

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT**

**LIST E**

**SCI 2009 10699**

**BETWEEN:**

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED  
(ACN 066 601 250) and WESTPAC BANKING CORPORATION  
(ACN 007 457 141)**

**Plaintiff**

**and**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ACN 005 357 522) & ORS (according to the attached Schedule)**

**Defendants**

**CERTIFICATE IDENTIFYING EXHIBIT**

Date of document: 3 March 2010  
Filed on behalf of: the Second, Third and Fourth Defendants

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This is the exhibit marked '**MAK-16**' now produced and shown to MARK ANTHONY KORDA at the time of swearing this affidavit on 3 March 2010.

Before me: 

**LUCY HANNAH KIRWAN**  
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An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

**Exhibit 'MAK-16'**

**Product Ruling 2005/16**



## Product Ruling

### Income tax: 2005 Timbercorp Almond Project – Post 30 June Growers (to 15 June 2006)

Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	65
Explanation	79
Example	114
Detailed contents list	115

Potential participants may wish to refer to the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au) or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office has issued.

#### Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

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

## No guarantee of commercial success

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

## Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

## What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is referred to as the '2005 Timbercorp Almond Project' or simply as 'the Project'.

### Tax law(s)

2. The tax laws dealt with in this Ruling are:

- Section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 8-1 of the ITAA 1997;
- Section 17-5 of the ITAA 1997;
- Section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Sections 82KZME to 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

### Goods and Services Tax

3. All fees and expenditure referred to in this Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Participant Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

### Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project 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**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects 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 Ruling is issued.

#### **Class of persons**

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, these persons are referred to as 'Participant Growers'.

8. The class of persons to whom this Ruling applies does not include:

- persons who intend to terminate their involvement in the Arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it;
- persons who participate in the Project through offers made other than through the Product Disclosure Statement;
- persons who are accepted to participate in the Project before 1 July 2005 and after 15 June 2006;
- persons who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraph 57 to 61 of this Product Ruling; and
- Timbercorp Securities Limited and its associates.

#### **Qualifications**

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

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## Date of effect

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11. This Ruling applies prospectively from 16 February 2005, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Note: The Addendum to this Ruling that issued on 7 December 2005, applies on and from 1 July 2005.

## Withdrawal

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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14. The arrangement that is the subject of this Ruling is specified below. This arrangement incorporates the following documents:

- Revised application for a Product Ruling dated 7 January 2005 as constituted by documents received on 4 October 2004 and additional correspondence, emails and telephone conversations dated 25 October 2004 and 9, 10, 18 and 23 November 2004 and 9, 12, 21, 24 and 27 December 2004 and 6, 12, 13 and 31 January 2005 and 4 February 2005;
- Draft Product Disclosure Statement for the 2005 Timbercorp Almond Project ('PDS'), as amended, received 4 February 2005, prepared for Timbercorp Securities Limited ('TSL'), ('the Responsible Entity');
- The **Constitution** of the 2005 Timbercorp Almond Project, undated, as amended, received on 4 October 2004;
- Draft Compliance Plan of the 2005 Timbercorp Almond Project, undated, received on 4 October 2004;
- Draft **Almondlot Management Agreement** between each 'Participant Grower' and TSL undated, received on 31 January 2005;
- Tree Supply and Capital Works Agreement – 2005 Timbercorp Almond Project between Almond Land Pty Ltd, Select Harvest Limited, Timbercorp Limited and Almond Investment Australia Limited, received on 31 January 2005;
- Draft Tree Supply and Capital Works Agreement – Establishment Plan, for the 2005 Timbercorp Almond Project between Almond Land Pty Ltd and Select, received 4 October 2004;
- Draft Almond Orchard Management Plan, received on 4 October 2004;
- Draft Management Agreement between TSL and Almond Management Pty Ltd ('Almond Management'), received on 7 January 2005;
- Draft Almond Orchard Management Agreement for the 2005 Timbercorp Almond Project between Almond Management, Select Harvests Limited ('Select'), TSL, Timbercorp Limited, Almond Investments Australia Pty Ltd and Almond Land Pty Ltd, received on 7 January 2005;

- Draft **Sub-lease Deed** between each Participant Grower, Almond Land Pty Ltd and TSL, received 31 January 2005;
- Draft Lease Agreement between Almond Land Pty Ltd and TSL for the 2005 Timbercorp Almond Project, received on 4 October 2004;
- Draft Custody Agreement between TSL and the Trust Company of Australia Limited ('the Custodian'), received on 4 October 2004; and
- Draft Finance Package, which includes the **Loan Application Form** and Loan Explanation and Loan Terms, undated, received on 4 October 2004.

