



# ***PR 2006/117 - Income tax: Heathcote Ridge Vineyard Project (October 2006 Growers)***

 This cover sheet is provided for information only. It does not form part of *PR 2006/117 - Income tax: Heathcote Ridge Vineyard Project (October 2006 Growers)*

 This document has changed over time. This is a consolidated version of the ruling which was published on *19 July 2006*



## Product Ruling

### Income tax: Heathcote Ridge Vineyard Project (October 2006 Growers)

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#### **ⓘ This publication provides you with the following level of protection:**

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

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

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## **No guarantee of commercial success**

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

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

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

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

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of persons, who take part in the scheme to which this Ruling relates. In this Ruling, this scheme is referred to as the 'Heathcote Ridge Vineyard Project' or simply as the Project'.

### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 8-1 of the ITAA 1997;
  - section 17-5 of the ITAA 1997;
  - section 25-25 of the ITAA 1997;
  - Division 27 of the ITAA 1997;
  - Division 35 of the ITAA 1997;
  - Division 40 of the ITAA 1997;
  - Subdivision 61-J of the ITAA 1997;
  - section 70-35 of the ITAA 1997;
  - Part 3-1 of the ITAA 1997;
  - Division 328 of the ITAA 1997;
  - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
  - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 82KZL of the ITAA 1936;
  - sections 82KZME and 82KZMF of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

**Note:** All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

**Goods and Services Tax**

3. All fees and expenditure referred to in this Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

**Changes in the Law**

4. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Entities who are considering participating in the Project 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**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that entities are fully informed of any legislative changes after the Ruling is issued.

**Class of entities**

7. The class of entities to whom this Ruling applies is the persons who enter into the scheme, specified below, on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling, these persons are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include persons who:

- intend to terminate their involvement in the scheme prior to its completion or who otherwise do not intend to derive assessable income from it;
- **have entered into the scheme specified below prior to the date this Ruling is made or after 31 October 2006;** or
- enter into finance arrangements with entities associated with the Project other than Total Beverage Australia Pty Ltd as described in paragraphs 60 to 62 of this Ruling.

## Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 63 of this Ruling.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this 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 Ruling may be withdrawn or modified.

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## Date of effect

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12. This Ruling applies prospectively from 19 July 2006, the date this 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant classes of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Withdrawal

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16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all persons within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the persons' involvement in the scheme.

## Scheme

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

- Application for a Product Ruling received on 24 March 2006 as constituted by documents provided on 24, 27 and 30 March 2006, 20 and 27 April 2006, 5, 8, 9, 11 and 12 May 2006 and 7 and 11 July 2006, and additional correspondence dated 20 April 2006, 2, 3, 8, 10 and 11 May 2006 and 11 July 2006;
- Draft Product Disclosure Statement & Prospectus for Heathcote Ridge Vineyard Project, received on 16 May 2006;
- Draft **Constitution** of the Heathcote Ridge Vineyard Project between Food and Beverage Australia Limited ('Responsible Entity') and the Growers, received on 9 May 2006;
- Draft **Management Agreement** of the Heathcote Ridge Vineyard Project between Food and Beverage Australia Limited ('Responsible Entity') and the Growers, received on 11 July 2006;
- Draft **Licence Agreement** of the Heathcote Ridge Vineyard Project between Heathcote Ridge Vineyard Limited ('Land Owning Company') and the Grower received on 7 July 2006;

- Draft Leases between Heathcote Ridge Vineyard Limited ('Lessor') and National Viticultural Fund of Australia Pty Ltd as Custodian for the Heathcote Ridge Vineyard ('Lessee') received on 5 May 2006;
- Draft Underleases between National Viticultural Fund of Australia Pty Ltd as Custodian for the Heathcote Ridge Vineyard ('Underlessor') and Heathcote Ridge Vineyard Limited ('Underlessee') received on 5 May 2006;
- Draft Compliance Plan of the Heathcote Ridge Vineyard Project received with the Application for a Product Ruling on 24 March 2006;
- Draft Custodian Agreement of the Heathcote Ridge Vineyard Project between Food and Beverage Australia Limited ('Responsible Entity') and National Viticultural Fund of Australia Pty Ltd ('Custodian'), received with the Application for a Product Ruling on 24 March 2006;
- Draft Grape Supply Agreement between Orlando Wines ('OW'), National Viticultural Fund of Australia Pty Ltd as Custodian for Heathcote Ridge Vineyard Project ('Custodian'), Heathcote Ridge Vineyard Limited ('Landowner') and the Grower, received on 11 May 2006; and
- Draft **Terms Loan Agreement** ('Loan Agreement') between Total Beverage Australia Pty Ltd ('Total Beverage Australia') and the Grower received on 8 May 2006.

