


# ***PR 2008/33 - Income tax: FEA Plantations Project 2008 - Woodlot Option 3***

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## Product Ruling

### Income tax: FEA Plantations Project 2008 – Woodlot Option 3

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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 under-paid 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

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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 the scheme is referred to as the 'FEA Plantations Project 2008 – Woodlot Option 3' or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations, and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as 'initial participants'<sup>1</sup> on or after the date this Product Ruling is made. They will have executed the relevant Project Agreements set out in paragraph 36 of this Ruling on or before 30 June 2008. **This Product Ruling only applies in respect of Growers who select Woodlot Option 3 in their application to participate in the scheme. Note that separate Product Rulings have been issued for Growers who selected other Woodlot options. These Product Rulings are as follows:**

- PR 2008/31 for Woodlot Option 1;
- PR 2008/32 for Woodlot Option 2; and
- PR 2008/34 for Woodlot Option 4.

5. 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:

- participate in the scheme other than as initial participants;
- are accepted into this Project before the date of this Ruling or after 30 June 2008;

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<sup>1</sup> For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

- finance their participation in the Project with loans from Forest Enterprises Australia Limited (FEA) other than those described at paragraphs 74 to 83 of this Ruling;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS); or
- are associates of FEA Plantations Limited (FEAP) or FEAP itself.

### **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 36 to 84 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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### **Superannuation Industry (Supervision) Act 1993**

9. 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.

## Date of effect

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10. This Product Ruling applies prospectively from 26 March 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 26 March 2008 until 30 June 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.

11. 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.

12. 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)).

13. 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.

14. 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

15. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law 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.

16. 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**

17. 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**

18. 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**

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**Application of this Ruling**

19. 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 36 to 84 of this Ruling.

20. 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.

21. 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.

**Concessions for small business entities<sup>2</sup>**

22. 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').

23. 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.

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<sup>2</sup> The meaning of 'small business entity' is explained in section 328-110.

**Deductions for the Establishment Fee****Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936**

24. Other than where a 'CGT event'<sup>3</sup> happens to their interest within 4 years of 30 June 2008 (see paragraph 25 of this Ruling), a Grower who is an 'initial participant' in the scheme may claim a tax deduction for the following amount on a per Woodlot basis.

| Fee Type                 | Year ending<br>30 June 2008        | Year ending<br>30 June 2009 | Year ending<br>30 June 2010 |
|--------------------------|------------------------------------|-----------------------------|-----------------------------|
| <b>Establishment Fee</b> | \$3,465<br>See Notes<br>(i) & (ii) | Nil                         | Nil                         |

**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 Establishment Fee is an expenditure for 'seasonally dependent agronomic activities' (SDAA) and is deductible in the income year in which it is incurred (see paragraphs 102 to 107 of this Ruling).

**'CGT event' within 4 years for Growers who are 'initial participants'****Section 82KZMGA**

25. A deduction for the Establishment Fee is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

26. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

<sup>3</sup> Defined in section 995-1.

27. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 108 to 110 of this Ruling).

### **Deductions for insurance premiums and interest**

#### ***Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936***

28. A Grower may claim tax deductions for the following fees and expenses as set out in the following table.

| <b>Fee Type</b>                | <b>Year ended<br/>30 June 2008</b>     | <b>Year ended<br/>30 June 2009</b>     | <b>Year ended<br/>30 June 2010</b>     |
|--------------------------------|--|--|--|
| <b>Insurance premiums</b>      | See Notes<br>(iii) & (iv)              | See Notes<br>(iii) & (iv)              | See Notes<br>(iii) & (iv)              |
| <b>Interest payable to FEA</b> | As incurred<br>See Notes<br>(v) & (vi) | As incurred<br>See Notes<br>(v) & (vi) | As incurred<br>See Notes<br>(v) & (vi) |

#### **Notes:**

- (iii) 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.
- (iv) Although Australian Forest Growers plantation insurance is prepaid for a Grower who acquires the minimum allocation, the amount of the prepaid insurance premium is less than \$1,000 and is deductible in the year in which it is incurred. For the purposes of this Project, an amount of less than \$1,000 is 'excluded expenditure'. However, where a Grower acquires more than the minimum allocation in the Project, the amount of the Grower's insurance premium may be \$1,000 or more. Such Growers MUST determine the deduction for the prepaid insurance premium using the formula shown in paragraph 95 of this Ruling.
- (v) Interest on loans with FEA 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 FEA, is outside the scope of this Ruling. Growers who borrow from lenders other than FEA may request a private ruling on the deductibility of the interest incurred.

