


PR 2010/24 - Income tax: AgriWealth 2011 Timber Project

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Product Ruling

Income tax: AgriWealth 2011 Timber 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, 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.

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 AgriWealth 2011 Timber Project, or simply as 'the Project'. **This Product Ruling does not rule on the tax consequences of investing in the Land Trust described in the Information Memorandum issued for the scheme to which this Ruling relates.**
2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product 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 Agreements set out in paragraph 42 of this Ruling on or before 30 June 2011 and will hold a 'forestry interest' in the Project. In this Ruling, each of these Growers will be wholesale clients for the purpose of the *Corporations Act 2001*.
7. The class of entities who can rely on this Product Ruling does **not** include:
 - Entities who are accepted into this Project before the date of this Ruling or after 30 June 2011;

- Entities who participate in the scheme through offers made other than through the Information Memorandum, or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way;
- Entities whose Application Price, including all loan monies, is not paid in full to AgriWealth Capital Limited by 30 June 2011, either by the Grower, and/or on the Grower's behalf by a lending institution; or
- Entities who enter into finance arrangements with AgriWealth Capital Limited other than those finance arrangements described at paragraphs 85 to 95 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 Commissioner 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 42 to 95 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 17 November 2010, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 17 November 2010 until 30 June 2011 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 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.

Changes in the law

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

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

Note to promoters and advisers

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

Goods and Services Tax

17. All amounts and percentages referred to in this Product Ruling exclude the Goods and Services Tax (GST), unless otherwise specified. The transactions in respect of this scheme may, where appropriate, have GST implications. Those GST implications are outside the scope of this Product Ruling.

Ruling**Structure of the Project**

18. The AgriWealth 2011 Timber Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of Radiata pine trees for felling in Australia. However, the Put Option, the associated Put Option Fee and investment in units in the associated Land Trust do not form part of the scheme to which subsection 394-15(1) applies.

19. 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 3 to 7 of this Ruling) who is accepted to participate in the 'forestry managed investment scheme' described at paragraphs 42 to 95 of this Ruling on or after 17 November 2010 and on or before 30 June 2011.

20. 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

21. A Grower (as described in paragraphs 3 to 7 of this Ruling) in the Project is not considered to be carrying on a business of primary production for income tax purposes.

¹ See subsection 394-15(5).

² See section 394-30.

The '70% DFE rule' and the establishment of the trees***Section 394-35 and subsection 394-10(4)***

22. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by AgriWealth Capital Limited (the Manager). The Commissioner has decided that on 30 June 2011 it will be reasonable to expect that the '70% DFE rule'³ 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'.

23. The Ruling will only apply if the Manager 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.⁴ For this Project the trees must be established before 31 December 2012.

24. 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 850 stems per hectare. The Manager is required by section 394-10 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) to notify the Tax Office if the trees are not established by 31 December 2012.

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

25. A Grower in the Project can claim deductions for the amount shown in the Table below that is paid to the Manager (sections 8-5 and 394-10).

26. The deductibility of this amount remains subject to:

- all the trees in the project being established by 31 December 2012 (see paragraph 109); and
- the requirement that a CGT event⁵ does not happen in relation to the Grower's 'forestry interest' before 1 July 2015 (see paragraphs 30 to 32 of this Ruling).

27. 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). This requires cash to flow from the Grower, or from another entity on the Grower's behalf, to the Manager's bank account in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into the Manager's bank account will not qualify for a deduction under subsection 394-10(2).

³ The '70% DFE rule' is set out in section 394-35.

⁴ See subsection 394-10(4).

⁵ Defined in section 995-1.

28. 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.

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

| Fee | Amount | Year deductible |
|--|---------------------|-----------------------------------|
| Establishment Services Fee | \$26,950 | 30 June 2011 |
| Council rates and other applicable statutory charges | Determined annually | When paid out of the Sinking Fund |

Note: A deduction will not be available to Growers until the Manager pays for the council rates and other applicable statutory charges from the Sinking Fund. The Manager will advise Growers of the amount paid from the fund and the Grower's Proportion.

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

Subsections 394-10(5) and (6)

30. Deductions for the Establishment Services Fee are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of a Grower before 1 July 2015 (subsection 394-10(5)).

31. 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.

32. 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'.