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

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

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

**Overview**

20. The salient features of the Heathcote Ridge Vineyard Project are as follows:

Location	Heathcote region, Victoria
Type of business to be carried on by each participant	Commercial growing of wine grapes
Number of hectares offered for cultivation	108
Size of each interest	0.25 hectares
Minimum allocation	1 interest
Minimum subscription	30 interests
Number of vines per hectare	1740
Term of the Project	16 years
Initial cost	\$10,839 plus \$1,000 for part payment of shares
Initial cost per hectare	\$43,356
Ongoing costs	<ul style="list-style-type: none"> <li>• Ongoing Management Services Fees;</li> <li>• Irrigation and Planting Fees; and</li> <li>• Rent</li> </ul>
Other costs	Growers will be liable for ongoing Viticulture Costs and a Call Amount

21. The Heathcote Ridge Vineyard Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. The Responsible Entity for the Project is Food and Beverage Australia Ltd ('FABAL'). Under the Product Disclosure Statement & Prospectus ('PDS'), FABAL proposes to offer 432 interests called 'Allotments' of 0.25 hectares each. Upon application, Growers will execute a Power of Attorney enabling FABAL to act on their behalf as required. There is a minimum subscription of 30 interests for this Project.

22. For each interest acquired in the Project, a Grower is required to subscribe for 100 ordinary shares in Heathcote Ridge Vineyard Limited ('Land Owner') at a cost of \$4,000. \$1,000 is payable at the time of Application and \$3,000 is payable on 1 July 2009.



23. The Project will be situated in the Heathcote region of Victoria. The land for the Project has been purchased by the Land Owner, which will lease the land to National Viticultural Fund of Australia Pty Ltd ('Custodian'), which will then sublease the land back to the Land Owner. The Land Owner will grant a licence to the Growers to use and occupy the Allotment for the planting, growing and harvesting of grapes. A Grower acquiring a single interest in the Project will hold a licence over an Allotment on which the Grower can plant and maintain 410 to 420 grapevines.

24. Growers enter into a Management Agreement with FABAL to manage their Allotments for the eventual harvest and sale of their grape produce. FABAL will manage and cultivate the vines and will be responsible for harvesting and selling the grapes. FABAL has entered into an arrangement to pre-sell 100% of the Growers grape produce to Orlando Wines ('OW').

25. Under the PDS offer, Growers can enter the Project during the period up to 31 May 2006, during the period 1 July 2006 to 31 October 2006 or during the period 1 November 2006 to 31 May 2007. Applicants will not be accepted into the Project between 1 June 2006 and 30 June 2006 and after 31 May 2007. This Ruling only applies to Growers who enter into the Project from the date of this Ruling to 31 October 2006.

## Constitution

26. The Constitution establishes the Project and operates as a deed binding on all the Project's Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which FABAL agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project. Pursuant to clause 5 of the Constitution, the Responsible Entity will keep a register of Growers.

27. The procedure for applying for Interests in the Project is stated at clause 3 and the Responsible Entity may accept or reject Applications in its absolute discretion. The Responsible Entity must confirm acceptance of an Applicant's Application as soon as is reasonably practicable. If the Responsible Entity refuses an Application, it must refund all monies paid to the Applicant within twenty eight (28) business days of deciding to do so, or such longer period as is reasonable in the circumstances if it is not reasonably practicable to do so.

28. The Responsible Entity may open a bank account, or bank accounts, with any bank in its discretion in which to deposit Application Fees received from Applicants ('Application Fund'). The Responsible Entity may transfer money from the Application Fund in respect of an Application for an Interest in the Scheme by an Applicant when the following things have occurred:

- the Responsible Entity has issued an Interest to the Applicant;

- the Management Agreement and Licence Agreement have been executed by the Responsible Entity and the Applicant;
- the Responsible Entity is ready and willing to fulfil its obligations under this Constitution;
- all other things required to be done under this Constitution to facilitate the issuing of an Interest to an Applicant have been done;
- there are no other outstanding and unrectified material breaches of this Constitution in respect of that Application for an Interest;
- the minimum subscription represented in the PDS has been reached; and
- all other things required by the PDS have been done.

