


PR 2009/4 - Income tax: FEA Plantations Project 2008 Late Grower - Option 4 Unit

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 This document has changed over time. This is a consolidated version of the ruling which was published on *8 April 2009*



Product Ruling

Income tax: FEA Plantations Project 2008 Late Grower – Option 4 Unit

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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.

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant 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. In this Product Ruling this scheme is referred to as the scheme, the FEA Plantations Project 2008 Late Grower – Option 4 Unit, or simply as 'the Project'.

2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Ruling, terms defined in the Project agreements have been capitalised.

Class of entities

3. 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.

4. 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 in this Product Ruling as Growers.

5. Growers are those entities that:

- meet the definition of 'initial participant' in subsection 394-15(5); and
- are accepted to take part in the scheme specified below on or after the date this Product Ruling is made.

6. A Grower will have executed the relevant Project Agreement set out in paragraph 46 of this Ruling on or before 30 June 2009 and will hold a 'forestry interest' in the Project. **This Product Ruling only applies in respect of Growers who select Option 4 Unit 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 2009/1 for Option 1 Woodlot;
- PR 2009/2 for Option 2 Woodlot; and
- PR 2009/3 for Option 3 Woodlot.

7. The class of entities who can rely on this Product Ruling does **not** include:

- Growers who are accepted into this Project before the date of this Ruling or after 30 June 2009;
- Growers who participate in the scheme through offers made other than through the FEA Plantations Project 2008 Product Disclosure Statement, dated 19 March 2008;
- Growers who enter into the Project under Option 1 Woodlot or Option 2 Woodlot or Option 3 Woodlot;
- Growers whose application fee, including all loan moneys, are not paid in full to FEA Plantations Ltd (FEAP) by 30 June 2009, either by the Grower and/or on the Grower's behalf by a lending institution; or
- Growers who enter into finance agreements with Forest Enterprise Australia Limited (FEA) outside the terms specified in paragraphs 82 to 92 of this Ruling.

Superannuation Industry (Supervision) Act 1993

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

Qualifications

9. 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 46 to 92 of this Ruling.

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

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

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Date of effect

12. This Product Ruling applies prospectively from 25 February 2009, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 25 February 2009 until 30 June 2009, 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 all income years up to the income year in which the scheme is terminated in accordance with the Project Constitution.

13. 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.

14. 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)).

15. 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.

16. 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

17. 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.

18. 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

19. 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

20. 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 creditable acquisition that it makes, it must be registered or required to be registered for GST and hold a valid tax invoice.

Ruling

Structure of the Project

21. The FEA Plantations Project 2008 Late Grower – Option 4 Unit is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of eucalypt and pine trees for felling in Australia.

22. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an 'initial participant'¹ in the defined class of entities (see paragraphs 4 to 7 of this Ruling) who is accepted to participate in the 'forestry managed investment scheme' described below at paragraphs 46 to 92 of this Ruling between 25 February 2009 and on or before 30 June 2009 inclusive.

¹ See subsection 394-15(5).

23. An entity that takes part in the Project as a 'subsequent participant'² is not covered by this Product Ruling but may request a private ruling on their participation in the Project. A 'subsequent participant' is an entity that does not meet the definition of 'initial participant' in subsection 394-15(5).

Carrying on a business

24. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 of the ITAA 1997 (see paragraphs 43 and 44 of this Ruling).

Concessions for 'small business entities'³

25. 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').

26. 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.

The '70% DFE rule' and the establishment of the trees

27. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by FEAP. On the basis of that information the Commissioner has decided that on 30 June 2009 it will be reasonable to expect that the '70% DFE rule'⁴ will be satisfied. The Tax Office may undertake review activities during the term of the Project to verify the information relied on for the purposes of the '70% DFE rule'.

28. The Ruling will only apply if FEAP establishes all of the Trees that were intended to be established under the Project within 18 months of the end of the income year in which the first 'participant' in the Project is accepted.⁵ For this Project the trees must be established before 31 December 2010. However, FEA will complete all Plantation Establishment Services by 30 June 2010.

² See section 394-30.

³ The meaning of 'small business entity' is explained in section 328-110.

⁴ The '70% DFE rule' is set out in section 394-35.

