



# ***PR 2008/46 - Income tax: Curtis Eastern Project***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *21 May 2008*



## Product Ruling

### Income tax: Curtis Eastern Project

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

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

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

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

### **No guarantee of commercial success**

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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**

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

## What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the Curtis Eastern Project or simply as 'the Project'. The Project will be offered under an Information Memorandum in relation to the Project and the Curtis Eastern Project – Land Trust (Land Trust). **This Product Ruling does not rule on the tax consequences of investing in the Land Trust.**

### 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 35 of this Ruling on or before 30 June 2008. In this Ruling, each of these persons will be wholesale clients for the purpose of the *Corporations Act 2001*.

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;
- are not a wholesale client for the purposes of section 761G of the *Corporations Act 2001*;
- participate in the scheme through offers made other than through the Information Memorandum;

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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.

- have their application conditionally accepted by the Manager subject to finance for the payment of the application fee, where finance has not been approved by the lender or funds have not been made available to the Manager on or before 30 June 2008;
- enter into finance arrangements with financiers associated with the Manager or other than United Pacific Finance Pty Limited; or
- are the Manager or its associates.

**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 35 to 77 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 21 May 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 21 May 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 may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

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 35 to 77 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 Forestry Management Agreement, on or before 30 June 2008.

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

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.

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

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

23. 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 tax deductions for the following amount on a per Timberlot basis.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
<b>Management Fee for Initial Establishment Services</b>	\$9,700 See Notes (i) & (ii)		

**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 Management Fee for Initial Establishment Services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 92 to 97 of this Ruling) and is deductible in the income year in which it is incurred.

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

24. A deduction for the Management Fee for Initial Establishment Services 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).

25. 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.

26. 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 103 to 105 of this Ruling).

**Deductions for Management Fee for Planting Services, loan interest and loan application fees**

***Sections 8-1 and 25-25 and Division 27***

27. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a per Timberlot basis, as set out in the Table:

<b>Fee Type</b>	<b>Year ending 30 June 2008</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>
<b>Management Fee for Planting Services</b>			\$550 See Notes (i) and (iii)
<b>Interest on loans with United Pacific Finance Pty Limited</b>	As incurred See Note (iv)	As incurred See Note (iv)	As incurred See Note (iv)
<b>Loan Application Fee</b>	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)

**Notes:**

- (iii) The Management Fee for Planting Services will be incurred in the year in which the services are provided and will be deductible in the year in which it is incurred (section 8-1).
- (iv) Interest on loans with United Pacific Finance Pty Limited is deductible in the year in which it is incurred (section 8-1). The deductibility or otherwise of interest arising from agreements entered into with financiers other than United Pacific Finance Pty Limited, is outside the scope of this Ruling. Prepayments of interest to any lender, including United Pacific Finance Pty Limited, are also 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 (see paragraph 91 of this Ruling).



- (v) The Loan Application Fee payable to United Pacific Finance Pty Limited is a borrowing expense and is deductible under section 25-25. The deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins. The deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.

The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than United Pacific Finance Pty Limited is outside the scope of this Ruling.

## **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***

28. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning<sup>4</sup> – see paragraph 32 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).

29. 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).

30. '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 Timberlot;
- 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.

31. 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 differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

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

32. 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***

33. 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 2036**. 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***

34. For a Grower who commences participation in the Project and incurs expenditure as required by Forestry Management Agreement and Timberlot 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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35. 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 provided on 8 April 2008;
- Draft Information Memorandum for the Curtis Eastern Project received on 8 April 2008;
- Draft **Constitution** establishing the Curtis Eastern Project – Tree Project received on 8 April 2008;
- Draft **Forestry Management Agreement** between Agriwealth Capital Limited (the Manager), Agriwealth Pty Limited, a subsidiary of the Manager, (Subco) and the Grower received on 8 April 2008;
- Draft APL Management Agreement between the Manager and Subco received on 8 April 2008;
- Draft Agreement for Lease between the Manager and Subco received on 8 April 2008;
- Draft Lease Agreement between the Manager and Subco received on 8 April 2008;
- Draft Forestry Management Agreement (Sub-contractor Agreement) between Subco and the Forestry Sub-contractor received on 8 April 2008;
- Draft **Timberlot Agreement** between the Manager, Subco and the Grower received on 8 April 2008;
- Draft **Terms Payment Agreement** documents from the Manager received on 8 April 2008; and
- Draft **Finance Facilities** documents from United Pacific Finance Pty Limited (United) received on 8 April 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.

