PR 2008/19 - Income tax: Heathcote Ridge Vineyard Project No. 2

Product Ruling

Income tax: Heathcote Ridge Vineyard Project No. 2

Contents Para

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. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling this scheme is referred to as the Heathcote Ridge Vineyard Project No. 2 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. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 31 of this Ruling on or before 31 May 2008. 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;
- are accepted into this Project before the date of this Ruling or after 31 May 2008; or
- participate in the scheme through offers made other than through the Product Disclosure Statement.

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 31 to 91 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.

Date of effect

9. This Product Ruling applies prospectively from 27 February 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 27 February 2008 until 31 May 2008, 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 the extent of those amendments this Product Ruling will be superseded.

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 31 to 91 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 Management Agreement and Licence Agreement, on or before 31 May 2008.

Minimum subscription

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. Under the terms of the Product Disclosure Statement, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 30 interests is achieved.

Concessions for 'small business entities'

21. From the 2007–08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the $2 million aggregated turnover test (a 'small business entity').

22. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling, unless otherwise stated.

Assessable income

Sections 6-5 and 17-5

23. 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.

Deductions for Initial and Ongoing Management Services fees, Land & Water Licence fees, Trellis, Plant and Equipment Rent, interest and borrowing costs

Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

24. A Grower who is accepted into the Project on or after the date of this ruling and on or before 31 May 2008 may claim tax deductions for the following fees and expenses on a per Allotment basis, as set out in the Table.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Initial Management Services Fee	$4,738 See Notes (i), (ii) & (iii)	Nil	Nil
Ongoing Management Services Fee	Nil	$1,620 See Notes (i), (ii) & (iii)	$1,429 See Notes (i), (ii) & (iii)
Land & Water Licence Fee	$47 See Notes (i), (ii) & (iii)	$374 See Notes (i), (ii) & (iii)	$406 See Notes (i), (ii) & (iii)
Trellis, Plant & Equipment Rent	$20 See Notes (i), (ii) & (iii)	$445 See Notes (i), (ii) & (iii)	$684 See Notes (i), (ii) & (iii)
Interest on loans with Total Beverage Australia Pty Ltd (Total Beverage Australia)	As incurred See Notes (ii), (iii) & (iv)	As incurred See Notes (ii), (iii) & (iv)	As incurred See Notes (ii), (iii) & (iv)
Borrowing Costs – Total Beverage Australia	Must be calculated. See Note (v)	Must be calculated. See Note (v)	Must be calculated. See Note (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) The Initial and Ongoing Management Service fees, Land and Water Licence fees, the Trellis, Plant and Equipment Rent and interest on loans with Total Beverage Australia are deductible under section 8-1 in the income year that the relevant fee is incurred.

(iii) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 101 to 105 of this Ruling). Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

(iv) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Total Beverage Australia, is outside the scope of this Ruling. Prepayments of interest to any lender, including Total Beverage Australia are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.

(v) The application fee is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. Borrowing expenses of $100 or less are deductible in the year in which they are incurred. If the borrowing expenses are greater than $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 Total Beverage Australia is outside the scope of this Ruling.

Deductions for capital expenditure (Non-'small business entities')

Division 40

25. A Grower, who is not a 'small business entity', will also be entitled to tax deductions relating to water facilities (for example, irrigation), a 'landcare operation' and grapevines. All deductions shown in the following Table are determined under Division 40, on a per Allotment basis.

Fee Type	**ITAA 1997 Section**	**Year ended 30 June 2008**	**Year ended 30 June 2009**	**Year ended 30 June 2010**
Water facility (Irrigation)	40-515	$764 See Notes (i) & (vi)	$764 See Notes (i) & (vi)	$763 See Notes (i) & (vi)
Landcare operations	40-630	$53 See Notes (i) & (vii)	NIL	NIL
Establishment of grapevines	40-515	NIL See Note (viii)	NIL See Note (viii)	NIL See Note (viii)

Notes:

(vi) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. As the condition in subsection 40-525(1) is met, a deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of $2,291 incurred by each Grower on the installation of the 'water facility' in the year ending 30 June 2008 and one-third in each of the next 2 years of income (section 40-540).

(vii) Capital expenditure of $53 incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.

