


# ***PR 2012/22 - Income tax: W.A. Blue Gum Project 2012***

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## Product Ruling

### Income tax: W.A. Blue Gum Project 2012

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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**

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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**

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

## What this Product Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the scheme, the W.A. Blue Gum Project 2012, or simply as 'the Project'.
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 48 on or before 30 June 2012 and will hold a 'forestry interest' in the Project.
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 2012;
  - entities who participate in the scheme through offers made other than through the W.A. Blue Gum Project 2012 Combined Product Disclosure Statement and Financial Services Guide; 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 establishment fee, including all loan moneys, are not paid in full to W.A. Blue Gum Limited by 30 June 2012, either by the Grower and/or on the Grower's behalf by a lending institution;
- entities who enter finance agreements with Albany Financial Pty Ltd outside the terms specified in paragraphs 91 to 95 of this Ruling; or
- entities who enter as a joint venture participant.

### **Qualifications**

8. 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 48 to 95 of this Ruling.

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

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- this Product Ruling may be withdrawn or modified.

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### ***Superannuation Industry (Supervision) Act 1993***

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

## Date of effect

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12. This Product Ruling applies prospectively from 20 June 2012, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 20 June 2012 until 30 June 2012, 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 Agreements.

13. However this 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 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.

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 ATO suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after this 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

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### Structure of the Project

18. The W.A. Blue Gum Project 2012 is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of *Eucalyptus globulus* (Tasmanian Blue Gum) trees for felling in Australia.

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'<sup>1</sup> in the defined class of entities (see paragraphs 4 to 7 above) who is accepted to participate in the 'forestry managed investment scheme' described below at paragraphs 48 to 95 of this Ruling on and after the date this Product Ruling is made and on or before 30 June 2012.

20. An entity that takes part in the Project as a 'subsequent participant'<sup>2</sup> 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. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6) 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, alone or in partnership, will be subject to the operation of Division 35 (see paragraphs 43 to 46).

### Concessions for 'small business entities'<sup>3</sup>

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

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

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<sup>1</sup> See subsection 394-15(5).

<sup>2</sup> See section 394-30.

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

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

24. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by W.A. Blue Gum Limited. On the basis of that information the Commissioner has decided that on 30 June 2012 it will be reasonable to expect that the '70% DFE rule'<sup>4</sup> will be satisfied. The Australian Taxation Office (ATO) may undertake review activities during the term of the Project to verify the information relied on for the purposes of the '70% DFE rule'.

25. The Ruling will only apply if W.A. Blue Gum Limited 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.<sup>5</sup> For this Project the trees must be established before 31 December 2013.

26. 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 900 trees per hectare. W.A. Blue Gum Limited is required by section 394-10 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) to notify the ATO if all of the trees are not established by 31 December 2013.

**Allowable deductions*****Sections 8-5, 394-10, 394-20 and Division 27***

27. A Grower in the Project can claim deductions for the amounts shown in the Table below that are paid to the W.A. Blue Gum Limited as Responsible Entity for the Project (sections 8-5 and 394-10).

28. The deductibility of these amounts remains subject to a requirement that a CGT event<sup>6</sup> does not happen in relation to the Grower's 'forestry within four years of the Grower first paying an amount under the scheme (otherwise known as the 'four year holding period', see paragraphs 32 to 35 and 39 to 41 below).

29. 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 W.A. Blue Gum Limited'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 W.A. Blue Gum Limited's bank account will not qualify for a deduction under subsection 394-10(2).

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

<sup>5</sup> See subsection 394-10(4).

<sup>6</sup> Defined in section 995-1.

30. 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.