36. 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.

37. In accordance with the above documents, a Grower who participates in the scheme must be a wholesale client. **This Ruling does not apply unless** the Grower is a wholesale client as defined in section 761G of the *Corporations Act 2001*. The meaning of wholesale client is explained in the Information Memorandum for this Project.

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

39. The main features of the Curtis Eastern Project are as follows:

<b>Plantation Investment</b>	
Location	Tumut, Tumbarumba, Oberon and Bathurst regions of NSW.
Type of business to be carried on by each Grower	Commercial growing and cultivation of <i>Pinus radiata</i> trees for the purpose of harvesting and selling timber.
Term of the Project	Approximately 28 years with an option to extend up to 5 years
Number of hectares offered for cultivation	1,000 hectares
Size of each Timberlot	0.5 plantable hectares
Number of Trees per Timberlot	550 Radiata Pine
Minimum allocation per Grower	2 Timberlots
Minimum subscription	No minimum subscription applies
Initial cost	\$22,500 for 2 Timberlots
Ongoing costs	Fee for Planting Services, Interim and Final Management Fees, Rental Fee, Tree Insurance, cost of harvesting and transporting timber and land rehabilitation.

### **The Project**

40. Under the Information Memorandum, applicants are invited to participate in the Curtis Eastern Project – Tree Project. This Ruling only applies Growers who participate in the Project. **The Information Memorandum for the Project also contains an offer to invest in Units in the Land Trust. This Ruling DOES NOT address the tax consequences of an investment in the Land Trust.**

41. Upon acceptance of their Application, Growers will enter into a Forestry Management Agreement with Agriwealth Capital (the Manager). The Manager operates in its role under its Australian Financial Services Licence number 317238.

42. Growers will enter into a Timberlot Agreement with Agriwealth Pty Limited, a subsidiary of the Manager, (Subco) as Grantor. Under the Timberlot Agreement, Growers will be allocated a specific parcel of land which is evidenced by holding a Forestry Right Interest (FRI).

43. A forestry services company has been contracted to provide the silvicultural services over the life of the Project. The Manager is responsible for identifying suitable land, land preparation, planting, forest maintenance and harvesting.

44. A Timberlot is equivalent to a 0.5 plantable hectare. The initial cost per Timberlot is \$9,700 for Initial Establishment Services and \$550 for Planting Services. Growers must subscribe for a minimum of two (2) Timberlots.

45. There is no minimum subscription for this Project.

46. Each Timberlot will be planted with 550 trees by 30 June 2010. There is a guaranteed average survival rate of 425 trees per Timberlot across the plantation for the first 12 months after planting.

47. The allotment date is at the Manager's discretion but will be no later than 30 June 2008.

48. This Ruling applies to Growers who acquire two or more Timberlots.

## **Constitution – Curtis Eastern Project – Tree Project (Plantation Constitution)**

49. The Plantation Constitution establishes the Project and operates as a deed binding all Growers (clause 1.3). It sets out the terms and conditions under which the Manager agrees to act as Manager. Growers are bound by the Plantation Constitution by virtue of their participation in the Project.

50. Under the terms of the Plantation Constitution, until an application is accepted, all application money received is to be placed into a bank account in the name of the Manager and held in accordance with the requirements of the *Corporations Act 2001* (clause 2.5.1). After acceptance the money is held by the Manager as an agent, for and on behalf of, each applicant (clause 2.5.2). The Manager is required to establish and maintain a register of Growers (clause 16).

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

- applications to be on the form attached to the Information Memorandum (clause 2.1);
- appointment of the Manager as the Grower's irrevocable agent, representative and attorney to enter into the Grower's Timberlot Agreement and Forestry Management Agreement on behalf of the Grower (clause 3.6);
- the effect of an applicant's application being accepted by the Manager (clause 3.5);
- preparation and execution of the Timberlot Agreement and Forestry Management by the Manager and the Grantor (clause 3.5);

- the Manager's duties, powers and obligations (clause 9);
- the right of the Manager to be paid certain expenses (clause 22); and
- Termination of the Scheme (clause 25.1).

