



PR 2006/99 - Income tax: WA Blue Gum Project 2006 (Growers not in Joint Venture)

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Product Ruling

Income tax: WA Blue Gum Project 2006 (Growers not in Joint Venture)

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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

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 entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the WA Blue Gum Project 2006 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 25-20 of the ITAA 1997;
 - section 25-25 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Subdivision 61-J 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 to 82KZMG of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

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 (referred to in this Ruling as a Grower) 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 laws 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. Taxpayers 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 participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to which this Ruling applies consists of the entities more specifically identified in the Ruling part of this Product Ruling 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 as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

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

- entities 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;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- entities who are accepted to participate in the Project after 30 June 2006;
- entities who enter into finance arrangements with Albany Financial Pty Ltd or United Pacific Finance Pty Ltd other than those described at paragraphs 57 to 62;
- 'Joint Venture Growers'. Entities who participate as 'Joint Venture Growers' should refer to Product Ruling PR 2006/98; and
- entities who opt to 'Harvest' and 'Deliver' the 'Wood' grown on their 'Leased Area' and/or opt to sell their 'Wood' other than to the 'Purchaser' under the Wood Purchase Agreement.

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 64.

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

12. This Ruling applies prospectively from 31 May 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 class 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

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 entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, 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 entities' involvement in the scheme.

Scheme

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

- Application for a Product Ruling dated 1 December 2005 as constituted by documents provided on 21 November 2005 and additional correspondence from the applicant including letters dated 14 and 23 December 2005, 31 January 2006, 14, 22, 23, and 27 February 2006, 1, 7, 9, and 17 March 2006, 26 April 2006, 5, 15, 19 and 22 May 2006;
- **Combined Financial Services Guide and Product Disclosure Statement** for the WA Blue Gum Project 2006 issued by WA Blue Gum Limited (WABG or the Responsible Entity), dated 28 February 2006;
- Draft **Supplementary Product Disclosure Statement**, undated, received on 5 May 2006;
- Draft **Constitution**, undated, received on 21 November 2005;
- The Compliance Plan for the WA Blue Gum Project dated 31 March 2005;
- Draft **Sub-Lease 2006**, to be entered into by each Grower and WABG (the Landholder), undated, received on 15 December 2005;
- Draft **Agreement to Sub-lease 2006**, which may be entered into by each Grower and WABG, undated, received on 15 December 2005;

- Draft **Project Management Contract 2006**, to be entered into by each Grower and WABG (the Project Manager), undated, received on 15 December 2005;
- Draft **Wood Purchase Agreement 2006**, to be entered into by each Grower, WABG (the Authorised Vendor) and WA Chip & Pulp Co Pty Ltd (the Purchaser), undated, received on 21 November 2005;
- Draft Plantation Services Agreement 2006 to be entered into between WABG and WACAP Treefarms Pty Ltd (the Contractor), undated, received on 21 November 2005;
- Draft Agreement for the Provision of Consulting Services to be entered into between WABG and URS Australia Pty Ltd, undated, received on 21 November 2005;
- The Scheme Property Custody Agreement between WABG and Sandhurst Trustees Ltd (the Custodian) dated 12 April 2000;
- Draft **Loan Agreement 2006**, which may be entered into by a Grower and Albany Financial Pty Ltd (Albany), an entity associated with WABG, undated, received on 21 November 2005; and
- Draft Finance Application and **Loan Agreement** which may be entered into by a Grower (the Borrower) and, if required, the Grower's Guarantor and United Pacific Finance Pty Ltd (UPF), undated, received on 1 March 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 or become a party to. A Loan Agreement will be executed where a Grower successfully applies for finance either from Albany or UPF. 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. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936.

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

Overview

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

Location	South west region of Western Australia
Type of business to be carried on by each participant	Commercial growing and cultivation of <i>Eucalyptus globulus</i> (Tasmanian blue gum) trees for the purpose of harvesting and selling timber for woodchips
Number of hectares offered for cultivation	500 hectares Oversubscriptions may be accepted
Size of each interest	One hectare
Minimum allocation	Six hectares
Number of trees per hectare	1,000 to 1,250 trees
Term of the Project	Approximately 10 years The Project will terminate when the plantation crop is harvested for the first time
Initial cost per hectare	\$5,225 for the establishment of the plantation
Ongoing costs	Growers will pay a management fee of \$110 per hectare per annum increased by the Consumer Price Index (CPI) and rent of \$440 per hectare per annum indexed by CPI.
Other costs	<ul style="list-style-type: none"> • 'Harvest', 'Delivery' and processing fees; • fire insurance; and • an incentive fee of 15% when the 'Relevant Harvest Income' due to the Grower exceeds \$13,750 per hectare indexed annually in accordance with CPI.