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

Section 8-1

33. A Grower in the Project can claim deductions for interest incurred on a loan to fund their investment in the Project (paragraph 8-1(1)(a)). This Ruling only applies to loans between a Grower and the Manager and only applies to the loans described in paragraphs 85 to 95 of this Ruling. Growers who enter into any other finance arrangements with the Manager, including arrangements to prepay interest, are not covered by any part of this Ruling (see paragraph 7).

34. Growers who borrow from financiers other than the Manager may apply for a private ruling on the deductibility of loan interest and borrowing costs or may self assess the deductibility of these amounts.

Put Option Fee

35. The Put Option Fee is capital in nature and not deductible under section 8-1 or section 394-10. The Put Option Fee does not form part of the 'forestry managed investment scheme' for the purposes of subsection 394-15(1).

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

Sections 6-10, 17-5 and 394-25

36. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁶ – see paragraph 39 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).

37. 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)).

38. '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.

⁶ 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 for Thinning the Project Trees
and for Carbon Sequestration Rights and Salinity Credits**

Section 6-5

39. The trees grown in this Project will be thinned twice during the term of the Project, at around age 12 and 20 years. An amount received by a Grower in respect of a thinning of the trees 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 the amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5).

40. An amount received by a Grower in respect of sales of Carbon Sequestration Rights and Salinity Credits or interest from the Sinking Fund also constitutes a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include such amounts received in their assessable income in the income year in which those amounts are derived (section 6-5).

**Prepayment provisions, non-commercial losses and
anti-avoidance provisions**

***Division 35 of the ITAA 1997 and sections 82KZM, 82KZME,
82KZMF and 82KL and Part IVA of the ITAA 1936***

41. Where a Grower is accepted to participate in the Project set out at paragraphs 42 to 95 of this Ruling, the following provisions of the ITAA 1936 or the ITAA 1997 have application as indicated:

- interest paid by a Grower to AgriWealth Capital Limited does not fall within the scope of sections 82KZM, 82KZME and 82KZMF of the ITAA 1936;
- losses arising from participation in the Project are not within the scope of Division 35 of the ITAA 1997;
- section 82KL of the ITAA 1936 does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA of the ITAA 1936 will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

42. 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 16 July 2010 and 11 August 2011 and additional correspondence and emails dated 10 August 2010, 7 September 2010, 18 October 2010;
- Draft Information Memorandum of the AgriWealth 2011 Timber Project, received on 16 July 2010;
- Draft Tree Constitution of the AgriWealth 2011 Timber Project, received on 16 July 2010;
- **Draft Forestry Management Agreement** of the AgriWealth 2011 Timber Project between AgriWealth Capital Limited (Manager) (ACL) and the Grower, received on 16 July 2010;
- Draft AgriWealth Management Agreement of the AgriWealth 2011 Timber Project between the Manager and AgriWealth Pty Limited (AgriWealth), received on 16 July 2010;
- Draft Forestry Management Contract of the AgriWealth 2011 Timber Project between AgriWealth and Forestry Commission of New South Wales (Forests NSW), received on 16 July 2010;
- **Draft Timberlot Agreement** of the AgriWealth 2011 Timber Project between the Grantor, the Manager and the Grower, received on 16 July 2010;
- **Draft Put Option Deed** of the AgriWealth 2011 Timber Project between the Manager and the Grower, received on 16 July 2010;
- **Draft Guarantee (in relation to Put Option Deed)** of the AgriWealth 2011 Timber Project between AgriWealth and the Grower, received on 16 July 2010;
- **Draft Loan Agreements** in relation to the AgriWealth 2011 Timber Project between the Manager, the Grower and the Guarantor, received on 16 July 2010; and
- Draft Deed of Definitions and Interpretations of the AgriWealth 2011 Timber Project, received on 16 July 2010.

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

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

44. 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. The meaning of wholesale client is explained in the Information Memorandum for this Project.

45. 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

46. The main features of the AgriWealth 2011 Timber Project are as follows:

| | |
|---|---|
| Location | Tumut/Tumbarumba/Hume and Oberon/Bathurst regions of NSW and nearby Victorian regions. |
| Species of trees to be planted under the scheme | Radiata pine (<i>pinus radiata</i>) |
| Term of the Project | 26 years |
| Date all trees are due to be planted on scheme land | 31 December 2012 |
| Number of trees per hectare | Minimum of 850 |
| Number of hectares offered for cultivation | 1,000 |
| Size of each 'forestry interest' | 0.5 hectares |
| Minimum allocation of 'forestry interests' per Grower | One |
| Initial cost | \$26,950 Establishment Services Fee \$95 Sinking Fund and further amounts at thinning |
| Other costs | <ul style="list-style-type: none"> • Roding, Harvest and Haulage fees in excess of the Roding, Harvest and Haulage Contribution Payments made by the Manager at the time of Thinnings and Final Harvest; and • Rehabilitation costs in excess of those included at clause 23.3.20 of Schedule 1 of the Forestry Management Agreement. |

47. The Project will be an unregistered managed investment scheme under the Corporations Act. AgriWealth Capital Limited will be the Manager for the Project.