(viii) Grapevines are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease or a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the grapevines is determined using the formula in section 40-545 and is based on the capital expenditure of $1,251 incurred by the Grower that is attributable to their establishment. If the grapevines have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the grapevines enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform Growers of when the grapevines enter their first commercial season.

Deductions for capital expenditure (small business entities)

Subdivision 328-D and Subdivisions 40-F and 40-G

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

27. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (ix) and (x) of paragraph 25 of this Ruling.

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

Fee type	ITAA 1997 section	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Water facility (Irrigation)	40-515	$764 See Notes (i) & (ix)	$764 See Notes (i) & (ix)	$763 See Notes (i) & (ix)
Landcare operations	40-630	$53 See Notes (i) & (x)	NIL	NIL
Establishment of grapevines	40-515	Must be calculated. See Note (viii)	Must be calculated. See Note (viii)	Must be calculated. See Note (viii)

Notes:

(ix) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. As the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. The capital expenditure incurred on the water facility is $2,291 in the year ended 30 June 2008. If the 'cost' apportionable to that deemed 'depreciating asset' is less than $1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first

uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2008 is determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years the full pool rate will apply.

Alternatively, Growers may choose to claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). As the condition in subsection 40-525(1) is met, a deduction is allowable equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).

(x) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than $1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

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

Section 35-55 – exercise of Commissioner's discretion

29. A Grower who is an individual accepted into the Project by 31 May 2008 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 below, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **30 June 2008 to 30 June 2011**. 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

30. For a Grower who commences participation in the Project and incurs expenditure as required by the Licence Agreement and the 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 (but see paragraphs 101 to 105 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

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

- Application for a Product Ruling received on 31 August 2007 as constituted by the following documents and additional correspondence, including emails, received 31 August 2007, 19 November 2007, 20 December 2007, 10 January 2008, 6 February 2008, 11 February 2008, 11 February 2008, 12 February 2008 and 13 February 2008, and telephone conversations on 21 September 2007, 8 October 2007, 12 October 2007, 8 November 2007, 4 December 2007, 6 December 2007, 9 January 2008, 3 February 2008, 6 February 2008, 12 February 2008, 13 February 2008 and 14 February 2008;

- Draft Product Disclosure Statement (PDS) received on 10 January 2008;
- **Constitution** of the Heathcote Ridge Vineyard Project No. 2 received on 13 February 2008;
- Draft **Supplemental Deed** to the Constitution of the Heathcote Ridge Vineyard Project No. 2 received on 13 February 2008;
- Draft **Management Agreement** of the Heathcote Ridge Vineyard Project No. 2 received on 13 February 2008;
- Draft **Licence Agreement** of the Heathcote Ridge Vineyard Project No. 2 received on 13 February 2008;
- Draft Compliance Plan of the Heathcote Ridge Vineyard Project No. 2 received on 31 August 2007;
- Draft Managed Investment Scheme Custodian Agreement received on 31 August 2007;
- Draft Joint Venture Agreement between Blaxland Vineyards Ltd and Food and Beverage Australia Ltd for the Heathcote Ridge Vineyard Project No. 2 received on 6 February 2008;
- Draft Grape Supply Agreement between Orlando Wines (OW), National Viticultural Fund of Australia Pty Ltd as Custodian for the Heathcote Ridge Vineyard Project No. 2 received on 13 February 2008;
- Draft Memorandum of Lease between Heathcote Ridge Vineyard Ltd and National Viticulture Fund of Australia Pty Ltd received on 11 February 2008;
- Draft Memorandum of Sub-Lease between National Viticulture Fund of Australia Pty Ltd and Heathcote Ridge Vineyard Ltd received on 11 February 2008;
- Draft **Terms Loan Agreement** for the Heathcote Ridge Vineyard Project No. 2 received on 31 August 2007;
- Draft **Direct Debit Agreement** for the Heathcote Ridge Vineyard Project No. 2 received on 31 August 2007; and
- Viticulturalist Report for the Heathcote Ridge Vineyard Project No. 2 received on 31 August 2007.

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

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

33. 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.