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

15. The documents highlighted are those that 'Participant Growers' may enter into. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Participant Grower, or any associate of a Participant Grower, will be a party to, which are a part of the arrangement. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936. The effect of these agreements is summarised as follows.

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

## Overview

17. The salient features of the 2005 Timbercorp Almond Project are as follows:

Location	Sites in North West Victoria.
Type of business to be carried on by each participant	Commercial growing, cultivation, and harvesting almonds for sale.
Number of hectares offered for cultivation	Up to 500 with capacity for oversubscription
Size of each interest	0.25 hectares
Minimum allocation	2 'Almondlots' (TSL may allocate less at its absolute discretion.)
Minimum subscription	None
Number of trees per hectare	Approximately 247
Term of the Project	20 years

Initial cost per 'Almondlot'	\$9,000
Ongoing costs	Annual 'Rent' Annual 'Management Fees' and charges (Note: part of the year two 'Management Fee' will be deferred)
Other costs	Incentive fees and Insurance

18. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Timbercorp Securities Limited ('TSL') has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

19. An offer to participate in the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 500 hectares in the Project, with capacity for oversubscription. Participants will be invited to subscribe for at least two Almondlots' comprising of 0.25 hectares per 'Almondlot'.

20. 'Applications' to participate in the Project must be made on the application form shown in the PDS. There is no minimum amount that must be raised under the PDS. A Custodian will be appointed under the Custody Agreement to protect the interests of the 'Participant Growers' in their dealings with TSL.

21. For 'Applicants', who are accepted as 'Participating Growers' in the Project, TSL will allocate Almondlots, place their details in a Register and enter into 'Agreements' in relation to the 'Almondlots' allocated to the 'Participant Grower' with TSL and its associates.

22. 'Participant Growers' accepted on or after 1 July 2005 and on or before 15 June 2006, will commence participation as 'Post 30 June Growers'. **This Ruling only applies in respect of 'Post 30 June Growers'. Note that a separate Product Ruling PR 2005/15 has issued for Growers who are accepted into the Project from 16 February 2005 to 15 June 2005.**

23. The Project lands on which the 'Participant Growers' will be growing and cultivating 'Almond Trees' for the production of 'Almonds' are on properties known as Carina West, Wangera and Nanandie, which are situated near Boundary Bend, in North West Victoria. TSL will enter into a 'Head Lease' with the Land Owner for the 'Land' and the 'Water Licences'.

24. TSL will grant 'Participant Growers' a 'Sub-lease' to use and occupy two or more identifiable 'Almondlots' of 0.25 hectares each, for the Term of the Project. TSL reserves the right to accept 'Applications' for less than two 'Almondlots'.

25. A 'Participant Grower' will also enter into an Almondlot Management Agreement with TSL to cultivate and maintain the 'Almond Trees' and be responsible for harvesting, procuring the processing of and selling the 'Participant Grower's' 'Almonds', 'Crop' or 'Product'.

26. As an alternative to participation by a 'Participant Grower' as a single entity, the terms of the Constitution, the Almondlot Management Agreement, and the Sub-lease Deed provide that two 'Participant Growers' may enter into a 'Joint Venture'.

## Constitution

27. The Constitution establishes the Project and operates as a deed binding all of the 'Participant Growers' and TSL (clause 8.6). The Constitution sets out the terms and conditions under which TSL agrees to act as Responsible Entity and thereby manage the Project.

28. Under clause 4, TSL holds the 'Application Money' on bare trust. TSL accounts for the 'Application Money' in a special trust account and deposits the money into a bank account solely for 'Application Money' for this Project. Once TSL is satisfied that all documents have been executed and any finance has been approved for an 'Applicant', the 'Application Money' is released and applied against the fees due to TSL (clause 9.3).

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

- invitations and offers under the PDS (clause 2);
- appointment of TSL as the Grower's irrevocable agent, representative and attorney (clause 3);
- how the Responsible Entity is to hold property of the 'Participant Grower' (clause 5);
- procedures relating to 'Applications' (clause 6);
- the discretion of TSL to refuse an 'Application' (clause 7);
- the effect of an 'Applicant's' 'Application' being accepted by TSL (clause 8);
- preparation and execution of the Sub-lease Deed, and Almondlot Management Agreement by TSL and release of the 'Application Moneys' (clause 9);
- preparation and issuing of 'Almondlot' Statements' to 'Participant Growers' and the setting up and maintenance of a 'Register' of 'Participant Growers' (clause 10);
- TSL's powers (clause 11);
- the keeping of a separate 'Agency Account' for the holding of 'Proceeds and any other money', apart from 'Application Money' and interest thereon, that TSL may hold for the 'Participant Grower' (clause 12);