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

22. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 500 hectares in the Project and will invite participants to subscribe for at least six hectares in the Project on or before 30 June 2006.

23. To participate in the Project participants must complete the Application and Power of Attorney Form in the PDS and pay \$5,225 per hectare with their 'Application' by 30 June 2006. The 'Application Money' will be banked into the relevant 'Application Fund' and released to WABG when the Grower's application to acquire an 'Interest' has been accepted by WABG.

24. Growers will establish, manage, harvest and sell a commercial plantation of *Eucalyptus globulus* trees and carry on a commercial business of afforestation during the 'Term' of the Project.

25. On or before 30 June 2006, Growers participating in the scheme will execute a Sub-lease (and if relevant, an Agreement to Sub-Lease where there is no Project 'Land' available for Growers on or before 30 June 2006), a Project Management Contract and a Wood Purchase Agreement.

26. The Sub-lease gives a Grower an interest in an identifiable area of land, called a 'Leased Area'. Each 'Leased Area' is made up of one hectare allotments. The minimum area of land that can be leased by a Grower in the Project is six hectares.

27. Where there is no Project 'Land' available for a Grower on or before 30 June 2006, the Project Manager may still accept the Grower's Application subject to a Sub-lease being entered into on behalf of the Grower and lodged for registration within nine months of the date of acceptance of the Grower's Application. Acceptance of the Grower's Application will also be subjected to the Project Manager's ability to complete the 'Establishment' of the 'Plantation' within the 'Establishment Period'. In these circumstances, the Grower will be required to enter into an Agreement to Sub-lease with the Project Manager.

28. The Growers enter into a Project Management Contract with the Project Manager. The Project Management Contract sets out the services to be provided by the Project Manager, in establishing and maintaining Tasmanian blue gum (*Eucalyptus globulus*) seedlings planted on the leased land for the purpose of felling and sale.

29. A Custodian has been appointed under the Scheme Property Custody Agreement to protect the interests of the Growers in their dealings with WABG.

30. There is no minimum amount that must be raised under the PDS. WABG has the right to accept oversubscriptions and additional land will be secured if necessary. The 'Land' that will be used for the Project will be leased by WABG from various farmers or alternatively, WABG will lease the Project 'Land' from WA Chip & Pulp Co Pty Ltd or WACAP Treefarms Pty Ltd.

Constitution

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

32. All moneys received from 'Applicants' will be paid to the Custodian. The Custodian shall open, or cause to be opened, an account designated 'Application Fund', into which all moneys received from 'Applicants' and accrued interest will be deposited. If the 'Application Money' is held in the 'Application Fund' for more than 12 months, the money shall be refunded, along with any interest earned on it, to the 'Applicant', unless the 'Applicant' directs WABG otherwise (clause 6).

33. Among other things, the Constitution sets out in detail the following:

- the Responsible Entity's entitlement to receive fees and rents (clause 8);
- a 'Register' of Growers is to be maintained which sets out each Grower's personal details, a description of their 'Plantation Allotments', and relevant dates (clause 9);
- the assignment of Grower's interest (clause 10);
- the Responsible Entity's powers to invest in and deal with any investments which are authorised by law (clause 11);
- the Responsible Entity's ability to borrow for the purpose of the Project and its protections and indemnities (clauses 12 and 13);
- additional powers, and other activities of the Responsible Entity (clauses 13 and 15);
- convening a meeting of Growers and voting requirements (clause 19);
- complaints handling and dispute resolution (clauses 20 and 21); and
- the termination of the Project (clause 23).

Compliance Plan

34. As required by the *Corporations Act 2001*, WABG has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that WABG manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected. Compliance is monitored by a Compliance Committee.

Scheme Property Custody Agreement

35. WABG, as Responsible Entity, has engaged Sandhurst Trustee Ltd to act as the Custodian of the 'Property', as defined in Item 1 of the Schedule of this Agreement. The 'Property' includes all 'Application Moneys' and 'Relevant Harvest Income' until disbursed or distributed in accordance with the Constitution, the 'Project Agreements' and the 'Head Lease', but does not include property legally vested in a Grower.