⁵ See subsection 394-10(4).

29. In the context of this Project the Trees will be established when they are planted on the land acquired for the purposes of the Project at the average rate of 1,200 trees per hectare. FEAP is required by section 394-10 of Schedule 1 of the TAA to notify the Tax Office if the trees are not established by 31 December 2010.

Allowable deductions

Sections 8-5, 394-10 and 394-20 and Division 27

30. A Grower in the Project can claim deductions for the amounts shown in the Table below that are paid to the FEAP (sections 8-5 and 394-10).

31. The deductibility of these amounts remains subject to a requirement that a CGT event⁶ does not happen in relation to the Grower's 'forestry interest' before 1 July 2013 (see paragraphs 35 to 37 of this Ruling).

32. The amount is deductible in the income year in which it is paid, or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). Where a Grower does not fully pay an amount, or it is not fully paid on their behalf in an income year, it is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

33. 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.

34. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

Fee	Amount on a per Unit basis	Year(s) deductible
Establishment Fee	\$23,100	2009
Management Fee	3% of the Grower's proportionate share of the Gross Harvest Proceeds	Any year in which this amount is paid See Note (i)
Rent	12% of the Grower's proportionate share of the Gross Harvest Proceeds in Option 1 and Option 2 Woodlots and 7% of the Grower's proportional share of the Gross Harvest Proceeds in Option 3 Woodlot.	Any year in which this amount is paid See Note (i)
pruning fees	See Note (ii)	Any year in which this amount is paid See Note (i)

⁶ Defined in section 995-1.

Notes:

- (i) Growers will be notified by FEAP of the years in which these amounts are paid.
- (ii) The pruning fee for each Option 4 Unit will be \$396 in year 2, \$410 in year 4 and \$440 in year 6. The pruning fee will increase in line with CPI.

'CGT event' within 4 years for Growers who are 'initial participants'***Subsections 394-10(5) and (6)***

35. Deductions for the Establishment Fee, the ongoing Management Fees, pruning fees and the Rent and any other amounts that have been allowed as deductions under 394-10 in the first four years are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of a Grower before 1 July 2013 (subsection 394-10(5)).

36. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years of the 'CGT event' happening (subsection 394-10(6) of the ITAA 1997). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

37. Growers whose deductions are disallowed because of subsection 394-10(5) are still required to include in assessable income the market value of the 'forestry interest' at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event'.

Deductions for insurance premiums and interest on loans to finance the 'forestry interest' of a Grower***Section 8-1 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936***

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

Fee Type	Year ended 30 June 2009	Year ended 30 June 2010	Year ended 30 June 2011
Insurance premiums	See Note (iii)	See Note (iii)	See Note (iii)
Interest payable to FEA	As incurred See Note (iv)	As incurred See Note (iv)	As incurred See Notes (iv)

Notes:

- (iii) Although the 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 123 of this Ruling.
- (iv) 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 or may self assess the deductibility of the interest incurred.

Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'**Sections 6-10 and 394-25**

39. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁷ – see paragraph 42 of this Ruling) happens to a 'forestry interest' held by a Grower in this Project the market value of the 'forestry interest', or the decrease in the market value of the 'forestry interest', is included in the assessable income of the Grower (sections 6-10 and 394-25).

40. The relevant amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 394-25(2)).

41. 'CGT events' for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown under the Project;
- the **sale, or any other disposal** of all or part of the 'forestry interest' held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'forestry interest held by the Grower.

⁷ 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***Section 6-5***

42. An amount received by a Grower in respect of a thinning of the Trees grown in this Project is not received as a result of a 'CGT event' and is not otherwise assessable under Division 394. The amount is a distribution of ordinary income that arises as an incident of a Grower holding a 'forestry 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).

Division 35 of the ITAA 1997 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner's discretion***

43. A Grower who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such a Grower, who is an individual and accepted into the Project in the year ended 30 June 2009, may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35. Division 35 does not apply however, to Growers who do not carry on a business.

44. The discretion in paragraph 35-55(1)(b) will be exercised for a Grower to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2033. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 46 to 92 of this Ruling, but will allow a Grower referred to who makes losses, to offset them against their other assessable income in the income years in which those losses arise.