Overview

34. The main features of the Heathcote Ridge Vineyard Project No. 2 are as follows:

Location	Heathcote region, Victoria
Type of business to be carried on by each Grower	Commercial growing of wine grapes
Term of the Project	16 years
Number of hectares offered for cultivation	69.5
Size of each interest	0.25 hectares
Minimum allocation per Grower	1 interest
Minimum subscription	30 interests
Initial cost	$7,008
Ongoing costs	• Ongoing Management Services Fees; • Irrigation Fees; and • Rent.
Other costs	Growers will be liable for ongoing Viticulture Costs and a Call Amount

35. The Project will be a registered Managed Investment Scheme under the *Corporations Act 2001*. Food and Beverage Australia Limited (FABAL) has been issued with an Australian Financial Service Licence number 246650 and will be the Responsible Entity for the Project.

36. The Project will be situated in the Heathcote region of Victoria. The Land for the Project has been purchased by Heathcote Ridge Vineyard Limited (Land Owning Company), which will lease the land to National Viticultural Fund of Australia Pty Limited (Custodian), which will then sublease the land back to the Land Owning Company. The Land Owning Company will grant a licence to the Growers to use and occupy the Allotment for the planting, growing and harvesting of grapes. A Grower acquiring a single interest in the Project will hold a licence over an Allotment on which the Grower can plant and maintain 450 to 470 grapevines.

37. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 69.5 hectares, which corresponds to 278 interests called Allotments of 0.25 hectares each.

38. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of one Allotment of 0.25 hectares in size.

39. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints FABAL to enter into, on behalf of the Grower, a Licence Agreement and a Management Agreement.

40. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Licence Agreement and the Management Agreement on or before 31 May 2008 will become 2008 Growers.

41. Under the terms of the PDS, the interests in the Grower's Allotment will only be issued after a minimum subscription of 30 interests has been achieved.

42. Each Grower will use their Allotment for the purpose of carrying on a business of cultivating and harvesting grapes and the sale of harvested produce.

Constitution

43. The Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which FABAL agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

44. In order to acquire an interest in the Project, the Grower must make an application for an Allotment in accordance with clause 3. Among other things, the application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Fee in a form acceptable to the Responsible Entity.

45. Under clause 4 of the Constitution, the Responsible Entity holds the Application Fees. The Responsible Entity will deposit all Application Fees received from applicants in a Project bank account, the Application Fund.

46. Once the Responsible Entity has accepted the application, all of the Project documents have been executed and the other conditions expressed in clause 4.5 have been satisfied, the Responsible Entity may transfer money from the Application Fund.

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

- Register of Growers (clause 5);
- Winding up of the Scheme (clause 17);
- Fees (clause 26);
- Expenses (clause 27);
- Distribution from the Proceeds Funds (clause 34); and
- Insurance (clause 37).

Supplemental Deed

48. This Deed amends the Constitution to reflect that the cut off date for the acceptance of applications to enter the Project is 31 May 2008.

Compliance Plan

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

Leases

50. The Land for the Project is described as the Area marked 'B' and 'C' on the Plan comprising CA 46 School Road Corop being a portion of the Land comprised in Certificate of Title Volume 4911 Folio 060, the Area marked 'B' and 'C' on the Plan comprising CA 32 Parish of Corop being a portion of the Land comprised in Certificate of Title Volume 3607 Folio 257 and CA 33 and 49 Parish of Corop being a portion of the land comprised in Certificate of Title Volume 8373 Folio 858.

51. The Land for the Project will be secured by two Leases. Under the Leases, the Land Owning Company leases the Land to the Custodian for the Term in return for Rent.

52. The Term of the Leases is the period commencing on the commencement date (31 May 2008) and ending on the expiration of the Lease (30 June 2023). The Rent is the amount of $11 for the first year of the Leases. At the end of the first year and then annually for the Term of the Leases, the Rent must be increased by the same percentage as the CPI. The Rent must be paid as a lump sum annually in advance.

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

Subleases

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

55. The Term of the Subleases is the period commencing on the commencement date (31 May 2008) and ending on the expiration of the Sublease (30 June 2023). The Rent is the amount of $11 for the first year of the Sublease. At the end of the first year and then annually for the term of the Subleases, the Rent must be increased annually by the same percentage as the CPI. The Rent must be paid as a lump sum annually in advance.