Sub-lease Agreement 2006

36. Growers will enter into a sub-lease of land with the Landholder. The Grower is to establish, tend and harvest a 'Plantation' of eucalyptus trees for commercial wood production on the 'Leased Area'. The term of the Sub-lease is 12 years or, until the completion of the first rotation, being the first 'Harvesting' of the 'Plantation'. The Grower may extend the 'Term' by giving written notice to the Landholder (clause 5).

37. The Grower grants the Landholder, its employees and contractors the right to enter the 'Leased Area' to carry out their duties under the Sub-lease in relation to the 'Leased Area' (clause 4.3). The Landholder warrants that it is entitled to grant this Sub-lease to the Grower and that the relevant consents required under clauses 3 and 4 have been obtained.

38. As consideration for the granting of the Sub-lease the Grower pays 'Rent' per hectare of the 'Leased Area', indexed after the first year by the Consumer Price Index (CPI). The 'Leased Area' is set out in Part 2 of the Schedule.

39. Grower's covenants, Landholder's covenants and mutual covenants are outlined in clauses 7, 8 and 9. The 'Parties' acknowledge that the 'Plantation' is and shall remain the property of the Grower until the end of the 'Term' and the Grower shall be entitled to 'Harvest' the 'Plantation' and to retain all income from the sale of the 'Wood'.

40. If there is damage to or reduction in the viability of the 'Plantation', the Grower is required by the Landholder to reduce the 'Plantable Area' by the area which has been damaged or is no longer viable or, where the whole of the 'Plantation' is damaged or no longer commercially viable, to terminate the contract (clause 10). The result of a reduction or termination under this clause is that the Grower is deemed to have surrendered the land back to the Landholder and all obligations in relation to that land under the Sub-lease end. The Grower's share of the 'Relevant Harvest Income' will be proportionally reduced.

41. The terms of the termination in the event of default and dispute resolution are outlined in clauses 13 and 14 respectively.

Agreement to Sub-lease 2006

42. Where there is no Project 'Land' available for a Grower on or before 30 June 2006, the Grower will be required to enter into an Agreement to Sub-lease with WABG.

43. Pursuant to the terms of the Agreement to Sub-lease the parties undertake to enter into a Sub-lease of the land on or before the 'Starting Date', being a date no later than 31 March 2007, which will allow all the 'Establishment' services referred to in the Plantation Management Contract to be completed within the 'Establishment Period'. The parties are bound by all the provisions of the Sub-lease from the 'Starting Date'.

Project Management Contract 2006

44. Growers contract with the Project Manager to carry out such services as are required to 'Establish', manage and maintain the 'Plantation' on the 'Land' until maturity in accordance with the 'Plantation Development and Management Plan' and sound silvicultural and environmental practices.

45. These services include the 'Establishment' of the 'Plantation' on the 'Land' during the 'Establishment Period' (clause 4).

46. In consideration for the performance by the Project Manager of its duties and obligations, the Grower agrees to pay the Project Manager the amounts specified in the Schedule.

47. The Grower may express and give recommendations to the Project Manager, object to and disallow any changes to the 'Plantation Development and Management Plan' (clause 8). The Project Manager shall provide to the Grower a report not later than 20 November of each year. Among other things, the report will detail any changes to the 'Plantation Development and Management Plan', and set out the actual operations performed on the 'Land' (clause 9).

48. The termination of the Project Management Contract in the event of default and procedures for dispute resolution are described in clauses 14 and 16.

49. A second rotation plantation crop, through a coppice option is provided for. Growers who take up this option will be required to pay additional amounts at a future date and enter into arrangements to extend the effect of the Project agreements. This option may be taken up prior to the first 'Harvest' of the 'Plantation'. **The coppice option is outside of the scope of this Product Ruling and the tax implications for Growers who participate in the coppice option do not form part of this Product Ruling.**

Plantation Services Agreement 2006

50. The Project Manager will engage the 'Contractor' as an independent contractor to carry out the necessary 'Plantation Services' to 'Establish', tend and maintain the 'Plantation' of eucalyptus trees on the 'Land' as set out in the 'Plantation Development and Management Plan'.

51. The services will be in accordance with sound silvicultural and environmental practices adopted within the forestry industry.