29. The Responsible Entity must:

- collect, receive, and get in all income due and payable to the Scheme;
- must gather in all of the produce from each Grower's Allotment;
- market and sell the produce gathered in from all Allotments without having regard to the quantity or quality of produce gathered in from any particular Allotment;
- cause to be established a bank account for the purpose of holding all income attributable to Grower Allotments ('Proceeds Fund'); and
- pay into the Proceeds Fund:
  - (i) the proceeds of the sale of produce attributable to each Grower's Allotment after payment of any costs and expenses in relation to the harvesting, marketing and sale of that produce;
  - (ii) the proceeds of any income protection insurance policy to which Growers are expressly entitled to benefit from, provided that all Growers in the Scheme have contributed to the payment of premiums payable in respect of that insurance policy or the Responsible Entity otherwise determines in its absolute discretion to pay such proceeds into the Proceeds Fund; and
  - (iii) any other income that relates to Grower's Allotment or Interests.

30. A Grower is entitled to money in the Proceeds Fund in a portion which reflects that portion which the Grower's Allotment bears to the total number of Grower Allotments for the Production Period less:

- all fees payable under the Management Agreement;
- all fees payable under the Licence Agreement;
- any other amounts which the Responsible Entity reasonably considers will be required to meet anticipated Viticultural Costs (as defined in the Management Agreement); and
- any other amounts payable by the Grower under this Constitution or any other liabilities that attach to the Grower's Interest.

31. If a Grower's Allotment is partially or totally destroyed, or if the contribution made by that Allotment to the Proceeds Fund is otherwise reduced or inadequate compared to other Allotments for any other reason then that Grower's entitlement to the amounts in the Proceeds Fund shall be reduced to reflect the reduced level of contribution of that Grower's Allotment.

32. The surplus available for each Grower after all deductions are made by the Responsible Entity must be paid by the Responsible Entity to the relevant Grower within 5 months after 30 June each year.

## **Compliance Plan**

33. As required by the Corporation Law, a Compliance Plan has been prepared by FABAL for the Project. The purpose of the Compliance Plan is to ensure that FABAL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

## **Management Agreement**

34. Growers participating in the scheme will enter into a Management Agreement with FABAL. The Term of the Agreement shall be the period commencing on the Commencement Date (being the date on which the Responsible Entity accepts the Grower's Application for an Interest in the Scheme) and ending on the Termination Date (being the earlier of 30 June 2021 or the termination date of the Grower's Interest).

35. The Management Agreement provides that each Grower appoints FABAL as an independent contractor to perform services under the agreement from the date FABAL accepts the Grower's application. FABAL will manage all viticultural activities on behalf of the Grower. The services to be performed are:

- Irrigation & Planting Services (clauses 5);
- Initial Management Services (clause 6);

- Ongoing Management Services (clause 7); and
- Harvesting and Sale of Grapes (clause 8).

36. The Responsible Entity is to provide the Irrigation and Planting Services (except those listed at clause 5.1.3) and the Initial Management Services for the Grower by 30 June 2006 ('Year 1').

37. In consideration of the Responsible Entity performing the services specified in paragraph 35 of this Ruling, the Growers are required to pay fees as follows:

- Initial Management Services Fees (as specified at Schedule 2);
- Irrigation & Planting Fees (as specified at Schedule 3); and
- Ongoing Management Services Fees (as specified at Schedule 4).

38. In addition to the fixed fees provided for in the Agreement and disclosed in the Schedules, the Responsible Entity is entitled to:

- be reimbursed by the Growers for all of the costs and expenses of and in relation to the performance of its duties pursuant to clauses 7 and 8 of the Agreement ('Viticulture Costs'), estimates of which are set out in Schedule 4; and
- request each Grower to make a payment to contribute to all or any unexpected expenses of or in relation to the Allotment, the amount of that payment not to exceed the call amount set out in Schedule 4.

39. Pursuant to Clause 34 of the Constitution and Clause 16.1 of the Management Agreement, Ongoing Management Services Fees and Viticulture Costs from Year 5 are expected to be paid out of the Proceeds Fund before any distributions to Growers. Growers will be liable for the above fees to the Responsible Entity, at the time and in the amount stated in the Management Agreement, if the proceeds from the sale of wine grapes are insufficient to meet these and other fees.

40. In accordance with the Constitution, the Grower directs and authorises the Responsible Entity to accumulate the grapes attributable to the Grower's Allotment together with the grapes generated from other Allotments unless:

- a Grower's Allotment is partially or totally destroyed;
- the level of production from a Grower's Allotment is reduced or inadequate compared to the other Allotments; or
- pooling the grapes from a Grower's Allotment with grapes from the Allotments of all other Growers would prejudice those other Growers in any way, shape or form.