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

<b>Fee</b>	<b>Amount</b>	<b>Year(s) deductible</b>
Establishment fee	\$5,000 per interest (\$15,000 for the minimum of three interests)	30 June 2012 See Note (i)
Annual tending fee	\$110 per interest per annum, indexed annually (\$330 for the minimum of three interests)	Any year in which these amounts are paid See Note (i) and (ii)
Annual Rent	\$510 per interest per annum, indexed annually (\$1,530 for the minimum of three interests)	Any year in which these amounts are paid See Notes (i) and (iii)
Harvesting, delivery and supervision expenses	As paid	The year(s) in which such expenses are paid See Note (i)
Incentive fee	15% of [the amount due to the Grower per hectare, less \$16,363.64 (indexed annually), multiplied by the number of hectares of Plantable Area]	Any year in which this amount is paid See Note (i)
Unforeseen expenses in relation to fertiliser or insect issues	As paid	The year(s) in which such expenses are paid See note (i)

**Notes:**

- (i) The amounts shown are GST exclusive. Whether registered for GST or not, a Grower cannot treat GST payments as a payment under a forestry managed investment scheme (paragraph 394-40(d)).

- (ii) The tending services will commence from when the trees are planted and continue until the trees have been harvested. No tending fee is payable in respect of any financial year ended 30 June for any hectare upon which no trees have been planted. The tending fee is deductible when paid.
- (iii) Rent is payable under the terms of the Sub-Lease W.A. Blue Gum Project 2012 which will commence on or after execution of the respective head lease held by W.A. Blue Gum Limited. Where the head lease and subsequent sub-leases have not been executed no deduction can be claimed for rent in the financial year.

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

### ***Subsections 394-10(5), 394-10(5A) and 394-10(6)***

32. Deductions for the Establishment fees, Tending fees, Rent and Unforeseen expenses that have been allowed as deductions under section 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 2016 (subsection 394-10(5)).

33. 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)). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

34. 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'.

35. However, deductions will not be affected where the 'CGT event' happens because of circumstances outside the Grower's control and the Grower could not reasonably have foreseen the 'CGT event' happening when they acquired the 'forestry interest' (subsection 394-10(5A)).

**Interest on loans to finance the 'forestry interest', credit card merchant fees, and fire insurance costs of a Grower****Section 8-1**

36. 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 Albany Financial Pty Ltd, where the interest is not prepaid or paid in advance. Growers who borrow from other financiers or who prepay their interest with Albany Financial Pty Ltd may apply for a private ruling on the deductibility of loan interest or may self assess the deductibility of the interest.

37. Credit card merchant fees incurred by a Grower in paying any fees under the Project will be deductible under section 8-1. The deduction is allowable in the year in which the merchant fee is incurred.

38. Fire insurance costs paid to the Responsible Entity are deductible under section 8-1 in the income year in which they are incurred. Amounts received from any claims will be assessable income in the financial year in which they are derived.

**Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'****Sections 6-10, 17-5, and 394-25**

39. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning<sup>7</sup>) 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), less any GST payable on those proceeds (section 17-5).

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.

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<sup>7</sup> A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

## **Amounts received by Growers for carbon or other environmental credits, and insurance proceeds**

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

42. An amount received by a Grower in respect of sales of carbon or other environmental credits, or the receipt of insurance proceeds, constitutes a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers should include such amounts received in their assessable income in the income year in which those amounts are derived (section 6-5) less any GST payable on those proceeds (section 17-5).

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

### ***Section 35-55 – annual exercise of Commissioner’s discretion during the period beginning with the financial year ended 30 June 2012 and concluding with the financial year ended 30 June 2022***

43. For each of the financial years ended 30 June 2012 to 30 June 2022, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of forestry during the income year;
- the business activity that is carried on is not materially different to that in the scheme described in this Product Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

44. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

45. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

46. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income year.