Wood Purchase Agreement 2006

52. Growers authorise the 'Authorised Vendor' to enter into the Wood Purchase Agreement with the 'Purchaser' on their behalf. All of the Growers' 'Wood' is pooled together for sale to the 'Purchaser' by the 'Authorised Vendor'. Under the Agreement the 'Purchaser' will 'Harvest', 'Deliver' and purchase the 'Wood', for a price offered as being fair and reasonable at the relevant time.

53. Growers and the 'Authorised Vendor' may seek alternative prices for 'Harvest' and 'Delivery' and an alternative price for the 'Wood'. Where such alternatives are obtained the 'Purchaser' retains the right to match the price offered by the other party.

54. The Agreement also provides for all or part of the 'Wood' to be sold for higher value use other than that of woodchips.

Fees

55. Growers who are accepted to participate in the Project on or before 30 June 2006 and who have executed the Project Management Contract, the Sub-lease (or if relevant, an Agreement to Sub-lease) and the Wood Purchase Agreement will pay the following fees per hectare:

- the 'Application Money' payable under the Project Management Contract of \$5,225 per hectare;
- an annual management fee of \$110 per hectare indexed from 30 June 2006 is payable from the period beginning 1 July 2006 until the 'Plantation' has been 'Harvested'. The first annual management fee will be payable on or before 28 February 2007, and thereafter on 28 February in each year;
- a fee of 15% of the amount that results when the 'Relevant Harvest Income' due to the Grower exceeds \$13,750 per hectare, indexed annually from 30 June 2006;
- any unforeseen expenses in relation to fertiliser and/or insect issues, may be borne between the Growers in proportion to the number of hectares held by each Grower. The Growers may vote to meet such expenses at a meeting convened by WABG;

- if a Grower enters into the Sub-lease on or before 30 June 2006, an annual 'Rent' of \$440 per hectare indexed will be payable. The first 'Rent' is payable on 15 November 2006 in respect of the period from 1 July 2006 until 30 June 2007. Subsequently it is payable annually on 30 September;
- if a Grower enters into the Sub-lease after 30 June 2006, the 'Rent' for the period from 1 July 2006 until 30 June 2007 will be 1/12 of \$440 indexed for each full and part calendar month payable on entry into the Sub-lease. After this period, an annual 'Rent' of \$440 per hectare indexed will be payable on 30 September each year; and
- the Grower's proportion of 'Harvest' and 'Delivery' fees, for services provided in accordance with the Harvest Plan.

Pooling of Growers timber and distribution of proceeds

56. The Constitution sets out the circumstances relating to the pooling of Growers' timber and the distribution of 'Harvest Income' (clause 7). This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed 'Wood' from their 'Leased Area' to the pool making up the 'Relevant Harvest Income' are entitled to benefit from distributions from those proceeds; and
- 'Wood' is only pooled with the 'Wood' of Growers accepted to participate in the WA Blue Gum Project 2006.

Finance

57. Growers have the option to fund their involvement in the Project with either of two finance packages offered on commercial terms. Growers may borrow from Albany Financial Pty Ltd (Albany), a lender associated with WABG or United Pacific Finance Pty Ltd (UPF). Alternatively, Growers may borrow from an independent lender.

58. Growers cannot rely on this Product Ruling if they enter into a finance package with Albany or UPF that materially differs from those provided to the Tax Office by WABG with the application for this Product Ruling. These financial packages are summarised below.

Finance offered by Albany

59. Growers are able to borrow from Albany an amount of up to 80% of the 'Application Money'. The terms of the finance offered by Albany include:

- a loan term ending on 15 September 2010;
- a requirement to pay equal monthly principal and interest instalments by way of direct debit; and
- a fixed interest rate of 10.5% per annum.

60. The security for the loan is provided by the assignment to Albany of the Grower's rights and interest in the Project Management Contract, the Sub-lease, the Wood Purchase Agreement and all monies payable to the Grower under those Agreements and the insurances. The assignment occurs upon default by the Grower or other events set out in clause 8 of the Loan Agreement.

61. The loan is provided by Albany on a full recourse basis and recovery action will be taken in respect of any default by the borrower. Overdue repayments will incur interest at the default rate of 14% per annum.