41. If the Responsible Entity pools grapes pursuant to clause 11, the proceeds of sale of the pooled grapes shall be distributed into the Proceeds Fund and distributed on a pro-rata basis according to the procedures set out in the Constitution.

## **Leases**

42. The Land for the Project will be secured by two Leases. Under the Leases, in return for the Rent, the Land Owner leases the Land to the Custodian for the Term. The Land is located in the Heathcote region in Victoria, specifically, CA 46 School Road Corop being the whole of the Land comprised in Certificate of Title Volume 4911 Folio 060 and CA 32 Parish of Corop being the whole of the Land comprised on Certificate of Title Volume 3607 Folio 257 and CA 33 and 49 Parish of Corop being the whole of the Land comprised in Certificate of title Volume 8373 Folio 858.

43. The Term of the Leases is the period commencing on the Commencement Date (31 May 2006) and ending on the Expiration of the Lease (30 June 2021). The Rent is the amount of \$11 for the first year of the Leases. At the end of the first year and then annually for the Term of the Leases, the Rent must be increased by the same percentage as the CPI. The Rent must be paid on the Commencement Date and on 1 July in each year thereafter.

44. The Lessee must only use the Land in accordance with the Constitution, Compliance Plan, Licence Agreements and Management Agreements.

## **Subleases**

45. Two Subleases will exist for the Project. Under the Subleases, in return for the Rent, the Custodian subleases the Land to the Land Owner for the Term. The Land which is the subject of the two Subleases is the same Land which is the subject of the two Leases.

46. The Term of the Subleases is the period commencing on the Commencement Date (31 May 2006) and ending on the Expiration of the Lease (30 June 2021). The Rent is the amount of \$11 for the first year of the Sublease. At the end of the first year and then annually for the Term of the Subleases, the Rent must be increased by the same percentage as the CPI. The Rent must be paid on the Commencement Date and on 1 July in each year thereafter.

47. The Sublessee must only use the Land in accordance with the Constitution, Compliance Plan, Licence Agreements and Management Agreements.

**Licence Agreement**

48. Growers participating in the scheme will enter into a Licence Agreement with FABAL. The Term of the Agreement shall be the period commencing on the Commencement Date (being the date on which the Responsible Entity accepts the Grower's Application for an Interest in the Scheme) and ending on the Termination Date (being the earlier of 30 June 2021 or the termination date of the Grower's Interest).

49. Under the Agreement the Land Owner agrees to grant the Grower licences to:

- use and occupy the Grower's Allotment of 0.25 of a hectare for the purposes of the Business of developing, planting, growing, maintaining, cultivating and harvesting grapes;
- draw water supplied by the Land Owner for the purpose of the Business;
- use trellising installed by the Land Owner on the Allotment for the purposes of the Business; and
- use plant and equipment owned by the Land Owner which is suitable for the Business for the purpose of the Business only.

50. In consideration of the Land Owner granting the above licences, the Grower agrees to pay the Land Owner the Land and Water Licence Fee and the Trellis, Plant and Equipment Rental in the amounts and in the manner set out in Schedule 2 of the Agreement.

51. Pursuant to Clause 34 of the Constitution and Clause 16.1 of this Agreement, the Land and Water Licence Fee and the Trellis, Plant and Equipment Rental are expected to be paid out of the Proceeds Fund before any distributions to Growers. Growers will be liable for the above fees to the Responsible Entity, at the time and in the amount stated in the Licence Agreement, if the proceeds from the sale of wine grapes are insufficient to meet these and other fees.

52. Under the Licence Agreement, the Grower must:

- use the Allotment for the purposes of the Business only;
- repair or make good any damage caused by an act or omission of the Grower or the Grower's authorised agents to the land or its improvements, or any neighbouring land;
- maintain the Allotment in good condition that is suitable for the Business;
- keep the Allotment free of weeds, pests, vegetation and vermin;

- do all things that are reasonably necessary to prevent or control the spread of infections, diseases, pests, weeds, insects or fire;
- ensuring that chemicals or other hazardous materials are only used and stored in such a manner so as to limit the possibility of damage or harm to livestock, water, soil, crops, vegetation or neighbouring land;
- take reasonable steps to combat land degradation on the Allotment; and
- permit the Land Owner and the Responsible Entity's employees, agents and contractors to enter upon the Allotment so as to fulfil their obligations under the Licence Agreement, Management Agreement and the Constitution.

53. The Land Owner will establish and maintain a water pipeline infrastructure for the purpose of servicing the Grower's Allotment and allow the Grower to draw water from the water infrastructure. The Land Owner will install and maintain trellising on the Allotment suitable for the Grower to carry out the Viticulture Business.

