


PR 2007/37 - Income tax: WA Blue Gum Project 2007 not Joint Venture Growers

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Product Ruling

Income tax: WA Blue Gum Project 2007 not Joint Venture 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. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the WA Blue Gum Project 2007 or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 28 of this Ruling on or before 30 June 2007. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- participate in the Project through offers made other than through the Product Disclosure Statement;
- are accepted to participate in the Project after 30 June 2007;
- enter into finance arrangements with Albany Financial Pty Ltd or United Pacific Finance Pty Ltd other than those described at paragraphs 68 to 75 of this Ruling;
- are Joint Venture Growers. Entities who participate as Joint Venture Growers should refer to Product Ruling PR 2007/38; or
- 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.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 28 to 76 of this Ruling.

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

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Date of effect

9. This Product Ruling applies prospectively from 18 April 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 18 April 2007 until 30 June 2007, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2010.

10. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;

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

11. 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)).

12. 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.

13. 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).

Changes in the law

14. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

15. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

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

Goods and Services Tax

17. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this 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.

Ruling

Application of this Ruling

18. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 28 to 76 of this Ruling.

19. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Project Management Contract, Sub-lease (or if relevant, an Agreement to Sub-lease) and Wood Purchase Agreement.

20. 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

21. 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 was an 'STS taxpayer' prior to 1 July 2005 and 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*.

22. For these Growers only, 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

23. 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.

Assessable income***Section 6-5 and section 17-5***

24. 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.

Deduction for application fee, management fees, rent, lease document expenses, borrowing expenses, and interest***Section 8-1, section 25-20, section 25-25 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936***

25. A Grower may claim tax deductions for the following fees and expenses on a per hectare basis, as set out in the table below.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Application fee	\$5,225 See Notes (i) & (ii)	Nil	Nil	Nil
Management fees	Nil	As incurred See Notes (i), (iii) & (v)	As incurred See Notes (i), (iii) & (v)	As incurred See Notes (i), (iii) & (v)
Rent for Sub-lease executed on or before 30 June 2007	Nil	As incurred See Notes (i), (iii) & (v)	As incurred See Notes (i), (iii) & (v)	As incurred See Notes (i), (iii) & (v)
Rent for Sub-lease executed after 30 June 2007	Nil	As incurred See Notes (i), (iii), & (v)	As incurred See Notes (i), (iii) & (v)	As incurred 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)
Registering or stamping the Sub-lease	As incurred See Note (vi)	Nil	Nil	Nil
Deductions for the loan establishment fee payable to UPF	Must be calculated – See Note (vii)	Must be calculated – See Note (vi)	Must be calculated – See Note (vi)	Must be calculated – See Note (vi)

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 *Income Tax Assessment Act 1936* (ITAA 1936) the application fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 93 to 95 of this Ruling) 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) Interest on loans with Albany or UPF is deductible in the year in which it is incurred. However, 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 management fees, rent or interest. A prepayment of management fees, rent or interest will occur where an amount is paid by a Grower for management fees, rent or interest for a period that extends beyond the income year in which the management fees, rent or interest are incurred. Such Growers may seek a private ruling on the tax implications of their participation in the Project.
- (vi) A Grower may claim a tax deduction under section 25-20 for the expense incurred in relation to registering or stamping a Sub-lease over property used solely for the purposes of producing assessable income.
- (vii) Borrowing expenses are deductible under subsection 25-25(1) where the borrowed money is used or will be used during that income year for income producing purposes. It is incurred for borrowing money that is 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.

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

Section 35-55 – exercise of Commissioner’s discretion

26. A Grower who is an individual accepted into the Project in the year ended 30 June 2007 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 Growers for the income years ended **30 June 2007 to 30 June 2017 or to the income year preceding the first Harvest of the Wood grown on the Grower’s Plantation (which ever 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.

Prepayment provisions and anti-avoidance provisions

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

27. For a Grower who commences participation in the Project and incurs expenditure as required by the Lease and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF, refer to paragraphs 90 to 92 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.