Prepayment provisions and anti-avoidance provisions***Division 35 of the ITAA 1997 and sections 82KZM, 82KZME, 82KZMF and 82KL and Part IVA of the ITAA 1936***

45. Where a Grower is accepted to participate in the Project set out at paragraphs 46 to 92 of this Ruling, the following provisions of the ITAA 1936 have application as indicated:

- interest paid by a Grower to FEA does not fall within the scope of sections 82KZM, 82KZME and 82KZMF;
- losses arising from participation in the Project are not within the scope of Division 35;
- 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

46. 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 18 September and 8 October 2008 and additional correspondence and emails received on 24 and 27 November 2008, 1, 4 and 15 December 2008;
- Product Disclosure Statement for the FEA Plantations Project 2008, dated 19 March 2008, issued by FEA Plantations Limited (FEAP), the Responsible Entity, received on 18 September 2008;
- Draft Supplementary Product Disclosure for the FEA Plantations Project 2008, received on 18 September 2008;
- Constitution establishing the FEA Plantations Project 2008, received on 18 September 2008;
- Supplementary constitution prepared amending constitution, received on 18 September 2008;
- Compliance Plan for FEA Plantations Project 2008 issued by FEAP, dated 25 January 2008, received on 18 September 2008;
- Draft Forestry Right Deed between the Landowner (Landowner), FEAP and Forest Enterprises Australia Limited (the Guarantor), received on 18 September 2008;
- Draft **Forestry Right Lease Deed** to be entered into by each Grower and FEAP (as the Lessor), received on 18 September 2008;
- Draft **Management Agreement**, to be entered into by each Grower and FEAP (as the Manager) received on 18 September 2008;
- Head Management Agreement between Forest Enterprises Australia Limited and FEAP, dated 31 May 2001;
- Wood Purchase Agreement between FEAP and Forest Enterprises Australia Limited, received on 18 September 2008;
- **Insurance scheme policy** documents provided to the Tax Office to be entered into by a Grower, received on 1 December 2008;

- Custodian Agreement between FEAP and Custodian dated 6 June 2000, received on 1 December 2008; and
- Draft **Finance Application and Loan Agreement**, to be entered into by each Grower seeking finance and FEA (the Lender), received on 18 September 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.

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

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

Overview

49. The main features of the FEA Plantations Project 2008 Late Grower Option 4 Unit are as follows:

Location	Tasmania, northern New South Wales and south east Queensland
Species of trees to be planted under the scheme	The establishment, management, harvesting and selling of a commercial plantation of: <ul style="list-style-type: none"> • Shining gum (<i>Eucalyptus nitens</i>), Dunn's white gum (<i>E. dunnii</i>), Spotted gum (<i>Corymbia citriodora ssp. variegata</i>) or similar species, for the purpose of harvesting and selling as unpruned and pruned sawlog, veneer and pulpwood; and • <i>Pinus radiata</i> trees or similar species, for the purpose of harvesting and selling as sawlog and pulpwood.
Term of the Project	Approximately 26 years from 30 June 2009
Date all trees are due to be planted on scheme land	30 June 2010
Number of trees per hectare	Approximately 1,200 to 1,330 Trees per hectare
Number of hectares offered for cultivation	Approximately 15,000 hectares

Size of each 'forestry interest'	0.5 hectares (1 Woodlot)
Minimum allocation of 'forestry interests' per Grower	One Option 4 Unit comprising of: <ul style="list-style-type: none"> • four Option 1 Woodlots; • one Option 2 Woodlot; and • two Option 3 Woodlots.
Minimum subscription	None
Initial cost	Establishment Fee of \$23,100 for each Option 4 Unit.
Ongoing costs	Growers will be charged for the cost of any insurance. Pruning fees will also be payable in approximately years 2, 4 and 6 after planting. Both the insurance premiums and pruning fees 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.

50. 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.

51. 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:

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

52. The offer under the PDS is for 15,000 hectares in total, which corresponds to 30,000 'forestry interests' in the Project.

53. An entity that participates in the Project as a Grower will do so by acquiring a minimum of one Option 4 Unit in the Project on or before 30 June 2009, which will consist of a minimum of 7 Woodlots of 0.5 hectares in size.