### **Grape Supply Agreement**

54. Under this Agreement, in each year during the Term (being from 1 October 2006 to 30 September 2017), the Grower must sell and OW must purchase the grapes produced in that year from the Grower on the terms of the Agreement.

55. The grapes from each OW Block (as defined in the Agreement) must be harvested by the Grower on the harvest dates advised by OW and delivered by the Grower to OW to the Winery within twelve hours of commencement of picking of each OW Block.

56. The mechanism for setting the price to be paid by OW for the grapes is stated in clause 4 and the payment arrangements are listed in clause 6.

### **Fees**

57. Under the Management Agreement and the Licence agreement a Grower is required to pay the following fees:

<b>Initial Management Services Fee</b>		
Year	Fees Payable (\$)	Due Date
1	220	On application
1	4,571 (includes 53 attributable to landcare activities)	By 31 October 2006

<b>Irrigation &amp; Planting Fees</b>				
Year	Irrigation Fee Payable (\$)	Planting Fees Payable (\$)	Total Fees Payable (\$)	Due Date
2	2,291	1,251	3,542	31 October 2006

<b>Ongoing Management Services Fees</b>				
Year	Ongoing Management Services Fees (\$)	Viticulture Costs Estimate (\$)*	Total (\$)	Due Date
1	Nil	Nil	Nil	
2	1,620	Nil	1,620	31 October 2006
3	1,429	Nil	1,429	31 July 2007
4	564	1,282	1,846	31 July 2008
5	353	1,319	1,672	31 July 2009
6	362	1,352	1,714	31 July 2010
7	371	1,386	1,757	31 July 2011
8	380	1,420	1,800	31 July 2012
9	390	1,455	1,845	31 July 2013
10	399	1,491	1,890	31 July 2014
11	409	1,528	1,937	31 July 2015
12	419	1,566	1,985	31 July 2016
13	430	1,605	2,035	31 July 2017
14	441	1,645	2,086	31 July 2018
15	452	1,685	2,137	31 July 2019
16	463	1,727	2,190	31 July 2020

\* This is an estimate only

<b>Rent</b>				
Year	Land & Water Licence Fee (\$)	Trellis, Plant & Equipment Rent (\$)	Total Rent (\$)	Due Date
1	47	20	67	31 October 2006
2	374	445	819	31 October 2006
3	406	684	1090	31 July 2007
4	415	686	1101	31 July 2008
5	421	696	1117	31 July 2009
6	431	455	886	31 July 2010



7	441	218	659	31 July 2011
8	450	222	672	31 July 2012
9	461	231	692	31 July 2013
10	471	222	693	31 July 2014
11	482	223	705	31 July 2015
12	493	241	734	31 July 2016
13	504	250	754	31 July 2017
14	515	243	758	31 July 2018
15	527	247	774	31 July 2019
16	539	247	786	31 July 2020

**Call for Funds**

58. In addition to any amounts payable to the Responsible Entity pursuant to either the Management Agreement or the Constitution, the Responsible Entity is entitled to request each Grower to make a payment to contribute to all or any unexpected expenses of or in relation to the Allotment, the amount of that payment not to exceed \$3,005 in any year. Such money is not to be used to provide remuneration to the Responsible Entity for activities or responsibilities which are intended to be funded by other fees payable pursuant to this Agreement or the Constitution but for expenses, whether they be revenue or capital in nature, which have not been anticipated by the Responsible Entity.

**Performance Incentive Fee**

59. In addition to all other fees payable to the Responsible Entity pursuant to this Agreement, each Year the Responsible Entity is entitled to be paid an additional fee ('Performance Incentive Fee') on account of the performance by it of its duties which leads to above budget returns attributable to the Grower's Allotment, which additional fee will be paid at the time of the distribution of proceeds. The Fee is calculated as 20% of the amount that the actual profit for a particular Year exceeds the threshold profit amounts for a particular Year as set out in the PDS.

**Finance**

60. Growers can fund their participation in the Project themselves, borrow from Total Beverage Australia Pty Ltd ('Total Beverage Australia') (a lender associated with the Responsible Entity) or borrow from an independent lender.

61. Total Beverage Australia will lend on a full-recourse commercial basis under the Loan arrangement. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting Growers. Total Beverage Australia will offer finance under the following arrangements:

**Option A: 12 Months Interest Free Finance**

- equal monthly principal instalments over 12 months commencing on the last day of the month that the Grower's application is accepted;
- instalments paid by direct debit;
- no interest applicable; and
- the loan is secured by a Charge over the Grower's interest in the Project.