- (vi) This Ruling will not apply to any Grower who prepays interest. A prepayment of interest will occur where an amount is paid by a Grower for interest for a period that extends beyond the income year in which the interest is incurred. Such Growers may seek a private ruling on the tax implications of their participation in the Project.

## **Assessable income from ‘CGT events’ for Growers who are ‘initial participants’**

### ***Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936***

29. Where a ‘CGT event’ (other than a ‘CGT event’ in respect of a thinning<sup>4</sup> – see paragraph 33 of this Ruling) happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower’s assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

30. The amount is included in the Grower’s assessable income in the income year in which the ‘CGT event’ happens (subsection 82KZMGB(2) of the ITAA 1936).

31. ‘CGT events’ for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown on the Grower’s Woodlot(s);
- the **sale, or any other disposal** of all or part of the ‘interest’ in the Project held by the Grower; or
- any other ‘CGT event’ that results in a reduction of the market value of the ‘interest’ in the Project held by the Grower.

32. Where an amount arising from a ‘CGT event’ is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936 the anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

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<sup>4</sup> A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning may occur over two or more income years and differs from a clear-fell of a percentage of mature trees.

**Amounts received by Growers where the Project trees are thinned*****Sections 6-5 and 17-5***

33. An amount received by a Grower in respect of a thinning of the trees grown in this Project is not an amount received as a result of a 'CGT event' and is not otherwise assessable under section 82KZMGB of the ITAA 1936. The amount is a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5 of the ITAA 1997) less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

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

34. A Grower who is an individual accepted into the Project in the year ended 30 June 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 above, 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 2033**. 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, 82KL and Part IVA***

35. For a Grower who commences participation in the Project and incurs expenditure as required by 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;
- 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

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

- Application for a Product Ruling as constituted by documents and correspondence received by the Tax Office on 22 October 2007, 21 December 2007, 24 December 2007, 9 January 2008, 11 January 2008, 14 January 2008, 21 January 2008, 31 January 2008, 5 February 2008, 13 February 2008, 14 February 2008, 15 February 2008, 20 February 2008, 21 February 2008 and 12 March 2008;
- Draft **Product Disclosure Statement** for the FEA Plantations Project 2008, issued by FEA Plantations Limited (FEAP), the Responsible Entity, received on 21 February 2008;
- Draft **Constitution** establishing the FEA Plantations Project 2008, received on 14 January 2008;
- Draft Compliance Plan for FEA Plantations Project 2008 issued by FEAP, received on 22 October 2007;
- Draft Forestry Right Deed between the Landowner (Landowner), FEAP and Forest Enterprises Australia Limited (the Guarantor), received on 22 October 2007;
- Draft **Forestry Right Lease Deed** to be entered into by each Grower and FEAP (as the Lessor), received on 5 February 2008;
- Draft **Management Agreement**, to be entered into by each Grower and FEAP (as the Manager) received on 5 February 2008;
- Head Management Agreement between Forest Enterprises Australia Limited and FEAP, dated 31 May 2001;
- Draft Wood Purchase Agreement between FEAP and Forest Enterprises Australia Limited, received on 22 October 2007;
- **Australian Forest Growers plantation insurance policy**, received on 22 October 2007; and
- Draft **Finance Application and Loan Agreement**, to be entered into by each Grower seeking finance and FEA (the Lender), received on 20 February 2008.

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

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

38. 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 effects of these agreements are summarised as follows.