### **Prepayment provisions and anti-avoidance provisions**

#### ***Sections 82KZM, 82KZME, 82KZMF, 82KL and Part IVA of the ITAA 1936***

47. Where a Grower is accepted to participate in the Project set out at paragraphs 48 to 95, the following provisions of the ITAA 1936 have application as indicated:

- interest paid by a Grower to Albany Financial Pty Ltd does not fall within the scope of sections 82KZM, 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Scheme**

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48. 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 20 December 2011, and additional correspondence and documents received on 17 January 2012, 21 February 2012, 13 March 2012, 3 April 2012, 4 April 2012, 5 April 2012, 9 May 2012, 15 May 2012, and 8 June 2012;
- Draft Combined Product Disclosure Statement and Financial Services Guide for the W.A. Blue Gum Project 2012, received 23 December 2011;
- Draft Constitution for the W.A. Blue Gum Project 2012 received 23 December 2011;
- Draft Compliance Plan for the W.A. Blue Gum Project 2012 received 23 December 2011;
- Draft **Project Management Contract** for the W.A. Blue Gum Project 2012 entered into by each Grower and W.A. Blue Gum Limited (as Project Manager), received 23 December 2011, including the Draft Plantation Development and Testing Plan received 21 February 2012;

- Draft Plantation Services Agreement for the W.A. Blue Gum Project 2012 entered into by W.A. Blue Gum Limited (as Project Manager) and WACAP Treefarms Pty Ltd (as Forestry Contractor), received on 23 December 2011;
- Draft Sub-Lease between unidentified sub-lessor and W.A. Blue Gum Limited, received on 23 December 2011;
- Draft **Sub-Lease** for the W.A. Blue Gum Project 2012 between each Grower and W.A. Blue Gum Limited (as Landholder), received on 23 December 2011;
- Draft **Agreement to Sub-Lease** for the W.A. Blue Gum Project 2012 between W.A. Blue Gum Limited and each Grower, received 23 December 2011;
- Draft **Wood Purchase Agreement** for the W.A. Blue Gum Project 2012 between each Grower and WA Blue Gum Limited (as Project Manager) and W.A. Chip & Pulp Co Pty Ltd (as Purchaser), received 23 December 2011;
- Draft **Loan Agreement** for the W.A. Blue Gum Project 2012 between a Grower and Albany Financial Pty Ltd (as Financier) received 23 December 2011;
- Draft Scheme Property Custody Agreement between W A Blue Gum Limited and Sandhurst Trustees Limited (as the Custodian), received 23 December 2011;
- Draft Guarantee and Indemnity for W.A. Blue Gum Limited (as Project Manager) and draft Guarantee and Indemnity for Albany Financial Pty Ltd (as Financier) , received 23 December 2011 (guarantors required where the Grower is a company); and
- Australian Financial Services Licence for authorising W.A. Blue Gum Limited to operate W.A. Blue Gum Project 2012, received 4 April 2012.

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

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

50. 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**

51. The main features of the W.A. Blue Gum Project 2012 are as follows:

Location	In the southwest of Western Australia, between Bunbury and Albany
Species of trees to be planted under the scheme	<i>Eucalyptus Globulus</i> (Tasmanian Blue Gum)
Term of the Project	Approximately 10 years
Date all trees are due to be planted on scheme land	31 December 2013
Number of trees per hectare	Approximately 900
Number of hectares offered for cultivation	Approximately 500
Size of each 'forestry interest'	One hectare
Minimum allocation of 'forestry interests' per Grower	Three forestry interests
Minimum subscription	None
Initial cost per forestry interest	\$5,000 Establishment fee (\$15,000 for the minimum of three forestry interests)
Ongoing annual costs per forestry interest	Tending fee of \$110, indexed annually (\$330 for the minimum of three forestry interests) Rent of \$510, indexed annually (\$1,530 for the minimum of three forestry interests)
Other costs	Harvest delivery and supervision expenses Incentive fee Unforeseen expenses Fire insurance Transfer of interest fee

52. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. W.A. Blue Gum Limited has been issued with an Australian Financial Service Licence 246264 and will be the Responsible Entity for the Project.

53. The Project will involve the planting and growing of Tasmanian Blue Gums in the southwest region of Western Australia for the purpose of harvest and sale of the timber.

54. An offer to participate in the Project will be made through the Combined Product Disclosure Statement and Financial Services Guide (CPDSFSG). The offer under the CPDSFSG is for up to 500 hectares, which corresponds to 500 'forestry interests' in the Project.