54. **This Product Ruling only applies to Option 4 Unit.**

Paragraph 6 of this Ruling details the Product Ruling numbers of Product Rulings that have been issued for other Woodlot options.

55. 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 2009.

56. By signing the Application Form & Power of Attorney the Applicant has 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.

57. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and whose agreements (see paragraph 46 of this Ruling) are executed by 30 June 2009 will become Growers in the 2008 Project.

58. FEAP has identified sufficient land to be used for the Project. Plantations in this Project will be established close to existing plantations that the FEA Group has established in Tasmania, New South Wales and Queensland. Land utilised by the Project must meet the requirements set out in the Independent Forester's Report.

59. Each Grower will be granted by, and take from FEAP, a lease of a Forestry Right in Woodlots 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 3.5 hectares. Land utilised by the Project must meet the requirements set out in the Independent Forester's Report.

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

61. Insurance will be compulsory for a Grower who obtains finance with a term 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.

62. The PDS describes the insurance options available. The terms of the insurance that will be procured by FEAP are set out in the 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.

63. 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.

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

Constitution

65. 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.

66. 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 form as the PDS may require.

67. 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).

68. 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

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

Forestry Right Deed

70. 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

71. 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).

72. Under this Lease the Grower agrees to pay to the FEAP 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.

Management Agreement

73. 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.

74. 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 Woodlots 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 Woodlots; and
- the control of weeds and other vegetation which might inhibit the growth of the seedlings on the Woodlots.

75. 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 by 30 June 2010.

76. The Manager will provide Management Services related to the tending and rearing of the seedlings and the management, maintenance and pruning of the plantation established on the Woodlots (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.

77. In the event that a Grower's plantation suffers damage or destruction and it is not economic to nurture the plantation to harvest, the Management Agreement will come to an end as at the date of damage or 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 damage or destruction and thereupon become due and payable (clause 15).

78. 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.

Wood Purchase Agreement

79. 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

80. 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.

Fees

81. The following fees, per Option 4 Unit, are set out in the Management Agreement and Forestry Right Lease Deed:

- \$23,100, payable on application for the Plantation Establishment Services to be provided by 30 June 2010;
- a Management Fee of 3% of the Gross Harvest Proceeds;
- Rent of 12% of the Grower's proportionate share of the Gross Harvest Proceeds in Option 1 and 2 Woodlots;
- Rent of 7% of the Grower's proportional share of the Gross Harvest Proceeds in Option 3 Woodlot; and
- FEAP will invoice the Grower the relevant insurance premium together with an administration fee of 11% of the amount of the premium, for a Grower electing to insure their Woodlots, on 1 June each year for each plantation insurance period being 1 October to 30 September.

- Pruning fees in year 2 (\$396), year 4 (\$418) and year 6 (\$440). These costs will be increased in line with CPI.

Finance

82. To finance all or part of the cost of their 'forestry interest' a Grower can enter into a finance arrangement with Forest Enterprises Australia Limited (FEA) or alternatively, borrow from an independent lender external to the Project.

83. 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.

84. A Grower cannot rely on any part of this Product Ruling if the Application Money is not paid in full on or before 30 June 2009 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.

Finance offered by FEA

85. A Grower can finance the cost of their Application by borrowing from FEA an amount equal to their full Application Money less any deposit that applies to the finance option selected.

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

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

88. 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.

89. 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 loan amounts are less than \$100,000, no minimum deposit is required and no application fee is payable. The details of each loan term for loans less than \$100,000 in respect of Option 4 Unit are summarised below.

Finance Option	Interest rate
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%

90. If the total finance sought from FEA is \$100,000 or more application for finance will be through a separate finance pack and a loan application fee is not payable. A 10% minimum deposit is payable on the total amount of the application. The details of each loan term in respect of Option 4 Unit are summarised below.

Finance Option	Interest rate	Minimum deposit required
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%

91. Growers who enter into finance arrangements with FEA will be required to make equal monthly repayments over the term of the loan commencing on 31 July 2009 for:

- one (1) year interest free loans; and
- principal and interest loans.

92. 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.