39. The main features of the FEA Plantations Project 2008 – Woodlot Option 3 are as follows:

|  |  |
|--|--|
| Location   | Tasmania, northern New South Wales and south east Queensland   |
| Type of business to be carried on by each Grower | The establishment, management, harvesting and selling of a commercial plantation of Radiata Pine or similar species, for the purpose of harvesting and selling as sawlog and pulpwood.   |
| Term of the Project                              | Approximately 26 years from 30 June 2008   |
| Size of each Woodlot                             | 0.5 hectare  |
| Number of trees per Woodlot                      | Minimum of 600 trees   |
| Minimum allocation per Grower                    | 1 Woodlot  |
| Minimum subscription                             | None   |
| Initial cost                                     | Establishment Fee of \$3,465 per Woodlot   |
| Ongoing costs                                    | Growers will be charged for the cost of any insurance, except for Public Liability insurance.<br>The insurance premiums will increase in line with CPI.  |
| Other costs                                      | Deferred management fee and deferred rent will be a percentage of harvest proceeds or salvaged value in the event of a salvaged harvest or from insurance proceeds where the plantation crop is damaged or destroyed. The fee will be equal to 11% of the above. |

40. The Project is a registered managed investment scheme under the *Corporations Act 2001*. FEA Plantations Limited (FEAP) has been issued with an Australian Financial Service Licence 243515 and will be the Responsible Entity for the Project.

41. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). There are 4 Woodlot Options offered under the PDS. These are:

- Woodlot Option 1;
- Woodlot Option 2;
- Woodlot Option 3; and
- Woodlot Option 4.

42. The offer under the PDS involves 5,000 hectares in total with capacity for oversubscription and an invitation to subscribe for a minimum of 1 Woodlot (0.5 hectare in size) on or before 30 June 2008.

43. **This Product Ruling only applies to Woodlot Option 3.** Paragraph 4 of this Ruling details the Product Ruling numbers of Product Rulings that have been issued for other Woodlot Options.

44. To participate in the Project Applicants must complete the Application Form & Power of Attorney in the PDS and pay the relevant application fee by 30 June 2008.

45. By signing the Application Form & Power of Attorney the Applicant is deemed to have signed and have agreed to be bound by the terms of the Management Agreement and Forestry Right Lease Deed, and authorise FEAP to date and complete the terms of the Management Agreement and Forestry Right Lease Deed.

46. Once FEAP receives the Applicant's signed application, FEAP may accept or refuse any application. For an Applicant who is accepted as a Grower in the Project, FEAP will allocate Woodlots and place their details in a Register. FEAP and its associates will also enter into agreements in relation to the Woodlot allocated to the Grower.

47. Plantations in this Project will be established close to other existing plantation holdings that the FEA Group has established in Tasmania, New South Wales and Queensland.

48. Each Grower will be granted by, and take from FEAP, a lease of a Forestry Right in a Woodlot under the Forestry Right Lease Deed for the purpose of cultivating, nurturing and harvesting the Plantation Crop. The minimum area of land that can be leased by a Grower under the Project is 1 Woodlot of 0.5 hectare. Land utilised by the Project must meet the requirements set out in the Independent Forester's Report.

49. The Grower's rights under the Forestry Right Lease Deed will include the right to enter and exclusively use the Woodlots allocated to the Grower, the right to plant, cultivate, manage and harvest Plantation Crop on that Land and to sever, take away and sell the Plantation Crop.

50. The Grower will enter into a Management Agreement with FEAP to have suitable seedlings planted on their Woodlots, cultivate the Grower's Trees and be responsible for harvesting, processing and selling the Grower's Trees.

51. The sale proceeds of the Trees will be placed in a Proceeds Fund established under the Constitution which will include amounts from the Option 3 Proceeds Fund which represents the aggregated proceeds from sale of timber from Option 3 Woodlots established under the Constitution. From the relevant Proceeds Fund the Custodian will deduct and pay to FEAP each Grower's respective Rent under the Forestry Right Lease Deed and their Management Fees under the Management Agreement. The amount remaining will be distributed to Growers.