**Option B: Principal and Interest Finance**

Term: 2 years or 5 years

Interest: 10.55%, fixed for the term of the loan:

- equal monthly principal and interest instalments over the term of the loan payable monthly in arrears commencing on the last day of the month that the Grower's application is accepted;
- instalments paid by direct debit; and
- the loan is secured by a Charge over the Grower's interest in the Project.

62. An application fee of \$50 is payable upon application to enter into the Loan Agreement.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Total Beverage Australia are involved or become involved in the provision of finance to Growers for the Project.

## Ruling

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### Application of this Ruling

64. This Ruling applies only to Growers who are accepted to participate in the Project **from the date of this Ruling and on or before 31 October 2006** and who have executed a Management Agreement and a Licence Agreement on or before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

### Minimum subscription

65. A Grower is not eligible to claim any tax deductions until the Grower's Application to enter the Project is accepted and the Project has commenced. Under the terms of the PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 30 interests is achieved.

### The Simplified Tax System (STS)

#### **Division 328**

66. To be an 'STS taxpayer', a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

67. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

**25% entrepreneurs tax offset*****Subdivision 61-J***

68. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

**Assessable income*****Section 6-5***

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

70. The Grower recognises ordinary income from carrying on the business of at the time that income is derived.

**Deductions for Management Fees, Licence Fees, Interest and Borrowing Costs*****Sections 8-1 and 25-25***

71. A Grower may claim tax deductions, on a per Allotment basis, for the revenue expenses set out in the Table below:

<b>Fee Type</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>	<b>Year ended 30 June 2009</b>
<b>Initial Management Services Fee</b>	\$4,738 See Notes (i), (ii) & (vi)	Nil	Nil
<b>Ongoing Management Services Fee</b>	\$1,620 See Notes (i), (ii) & (vi)	\$1,429 See Notes (i), (ii) & (vi)	\$564 See Notes (i), (ii) & (vi)
<b>Land &amp; Water Licence Fee</b>	Amount must be calculated See Notes (i), (ii), (iii), (iv) & (vi)	\$406 See Notes (i), (ii) & (vi)	\$415 See Notes (i), (ii) & (vi)
<b>Trellis, Plant &amp; Equipment Rent</b>	Amount must be calculated See Notes (i), (ii), (iii), (iv) & (vi)	\$684 See Notes (i), (ii) & (vi)	\$686 See Notes (i), (ii) & (vi)

<b>Interest on Terms Loan Agreement - Total Beverage Australia</b>	As incurred See Note (v)	As incurred See Note (v)	As incurred See Note (v)
<b>Borrowing Costs – Total Beverage Australia</b>	Amount must be calculated See Note (vii)	Amount must be calculated See Note (vii)	Amount must be calculated See Note (vii)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Where a Grower pays the Management Fees, Licence Fees and Rent in the relevant income years shown in the Management Agreement and Licence Agreement, those fees are deductible in full in the year that they are incurred.
- (iii) For a Grower who enters the Project during the period from the date of this Ruling to 31 October 2006, the Year 1 Land and Water Licence Fee (\$47) and Trellis, Plant & Equipment Rent (\$20) will not be deductible.
- (iv) For a Grower who enters the Project from the date of this Ruling to 31 October 2006, the 30 June 2007 Fees for Land and Water Licence (\$421) Trellis, Plant and Equipment Rental (\$465) payable by 31 October 2006 may not be deductible in full. The deductions will be calculated on a pro-rata monthly basis to reflect the period of time the Grower has been a party to the Licence Agreement. The following amounts are deductible for each month or part month that the Grower is in the Project for the 2007 Income Year:
  - \$31.17 per month for the Land and Water Licence; and
  - \$37.08 per month for the Trellis, Plant and Equipment Rental.
- (v) Interest is deductible under a loan agreement with Total Beverage Australia as described at paragraphs 61 and 62 of this Ruling. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Total Beverage Australia, the internal financier, is outside the scope of this Ruling. However all Growers who finance their participation in the Project should read the discussion of the prepayment rules in paragraphs 107 to 110 of this Ruling as those rules may be applicable if interest is prepaid.

- (vi) This Ruling does not apply to Growers who choose to prepay management fees or rent (see paragraphs 107 to 110 of this Ruling). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (vii) The Loan Application Fee is a borrowing cost and is deductible under section 25-25. It is incurred for borrowing funds that are used or are to be used during that income year solely for income producing purposes. Borrowing expenses of \$100 or less are deductible in the year in which they are incurred. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Total Beverage Australia is outside the scope of this Ruling.