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

Licence Agreement

57. The Land Owning Company, the Responsible Entity and the Growers will enter into a Licence Agreement. The Land Owning Company will licence land, plant, equipment and trellising to the Grower to be used directly or through the Responsible Entity, with which the Grower can carry out the Business in accordance with the terms and conditions of the Licence Agreement.

58. Under the Agreement, the Land Owning Company agrees to grant the Grower licences to:

- use and occupy the Grower's Allotment of 0.25 of a hectare for the purposes of the Business of developing, planting, growing, maintaining, cultivating and harvesting grapes (clause 3.1.1);
- draw water supplied by the Land Owning Company for the purposes of the business (clause 3.1.2);
- use trellising installed by the Land Owning Company on the Allotment for the purposes of the Business (clause 4.1.1); and
- use plant and equipment owned by the Land Owning Company which is suitable for the Business for the purposes of the Business only (clause 4.1.2).

59. The Land Owning Company will establish and maintain a water pipeline for the purpose of servicing the Grower's Allotment and allow the Grower to draw water from the water infrastructure. The Land Owning Company will install and maintain trellising on the Allotment suitable for the Grower to carry out the viticulture business.

60. In consideration of the Land Owning Company granting the above licences, the Grower agrees to pay the Land Owning Company the Land and Water Licence Fee and the Trellis, Plant and Equipment Rent (Rent) in the amounts and in the manner set out in Schedule 2 of this Agreement.

61. Pursuant to clause 34 of the Constitution and clause 5.1 of this Agreement, the Land and Water Licence Fee and the Rent are expected to be paid out of the Proceeds Fund before any distributions to Growers.

62. The Grower's title and Interest in the vines on the Allotment is limited to such title and interest as is required for the Grower to grow and maintain the vines, and to harvest and sell the grapes from the vines.

63. The Grower will take full title to any grapes grown on the vines from the date of commencement of harvest to the date of the sale of the grapes. The Grower acknowledges and agrees that title to the vines will at all times remain the absolute property of the Land Owning Company.

64. The Grower's obligations are set out in detail in clause 7 under which the Grower agrees to use the Allotment for the purpose of establishing, maintaining, and harvesting the grapes in accordance with best practices of the viticulture industry.

Management Agreement

65. Each Grower enters into a Management Agreement with the Responsible Entity, contracting with the Responsible Entity to manage the Grower's Business on their Allotment subject to the terms and conditions of the Agreement and in accordance with good viticultural, environmental and industry practices.

66. The Agreement will commence on the date the Responsible Entity accepts the Grower's Application for an Interest in the Scheme and shall continue until its termination under clause 3.3 (being the earlier of 30 June 2023 or the termination date of the Grower's interest).

67. The Management Agreement provides that each Grower appoints the Responsible Entity as an independent contractor to perform services under the Agreement except to the extent provided by the Grower pursuant to clause 4.1.2 of the Licence Agreement. The services to be performed are:

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

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

68. In consideration of the Responsible Entity performing the services specified above, the Growers are required to pay fees as follows:

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

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

- a Performance Incentive Fee pursuant to clause 13 of the Agreement;
- be reimbursed by the Growers for all the costs and expenses of and in relation to the performance of its duties pursuant to clause 14 of the Agreement (Viticulture Costs), estimates of which are set out in Schedule 4; and
- request each Grower to make a payment to contribute to all or any unexpected expenses of or in relation to the Allotment, the amount of that payment not to exceed the call amount set out in Schedule 4.

Custodian Agreement

70. Under the Managed Investment Scheme Custodian Agreement, the Responsible Entity will appoint National Viticulture Fund of Australia Pty Ltd as Custodian of the Assets. All Assets delivered to the Custodian will be held and dealt with in accordance with this Agreement. The Custodian agrees to exercise all due care and act honestly in carrying out obligations under this Agreement.

Joint Venture Agreement

71. Under the Heathcote Ridge Joint Venture Agreement, FABAL and Blaxland Vineyards Limited (Blaxland) agree to participate in the Joint Venture to develop and market the Project in accordance with the terms of the Agreement.