52. Insurance will be compulsory for a Grower who obtains finance longer than one year from FEA. A Grower may also elect to arrange their insurance. However, if requested, FEAP will endeavour to procure insurance cover against destruction or damage of the Grower's Woodlots by fire and other risks.

53. The PDS describes the insurance options available. The terms of the insurance that will be procured by FEAP are set out in the Australian Forest Growers plantation insurance policy. FEAP will invoice the Grower the relevant insurance premium together with an administration fee of 11% of the amount of the premium on 1 June each year for each plantation insurance period being 1 October to 30 September.

54. Growers will receive an annual report from the Independent Forester and FEAP summarising the progress of plantations in the Project. The report will cover:

- compliance with the arrangement as described in the Product Ruling;
- compliance with any changes to the tax laws subsequent to the issue of the Product Ruling and any significant changes to the market which may impact product marketing; and
- any changes to fees.

55. The Project will conclude upon final harvest of the trees and the sale of the timber which will occur in approximately 25 years from planting.

### **Constitution**

56. 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 FEA Plantations Limited 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.

57. An applicant for an Interest in the Project must complete and sign the application in the form and manner approved by the Responsible Entity. Clause 6 provides that the application must:

- be accompanied by payment of the amount due to, and in the form required by the Responsible Entity for an Interest in the Project;
- include an irrevocable and binding authority by the applicant to enter into the Forestry Right Lease Deed and Management Agreement, in the form in Schedules 4 and 5 of the Constitution or in such other form and content as the Responsible Entity determines from time to time;
- include a power of attorney in favour of the Responsible Entity; and
- be accompanied by such other information and documents and in such forms as the PDS may require.

58. All moneys received from applications shall be held by FEAP in the Application Fund, on trust for the Growers. The Responsible Entity will only transfer money paid by an Applicant from the Application Fund when FEAP is reasonably satisfied that certain specified criteria in the Constitution have been met (clause 15). If Application Money is paid and Interests are not issued to the Applicant who paid the Application Money, then the Application Money must be refunded to the Applicant before the end of one month starting on the day on which the Application Money was received, or if it is not reasonably practicable to do so before the end of one month, then by the end of such longer period as is reasonable in the circumstances (clause 14.2).

59. The Constitution also sets out among other things, the following provisions relating to:

- the keeping of a register of Growers (clause 9);
- the transfer and transmission of Growers' Interests (clauses 10 and 11 respectively);
- Grower's income and distributions (clause 17);
- the general functions, powers and duties under which the Responsible Entity agrees to act for the Growers and manage the Project (clauses 20 and 21);
- the rights of the Responsible Entity (clause 22);
- withdrawal rights available under the Project (clause 23);
- the handling of complaints (clause 24);
- the fees payable to, and expenses of the Responsible Entity (clause 26);

- the liability and indemnity of the Responsible Entity (clause 29); and
- the winding up of the Project (clause 30).

### **Compliance Plan**

60. As required by the Corporations Act, 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 interest of a Grower is protected.

### **Forestry Right Deed**

61. The Landowner grants to FEAP the Forestry Rights described in clause 6 for the Term commencing on the Commencement Date and ending on the Termination Date. FEAP will register a Forestry Right by lodging an Instrument Form detailing the particulars of the Forestry Right (in Tasmania), a Registration of profit a prendre (in Queensland) or a Transfer Creating Profit a Prendre or Forestry Right (in New South Wales), and lodge a caveat or other document with the Land Titles Office.

### **Forestry Right Lease Deed**

62. The Responsible Entity grants to the Grower a lease of the Responsible Entity's Forestry Right over the Land on which the Grower's plantation will be established including the right for the Responsible Entity (as the Manager) or any person authorised by the Manager to have the use and benefit of the Forestry Right as it pertains to the Land and includes the right granted in clause 2.1(a)(i) to (iii).

63. Under this Lease the Grower agrees to pay to the Lessor the Rent for the lease of the specified area of Land for the term of the lease period. The term of the Lease is from the date of the allocation of the Land by FEAP until the clear-fell of Trees on the Land or the expiry of 30 years from the date the Land is allocated, whichever is the earlier.