### **Deductions for capital expenditure (non-STs taxpayers)**

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

72. A Grower who is not an 'STs taxpayer' will also be entitled to tax deductions relating to water facilities (for example irrigation), a 'landcare operation' and grapevines. All deductions shown in the following Table are determined under Division 40.

<b>Fee Type</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>	<b>Year ended 30 June 2009</b>
<b>Water facility (Irrigation)</b>	\$764 See Notes (viii) & (ix)	\$764 See Notes (viii) & (ix)	\$763 See Notes (viii) & (ix)
<b>Landcare operations</b>	\$53 See Notes (viii) & (x)	Nil	Nil
<b>Establishment of grapevines</b>	Nil See Note (xi)	Nil See Note (xi)	Nil See Note (xi)

#### **Notes:**

- (viii) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

- (ix) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$2,291 incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (x) Capital expenditure of \$53 incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.
- (xi) Grapevines are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the grapevines is determined using the formula in section 40-545 and is based on the capital expenditure of \$1,251 incurred by the Grower that is attributable to their establishment. If the grapevines have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the grapevines enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform Growers of when the grapevines enter their first commercial season.

**Deductions for capital expenditure (STS taxpayers)*****Subdivision 328-D and Subdivisions 40-F and 40-G***

73. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to water facilities (for example, irrigation), a 'landcare operation' and grapevines. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'water facility' or 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the grapevines must be determined under Subdivision 40-F.

74. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (xi) and (xii).

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

<b>Fee Type</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>	<b>Year ended 30 June 2009</b>
<b>Water facility (irrigation)</b>	\$764 See Notes (xii) & (xiii)	\$764 See Notes (xii) & (xiii)	\$763 See Notes (xii) & (xiii)
<b>Landcare operations</b>	\$53 See Notes (xii) & (xiv)	Nil	Nil
<b>Establishment of grapevines</b>	Nil See Note (xv)	Nil See Note (xv)	Nil See Note (xv)

**Notes:**

- (xii) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27.
- (xiii) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in



which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2006 is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years the full pool rate will apply.

If the expenditure is not on a 'depreciating asset', or if they choose to use Subdivision 40-F, Growers must claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$2,291 incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).

- (xiv) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure of \$53 is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.
- (xv) Grapevines are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the grapevines is determined using the formula in section 40-545 and is

based on the capital expenditure of \$1,251 incurred by the Grower that is attributable to their establishment. If the grapevines have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the grapevines enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform Growers of when the grapevines enter their first commercial season.

**Interest**

76. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier, other than Total Beverage Australia under their Terms Loan Agreement, is outside the scope of this Ruling. However all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in paragraphs 107 to 110 of this Ruling as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

**Trading stock****Section 70-35**

77. A Grower who is not an 'STS taxpayer' will, in some years, hold grapes that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

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

**Section 328-285**

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

80. Alternatively, a Grower who is an 'STS taxpayer' may instead choose to account for trading stock in an income year under the provisions of Division 70 (subsection 328-285(2)).

## **Amounts not deductible under section 8-1**

81. A Grower in this Project may be required to pay additional funds to meet Project costs at the request of the Responsible Entity. This call for funds is in addition to all other fees described in this Ruling and cannot exceed \$3,300 in any year of the Project. Any such amounts are capital in nature and will not be deductible under section 8-1.

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

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

82. A Grower who is an individual accepted into the Project by 31 October 2006 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the income years ending **30 June 2007 to 30 June 2010**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

## **Sections 82KZME, 82KZMF, 82KL and Part IVA**

83. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the Licence Agreement the following provisions of the ITAA 1936 apply:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 107 to 110 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## Appendix 1 – Explanation

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

### Is the Grower carrying on a business?

84. For the amounts set out in the Tables above to constitute allowable deductions, the Grower's viticultural activities as a participant in the Heathcote Ridge Vineyard Project must amount to the carrying on of a business of primary production.

85. Where there is a business, or a future business, the gross proceeds from the sale of the grapes will constitute gross 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.

86. For schemes such as that of the Heathcote Ridge Vineyard Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

87. Generally, a Grower will be carrying on a business of viticulture, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's vines are established;
- the Grower has a right to harvest and sell the grapes from those vines;
- the viticultural activities are carried out on the Grower's behalf;
- the viticultural activities of the Grower are typical of those associated with a viticultural business; and
- the weight and influence of general indicators point to the carrying on of a business.