- procedures relating to processing and the sale of 'Crop' and distributions from the 'Agency Account' of 'Proceeds' and pooling of amounts (clause 13 );
- the right of TSL to be paid fees and other expenses (clause 14);
- authority to use money in the 'Agency Account' and powers of investment of the money standing in the 'Agency Account' (clauses 15 and 16);
- the status, the retention by TSL, and termination by TSL or the 'Participant Grower', of the Almondlot Management Agreement, or Sub-lease Deed. This includes the right of 'Participant Grower' to obtain a copy of the above agreements by written request to TSL (clause 18.2);
- the right of the 'Participant Grower' to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 19.1);
- the assignment and transmission of 'Almondlots' (clause 20) and restrictions on such assignments and transmissions (clause 21);
- procedures for calling a meeting of 'Participant Growers' (clause 22).
- resolution of complaints made by the 'Participant Grower' in relation to the Project or TSL (clause 25); and
- termination of the Project (clause 26).

30. Although Clause 6.4 of the Constitution provides that 'Participant Growers' may pay the 'Application Moneys' by instalments, **this Product Ruling does not apply to any 'Participant Grower' who enters into an arrangement to pay their 'Application Moneys' by instalments.**

### **Joint Venture**

31. Where two 'Participant Growers' enter a 'Joint Venture' the 'First Joint Venturer' and the 'Second Joint Venturer' constitutes a joint venture for the purposes of carrying on the 'Joint Venture Operations' in respect of the 'Joint Venture Assets' in accordance with clause 29. The interest of the 'Joint Venturers' in the 'Joint Venturer' and the 'Joint Venturer Assets' and any losses realised will be as tenants in common in their 'Prescribed Portions'.

32. Clause 29.5 of the Constitution sets out certain obligations and rights of the Joint Venturers.

33. The **'First Joint Venture Grower'** will be solely responsible for paying the following fees and other amounts:

- the 'Management Fees' and 'Rent' payable under the Almondlot Management Agreement and Sub-lease Deed for the year ended 30 June 2006; and
- 50% of the 'Management Fee' payable under the Almondlot Management Agreement in respect of management services provided in all 'Financial Years' commencing on and from the 2010 'Financial Year'; and
- 50% of the 'Rent' payable under the Sub-lease Deed in respect of all leasehold rights granted in all 'Financial Years', commencing on and from the 2010 'Financial Year'.

34. The **'Second Joint Venturer'** will be solely responsible for paying the following fees and other amounts:

- the 'Management Fees' (other than the deferred 'Management Fees') and the 'Rent' payable under the Almondlot Management Agreement and Sub-lease Deed in respect of management services and leasehold rights provided in the 'Financial Years' from 2007 to 2009;
- the deferred 'Management Fee' payable during the 'Term' of the Project under clauses 11.2(b)(ii) of the Almondlot Management Agreement in respect of the management services provided in the 2007 'Financial Year'; and
- 50% of the 'Management Fee' and the 'Rent' payable under the Almondlot Management Agreement and Sub-lease Deed in respect of management services and leasehold rights provided in all 'Financial Years', commencing on and from the 2010 'Financial Year'.

35. Each 'Joint Venturer' is liable for 50% of any incentive fees (clauses 29.5(e)) and each will be entitled to these proportions of the 'Joint Venture's' 'Almonds', 'Crop' and the 'Product', and the 'Joint Venture Proceeds' (clause 29.6).

## Compliance Plan

36. As required by the *Corporations Act 2001*, TSL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that TSL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of 'Participant Growers' are protected.

## Head Lease

37. The 'Land' and 'Water Licences' for the Project are owned by Almond Land Pty Ltd (the Lessor) and will be leased to TSL under the

'Head Lease'. The 'Head Lease' sets out the terms and conditions under which the Lessor will lease the 'Land' and 'Water Licences' to TSL to use and exploit during the 'Term' of the Project.

38. The 'Land' on which the Project is to be established are on the following properties:

- Wangera property – on which approximately 460 hectares of the Orchard will be established;
- Carina West property –on which approximately 40 hectares of the Orchard will be established; and
- Nanandie property – on which approximately 700 hectares of the Orchard will be established.

### **Tree Supply and Capital Works Agreement**

39. Under the Tree Supply and Capital Works Agreement, the Land Owner engages Select as an independent contractor. Select will provide certain services in relation to the 'Capital Works' on the 'Land' associated with the establishment of an almond 'Orchard'. The 'Capital Works' include the preparation of the 'Land', the installation of the 'Internal Irrigation System' and the 'Primary Irrigation Infrastructure', the planting of the 'Almond Trees', and staking.