Commissioner of Taxation

25 February 2009

Appendix 1 – Explanation

① *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.*

Structure of the Project

93. In return for payment of the Establishment Fee and the other fees and expenses required under the Management Agreement and the Forestry Right Lease Deed during the term of the Project, Growers will hold a 'forestry interest' in a 'forestry managed investment scheme'. The Project qualifies as a 'forestry managed investment scheme' because its purpose is for 'establishing and tending trees for felling in Australia' (see subsection 394-15(1))

94. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Grower a right to a share in the proceeds of the harvest and share of the proceeds of any thinning of the trees grown on the Project land. That share of proceeds is determined using the number of 'forestry interests' held by a Grower as a proportion of all 'forestry interests' held by 'participants'⁸ in the Project.

Is the Grower carrying on a business?

95. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business?

96. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T*; *Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

97. Application of these principles to the arrangement set out above leads to the conclusion that a Grower (as described in paragraphs 4 to 6 of this Ruling), who stays in the Project until its completion, will be carrying on a business of primary production involving afforestation activities.

⁸ The term 'participant' is defined in subsection 394-15(4).

Allowable deductions***Sections 8-5, 12-5, 394-10, and 394-20***

98. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a 'forestry managed investment scheme' that meet the requirements of subsection 394-10(1).

The '70% DFE rule'***Paragraph 394-10(1)(c) and section 394-35***

99. The threshold test for Growers in the Project to be entitled to deductions under subsection 394-10(1) is the '70% DFE rule' in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that on 30 June 2009, the amount of 'direct forestry expenditure'⁹ under the scheme will be no less than 70% of the amount of payments under the scheme.¹⁰

100. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that FEAP, as 'forestry manager'¹¹ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

101. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (i.e., the fees and expenses) that all current and future 'participants' in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

102. Both of the above amounts are determined as at 30 June 2009 taking into account:

- the timing requirements in subsections 394-35(4) and (5);
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6));
- the discount rate in subsection 394-35(7); and
- the market value rule in subsection 394-35(8).

103. Applying all of these requirements to the information provided by FEAP of the Project the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2009.

⁹ See section 394-45.

¹⁰ See subsection 394-35(1) and section 394-40.

¹¹ Defined in section 394-15(2).

The other elements for deductibility under subsection 394-10(1)

104. The requirement of paragraph 394-10(1)(d) that Growers in the Project not have day to day control over the operation of the Project is clear from the Project Agreements as are the alternative elements of paragraph (e) relating to the number of Growers in the scheme and the Responsible Entity's role in other managed investment schemes.

105. The final requirement for deductibility requires all the Project trees to be established within 18 months of 30 June 2009 (see paragraph 394-10(1)(f) and subsection 394-10(4)). However, according to the management agreement the establishment of the Trees will be completed by 30 June 2010.

106. Accordingly, subject to the qualifications set out below, amounts paid by Growers to FEAP in relation their 'forestry interests' satisfy all requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

107. Where a Grower does not fully pay an amount, or the amount is not fully paid on their behalf in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the 'forestry manager' on or before 30 June in an income year.

Loss of deductions previously allowed under section 394-10(1)

108. Two situations may lead to a loss of deductions previously allowed to Growers.

109. The first of these situations will occur if FEAP fails to establish the trees on the Project land within 18 months. Where this occurs FEAP is required to notify the Commissioner within 3 months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

110. The second situation where a Grower may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within 4 years from 30 June of the income year they paid an amount under the scheme, for example, the Establishment Fee (see subsection 394-10(5)).

111. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower within 2 years of the relevant 'CGT event' happening. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6)).

112. Where a 'CGT event' happens to the 'forestry interest' of a Grower within 4 years, the market value of the forestry interest at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event' is still included in the assessable income of the Grower by section 394-25. The amount must be included in assessable income even where an amendment has disallowed or may disallow the deductions previously allowed under section 394-10.

Interest on loans to finance the 'forestry interest' of a Grower

Section 8-1

113. Where a Grower borrows money to fund their investment in the Project the deductibility of the interest incurred on the loan monies falls for consideration under the general deduction provisions of section 8-1. If the interest incurred by the Grower is deductible under the first positive limb in subsection 8-1(1) there is no requirement to consider whether it is also deductible under the second positive limb of that provision. Court decisions show that the same basic test applies to both limbs (see *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47; (1949) 8 ATD 431, at CLR 56; ATD 435).

