trees, and cultivate, maintain, fertilise, water, prune, and do all things necessary to the trees to produce mature trees suitable for woodchipping.

27. The Manager will harvest (cl 8.1) and sell the timber produce on the Growers' behalf, at market rates (cl 8.2). The Manager will

arrange insurance for the Growers and pay the insurance premiums for the duration of the Project.

28. The Manager may be removed from its appointment if the Growers take action under Division 1 of Part 2G.4 of the Corporations Law for the calling of a members' meeting to consider and vote on:

- an extraordinary resolution that the current Manager should be removed; and
- an extraordinary resolution choosing a company to be a new Manager (clause 23.5 of the Constitution).

29. The resolution will be passed on a poll of at least 50% of the votes cast by Growers (clause 24.35 of the Constitution).

## Fees

30. The initial licence fee is \$50 per Woodlot. The initial Management fee of \$4,950 per Woodlot is for plantation preparation and establishment costs including the provision and planting of seedlings (clauses 1 and 6 of the Licence and Management Agreement). These initial fees are payable upon application to the Project.

31. The annual licence fee is \$80 per Woodlot commencing 12 months after the initial lease fee is paid. The annual Management fee commencing 12 months after the initial Management fee is paid is \$120. These fees will be increased yearly by the percentage increase in the Consumer Price Index Australia (All Groups) from the immediately preceding year (clauses 1, 4 and 6 of the Licence and Management Agreement). The Management fee is in respect of the management of the crop including weed control, fire control, insurance, inspection and preparation of reports.

32. The Independent Forester has stated, at page 21 of the Draft Prospectus that management proposals contained in the Prospectus for the establishment of *Eucalyptus globulus* plantations are realistic, subject to the normal risks associated with afforestation operations, such as rainfall, climatic conditions and fire.

33. The Application Monies will be banked in the Application Bank Account formed under the Projects Constitution (cl 15.2). Upon acceptance of an Application Form, the Manager shall transfer the relevant application monies from the Applications Bank Account to the Scheme Bank Account (cl 15.8).

**Planting**

34. During the period up to 30 June 2000 the Manager will be responsible for planting *Eucalyptus globulus* trees on the licensed area. After 30 June 2000, the Manager will maintain the trees in accordance with good silvicultural practice. The services to be provided by the Manager over the Project's term are outlined in the Licence and Management Agreement (cl 1). The Manager will be responsible for arranging the marketing and sale of the timber produce (cl 8). The Harvest shall take place no later than year 12 (cl 8). The Manager is entitled to 3% of any Net Proceeds in excess of the projections set out in the Prospectus (cl 6.2).

35. The Proceeds of sale of the Timber produce will be paid into the Scheme Bank Account. Proceeds received by the Manager are to be distributed in the following order of priority:

- to the Manager for any outstanding Annual Fees and to reimburse the Manager for operational expenses and harvest fee; then
- to the Growers under each Project Agreement and the Constitution. (cl 18.2 Constitution).

**Finance**

36. Growers can fund their investment in the Project themselves, or borrow from an independent lender.

37. This Ruling does not apply if a Grower enters into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and 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) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

38. There is no agreement, arrangement or understanding between any entity or party associated with the Project and any financial or other institution for the provision of any finance to the Grower for any purpose associated with the Project.

## Ruling

### Section 8-1

39. For a Grower who invests in the Project by 30 May 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

#### Deductions available each year

Fee Type	ITAA 1997 Section	Year 1 30/6/2000	Year 2 30/6/2001	Year 3 30/6/2002
Management fee	8-1	\$4,950	\$120 (indexed)	\$120 (indexed)
Lease fee	8-1	\$50	\$80 (indexed)	\$80 (indexed)

40. Section 27-5 of the ITAA 1997 will apply to fees incurred after 1 July 2000, to deny a deduction that would otherwise be allowable under section 8-1, to the extent that the fee includes an amount relating to a GST input tax credit to which a Grower is entitled.

### Section 82KZM and 82KL; Part IVA

41. For a Grower who invests in the Project the following provisions of the ITAA 1936 have applications as indicated:

- the expenditure by Growers does not fall within the scope of section 82KZM;
- section 82KL does not apply to deny the deductions otherwise allowable; and

(iii) 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.