### **Timberlot Agreement**

52. An interest in the land will be provided to Growers via the Timberlot Agreement between the Grantor and the Grower. The provisions of the agreement are incidental to a Forestry Right Interest with the intent that all the provisions are forestry covenants within the meaning of section 87A of the *Conveyancing Act 1919* (NSW) (clause 1.1).

53. The Grower is required to pay the Grantor a Rental Fee equal to 11% of the net harvest proceeds to which the Grower is entitled from the Final Harvest (clause 3.2).

54. The Rental Fee will be calculated on the amount of any insurance proceeds received by the Grower in respect of a partial or total loss or destruction of the plantation produce on their Timberlot. The Rental Fee levied in relation to the insurance proceeds will be payable at the time the insurance proceeds are received.

55. Where no insurance proceeds are received by a Grower, in the event of a partial or total loss or destruction of the plantation produce, the Rental Fee will be calculated on the amount of Discounted Harvest proceeds (to be assessed by an independent forester at the time of the loss or destruction).

56. The Grower must use the Timberlots only for approved purposes and must establish, maintain, manage and harvest the plantation in accordance with sound forestry practice (clause 6.1).

57. The Timberlot Agreement will grant the Grower the right to maintain, manage and harvest a crop of trees on the Timberlot (clause 5.1.1). The Grower may also construct roads, tracks, bridges and other facilities on the land with written consent of the Landowner (clause 5.30). The Timberlot Agreement will give the Grower ownership of all trees on their Timberlots and all plantation produce from the land (clause 4.1).

58. The Grower must bear the harvesting costs (clause 9.6).

59. The Grower is responsible for rehabilitating the Timberlot following final harvest (clause 9.1).

60. The Grantor must not do anything on the Timberlots or on the adjacent land which would materially or adversely affect the plantation (clause 7.8).

## Forestry Management Agreement

61. The Grower engages the Manager to perform forestry services in respect of the Timberlots. Growers are required to pay \$9,700 Management Fee per Timberlot (\$19,400 per minimum investment) for Initial Establishment Services and will pay \$550 Management Fee per Timberlot (\$1,100 per minimum investment) for Planting Services.

62. The Initial Establishment Services are for seasonally dependent agronomic activities to be conducted on or prior to 30 June 2009. The services include (schedule 1, clause 24):

- site preparation within the approved Code of Practice, comprising, ripping and mounding cultivation, where appropriate, control of competing vegetation and control of noxious weeds and animals; and
- provision of cuttings or seedlings equivalent to Radiata Pine GF 19+ wherever growing conditions are suitable or such other quality stock cuttings or seedlings approved by the Manager in accordance with the Plantation Establishment and Management Plan. Density of planting is to be consistent with the desired silvicultural outcome (usually 1,100 stems per hectare for GF19+).

63. Planting Services are to be completed by 30 June 2010. Services include (schedule 1, clause 25):

- planting Radiata Pine GF19+ equivalent (or such other quality stock approved by the Manager) cuttings or seedlings in accordance with the Plantation Establishment and Management Plan; and
- application of fertiliser if considered necessary by the Manager, including the application of boron.

64. The Manager is appointed to market and deal with the plantation produce at each thinning and final harvest. Ongoing forestry services will be performed at all times prior to final harvest. Ongoing Services include (schedule 1, clause 26):

- managing and maintaining the plantation;
- hazard reduction activities;
- quality control and internal audit of operations;
- assessments and reports on growth and performance as necessary;
- inventory assessments targeted at ages 1 or 2 years, at age 5 years where necessary, age 10 years and harvest;
- maintenance and repair of roads, firebreaks, gates and related infrastructure and fences;

- identification of fire prevention and risk reduction parameters; and
- rehabilitation of plantation land after final harvest.

65. Growers will appoint the Manager to act as their agent to market the plantation produce. Growers will authorise the Manager to consolidate and mix the plantation produce of their Timberlot with that of other Growers (clause 6.10.2).