48. The Project will involve the establishment and tending of pinus radiata trees for felling in Australia over a 26 year period.

49. An offer to participate in the Project will be made through an Information Memorandum (IM). The offer under the IM is for up to 1,000 hectares, which corresponds to 2,000 Timberlots in the Project. **The IM for the Project also contains an offer to invest in Units in a Land Trust. This Ruling does not address the tax consequences of an investment in the Land Trust.**

50. An entity that participates in the Project as a Grower will do so by acquiring a Timberlot in the Project on or before 30 June 2011, which will consist of a minimum of one Timberlot of 0.5 hectares in size.

51. To participate in the Project as a Grower each applicant must complete the 2011 Application Form and pay the Application Price in full. Under the Constitution, the Manager is appointed as agent, attorney and/or trustee in relation to the Project. Upon acceptance of an Application, the Manager will be authorised to execute a Timberlot Agreement, Put Option Deed, Put Option Deed Guarantee and Forestry Management Agreement on behalf of the Grower.

52. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Timberlot Agreement, Put Option Deed, Put Option Deed Guarantee and Forestry Management Agreement on or before 30 June 2010 will become Growers in the Project.

53. The Manager currently owns less than 1000 hectares of land for the Project. The acquisition of the remaining land required for the Project is being negotiated by the Manager. The Project Land will be divided into 0.5 hectare lots and licensed to the Growers accepted in the Project via the Timberlot Agreements.

Constitution

54. The Constitution establishes the Project and operates as a deed binding all Growers and the Manager (clause 1.3). The Constitution sets out the terms and conditions under which the Manager agrees to act in that capacity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

55. In order to acquire an interest in the Project, an entity must make an application for Timberlots on the form attached to the Information Memorandum (clause 2.1). Among other things, the application is to be signed by or on behalf of the Applicant, lodged at the registered office of the Manager and accompanied by payment of the full amount of the Application Price in a form acceptable to the Manager (clause 2.2).

56. Until the Grower's Application is accepted, the Manager holds the Application Price in one or more bank accounts in its own name in accordance with the requirements of the Corporations Act (clause 2.5).

57. Once the Manager has accepted the Application and each of the Project Documents have been executed the Application Price will then be held by the Manager on its own behalf and paid as required by each Grower's Forestry Management Agreement and Put Option Deed (clauses 2.5.2 and 4.2). The Sinking Fund Payments will be transferred into a separate bank account in the name of the Manager who will act for and on behalf of the Growers.

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

- nature of Grower's interests in the Project (clause 1.2);
- other amounts payable by Growers under the Agreements (clause 6);
- the keeping of an up-to-date register of all Investments (clause 8) and an up-to-date register of all Growers (clause 16);
- the powers, duties and obligations of the Manager (clause 9);
- change of Manager (clause 12);
- the Manager's entitlement to fees and expenses (clause 22);
- termination of the Project (clauses 24 and 25); and
- distribution of the Harvest Proceeds (clause 25.2).

Forestry Management Agreement

59. Under the Forestry Management Agreement the Grower engages the Manager as an independent contractor to perform the Establishment Services (clause 1.1) and acknowledges that this engagement is not exclusive to the Project (clause 1.2).

60. The Establishment Services to be provided by the Manager (clause 4) are listed in Item A of Schedule 4 of the Deed of Definitions and Interpretations. Services which are not provided by the Manager, but which may be able to be provided by separate agreement, are listed at Item B of Schedule 4. The Manager intends to sub-contract the Establishment Services to AgriWealth.

61. The Establishment Services include:

- Arranging for the harvesting of Plantation Produce at First and Second Thinnings and Final Harvest;

- Contributing to the harvest, road construction and maintenance costs, harvesting expenses and haulage expenses up to the Roding, Harvest and Haulage Contribution Payments;
- Rehabilitation of the Plantation Land after Final Harvest; and
- Site preparation, application of fertiliser, planting, and replanting areas to meet a minimum stocking rate of 850 stems per hectare.