72. The parties to the Agreement agree the Joint Venture will be conducted as a commercial venture and in accordance with good and proper commercial viticultural practice (clause 3.1).

73. Under clause 5 of the Agreement, Blaxland must, among other things, provide Vineyard Services in accordance with good viticultural practices through its employees or, if agreed between the parties, through contractors, consultants or agents.

Pooling of Crops and Grower's Entitlement to Net Proceeds

74. The Management Agreement and the Constitution set out the provisions relating to the pooling of grapes and distribution of proceeds (clause 11 of the Management Agreement and clause 34 of the Constitution). This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed grapes to the pool are entitled to benefit from distributions of Proceeds Fund; and
- any pooled grapes must consist only of grapes attributable to the Grower's Allotment and grapes generated from other Allotments.

75. The Grower's share of the pool or the Proceeds Fund is based on the proportion of the Allotment/s they licence in relation to total number of Allotments licensed under the Project.

76. However, before the distribution, the proceeds will be reduced by any fees payable under the Management Agreement, Licence Agreement, any amounts which the Responsible Entity considers will be required to meet anticipated Viticultural Costs or amounts payable by the Grower under the Constitution (clause 34.1 of the Constitution).

77. In the event that Grower's Allotment is partially or totally destroyed, the proceeds will be reduced in accordance with the terms of clause 34.8 of the Constitution.

Grape Supply Agreement

78. In each year during the Term (being from 1 October 2008 to 30 September 2017), the Grower must sell and Orlando Wines (OW) must purchase the grapes produced in that year from the Grower on the terms of the Agreement.

79. The grapes from each OW Block (as defined in the Agreement) must be harvested by the Grower on the harvest dates advised by OW and delivered by the Grower to the Delivery point.

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

Fees

81. Under the terms of the Management Agreement and Licence Agreement, each grower is required to pay the following:

Initial Management Services Fees

Year	Fees Payable	Due Date
1	$4,791 (includes 53 attributable to landcare activities)	By 31 May 2008

Irrigation & Planting Fees

Year	Irrigation Fees	Planting Fees	Due date
1	$899	$1,251	31 May 2008
2	$1,392	Nil	31 August 2008
3	Nil	Nil	-

Ongoing Management Services Fees

Year	Ongoing Management Services Fees	Viticulture Costs Estimate	Total	Due Date
1	Nil	Nil	Nil	-
2	$1,620	Nil	$1,620	31 August 2008
3	$1,429	Nil	$1,429	31 July 2009

Rent

Year	Rent	Due Date
1	$67	31 May 2008
2	$819	31 August 2008
3	$1,090	31 July 2009

82. In return for the Responsible Entity performing its ongoing duties under the Management Agreement, the Responsible Entity continues to be entitled to be paid Ongoing Management Services Fees at the rates specified in Schedule 4 of the Management Agreement.

83. Under Clause 14 of the Management Agreement the Responsible Entity is entitled to Viticulture Costs from Year 4 onwards. Estimated Viticulture Costs are listed in Schedule 4 of the Management Agreement.

84. Growers will be liable for the fees above from year 5 if the proceeds from the sale of winegrapes are insufficient to meet these and other fees (Schedule 2 to the Licence Agreement and Schedule 4 to the Management Agreement).

Call for Funds

85. Under clause 15 of the Management Agreement, the Responsible Entity is entitled to request each Grower make a payment to contribute to all or any unexpected expenses of or in relation to the Allotment, the amount of that payment not to exceed $3,261 in any year. Such money is not to be used to provide remuneration to the Responsible Entity for activities or responsibilities which are intended to be funded by other fees payable pursuant to the Management Agreement or the Constitution but for expenses, whether they be revenue or capital in nature, which have not been anticipated by the Responsible Entity. These payments can be called at any time during the term and the Responsible Entity will advise Growers of the nature of the activities to which the payments are directed.

Performance Incentive Fee

86. Under clause 13 of the Management Agreement, the Responsible Entity is entitled each year to be paid an additional fee on account of the performance by it of its duties which leads to above budget returns attributable to the Grower's Allotment. The additional fee will be paid at the time of the distribution of proceeds. The fee is calculated as 20% of the amount that the actual profit for a particular year exceeds the threshold profit amount for the particular year.