66. Growers are entitled to all proceeds from the sale of the plantation produce net of all costs of harvesting and transportation (clause 6.10.2).

67. A Grower's share of produce will be calculated by reference to the size of the Grower's Timberlot land compared to the overall size of the plantation land of all growers adjusted for any Grower who has suffered a loss or destruction of plantation produce on their Timberlots (clause 9).

68. Growers who have suffered a loss or destruction of plantation produce will have their share of pooled plantation produce reduced by the pro rata amount of plantation produce lost or destroyed from their Timberlots (clause 9).

### **Sub-Contractor Agreement**

69. Forestry sub-contractors have been contracted to provide the silvicultural services for the term of the Project.

### **Fees**

70. Under the terms of the Forestry Management Agreement and the Timberlot Agreement, a Grower will make payments as described below on a per Timberlot basis.

- \$9,700 for Initial Establishment Services to be performed on or before 30 June 2009, payable on 30 June 2008;
- \$550 for Planting Services to be performed on or before 30 June 2010, payable in arrears on 30 June 2010;
- First Interim Management Fee of 11% of the net harvest proceeds from the First Thinning, payable at the time of the First Thinning, approximately year 13;
- Second Interim Management Fee of 11% of the net harvest proceeds from the Second Thinning, payable at the time of the Second Thinning, approximately year 20;



- Final Management Fee of 11% of the net harvest proceeds from the Final Harvest or \$1,705 (adjusted for annual CPI movements) per Timberlot whichever is greater, payable at the time of the Final Harvest; and
- Rental Fee per Timberlot equal to 11% of net Final Harvest proceeds, payable at the time of Final Harvest.

## **Finance**

71. A Grower who does not pay the Management Fee for Initial Establishment Services in full upon application can execute a Terms Agreement with the Manager, borrow from United, or borrow from an independent lender external to the Project.

72. 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 either the Manager or United 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 the Preferred Financier may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

73. Other than where a Terms Payment Agreement is in place, Growers cannot rely on any part of this Ruling if the Management Fee for Initial Establishment Services 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 United, Growers cannot rely on this Ruling if the funds have not been made available to the Manager by 30 June 2008.

## ***Terms Payment Agreement***

74. Details of the Terms Payment Agreement offered to Growers by the Manager are set out in the Finance Facility (Curtis Eastern Project) documents. The Terms Payment Agreement is summarised as follows:

- the Manager will offer a terms payment option to Growers that are individuals for up to 100% of the Grower's Management Fees for Initial Establishment Services and Planting Services. The Manager will not offer a terms payment option to Growers that are companies or trustees;
- the Manager will pay stamp duty and registration fees in relation to the Terms Payment Agreement document;
- the Terms Payment Agreement is for a period of one year;
- no interest is payable pursuant to the Terms Payment Agreement;

- the amount subject to each Terms Payment is repayable in 12 equal monthly instalments, with payment commencing one month after the due date for payment of the Management Fee for Initial Establishment Services and the fee for Planting Services respectively; and
- the Manager may obtain security for the Terms Payment Agreement by a mortgage over the Grower's Timberlots.

### ***Finance offered by United***

75. A Grower can finance the cost of their Management Fees for Initial Establishment Services and Planting Services by borrowing that amount from United. The United documents are summarised as follows:

- United will lend up to 100% of the Grower's Management Fees for Initial Establishment Services and Planting Services;
- Growers will pay stamp duty and registration fees in relation to the document;
- Growers will pay a loan establishment fee of \$250 plus 0.5% of the amount borrowed to fund the Management Fees for Initial Establishment Services and Planting Services up to a maximum of \$1,250;
- the 'Loan Terms' are for periods of 10 years, 12 years or 15 years;
- the loans attach a fixed interest rate with a current indicative interest rate of 10.9% per annum payable monthly in arrears (however under the 10 year loan facility interest may be charged at a variable rate);
- the 10 year and 12 year loans are repayable as to interest only during the first 3 years of the loans. Thereafter, the 10 year and 12 year loans are repayable over the remaining term of the loans by way of equal monthly repayments of principal and interest. Under the 10 year variable rate loan, a borrower can repay part or all of the outstanding loan balance without penalty at each 90 day interest reset date. An administration fee may apply should an early repayment be exercised;
- the 15 year loan is repayable over the term of the loan by way of equal monthly repayments of principal and interest;
- United will obtain security for the finance facilities by a mortgage over the Grower's Timberlots; and

- where the Grower/Unit Holder is a corporate borrower, unless otherwise advised by United, the directors of the entity will be required to personally guarantee the finance facilities.