55. An entity that participates in the Project as a Grower will do so by acquiring a 'forestry interest' in the Project on or before 30 June 2012, which will consist of a minimum of three forestry interests each of one hectare in size.

56. Applicants execute a Power of Attorney contained in the CPDSFSG. The Power of Attorney irrevocably appoints W.A. Blue Gum Limited to enter into, on behalf of the Grower, an Agreement to Sub-Lease or a Sub-Lease, a Project Management Contract, and a Wood Project Agreement.

57. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Agreement to Sub-Lease or the Sub-Lease, and the Project Management Contract, on or before 30 June 2012, will become Growers in the Project.

58. The Responsible Entity is currently seeking land for the Project within the relevant geographic part of Australia. Land utilised by the Project must meet the requirements set out by the Independent Forester at page 37 of the Draft CPDSFSG.

59. Note that the CPDSFSG advises that where the land for the Project is not available on or before 30 June 2012, acceptance of applications is subject to land being acquired and a Sub-Lease being entered into on behalf of the Grower by 30 September 2013.

## **Constitution**

60. The Constitution establishes the Project and operates as a deed binding all Growers and W.A. Blue Gum Limited. The Constitution sets out the terms and conditions under which W.A. Blue Gum 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.

61. In order to acquire an interest in the Project, an entity must make an application for 'forestry interests' in accordance with clause 4. Among other things, the application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity, and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

62. Under clause 6 of the Constitution, the Responsible Entity will open an Application Fund with an Australian bank or financial institution into which all Application Moneys received from applicants will be deposited.

63. Once the Responsible Entity has accepted the application and issued an Interest to a Grower, an amount equal to the Application Money in the Application Fund will be transferred to the Responsible Entity (clause 6.4).

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

- the purpose of the Project (clause 2.2);
- the holding of the Project property (clause 5);
- refunds of Application Money (clause 6.5);
- distribution of income to Growers (clause 7);
- the keeping of a register of Growers (clause 9);
- assignment of Grower Interests (clause 10);
- termination and expiry of the Project (clause 23); and
- the winding up of the Project (clause 24).

### **Compliance Plan**

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

### **Project Management Contract**

66. In consideration of the Growers paying the fees set out in Schedule 2 of the contract, W.A. Blue Gum Limited as Project Manager agrees to provide the Plantation Services to the Growers (clauses 3 and 14).

67. The Fees Payable under Schedule 2 are: the initial fee for the Establishment of the Plantation; the Annual tending fee (once trees are planted); unforeseen expenses in relation to fertiliser or insect issues (if approved by Growers); Harvest expenses; Delivery expenses; and other expenses arising out of the sale of the Wood.

68. The Plantation Services to be provided by the Project Manager are set out at clause 4 and include:

- the establishment of the plantation no later than 31 December 2013;

- the provision of sufficient healthy seedlings to achieve the stocking rate of 900 stems per hectare set out in the Plantation Development and Tending Plan;
- that third party public liability insurance and fire insurance (the latter at the cost of the Grower) must be provided.

69. Clause 5 explains that the term of the contract starts on the Commencement Date and terminates when the whole of the plantation has been harvested.

70. Clause 7 details that any insurance proceeds following fire or other damage to the plantation will be pooled and distributed proportionally to 'affected' Growers.

71. Clause 11 explains the harvesting will be conducted in accordance with the Wood Purchase Agreement.

## **Plantation Services Agreement**

72. The Project Manager will engage WACAP Treefarms Pty Ltd as Forestry Contractor to carry out the plantation services required to establish and tend the plantation in accordance with the Plantation Development and Tending Plan.

## **Head Leases**

73. The Responsible Entity will secure the Project Land by to entering into a Head Lease or Sub-Lease (or a number of such leases) with lessors on or before 30 September 2013 (the Forestry Contractor or the Purchaser may be lessors).

## **Sub-Lease**

74. Each Grower will execute a Sub-Lease with the Responsible Entity as the Landholder, either at the time their application is accepted or prior to 30 September 2013.