114. Under the first positive limb of subsection 8-1(1) the interest incurred by a Grower will be deductible if it is incurred in gaining or producing a Grower's assessable income and is not excluded by one of the negative limbs in subsection 8-1(2).

The question of whether an outgoing [is] ... incurred in gaining or producing the assessable income is a question of characterisation (*Fletcher & Ors v. Federal Commissioner of Taxation* (1991) 173 CLR 1; (1991) 91 ATC 4950; (1991) 22 ATR 613, at CLR 17; ATC 4957; ATR 621).

To the extent that ... outgoings of interest ... can properly be characterised as of a kind referred to in the first limb of [section 8-1] they must draw their character from the use of the borrowed funds (*Fletcher*, at CLR 19; ATC 4958; ATR 623).

[T]he characterisation of interest will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put (*Federal Commissioner of Taxation v. Roberts* (1992) 37 FCR 246; (1992) 92 ATC 4380; (1992) 23 ATR 494, at FCR 257; ATC 4388; ATR 504).

115. Growers in the Project use the borrowed funds to acquire a 'forestry interest' in a 'forestry managed investment scheme'. The holding of that 'forestry interest' will produce assessable income for a Grower in the form of the proceeds of a full or part disposal of the 'forestry interest' or, as a proportionate share of the harvest and thinning proceeds. The tests of deductibility of interest under the first limb of subsection 8-1(1) are, therefore, met unless one of the exclusions in subsection 8-1(2) apply.

116. For the purposes of this Project, only the capital exclusion in paragraph 8-1(2)(a) is relevant. The use of borrowed funds to purchase a capital asset, such as a 'forestry interest', does not mean that the interest outgoings are on capital account (see *Steele v. Federal Commissioner of Taxation* (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139, at CLR 470; ATC 4249; ATR 148).

Interest [is a] periodic payment for the use, but not the permanent acquisition of a capital item. Therefore, a consideration of the often-cited three matters identified by Dixon J in *Sun Newspapers Ltd v FC of T* ... assigns interest ... to revenue (*Australian National Hotels Ltd v. Federal Commissioner of Taxation* (1988); 19 FCR 234; (1988) 88 ATC 4627; (1988) 19 ATR 1575, at FCR 241; ATC 4633-4634; ATR 1582).

117. Therefore, the capital exclusion in subsection 8-1(2) does not apply to the interest and, subject only to the potential application of the prepayment provisions, a deduction for the interest can be claimed in the year in which it is incurred. (Note: the meaning of 'incurred' is explained in Taxation Ruling TR 97/7.)

Prepayment provisions

Sections 82KZL to 82KZMF

118. 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 that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and 82KZMF of the ITAA 1936.

119. However, subsection 394-10(7) specifically provides that sections 82KZMD and 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible under section 394-10 of the ITAA 1997.

Application of the prepayment provisions to this Project

Sections 82KZME and 82KZMF

120. 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).

121. As stated in Note (iv) of paragraph 38 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.

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

123. As stated in Note (iii) of paragraph 38 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 in accordance with the formula below :

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

124. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) 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.

Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'

Sections 6-10, 10-5, and 394-25

125. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of 'initial participants' of a 'forestry managed investment scheme' by subsection 394-25(2).

Subsection 394-25(2)

126. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)¹² happens to a 'forestry interest' held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted an amount under section 394-10; or
- the Grower would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 35 to 37 and paragraphs 110 to 112 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

¹² A thinning under this scheme is not a 'CGT event'.

Market value rule applies to 'CGT events'

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

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

then the market value of the 'forestry interest' at the time of the event, or the reduction of the market value of the 'forestry interest' as a result of the event, is included in the assessable income of the Grower in the income year in which the 'CGT event' happens (subsection 394-25(2)). A market value rule applies rather than the amount of money actually received from the 'CGT event' (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

128. The market value amount included in the assessable income of a Grower is the value of the 'forestry interest' just before the 'CGT event', or where the Grower continues to hold their interest after the event, the amount by which the market value of the 'forestry interest' is reduced as a result of the 'CGT event' (subsection 394-25(2)).

129. Section 394-25 will apply where the 'forestry interest' is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the 'forestry interest' or from a full or partial clear-fell harvest of the trees grown under the Project.