64. In summary, the Lease also sets out provisions relating to:

- Grower's covenants (clause 3);
- mutual covenants (clause 4);
- payment of Rent (clause 5);
- the consequences of total or partial damage or destruction to a Grower's Woodlot (clause 7); and
- termination (clause 10).

## Management Agreement

65. Under the Management Agreement, each Grower contracts with the Manager to establish and maintain a plantation of Trees on their leased area of Land until maturity. At maturity, the Trees will be harvested and the timber sold on behalf of the Grower.

66. The Manager will provide the Plantation Establishment Services described in clause 1 of the agreement. These include:

- the completion of all preparatory work necessary for the planting of seedlings on the Woodlot including all ploughing and vermin control deemed necessary by the Manager;
- the supply and planting of healthy seedlings to an average density per hectare appropriate to the soil and climatic circumstances of the Woodlot; and
- the control of weeds and other vegetation which might inhibit the growth of the seedlings on the Woodlot.

67. The Plantation Establishment Services shall commence as soon as practical after the date of execution of the Management Agreement being the date on which the Grower's application is accepted (Agreement Commencement Date). The Manager will use its best endeavours to complete all Plantation Establishment Services within the first 12 months from the date that the Grower is accepted into the Project.

68. The Manager will provide Management Services related to the tending and rearing of the seedlings and the management and maintenance of the plantation established on the Woodlot (clause 3). These include:

- the replanting to 90% of the average initial planting density, of any seedlings which die during the first 2 years after the date the Grower is registered as the holder of the Woodlots;
- the general maintenance of the plantation, fire breaks, and access roads;
- the application of fertiliser to maintain satisfactory growth;
- the provision of an annual written report; and
- the provision of advice and assistance to the Grower generally.

69. In the event that a Grower's plantation suffers damage and it is not economic to nurture the plantation to harvest, the Management Agreement will come to an end as at the date of destruction. The only obligation remaining on the parties will be the obligation of the Grower under the Constitution to pay Deferred Fees (which includes the Management Fees). The Deferred Fees will crystallise on the date of destruction and thereupon become due and payable (clause 15).

70. On behalf of the Grower the Manager will determine the appropriate time for the thinning and clear-fell of the Grower's Trees and will market and sell the Grower's timber.

#### **Draft Wood Purchase Agreement**

71. The Manager has entered into a Wood Purchase Agreement with FEA whereby FEA has agreed to purchase the harvested wood for the purchase price, which is fair and reasonable having regard to the market prices at the time of harvest for wood of similar quality and quantity.

#### **Pooling of wood and Grower's entitlement to a distribution**

72. The Constitution (clauses 16 and 17) sets out provisions relating to the pooling of amounts from the sale of the Grower's timber and the distribution of Proceeds Funds from that sale or from Insurance Proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a Grower who has contributed to the pool making up the Option 3 Proceeds Fund is entitled to benefit from distribution from those proceeds; and
- any pooled wood must consist only of wood contributed by Growers in the FEA Plantations Project 2008 – Woodlot Option 3.

#### **Fees**

73. The following fees, per Woodlot, are set out in the Management Agreement and Forestry Right Lease Deed:

- \$3,465, for the Plantation Establishment Services to be provided within 12 months of the Grower's application being accepted, payable on application;
- Rent of 7.7% of the Harvest Proceeds; and
- a Management Fee of 3.3% of the Harvest Proceeds.

#### **Finance**

74. A Grower who does not pay the Application Monies in full upon application can borrow from Forest Enterprises Australia Limited (FEA) or borrow from an independent lender external to the Project.

75. 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 FEA 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 may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

76. Growers cannot rely on any part of this Product Ruling if the Application Money is not paid in full on or before 30 June 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 Product Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 30 June 2008.

### ***Finance offered by FEA***

77. A Grower can finance the cost of their Application by borrowing from FEA an amount equal to their full Application Money of \$3,465 less any deposit that applies to the finance option selected.

78. FEA will only provide loan funds to Growers if FEA has sufficient funds available to advance the loan monies for the Growers.