Finance

87. A Grower who does not pay the initial fees in full upon application can borrow from Total Beverage Australia, a lender associated with the Responsible Entity, or from an independent lender external to the Project.

88. 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 Total Beverage Australia 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 Total Beverage Australia may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

89. Growers cannot rely on any part of this Ruling if the initial fees are not paid in full on or before 31 May 2008 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, 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 31 May 2008 and the loan monies have not been paid in full to the Responsible Entity by 30 June 2008.

Finance offered by Total Beverage Australia

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

Option A: 12 Months Interest Free Finance

- applies to the initial fees payable by Growers;
- equal monthly principal instalments over 12 months commencing on 31 July 2008;
- instalments paid by direct debit;
- no interest applicable;
- the loan is secured by a charge over the Grower's interest in the Project; and
- an application fee of $50 per loan is payable upon application to enter into Option A.

Option B: Principal and Interest Finance

- Term – 2 years or 5 years
- Interest – 11.05%, fixed for the term of the loan
- the 2 year loan applies to the fees payable by the Growers for either the first year, the first two years or the first three years of the Project;
- the 5 year loan applies to the fees payable by the Growers for either the first year, the first two years, the first three years or the first four years of the Project;
- equal monthly principal and interest instalments over the term of the loan payable monthly in arrears commencing on 31 July 2008;
- instalments paid by direct debit;
- the loan is secured by a Charge over the Grower's interest in the Project; and
- an application fee of $50 per loan is payable upon application to enter into Option B.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Total Beverage Australia, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation
27 February 2008

Appendix 1 – Explanation

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?

92. For the amounts set out in paragraphs 24 to 25 of this Ruling to constitute allowable deductions, the Grower's viticulture activities as a participant in the Heathcote Ridge Vineyard Project No. 2 must amount to the carrying on of a business of primary production.

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

94. 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?

95. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Heathcote Ridge Vineyard Project No. 2. 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.

96. Having applied these principles to the arrangement set out above, a Grower in the Heathcote Ridge Vineyard Project No. 2 is accepted to be carrying on a business of growing and harvesting wine grapes for sale.

Deductibility of the Initial and Ongoing Management Services Fees, Land & Water Licence Fees, Trellis, Plant and Equipment Rent and interest on loans with Total Beverage Australia

Section 8-1

97. The Initial Management Services Fees, Ongoing Management Services Fees, Licence Fees, Rent and interest on loans are 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 Initial Management Services Fees, Licence Fees and Rent (see paragraphs 49 to 51 of TR 2000/8).

98. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraph 30 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.)

99. Some Growers may finance their participation in the Project through a Terms Loan Agreement with Total Beverage Australia. Applying the same principles as that used for the management and rent fees, the interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

100. Other than where the prepayment provisions apply (see paragraphs 101 to 105 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 82KZMF

101. 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.

102. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to this Project

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

104. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Management Agreement and/or the Licence Agreement, or prepays interest under any loan agreement (including loan agreements with lenders other than Total Beverage Australia).

105. As noted in the Ruling section 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.

Expenditure of a capital nature

Division 40 and Division 328

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

107. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity'.

108. The tax treatment of capital expenditure has been dealt with in a representative way in Table(s) in paragraphs 25 and 28 of this Ruling and in the accompanying notes.

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

109. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2008 to 30 June 2011, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion. 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 viticulture industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

110. 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.

111. 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

112. The operation of section 82KL 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.

Part IVA – general tax avoidance provisions

113. For Part IVA to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

114. The Heathcote Ridge Vineyard Project No. 2 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 24 to 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.

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

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22; TR 2000/8; TR 2007/6

Subject references:

- carrying on a business
- commencement of business
- non-commercial losses
- primary production
- primary production expenses
- management fee expenses
- producing assessable income
- product rulings
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 Subdiv 40-F
- ITAA 1997 40-515
- ITAA 1997 40-515(1)(a)
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(1)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(1)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-540
- ITAA 1997 40-545
- ITAA 1997 Subdiv 40-G
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-D
- ITAA 1997 40-630
- ITAA 1997 40-635
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

ATO references

NO: 2007/16162
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ vineyards & wineries