88. In this Project, each Grower enters into a Management Agreement and a Licence Agreement.

89. Under the Licence Agreement each individual Grower will have rights over a specific and identifiable area of 0.25 hectares of land. The Licence Agreement provides the Grower with an ongoing interest in the specific vines on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out viticultural activities, and for no other purpose. The licence allows the Responsible Entity to come onto the land to carry out its obligations under the Management Agreement.

90. Under the Management Agreement the Responsible Entity is engaged by the Grower to establish and maintain a vineyard on the Grower's identifiable area of land during the term of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the vineyard on the Grower's behalf.

91. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the grapes grown on the Grower's Allotment.

92. 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 Project's description for all the indicators.

93. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the grapes that will return a before-tax profit, which is a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

94. The pooling of grapes from vines grown on the Grower's Allotment with the grapes of other Growers is consistent with general viticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled grapes will reflect the proportion of the grapes contributed from their Allotment.

95. The Responsible Entity's services are also consistent with general viticultural practices. They are of the type ordinarily found in viticultural ventures that would commonly be said to be businesses. While the size of an Allotment is relatively small, it is of a size and scale to allow it to be commercially viable.

96. The Grower's degree of control over the Responsible Entity as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Allotment and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

97. The viticultural 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. For the purposes of this Ruling, the Growers' viticultural activities in the Heathcote Ridge Vineyard Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

98. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

99. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

## **Deductibility of management fees and licence fees**

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

100. Consideration of whether the management fees and licence fees (the 'Fees') are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing 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 the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed 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 second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

101. The Fees associated with the viticulture activities will relate to the gaining of income from the Grower's business of viticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of grapes) is to be gained from this business. They will thus be deductible under the first limb of section 8-1, apart from the Landcare activities component of the fee and the portion of the Licence Fees and rent that is considered to be a premium paid by the Grower and capital in nature. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the scheme. The fee appears to be reasonable. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

102. One of the exclusions under section 8-1 relates to expenditure which is capital, or capital in nature. Any part of the expenditure of a Grower entering into a viticultural business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that a portion of the fees payable under the Licence Agreement is capital expenditure and therefore the amount allowed as a deduction will be reduced as described in paragraph 103 of this Ruling.

103. A grower who enters the Project during the period from the date of this Ruling to 31 October 2006 does not use the Water Licence or rent the land or use the Trellis, Plant and Equipment for a full income year in the initial year of the Project. As there is no reduction in the Licence Fees and rent in the 2006-07 income year to reflect the actual period the Grower is in the Project, it is considered that the 30 June 2006 Licence Fees and rent and part of the 30 June 2007 Licence Fee and rent is a premium paid by the Grower and are capital in nature. Growers will not be entitled to a deduction under section 8-1 for the 30 June 2006 Licence Fees and rent but will be entitled to a partial deduction for the 30 June 2007 Licence Fees and rent, calculated on a pro-rata monthly basis, for each month that they are in the Project in the 2006-07 income year as follows:

- \$31.17 per month for the Land and Water Licence; and
- \$37.08 per month for the Trellis, Plant and Equipment Rental.

## **Interest deductibility**

### **Section 8-1**

*(i) Growers who use Total Beverage Australia as the finance provider*

104. Some Growers may finance their participation in the Project through a loan facility with Total Beverage Australia. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the management fees and licence fees.

105. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

*(ii) Growers who DO NOT use Total Beverage Australia as the finance provider*

106. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Total Beverage Australia is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

### **Prepayment provisions**

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

107. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

### **Application of the prepayment provisions to this Project**

108. Under the scheme to which this Product Ruling applies management fees and licence fees are incurred annually and interest on Total Beverage Australia loans is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

109. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Management Agreement and/or the Licence Agreement or prepays interest under any loan agreement, including loan agreements with financiers other than Total Beverage Australia. Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

110. As noted in the Ruling section above, Growers who prepay management fees and licence fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.



## **Expenditure of a capital nature**

### ***Division 40 and Division 328***

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

112. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

113. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 72 and 75 of this Ruling in the Tables and accompanying notes.

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

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

114. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2007 to 30 June 2010** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2007 up to and including 30 June 2010:

- it is because of its nature the business activity of a Grower that will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the viticulture industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

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

**Section 82KL – recouped expenditure**

116. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

**Part IVA – general tax avoidance provisions**

117. 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).

118. The Heathcote Ridge Vineyard Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 71, 72 and 75 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

119. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the grapes. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936, it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## Appendix 2 – Detailed contents list

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

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 97/11; TR 98/22; TR 2000/8;  
TR 2001/14; TR 2002/6;  
TR 2002/11

*Subject references:*

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

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
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