62. In consideration of the Manager agreeing to carry out the Establishment Services, the Grower agrees to pay the Manager the Establishment Services Fees set out in Schedule 2 (clause 8.1) and the Sinking Fund Payments under Schedule 2 (clause 8.14). The Establishment Services Fees will be the only fees paid by the Grower to the Manager in return for the Establishment Services (clause 8.2). The Sinking Fund Payments will be for the purposes of meeting the costs of the Manager acting as agent for the Grower in relation to council rates and other applicable statutory charges in relation to the Forestry Right Land of the Grower (Schedule 2, clause 8.13).

63. The Grower is entitled to all Carbon Sequestration Rights, Carbon Sequestration Benefits, Salinity Credits and Salinity Credit Benefits produced by or derived from their Forestry Rights and related Plantation Produce. These Rights and Benefits are calculated by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers (clause 5).

64. The Grower will own the Trees and Timber on the Planted Land and all of the Plantation Produce for that land (clause 6.1). The Grower will also be entitled to all proceeds from the sales of Plantation Produce net of all costs of Harvest, transportation and other associated costs where those costs exceed the amounts of the Roding, Harvest and Haulage Contribution Payments for a Thinning or Final Harvest (clause 6.2).

65. The Manager will notify the Grower when the Planted Land is ready for any Thinning or Final Harvests (clause 6.3) and will act as agent for the Grower to market the Plantation Produce (clause 6.7). After deducting certain amounts owed to the Manager the Grower will be entitled to a pro rata sum referable to the Grower's entitlement to the Plantation Produce (clause 6.12). The Manager will provide the Grower with a reconciliation of the amounts owed as soon as reasonably practical after the sale of the Plantation Produce (clause 6.13) and distribute the proceeds of sale within 30 days after receiving the last receipt attributable to the relevant harvest activity (clause 6.14).

AgriWealth Management Agreement

66. Under this Agreement the Manager engages AgriWealth in a non-exclusive arrangement as an independent contractor to provide the Forestry Services to the Manager for the purposes of establishing and managing the Growers' plantations (clause 1.1).

67. AgriWealth intends to sub-contract the Forestry Services to Forests NSW (recital E).

68. AgriWealth will have the right to carry out on behalf of and in the name of the Manager and the Growers all functions which the Manager and the Growers are entitled or obliged to perform or carry out in the exercise of its or their rights or obligations under the Timberlot Agreement and Forestry Management Agreement against the Manager granting the relevant Forestry Right (clause 2.4).

Forestry Management Contract

69. In respect of each Plantation AgriWealth will engage Forests NSW in a non-exclusive arrangement as an independent contractor to perform the Forestry Services as described in Schedule 1 and as a disclosed agent to perform the Agency Services in Schedule 4 (clauses 3.1 and 3.2).

70. The Contract commences on the date the Contract is executed and will terminate upon completion of all Forestry Services and final settlement of accounts between the Parties after Final Harvest of all Plantations, unless terminated earlier as provided in the Contract. However, the Contract should not continue after 30 June 2044 (clause 4.1).

71. The Contract shall apply only to the Plantation Establishment and Management Plan agreed by AgriWealth and Forests NSW for the Plantations intended to be established during the calendar year of 2012 (clause 4.2).

Timberlot Agreement

72. Under the Timberlot Agreement the Manager grants the Grower an interest in and a forestry right over the Forestry Right Land.

73. The Grower must punctually pay all rates, taxes and other charges levied on the Forestry Right Land (clause 6.7).

74. Under the Forestry Right (Timber) and Forestry Right (Carbon Sequestration) the Grower is granted:

- (a) the right to enter the Forestry Right Land;
- (b) the right to establish, maintain and Harvest a crop of Trees on the Forestry Right Land;

- (c) the right to construct and use such buildings, works and facilities as may be necessary or convenient to enable the Grower to establish, maintain and Harvest a crop of Trees on the Forestry Right Land; and
- (d) the right to any Salinity Credits and Carbon Sequestration Rights and any benefit to be derived from such Salinity Credits and Carbon Rights that may attach to the Forestry Right Land.

75. The Forestry Right shall commence on the date of execution of the Timberlot Agreement and continue for a term of 31 years.