75. The Schedule to the Sub-Lease will identify: the Leased Area; the Plantable Area; the Rent payable by the Grower; the Commencement Date of the Sub-Lease; that the Term is until completion of Harvesting; and details of the relevant Head Lease(s).

76. The Sub-Lease also provides that livestock can be grazed on the Leased Area, and that the Grower is entitled to any income derived from such grazing (except where by operation of the 'Head Lease', the head lessor grazes livestock). The Grower shall reimburse the Landholder for stamp duty in respect of the Sub-Lease (clause 9.11(b)).

77. Carbon, environmental or other credits derived from the Plantation are the property of the Grower (clause 9.17).

78. Sub-Lease can be terminated if the whole or a substantial part of the Plantation is damaged, for example, by fire, such that the Plantation is no longer commercially viable. Alternatively, if only part of the Plantation is destroyed, the Plantable Area will be reduced (clause 10).

79. Both the Landholder and the Grower shall be excused from performance of or liability under the Sub-Lease if prevented by 'Force Majeure' (clause 12).

### **Agreement to Sub-Lease**

80. Where there is no Project land available for a Grower on or before 30 June 2012, the Grower will be required to enter into an Agreement to Sub-Lease with the Responsible Entity.

81. Pursuant to the terms of the Agreement to Sub-Lease the parties undertake to enter into a Sub-Lease of the land on or before 30 September 2013, which will allow all the Establishment of the Plantation by 31 December 2013 in accordance with the Project Management Contract.

### **Wood Purchase Agreement**

82. This agreement is between the Growers, the W.A. Blue Gum Limited as Project Manager, and WA Chip & Pulp Co Pty Ltd as Purchaser.

83. The Project Manager and the Purchaser will agree on a Harvest Plan not less than six months out from harvest and delivery. Not less than two months before harvest the Purchaser will give notice of the Proposed Purchase Price, including harvest and delivery costs. The Project Manager may seek alternative pricing from third parties, but the Purchaser retains the right to match the price offered by the third parties.

### **Pooling of money from the harvest of timber and Grower's entitlement to a distribution**

84. Clause 7 of the Constitution provides that:

- Harvest Income comprises all money received from the harvest of timber on the Plantation Allotment including thinnings (clause 1.1);
- Harvest Income shall be pooled and deposited in a Proceeds Fund (clauses 7.1 and 7.2);
- to the extent that any part of a Grower's Plantation Allotment is destroyed, it shall not be taken into account in determining the entitlements of the Growers (clause 7.1(a));

- for Growers whose interest in the Project is terminated because of default under the Project Agreement, their income will not form part of Harvest Income (clause 7.1(b)); and
- after deduction of (outstanding) fees payable by Growers under the Project Management Contract, the Sub-Lease, and the Wood Purchase Agreement (as set out in the Schedule to the Constitution), Growers shall be presently entitled to the balance of the Harvest Income (clause 7.4).

85. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Wood from their Leased Area to the pool making up the Relevant Harvest Income are entitled to benefit from distributions from those proceeds; and
- wood is only pooled with the Wood of Growers accepted to participate in the W.A. Blue Gum Project 2012.

## **Schemes Property Custody Agreement**

86. W. A. Blue Gum Limited as Responsible Entity, has engaged Sandhurst Trustees Limited to act as the Custodian of the Property. The Property includes all Application Money and Harvest Income until disbursed or distributed in accordance with the Constitution and Project Agreements, but does not include property legally vested in a Grower.

## **Fees**

87. Under the terms of the Project Management Contract and the Sub-Lease, a Grower will make payments as described below on a per 'forestry interest' basis.

### ***Fees payable under the Project Management Contract***

88. The Application Money of \$5,000 is to be paid by each Grower on application for the Establishment of the Plantation.