79. Subject to FEA accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

80. FEA provides the loan on a full recourse basis and recovery action will be taken in respect of any default by the borrower. Security is provided by a charge over the whole right, title and interest of the benefits arising out of each of the project documents. Overdue repayments will incur interest at the default rate of 15% per annum.

81. One (1) year interest free and principal and interest finance options will be offered by FEA. If the finance option being sought from FEA is a one (1) year interest free term or the amount of total finance is less than \$100,000 application for finance will be through the PDS, minimum deposit is not required and loan application fee is not payable. The details of each loan term in respect of Woodlot Option 3 are summarised below.

| <b>Finance Option</b>         | <b>Interest rate</b> |
|-------------------------------|----------------------|
| One (1) year interest free    | n/a                  |
| 3 years principal & interest  | 8.50%                |
| 5 years principal & interest  | 9.00%                |
| 7 years principal & interest  | 9.50%                |
| 10 years principal & interest | 10.00%               |
| 12 years principal & interest | 10.50%               |
| 15 years principal & interest | 11.00%               |

82. If the total finance sought from FEA is \$100,000 or more application for finance will be through a separate finance pack and loan application fee is not payable. The details of each loan term in respect of Woodlot Option 3 are summarised below.

| <b>Finance Option</b>         | <b>Interest rate</b> | <b>Minimum deposit required</b> |
|-------------------------------|----------------------|---------------------------------|
| 3 years principal & interest  | 8.50%                | 10%                             |
| 5 years principal & interest  | 9.00%                | 10%                             |
| 7 years principal & interest  | 9.50%                | 10%                             |
| 10 years principal & interest | 10.00%               | 10%                             |
| 12 years principal & interest | 10.50%               | 10%                             |
| 15 years principal & interest | 11.00%               | 10%                             |

83. Growers who enter into finance arrangements with FEA will be required to make equal monthly repayments over the term of the loan commencing as follows:

- for one (1) year interest free term, on the last day of the month following the month of acceptance into the Project; and
- for principal and interest loans, on 31 July 2008.

84. 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 FEA, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**

26 March 2008

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## **Appendix 1 – Explanation**

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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?**

85. For the amounts set out in paragraphs 24 to 28 of this Ruling to constitute allowable deductions, the Grower’s carrying on of a commercial forestry business activities as a participant in the Project must amount to the carrying on of a business of primary production.

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

87. 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?

88. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Project. 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.

89. Having applied these principles to the arrangement set out above, a Grower in the Project is accepted to be carrying on a business of growing and harvesting radiata pine for sale.

### **Deductibility of the Establishment Fee, insurance premiums and the loan interest**

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

90. The Establishment Fee, insurance premiums and the 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 Establishment Fee, insurance premiums and the loan interest (see paragraphs 49 to 51 of TR 2000/8).

91. 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 94 to 107 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred.

92. Some Growers may finance their participation in the Project through a financing agreement with FEA. Applying the same principles as that used for the Establishment Fee and the insurance premiums, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

93. Other than where the prepayment provisions apply (see paragraphs 97 to 101 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***

94. 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 provision of insurance coverage) 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.

95. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF of the ITAA 1936 using the formula in subsection 82KZMF(1) which is as follows:

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

96. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

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

#### ***Sections 82KZME and 82KZMF***

97. Other than the Establishment Fee (see paragraph 102 of this Ruling), the fees payable under the scheme to which this Product Ruling applies are payable only out of Gross Harvest Proceeds and the interest payable to FEA is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to these fees or interest on loans from FEA.

98. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than FEA).

99. As stated in Note (vi) of paragraph 28 of this Ruling prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest on loans.

100. Sections 82KZME and 82KZMF of the ITAA 1936 will have relevance to the insurance premiums payable by a Grower under the Australian Forest Growers plantation insurance policy.

101. As stated in Note (iv) of paragraph 28 of this Ruling the insurance premiums are subject to the prepayment rules. Where the quantum of prepaid insurance premiums by a Grower is \$1,000 or greater, section 82KZMF of the ITAA 1936 applies to apportion the relevant prepaid expenditure.