76. Growers cannot rely on this Product Ruling if they enter into a finance agreement with United that materially differs from that set out in the information provided to the Tax Office with the application for this Product Ruling.

77. 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 United, are involved or become involved in the provision of finance to Growers for the Project.

## Appendix 1 – Explanation

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

### **Is the Grower carrying on a business?**

78. For the amounts set out in paragraphs 23 and 27 of this Ruling to constitute allowable deductions the Grower's afforestation activities as a participant in the Curtis Eastern Project must amount to the carrying on of a business of primary production.

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

80. 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?

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

82. Having applied these principles to the arrangement set out above, a Grower in the Curtis Eastern Project is accepted to be carrying on a business of growing and harvesting Radiata Pine for sale.

### **Deductibility of the Management Fees for Initial Establishment Services and Planting Services and loan interest**

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

83. The Management Fees for Initial Establishment Services and Planting Services and interest on loans with United 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 Management Fees for Initial Establishment Services and Planting Services (see paragraphs 49 to 51 of TR 2000/8).

84. 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 87 to 97 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.)

85. Some Growers may finance their participation in the Project through a Loan Agreement with United. Applying the same principles as that used for the Management Fees for Initial Establishment Services and Planting Services, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

86. Other than where the prepayment provisions apply (see paragraph 91 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

## **Prepayment provisions**

### ***Sections 82KZL, 82KZME, 82KZMF and 82KZMG***

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

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

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

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

89. Other than the Management Fees for Initial Establishment Services and Planting Services (see below), the fees payable under the scheme to which this Product Ruling applies are payable only out of harvest proceeds and the interest payable to United is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application.

90. 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 United).

91. As stated in Note (iv) of paragraph 27 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.

### **Section 82KZMG**

92. 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.

93. 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).

94. 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.

95. 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).

96. Under the Forestry Management Agreement each Grower incurs a Management Fee of \$9,700 per Timberlot for Initial Establishment Services 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.

97. 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 applies (see paragraphs 98 to 100 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 fees for Initial Establishment Services.

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

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

98. 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 fees for the Initial Establishment Services meet the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$9,700 per 'interest' for the Management Fee for Initial Establishment Services will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

99. 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)

100. A Grower whose deduction for the Management Fee for the Initial Establishment Services is disallowed because of section 82KZMGA 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***

101. Section 6-10 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***

102. 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 fees for the Initial Establishment Services (shown in paragraph 23 of this Ruling); and

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

- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of the Management Fee for the Initial Establishment Services (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

### **Market value rule applies to ‘CGT events’**

103. 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.

104. 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).

105. 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.

### **Anti-overlap provisions**

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

106. 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 income tax law other than the CGT provisions includes an amount in the taxpayer’s assessable income.

107. 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**

108. 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).

109. 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.

## **Borrowing costs**

### **Section 25-25**

110. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

111. In this Project, the loan application fee payable to United is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

112. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

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

113. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for 30 June 2008 to 30 June 2036, 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.

114. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

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

### **Section 82KL – recouped expenditure**

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

### **Part IVA – general tax avoidance provisions**

117. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

118. The Curtis Eastern 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 paragraph 23 and 27 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

119. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 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

### *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;  
TD 2003/12

### *Subject references:*

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

### *Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
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- ITAA 1936 82KZMG(3)
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- ITAA 1936 Pt IVA
- ITAA 1936 170
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
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- ITAA 1997 Pt 3-1
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- ITAA 1997 328-110
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- SISA 1993
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- TAA 1953 Sch 1 357-75(1)
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- Corporations Act 2001 761G
- Conveyancing Act 1919 (NSW) 87A

### *Case references:*

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

### ATO references

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