Amounts received by Growers where the Project trees are thinned

Section 6-5

130. Section 394-25 specifically excludes from the operation of Division 394 a 'CGT event' that happens in respect of a thinning (see paragraph 394-25(1)(c)).

131. Thinning amounts received by a Grower in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under Division 394. 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 a 'forestry interest' in the Project. It is an item of ordinary income and is assessable under section 6-5 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

132. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for **30 June 2009 up to and including 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.

133. 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.

134. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) for a Grower who will stay in the Project until its completion 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

135. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of ‘additional benefit(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 8-5 of the ITAA 1997.

Part IVA – general tax avoidance provisions

136. 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).

137. The FEA Plantations Project 2008 Late Grower will be a 'scheme' and a Grower will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions for the amounts detailed at paragraphs 34 and 38 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.

138. Growers to whom this Ruling applies will derive assessable income from holding or disposing of their 'forestry interest' in the Project. 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 Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

- Previous draft:*
- ITAA 1997 8-1(2)
 - ITAA 1997 8-1(2)(a)
- Not previously issued as a draft
- ITAA 1997 8-5
- Related Rulings/Determinations:*
- ITAA 1997 8-10
 - ITAA 1997 10-5
 - ITAA 1997 12-5
 - 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 328-110
 - ITAA 1997 Div 394
 - ITAA 1997 394-10
 - ITAA 1997 394-10(1)
 - ITAA 1997 394-10(1)(c)
 - ITAA 1997 394-10(1)(d)
 - ITAA 1997 394-10(1)(e)
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 - ITAA 1997 394-10(2)
 - ITAA 1997 394-10(4)
 - ITAA 1997 394-10(5)
 - ITAA 1997 394-10(6)
 - ITAA 1997 394-10(7)
 - ITAA 1997 394-15(1)
 - ITAA 1997 394-15(2)
 - ITAA 1997 394-15(4)
 - ITAA 1997 394-15(5)
 - ITAA 1997 394-20
 - ITAA 1997 394-25
 - ITAA 1997 394-25(1)(c)
 - ITAA 1997 394-25(2)
 - ITAA 1997 394-25(3)
 - ITAA 1997 394-30
 - ITAA 1997 394-35
 - ITAA 1997 394-35(1)
 - ITAA 1997 394-35(2)
 - ITAA 1997 394-35(3)
 - ITAA 1997 394-35(4)
 - ITAA 1997 394-35(5)
 - ITAA 1997 394-35(6)
 - ITAA 1997 394-35(7)
 - ITAA 1997 394-35(8)
 - ITAA 1997 394-40
 - ITAA 1997 394-45
 - ITAA 1997 995-1
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - TAA 1953 Sch 1 394-10
 - SISA 1993
 - Copyright Act 1968
 - Corporations Act 2001
- TR 97/7; TR 97/11; TR 98/22;
TR 2007/6; PR 2009/1;
PR 2009/2; PR 2009/3
- Subject references:*
- 4 year holding period
 - 70 per cent DFE rule
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 - direct forestry expenditure
 - forestry interest
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 - interest expenses
 - managed investment schemes
 - market value substitution rule
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- Legislative references:*
- ITAA 1936
 - 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
 - ITAA 1936 82KZMD
 - ITAA 1936 82KZME
 - ITAA 1936 82KZMF
 - ITAA 1936 Pt IVA
 - ITAA 1936 170
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1936 177D(b)
 - ITAA 1936 318
 - ITAA 1997
 - ITAA 1997 6-5
 - ITAA 1997 6-10
 - ITAA 1997 8-1
 - ITAA 1997 8-1(1)

Case references:

- Australian National Hotels Ltd v. Federal Commissioner of Taxation (1988) 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575
- Federal Commissioner of Taxation v. Roberts (1992) 37 FCR 246; 92 ATC 4380; (1992) 23 ATR 494
- Fletcher & Ors v. Federal Commissioner of Taxation (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085
- Ronpibon Tin NL v. Federal Commissioner of Taxation (1949) 78 CLR 47; (1949) 8 ATD 431
- Steele v. Federal Commissioner of Taxation (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139

Other references:

- Hannebery & Hance (NSD 492 – 493 of 2008)

ATO references

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