89. Following the Application Year, the following ongoing fees are payable to the Responsible Entity:

- an annual tending fee of \$110, indexed, first payable 30 November 2012 and thereafter on 30 September each year, but not payable in any income year ended 30 June for any hectare upon which no trees have been Established;

- unforeseen expenses in relation to fertiliser or insect issues, if approved by a meeting of all Growers;
- the Growers proportion of Harvest, Delivery, and other expenses arising out of the sale of the Wood, to be deducted from the Harvest Income;
- fire insurance charged to the Grower at cost plus 10% (no insurance premium payable in respect of any area in which trees have not been Established); and
- a fee calculated as 15% of [(the amount due per hectare to the Grower from the Harvest of the Plantation less \$16,363.64 indexed per hectare of Plantable Area) multiplied by the number of hectares of Plantable Area].

***Fees payable under the Sub-Lease***

90. Starting from the latter of the date of the Sub-Lease or the date of commencement of the Head Lease and continuing for the Term of the Project, Rent of \$510 per 'forestry interest' per annum, first payable on 30 November 2012, and then indexed annually and payable 30 September.

**Finance**

91. To finance all or part of the cost of their 'forestry interest' a Grower can enter into a finance arrangement with Albany Financial Pty Ltd or, alternatively, borrow from an independent lender external to the Project.

92. Only the finance arrangement set out below is covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Albany Financial Pty Ltd that materially differs from that set out in the documentation provided 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.

93. A Grower cannot rely on any part of this Ruling if the Application Monies are not paid in full on or before 30 June 2012 by the Grower or, on the Grower's behalf, by a lending institution.

***Finance offered by Albany Financial Pty Ltd***

94. Subject to Albany Financial Pty Ltd accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement, which include:

- a Principal Sum of up to 80% of the Application Money;

- loan interest payable at the fixed rate of 12.75% per annum;
- a loan term of five years;
- repayment of principal and interest by equal monthly instalments on the fifteenth day of each month by direct debit, commencing 15 July 2012 and ending 15 June 2017;
- if any part of the principal is not repaid when due, additional fixed interest at the rate of 17% per annum is due and payable from the date the unpaid part of the principal fee due until the date the same is paid;
- by way of security, the Grower assigns all rights title and interest in the Plantation Management Contract, the Sub-Lease, and the Wood Purchase Agreement, to Albany Financial Pty Ltd; and
- upon repayment of the principal and interest, the assignment to Albany Financial Pty Ltd of all rights title and interest in the Plantation Management Contract, the Sub-Lease, and the Wood Purchase Agreement, shall be void and of no further effect.

### ***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, other than Albany Financial Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**

20 June 2012

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## Appendix 1 – Explanation

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

### Structure of the Project

96. In return for payment of the fee for the Establishment of the Plantation and the other fees and expenses required under the Plantation Management Contract, Sub-Lease and Wood Purchase Agreement 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)).

97. 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’<sup>8</sup> in the Project.

### Is the Grower carrying on a business?

98. 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?*

99. 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).

100. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 4 to 6), who stay in the Project until its completion, will be carrying on a business of primary production involving forestry activities.

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<sup>8</sup> The term ‘participant’ is defined in subsection 394-15(4).

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

101. 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***

102. 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 2012, the amount of 'direct forestry expenditure'<sup>9</sup> under the scheme will be no less than 70% of the amount of payments under the scheme.<sup>10</sup>

103. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that the Responsible Entity, as 'forestry manager'<sup>11</sup> of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

104. 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)).

105. Both of the above amounts are determined as at 30 June 2012 taking into account:

- the timing requirements in subsections 394-35(4) and 394-35(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).

106. Applying all of these requirements to the information provided by the Responsible Entity of the Project the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2012.

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<sup>9</sup> See section 394-45.

<sup>10</sup> See subsection 394-35(1) and section 394-40.

<sup>11</sup> Defined in section 394-15(2).

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

107. 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.

108. The final requirement for deductibility requires all the Project trees to be established within 18 months of 30 June 2012 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by the Responsible Entity indicates that all the trees required to be established under the scheme will be planted on the Project land by 31 December 2013.