Put Option Deed and Put Option Deed Guarantee

76. Growers will be granted a Put Option by the Manager in respect of part of their Timberlot(s) (the Put Option Property). Growers must pay \$243 per Timberlot to the Manager on or before 30 June 2011 as consideration for this right. The Put Option (if exercised) will require the Manager to purchase the Put Option Property for the Sale Consideration of \$7,000 per part Timberlot between 1 July 2015 and 18 July 2020. Clause 4.1 of the Put Option Deed allows the Manager to set off any amount payable and not paid by the Grower to the Manager against the Sale Consideration. The Manager has secured a Guarantee from AgriWealth in respect of the consideration payable by the Manager should the Put Option be exercised by a Grower.

Pooling of Timber and Entitlement to Net Proceeds

77. The Forestry Management Agreement sets out provisions relating to the Grower's entitlement to Harvest Proceeds.

78. In accordance with the Constitution, the Grower authorises the Manager to collect for distribution to the Grower the Harvest Proceeds from sale of the Plantation Produce to which the Grower is entitled.

79. The Harvest Proceeds to which the Grower is entitled will be calculated by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers after deducting the Manager's reasonable estimate of all moneys owing by the Grower to the Manager or AgriWealth, including Rehabilitation expenses (in excess of those included at Item A-20 of Schedule 4 of the Deed of Definitions and Interpretations) and any other costs for which the Grower is or will be liable in terms of the Forestry Management Agreement or the Timberlot Agreement. These costs will be calculated pro rata by reference to the size of the Grower's Forestry Right Land compared with the overall size of the Plantation Land of all Growers.

Fees***Establishment Services Fee***

80. Under the terms of the Forestry Management Agreement, the Establishment Services Fee is \$26,950 per Timberlot and is payable by Growers when the Application Form is lodged.

Sinking Fund Payments

81. Under the terms of the Forestry Management Agreement, the Sinking Fund Payment is \$95 per Timberlot and is payable by Growers when the Application Form is lodged. Additional Sinking Fund Payments will be called upon by the Manager to cover council rates and other applicable charges to cover any shortfall in the Sinking Fund.

Put Option Fee

82. Under the terms of the Put Option Deed, the Put Option Fee is \$243 per Timberlot and is payable by Growers when the Application Form is lodged.

Roading, harvest and haulage fees

83. Growers will be required to pay any roading, harvest and haulage fees in relation to their Forestry Right Land, that are in excess of the Roding, Harvest and Haulage Contribution Payments paid by the Manager.

Rehabilitation Costs

84. Growers will be required to pay Rehabilitation Costs in excess of those included at Item A-20 of Schedule 4 of the Deed of Definitions and Interpretations.

Finance

85. To finance all or part of the cost of their Timberlot a Grower can enter into a finance arrangement with the Manager or, alternatively, borrow from an independent lender external to the Project.

86. 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 any finance arrangement with the Manager that materially differs from that set out in the documentation provided with the application for this Product Ruling (see paragraph 7). 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.

87. A Grower cannot rely on any part of this Ruling if the Application Price is not paid in full on or before 30 June 2011 by the Grower or, on the Grower's behalf, by another entity. Payment in this context is explained in paragraph 27 of this Ruling.

Finance offered by the Manager

88. A Grower who is an individual (not a corporate or trustee entity) can finance the cost of their Application Price by borrowing that amount from the Manager.

89. Subject to the Manager accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement and the Information Memorandum.

90. There are two finance options offered by the Manager to Growers to finance their interests in the Project.

91. As security for the due and punctual payment of all Moneys owed to the Manager under the Loan Agreement, Growers will charge to the Manager all of the Grower's interests in the Project. Should a Grower exercise the Put Option, this charge will be reduced to the remaining interest held by a Grower. The charge will include the Put Option Sale Consideration.

92. The total amount of finance provided by the Manager to Growers will not exceed its credit facility of \$5 million.

Loan Options

93. 1 year loan with terms and conditions as follows:

- applies to up to 100% of the Application Price;
- the loan is full recourse;
- interest free repayments of 12 equal monthly instalments commencing on 31 July 2011 and end on 30 June 2012;
- no loan application fee applies; and
- Growers may make early repayment of instalments without incurring additional fees.

94. 15 year loan with terms and conditions as follows:

- applies to up to 100% of the Application Price;
- the loan is full recourse;
- interest will be charged monthly in arrears on the outstanding balances, calculated daily, at the Specified Interest Rate of 12%. However, where monthly repayments are made on or before the due date and on or before the Reset Date (being 1 July 2015), the interest rate will be reduced to the Initial Interest Rate of 5%;

- loan repayments of 180 equal monthly instalments of principal and interest commencing on 31 July 2011;
- no loan application fee applies; and
- Growers may make early repayments without incurring additional fees.