Finance offered by UPF

62. As an alternative, Growers are able to borrow from UPF an amount up to 100% of the 'Application Money'. The terms of the finance are an eight (8) year term with interest only payable for the first two (2) years and then principal and interest over the following six (6) years with a fixed interest rate of 10.95% per annum. Growers are also liable to pay a loan establishment fee of \$250 plus 0.5% of the 'Application Money' (up to a maximum of \$1,250) and applicable stamp duty. Security is provided by a charge over the whole right, title and interest of the benefits arising out of each of the project documents and all monies payable to the Grower in these agreements. The loan is on a full recourse basis and recovery action will be taken in respect of any default.

63. Growers cannot rely on this Product Ruling if the 'Application Money' including the 'Application Money' payable subject to a finance arrangement with any lender, is not paid in full by 30 June 2006 by the Grower or, by the lender, on the Grower's behalf. Where an application is accepted by WABG subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to WABG by 30 June 2006.

64. 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 Albany, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

65. Subject to paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project and who have executed a Project Management Contract, Sub-lease (or if relevant, an Agreement to Sub-lease) and Wood Purchase Agreement on or before 30 June 2006. Where a Grower executes the Agreement to Sub-lease, the Sub-lease must be executed by the Grower on or before 31 March 2007.

66. The Grower's participation in the Project must constitute the carrying on of a business of primary production. 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.

The Simplified Tax System (STS)

Division 328

67. 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 1TAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a 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*.

68. 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.

Qualification

69. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

25% entrepreneurs tax offset

Subdivision 61-J

70. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for 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.

Tax outcomes for Growers

71. The following paragraphs outline the tax outcomes for all Growers who are **not** 'Joint Venture Growers'.

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

72. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on these proceeds (section 17-5), will be assessable income of the Grower under section 6-5 at the time that income is derived.

Deduction for lease document expenses***Section 25-20***

73. A Grower may claim a tax deduction under section 25-20 for the expense incurred in relation to registering or stamping the Sub-lease over property used solely for the purposes of producing assessable income.

Deductions for the loan establishment fee payable to UPF***Section 25-25***

74. Borrowing expenses are deductible under subsection 25-25(1) where the borrowed moneys are used or will be used during that income year for income producing purposes. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. Where the borrowing expenses exceed \$100 the deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than UPF is outside the scope of this Ruling.

Deductions for the Application Money, annual management fees, rent and interest***Section 8-1***

75. A Grower may claim tax deductions, on a per hectare basis, for the following expenditure.

PR 2006/99

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Application Money	\$5,225 See Notes (i) & (ii)	Nil	Nil	Nil
Management fees	Nil	\$110 (indexed) See Notes (i), (iii) & (v)	\$110 (indexed) See Notes (i), (iii) & (v)	\$110 (indexed) See Notes (i), (iii) & (v)
Rent for Sub-lease executed on or before 30 June 2006	Nil	\$440 (indexed) See Notes (i), (iii) & (v)	\$440 (indexed) See Notes (i), (iii) & (v)	\$440 (indexed) See Notes (i), (iii) & (v)
Rent for Sub-lease executed after 30 June 2006	Nil	Amount incurred See Notes (i), (iii) & (v)	\$440 (indexed) See Notes (i), (iii) & (v)	\$440 (indexed) See Notes (i), (iii) & (v)
Interest payable to Albany or UPF	As incurred See Notes (iv) & (v)	As incurred See Notes (iv) & (v)	As incurred See Notes (iv) & (v)	As incurred See Notes (iv) & (v)

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) Under section 82KZMG of the ITAA 1936 the 'Application Money' is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 96 to 100) and is deductible in the income year in which it is incurred.
- (iii) The management fees and rent set out in the Project Management Contract and the Sub-lease Agreement are deductible in full in the year that they are incurred.
- (iv) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Albany or UPF, is outside the scope of this Ruling. Growers who borrow from lenders other than Albany or UPF may request a private ruling on the deductibility of the interest incurred.
- (v) This Ruling will not apply to any Grower who prepays fees or interest. A prepayment of fees or interest will occur where an amount is paid by a Grower for fees or interest for a period that extends beyond the income year in which the fees or interest are incurred. Such Growers may seek a private ruling on the tax implications of their participation in the Project.

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner’s discretion***

76. A Grower who is an individual accepted into the Project by 30 June 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 the income years ending **30 June 2006 to 30 June 2015 or to the income year preceding the first ‘Harvest’ of the ‘Wood’ grown on the Grower’s ‘Plantation’ (whichever occurs sooner)**. 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 and 82KL and Part IVA

77. For a Grower who participates in the Project and incurs expenditure as required by the Project Management Contract and the Sub-lease Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME and 82KZMF;
- 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.