## **Explanations**

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### **Section 8-1**

42. Consideration of whether licence and management fees are deductible under section 8-1, begins with paragraph 8-1(1)(a), on the following basis:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under paragraph 8-1(1)(b) if they are incurred when the business has not commenced; and
- where all that happens in a year of income is a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a), and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

43. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the timber's sale from the scheme, will constitute assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the trees.

44. Generally, an investor will be carrying on a business of afforestation where:

- the investor has an identifiable interest in specific growing trees coupled with a right to harvest and sell the timber;
- the afforestation activities are carried out on the investor's behalf; and

- the weight and influence of the general indicators of a business as used by the Courts point to the carrying on of a business.

45. For this Project Growers have, under the Licence and Management Agreement, rights in the form of a licence over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Licence and Management Agreement Growers appoint Plantation Forestry Managers Ltd, as Manager, to provide services such as planting, cultivating, tending, culling, pruning, fertilising, replanting, spraying, maintaining and otherwise caring for the trees according to good silvicultural practice. Growers are considered to control their investment. The specific cost of these services provided by 30 June 2000, together with the initial cost of licensing the land, will total \$5,000 per hectare (or Woodlot).

46. The Licence and Management Agreement gives Growers the full right, title and interest in the products and the right to have the products sold for their benefit (clause 8) until the end of the licence term.

47. Growers have the right to use the land in question for afforestation purposes and to have the Manager come onto the land to carry out its obligation under the Licence and Management Agreement. The Growers' degree of control over the Manager, as evidenced by the Agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on the state of the tree crop and the Manager's activities. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect. The afforestation activities described in the Lease and Management Agreements are carried out on the Growers' behalf.

48. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Draft Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction. The Independent Forester's assessment is that plantation yields will be economically viable.

49. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted silvicultural practices and are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses.

50. Growers have a continuing interest in the trees from the time they are acquired until harvest. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. 'The Growers' afforestation activities will constitute the carrying on of a business.

51. The fees associated with the afforestation activities will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the sale of timber) is to be gained from this business. They will, therefore, come within paragraph 8-1(1)(a). Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under section 8-1 are met. The exclusions do not apply.

52. Section 27-5 operates to deny a deduction that would otherwise be available under section 8-1, to the extent that the loss or outgoing incurred (after 1 July 2000) includes an amount relating to a GST input tax credit to which a Grower is entitled.

### **Section 82KZM**

53. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible in full under section 8-1. The section applies to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

54. Under the Licence and Management Agreement, fees of \$5,000 per Woodlot will be incurred on the execution of that Agreement. The fee is charged for providing services to a Grower by 30 June of the year of execution of the Agreement. The fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years.

55. There is also no evidence that might suggest the services covered by the fee could not be provided in the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Project Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure incurred by the Grower. New sections 82KZMB, 82KZMC and 82KZMD also have no application to this Project since the services to be provided in respect of the initial

fee are completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

### **Section 82KL**

56. The operation of section 82KL depends, among other things, on the identification of a certain quantum of ‘additional benefits’. There are no loans provided to the Grower by the Manager or any related party. No ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

### **Part IVA**

57. For Part IVA 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). The Project will be a ‘scheme’ commencing when the Prospectus is issued. The Growers will obtain an initial ‘tax benefit’ from entering into the scheme, in the form of the deduction for the initial fee allowable under section 8-1, 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.

58. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. The Independent Forester’s Report states that the Management proposals contained in the Prospectus for the establishment of *Eucalyptus globulus* plantations are realistic, subject to the normal risks associated with afforestation operations, such as rainfall, climatic conditions and fire. There are no features of the Project that might suggest the Project was so ‘tax driven’, and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

## **Detailed contents list**

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59. Below is a detailed contents list for this draft Ruling:

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## **Commissioner of Taxation**

23 February 2000

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

TR 92/1; TR 92/20; TD 93/34;  
TR 97/11; TR 97/16; TR 98/22;  
PR 1999/95

*Subject references:*

- carrying on a business
- commencement of business
- fee expenses
- interest expenses

- management fees expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 82KZM
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD

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- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1997 6-5
- ITAA 1997 8-1

- ITAA 1997 27-5

*Case references:*

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