Other qualifications relating to finance

95. 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 or the Manager, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation17 November 2010

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.*

Structure of the Project

96. In return for payment of the Establishment Services Fee required under the Forestry Management Agreement 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)).

97. However, the Put Option Fee does not form part of the scheme for the purposes of subsection 394-15(1) because this fee is not concerned with establishing and tending trees for felling in Australia.

98. 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 proceeds of thinnings 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'⁷ in the Project.

Is the Grower carrying on a business?

99. 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 of primary production?

100. 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).

101. Application of these principles to the arrangement set out above leads to the conclusion that a Grower (as described in paragraphs 3 to 7 of this Ruling), in the AgriWealth 2011 Timber Project is not considered to be carrying on a business of primary production involving afforestation activities.

⁷ The term 'participant' is defined in subsection 394-15(4).

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

102. 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***

103. 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 2011, the amount of 'direct forestry expenditure'⁸ under the scheme will be no less than 70% of the amount of payments under the scheme.⁹

104. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that the Manager, as 'forestry manager'¹⁰ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

105. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (that is, 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)).

106. Both of the above amounts are determined as at 30 June 2011 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).

107. Applying all of these requirements to the information provided by the Manager of the Project the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2011.

⁸ See section 394-45.

⁹ See subsection 394-35(1) and section 394-40.

¹⁰ Defined in section 394-15(2).

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

108. 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 Manager's role in other managed investment schemes.

109. The final requirement for deductibility requires all the Project trees to be established within 18 months of 30 June 2011 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by the Manager indicates that all the trees required to be established under the scheme will be planted on the Project land by 31 December 2012.

110. Accordingly, subject to the qualifications set out below, amounts paid by Growers to the Manager 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)).

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

112. 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 subsection 394-10(1)

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

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

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

116. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower within two 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) of the ITAA 1997).

117. Where a 'CGT event' happens to the 'forestry interest' of a Grower within four 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

118. 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).

119. 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; 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; 92 ATC 4380; (1992) 23 ATR 494, at FCR 257; ATC 4388; ATR 504).

120. Growers in the Project may use borrowed funds in the form of the 15 year principal and interest loan with the Manager to acquire a 'forestry interest' in the '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 thinnings 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.

121. 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; (1999) 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).

122. 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 by a Grower in the Project 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

123. 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.

124. However, subsection 394-10(7) of the ITAA 1997 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.

125. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under the 15 year principal and interest loan with the Manager will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 85 to 95 of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to Growers who enter into those loans.

126. If a Grower chooses to prepay interest on these loans that Grower may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

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

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

127. 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)

128. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)¹¹ 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 30 to 32 and paragraphs 113 to 117 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

¹¹ A thinning under this scheme is not a 'CGT event'.

Market value rule applies to 'CGT events'

129. 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.

130. 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)).

131. 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.

132. Based on the scheme set out in the Product Ruling application and as ruled upon herein, where the Put Option is exercised, the Manager has estimated that there will be a decrease in the market value of the forestry interest of \$7,000 (the value assigned to the Put Option).

Amounts received by Growers where the Project trees are thinned

Section 6-5

133. 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)).

134. 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

135. Division 35 has no application to losses arising from the Grower’s participation in the Project, as a Grower who is an ‘initial participant’ in the Project is not carrying on a business activity.

Section 82KL – recouped expenditure

136. 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 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

137. 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).

138. The AgriWealth 2011 Timber Project 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 paragraph 29 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.

139. 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.

140. A Grower can rely on this Ruling and the Commissioner will not apply Part IVA of the ITAA 1936 to deny the tax deductions set out in paragraphs 25 to 29 and 33 to 34 of this Ruling by reason of a Grower acquiring units in the Land Trust.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22

Subject references:

- 4 year holding period
- 70 per cent DFE rule
- carrying on a business
- DFE
- direct forestry expenditure
- forestry interest
- forestry MIS
- interest expenses
- managed investment schemes
- market value substitution rule
- payments under the scheme
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- product rulings
- reasonable expectation
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Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
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- ITAA 1997 394-35(8)
- ITAA 1997 394-40
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 - Fletcher & Ors v. Federal Commissioner of Taxation (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613
 - Ronpibon Tin NL v. Federal Commissioner of Taxation (1949) 78 CLR 47; (1949) 8 ATD 431
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