Commissioner of Taxation31 May 2006

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?

78. For the amounts set out in the table above to constitute allowable deductions, the Grower's afforestation activities as a participant in the WA Blue Gum Project 2006 must amount to the carrying on of a business of primary production.

79. Where there is a business, or a future business, the gross proceeds from the sale of the 'Wood' grown on the Grower's 'Plantation' 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.

80. For schemes such as that of the WA Blue Gum Project 2006, 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.

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

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

82. In this Project, each Grower enters into a Project Management Contract and a Sub-lease Agreement.

83. Under the Sub-lease Agreement each individual Grower will have rights over a specific and identifiable area of at least six hectares of land, called the 'Leased Area'. The Sub-lease Agreement provides the Grower with an ongoing interest in the specific trees on the 'Leased Area' for the term of the Project. Under the Sub-lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Sub-lease allows the Project Manager to come onto the land to carry out its obligations under the Project Management Contract.

84. Under the Project Management Contract the Project Manager is engaged by the Grower to establish and maintain a 'Plantation' on the Grower's identifiable 'Land' during the term of the Project. The Project Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the 'Plantation' on the Grower's behalf.

85. The Project Manager is also engaged to arrange harvest and sell, on the Grower's behalf, the 'Wood' grown on the 'Plantation' on the Grower's 'Land'.

86. 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.

87. 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 'Wood' that will return a before-tax profit, that is a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

88. The pooling of 'Wood' from the 'Plantation' on the Grower's 'Land' with the 'Wood' of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Wood' will reflect the proportion of the trees contributed from their 'Plantation'.

89. The Project Manager's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a 'Land' is relatively small, it is of a size and scale to allow it to be commercially viable.

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

91. 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. For the purposes of this Ruling, the Growers' afforestation activities in the WA Blue Gum Project 2006 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

92. 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.

93. Changes to the STS rules apply from 1 July 2005. 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 the Application Money, annual management fees and rent

Section 8-1

94. Consideration of whether the 'Application Money', annual management fees and the annual rent payments 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.

95. The Application Money, annual management fees and the rent payments associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Wood') is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions

Sections 82KZL to 82KZMG

96. 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.

97. For the Scheme that applies to this Product Ruling, only sections 82KZL (an interpretive provision) and 82KZMG of the ITAA 1936 are relevant (but see paragraphs 101 to 104 for comments on the possible application of sections 82KZME and 82KZMF of the ITAA 1936).

Section 82KZMG

98. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules that would otherwise apply. Section 82KZMG provides a '12 month rule' that, in effect, facilitates a deduction for certain prepaid expenditure incurred under a plantation forestry managed agreement. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees. Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the following income year.

Application of the prepayment provisions to this Project

Section 82KZMG

99. Under the Project Management Contract, a Grower incurs the 'Application Money' consisting of expenditure of \$5,225 per hectare that:

- is for 'seasonally dependent agronomic activities'; and
- meets the other requirements of section 82KZMG of the ITAA 1936.

100. As the requirements of section 82KZMG of the ITAA 1936 have been met, a deduction is allowable in the same income year as the expenditure is incurred under the Project Management Contract for 'seasonally dependent agronomic activities'.

Sections 82KZME and 82KZMF

101. Under the scheme described in this Product Ruling, the annual management fee and rent are incurred annually and relate to the income year in which they are incurred. Interest payable to Albany and UPF is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

102. A Grower can therefore claim a deduction for each of the relevant amounts in the income year in which the amount is incurred.

103. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses to prepay all or some of the expenditure payable under the Project Management Contract, Sub-lease Agreement or prepays interest under a finance agreement with Albany or UPF or chooses or is required to prepay interest under a loan agreement with a lender other than Albany or UPF. 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.

104. Growers who choose to prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner’s discretion***

105. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years discussed in paragraph 76 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:

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

106. 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 in the income years discussed in paragraph 76.

107. 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

108. 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. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

109. 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).

110. The WA Blue Gum Project 2006 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 73 to 75 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.

111. 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 'Wood'. 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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2006/98; TR 97/11;
TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11; TD 2003/12

Subject references:

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- stamp duty
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
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- ITAA 1936 82KZMB

- ITAA 1936 82KZMC
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- ITAA 1936 177C
- ITAA 1936 177D
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