Scheme

28. 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 21 November 2006 and additional correspondence dated 9, 21 and 22 February 2007;
- **Draft Combined Product Disclosure Statement and Financial Services Guide** for the WA Blue Gum Project 2007 issued by WA Blue Gum Limited (WABG or the Responsible Entity), received 21 November 2006;
- **Constitution of the WA Blue Gum Project 2007**, dated 23 May 2006;

- The Compliance Plan for the WA Blue Gum Project dated 31 March 2005;
- Draft Sub-Lease, to be entered into by WABG and Sub-Lessor, received on 21 November 2006;
- Draft **Sub-Lease 2007**, to be entered into by each Grower and WABG (the Landholder), received on 21 November 2007;
- Draft **Agreement to Sub-lease 2007**, which may be entered into by each Grower and WABG, received on 21 November 2007;
- Draft **Project Management Contract 2007**, to be entered into by each Grower and WABG (the Project Manager), received on 21 November 2007;
- Draft **Wood Purchase Agreement 2007**, to be entered into by each Grower, WABG (the Authorised Vendor) and WA Chip & Pulp Co Pty Ltd (the Purchaser), received on 21 November 2006;
- Draft Plantation Services Agreement 2007 to be entered into between WABG and WACAP Treefarms Pty Ltd (the Contractor), received on 21 November 2006;
- Draft Agreement for the Provision of Consulting Services to be entered into between WABG and URS Australia Pty Ltd, received on 21 November 2006;
- The Scheme Property Custody Agreement between WABG and Sandhurst Trustees Ltd (the Custodian) dated 12 April 2000;
- Draft **Loan Agreement 2007**, which may be entered into by a Grower and Albany Financial Pty Ltd (Albany), an entity associated with WABG, received on 21 November 2006; and
- Draft **Finance Application and Term Loan Finance 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 21 November 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.

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

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

31. The main features of the WA Blue Gum Project 2007 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 \$14,575 per hectare indexed annually in accordance with CPI.

32. 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.

33. 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 2007.

34. 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 2007. 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.

35. 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.

36. On or before 30 June 2007, 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 2007), a Project Management Contract and a Wood Purchase Agreement.

37. 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.

38. Where there is no Project Land available for a Grower on or before 30 June 2007, 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 subject 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.

39. 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.

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

41. 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

42. 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.

43. All Application Money 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 money 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).

44. 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 14 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

45. 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

46. 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 Money 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 2007

47. 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).

48. 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.

49. 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.

50. 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.

51. 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.

52. 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 2007

53. Where there is no Project Land available for a Grower on or before 30 June 2007, the Grower will be required to enter into an Agreement to Sub-lease with WABG.

54. 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 2008, 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 2007

55. 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.

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

57. 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.

58. 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).

59. The termination of the Project Management Contract in the event of default and procedures for dispute resolution are described in clauses 15 and 17.

60. 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 2007

61. 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.

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

Wood Purchase Agreement 2007

63. 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.

64. 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.

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

Fees

66. Growers who are accepted to participate in the Project on or before 30 June 2007 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 fee is payable under the Project Management Contract of \$5,225 per hectare;
- an annual management fee of \$110 per hectare indexed from 30 June 2007 is payable from the period beginning 1 July 2007 until the Plantation has been Harvested. The first annual management fee will be payable on 30 September 2007, and thereafter on 30 September in each year;
- a fee of 15% of the amount that results when the Relevant Harvest Income due to the Grower exceeds \$14,575 per hectare, indexed annually from 30 June 2007;

- 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 2007, an annual Rent of \$440 per hectare indexed will be payable. The first Rent is payable on 15 September 2007 in respect of the period from 1 July 2007 until 30 June 2008. Subsequently, it is payable annually on 30 September;
- if a Grower enters into the Sub-lease after 30 June 2007, the Rent for the period from 1 July 2007 until 30 June 2008 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

67. 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 2007.

Finance

68. A Grower who does not pay the Application Money in full upon application has an 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) the preferred lender. Alternatively, Growers may borrow from an independent lender external to the Project.

69. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Albany or with UPF that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than with UPF may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

70. Growers cannot rely on any part of this Ruling if the Application Money is not paid in full on or before 30 June 2007 by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than Albany, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 30 June 2007.

Finance offered by Albany

71. A Grower can finance the cost of their Application Money by borrowing from Albany an amount of up to 80% of the Application Money. Subject to Albany accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

72. The terms of the finance offered by Albany include:

- a loan term ending on 15 September 2011;
- a requirement to pay equal monthly principal and interest instalments by way of direct debit; and
- an indicative fixed interest rate of 11.2% per annum.

73. 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.

74. 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 15% per annum.

Finance offered by UPF

75. As an alternative, a Grower able to borrow from UPF an amount up to 100% of the Application Money. The terms of the finance are a seven (7) year term with interest only payable for the first two (2) years and then principal and interest over the following five (5) years with a fixed interest rate of approximately 10.25% per annum. Growers are also liable to pay a loan establishment fee of \$250 plus 2.5% of the Application Money 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.

76. 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.

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?

77. For the amounts set out in paragraph 25 of this Ruling to constitute allowable deductions, the Grower's afforestation activity as a participant in the WA Blue Gum Project 2007 must amount to the carrying on of a business of primary production.

78. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on of a business of primary production.

79. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

80. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the WA Blue Gum Project 2007. As Taxation Ruling TR 2000/8 sets out, the relevant principles 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. Having applied these principles to the arrangement set out above, a Grower in the WA Blue Gum Project 2007 is accepted to be carrying on a business of growing and harvesting Wood for sale.

The Simplified Tax System

Division 328

82. 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.

83. 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 fee, annual management fees, Rent and interest on loans with Albany or UPF the Preferred Financier

Section 8-1

84. The application fee, management fee and Rent is deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the application fee, management fees or Rent (see paragraphs 49 to 51 of TR 2000/8).

85. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 88 to 92 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred (Note: The meaning of incurred is explained in Taxation Ruling TR 97/7).

86. Some Growers may finance their participation in the Project through a Loan Agreement with Albany or UPF, the Preferred Financier. Applying the same principles as those used for the application fee, management fees and the Rent, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

87. Other than where the prepayment provisions apply (see paragraphs 88 to 92 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMG

88. 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 income year, then it is not expenditure to which the prepayment rules apply.

89. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and section 82KZMG of the ITAA 1936 (an operative provision). References to sections 82KZME and 82KZMF of the ITAA 1936 are made only in respect their interaction with section 82KZMG and to confirm that these provisions have no application to expenditure incurred by Growers who participate in the scheme set out in this Ruling.

Application of the prepayment provisions to this Project***Sections 82KZME and 82KZMF***

90. Other than the application fee (see below) the fees payable under scheme to which this Product Ruling applies are incurred annually for services to be wholly provided in the year in which those fees are incurred and the interest payable to Albany or to UPF is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to expenditure incurred by Growers under this scheme.

91. 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 Sub-lease, or prepays interest under a loan agreement (including loan agreements with lenders other than Albany or the UPF). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion in section 82KZME that excludes them from the operation of section 82KZMF.

92. As noted in the Ruling part above, Growers who 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.

Section 82KZMG

93. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply. Section 82KZMG provides a '12 month rule' that, in effect, facilitates an immediate 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 commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the following income year.

94. Under the Project Management Agreement each Grower incurs an application fee of \$5,225 per hectare for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the Trees.

95. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, a deduction is allowable in the income year ended 30 June 2007 for the full amount of expenditure incurred by the Grower for the application fee.

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

96. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for year ended 30 June 2007 to 30 June 2017, 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.

97. 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.

98. 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

99. 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

100. 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).

101. The WA Blue Gum Project 2007 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 paragraph 25 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.

102. 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.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2007/38; TR 97/7; TR 97/11;
TR 98/22; TR 2000/8;
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

- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
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- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
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- Copyright Act 1968
- Corporations Act 2001
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Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
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Case references:

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