### **Section 82KZMG**

102. 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.

103. Section 82KZMG provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure<sup>5</sup> incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

104. 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 (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

105. 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 income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

106. Under the Management Agreement each Grower incurs an Establishment Fee of \$3,465 per Woodlot in the income year ended 30 June 2008 for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the Trees.

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<sup>5</sup> The expenditure must be incurred on or before 30 June 2008 (subsection 82KZMG(2) of the ITAA 1936).

107. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, other than where section 82KZMGA of the ITAA 1936 applies (see paragraphs 108 to 110 of this Ruling), a deduction is allowable in the income year ended 30 June 2008 for the full amount of expenditure incurred by the Grower for the Establishment Fee.

## **'CGT event' within 4 years for Growers who are initial participants**

### ***Section 82KZMGA***

108. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the Establishment Fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$3,465 per 'interest' for the Establishment Fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

109. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

110. A Grower whose deduction for the Establishment Fee is disallowed because of section 82KZMGA of the ITAA 1936 is still required to include in their assessable income either the market value of the interest at the time of the 'CGT event', or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

## **Assessable income from 'CGT events' for Growers who are initial participants**

### ***Sections 6-10, 10-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936***

111. Section 6-10 of the ITAA 1997 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 of the ITAA 1997 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

**Section 82KZMGB**

112. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)<sup>6</sup> happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted the Establishment Fee (shown in paragraph 24 of this Ruling); and
- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of the Establishment Fee (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

**Market value rule applies to 'CGT events'**

113. If, as a result of the 'CGT event' the Grower either:

- no longer holds the interest; or
- otherwise – where the Grower continues to hold the 'forestry interest' but there is a decrease in the market value of the interest,

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

114. The market value amount included in the assessable income of a Grower is the value of the interest just before the 'CGT event', or where the Grower continues to hold their interest after the 'CGT event', the amount by which the market value of the interest is reduced by the 'CGT event' (subsection 82KZMGB(2) of the ITAA 1936).

115. This provision will apply where the interest is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

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<sup>6</sup> A thinning under this scheme is not a 'CGT event'.

## **Anti-overlap provisions**

### ***Section 118-20***

116. Generally, where as a result of a 'CGT event' a capital gain would otherwise be included in a taxpayer's assessable income, section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA 1936 or ITAA 1997 other than the CGT provisions includes an amount in the taxpayer's assessable income.

117. In the case of interests held by Growers who are initial participants in this Project the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

## **Amounts received by initial participants where the Project trees are thinned**

### ***Section 6-5***

118. Section 82KZMGB of the ITAA 1936 specifically excludes from its operation a 'CGT event' that happens in respect of a thinning (see paragraph 82KZMGB(1)(d) of the ITAA 1936).

119. Thinning amounts received by a Grower who is an initial participant in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under section 82KZMGB of the ITAA 1936. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Grower holding an interest in the Project. It is an item of ordinary income and is assessable under section 6-5 of the ITAA 1997 in the year in which it is derived.

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

120. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for 30 June 2008 to 30 June 2033 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 afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

121. 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.

122. 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**

123. 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**

124. 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).

125. The Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 24 and 28 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.

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

## Appendix 2 – Detailed contents list

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 97/11; TR 98/22; TR 2000/8;  
TR 2007/6; TD 2003/12;  
PR 2008/31; PR 2008/32;  
PR 2008/34

*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
- primary production
- producing assessable income
- product ruling
- public ruling
- seasonally dependent agronomic activity
- tax avoidance
- tax benefits
- tax shelter
- taxation administration

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
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- ITAA 1936 82KZMG(2)
- ITAA 1936 82KZMG(3)
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- ITAA 1936 170
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- ITAA 1936 177A
- ITAA 1936 177C
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- ITAA 1997 6-5
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- ITAA 1997 8-1
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- ITAA 1997 17-5
- 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 Pt 3-1
- ITAA 1997 118-20
- ITAA 1997 328-110
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- TAA 1953
- TAA 1953 Sch 1 357-75(1)
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*Case References:*

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

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