109. Accordingly, subject to the qualifications set out below, amounts paid by Growers to the Responsible Entity in relation to 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)).

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

111. 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)***

112. Two situations may lead to a loss of deductions previously allowed to Growers under subsection 394-10(1).

113. The first of these situations will occur if the Responsible Entity fails to establish the trees on the Project land within 18 months. Where this occurs the Responsible Entity 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).

114. 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 fee for the Establishment of the Plantation (see subsection 394-10(5)).

115. 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)).

116. 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.

117. However, subsection 394-10(5) will have no application where the 'CGT event' happens because of circumstances outside the Grower's control and the Grower could not reasonably have foreseen the 'CGT event' happening when they acquired the 'forestry interest' (subsection 394-10(5A)).

### **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; (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).

120. 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 proceeds. Therefore, 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 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 of the ITAA 1936***

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 section 82KZMF of the ITAA 1936.

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

125. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a loan with Albany Financial Pty Ltd will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 94 to 95 above) 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<sup>12</sup>) 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 32 to 35 and paragraphs 112 to 117 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

#### ***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';

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<sup>12</sup> A thinning under this scheme is not a 'CGT event'.

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.

### **Amounts received by Growers for carbon or other environmental credits, and insurance proceeds**

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

132. Carbon and/or other environmental credit amounts and insurance proceeds 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 receipts of such an amount are a distribution that arises as an incident of the Grower holding a 'forestry interest' in the Project. It is an item of the ordinary income and the assessable under section 6-5 in the year in which it is derived.

### **Deferral of losses from non-commercial business activities and the Commissioner's discretion**

#### ***Sections 35-10 and 35-55***

133. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the year ended 30 June 2012 who carries on a business of forestry individually (alone or in partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35.<sup>13</sup> These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

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<sup>13</sup> Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership).

134. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

135. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 *Income tax: non commercial business losses: Commissioner's discretion* when exercising the discretion.

136. Where a Grower with income for non-commercial loss (NCL) purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the 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 forestry industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and 35-10(2C).

137. Where a Grower with income for NCL purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the forestry industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and 35-10(2C).

138. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;

- reportable superannuation contributions for that year; and
- total net investment losses for that year.

139. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 135 or paragraph 136 who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

## **Recouped expenditure**

### ***Section 82KL of the ITAA 1936***

140. 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.

## **General tax avoidance provisions**

### ***Part IVA of the ITAA 1936***

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

142. The W.A. Blue Gum Project 2012 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 31 and 36 through 38 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.

143. 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.

## **Appendix 2 – Detailed contents list**

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*TR 97/7; TR 97/11; TR 98/22;  
TR 2007/6*Subject references:*

- assessable income
- carrying on a business
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- direct forestry expenditure
- forestry interest
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- four year holding period
- interest incurred
- managed investment schemes
- market value rule
- payments under the scheme
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- tax avoidance

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- 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 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 8-1(1)
- ITAA 1997 8-1(1)(a)
- ITAA 1997 8-1(2)
- ITAA 1997 8-1(2)(a)
- ITAA 1997 8-5
- ITAA 1997 10-5
- ITAA 1997 12-5
- ITAA 1997 Div 35

- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2C)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- 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)(f)
- ITAA 1997 394-10(2)
- ITAA 1997 394-10(4)
- ITAA 1997 394-10(5)
- ITAA 1997 394-10(5A)
- 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 1 394-10
- SISA 1993
- Copyright Act 1968
- Corporations Act 2001

*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; (1992) 92 ATC 4380; (1992) 23 ATR 494
- Fletcher & Ors v. Federal Commissioner of Taxation (1991) 173 CLR 1; (1991) 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; (1999) 99 ATC 4242; (1999) 41 ATR 139

*Other references:*

- Hannebery and Hance (NSD 492-493 of 2008)
- 

## ATO references

NO: 1-304S9NL  
ISSN: 1441-1172  
ATOlaw topic: Income Tax ~~ Product ~~ timber