40. Under clause 5.1, Select will conduct the 'Capital Works' having regard to the 'Establishment Plan' good workmanlike and commercially responsible standards and 'Best Horticultural Practice'. A draft 'Establishment Plan' prepared by Select for the 'Financial Year' ending 30 June 2005 forms part of the application for this Product Ruling.

41. Select will ensure the 'Development Services' are performed by 15 May 2005, (clause 5.2(g)) and the 'Almond Trees' are planted on all the remaining parts of the Almondlots by 31 July 2005, (clause 5.2(b)(ii)).

42. Select will replace and replant 'Almond Trees' which fail in the first 6 months after planting due to or caused by any breach or default of Select, clause 5.2(c).

### **Sub-lease Deed**

43. Each 'Participant Grower' will enter into a Sub-lease Deed with TSL and the Land Owner. Under clause 3.1, TSL grants a 'Sub-lease' of the 'Almondlot(s)' to the 'Participant Grower' for the purpose of growing and cultivating the 'Almond Trees' for the production of 'Almonds', 'Crop' or 'Product' for commercial gain. 'Almondlot' is defined to include the 'Participant Grower's' separate and identifiable interest in the 'Land' and includes the 'Almond Trees', the 'Capital Works' and the 'Water Licences'.

44. The Land Owner will have completed the 'Pre-plant Capital Works', on the Almondlots by 15 May 2005 (clause 2.1(a)(i)-(vii)).and

the planting of the 'Almond Trees' on the 'Almondlots' by 31 July 2005, (clause 2.1(a)(viii)(i) & (ii)).

45. In accordance with the provisions of the Almondlot Management Agreement the Land Owner must also fully exploit its 'Water Licences' to enable water to be supplied to the 'Almondlots' by TSL for the benefit of all the 'Participant Growers' during the 'Term' of the Project (clause 3.2).

46. Under clause 2.2 the 'Participant Grower' acknowledges that the 'Capital Works', 'Almond Trees', and the 'Water Licences' on and attaching to, the Participant Growers' Almondlots, are the property of the Land Owner.

47. In summary, the Sub-lease also sets out provisions relating to:

- its 'Term' (clause 4.1);
- a requirement that the 'Participant Grower' enter into the Almondlot Management Agreement (clause 6.1);
- the 'Rent' payable by 'Participant Growers' (clause 7);
- damage to, or reduction of the viability of the 'Participant Grower's' 'Almondlots' (clauses 10.3 and 10.4);
- the obligations and rights of TSL (clause 5) the 'Participant Grower' (clause 8), and the Land Owner (clauses 9); and
- early termination of the 'Sub-lease' by the 'Participant Grower' or TSL (clause 10) and the rights and obligations of the parties following such termination (clause 12).

## **Almondlot Management Agreement**

48. 'Participant Growers' engage TSL as an independent contractor to manage the Project, conduct the 'Project Operations' on behalf of the 'Participant Grower' and perform the 'Orchard Services' in accordance with the 'Management Plan' and good horticultural and environmental practices during the 'Term' of the Project.

49. Commencing on the later of 1 July 2005 and completion of the planting of the 'Almond Trees' on the 'Participant Grower's' 'Almondlot', TSL will provide the 'Orchard Services', listed in clause 5.2A(b)-(ff), test the 'Almonds' and, where they are ready for harvesting, harvest the mature 'Almond Trees' and deliver the harvested 'Almonds' to delivery point(s) for processing and sale (clause 6).

50. Under clause 7, as agent for the 'Participant Grower', TSL will process, market and sell their share of the 'Almonds', the 'Crop' and the 'Product' for as high a price as it can reasonably achieve. 'Participant Growers' are entitled to receive a proportion of the

proceeds of sale of all of the 'Product' or 'Crop' according to their interest in the Project (clause 7.3(a)).

### **Management Agreement**

51. Under the Management Agreement, TSL engages Almond Management Pty Ltd as Almond Manager, to manage and administer the Project, to manage, direct and conduct the 'Project Operations' on behalf of the 'Participant Growers' and to perform the 'Orchard Services'.

### **Almond Orchard Management Agreement**

52. Under the Almond Orchard Management Agreement, Almond Management Pty Ltd engages Select as an independent contractor to carry out the 'Services' and include the 'Orchard Services' (clause 4), 'Processing Services' (clause 5) and 'Marketing Services' (clause 6). Select must carry out the provision of these services in accordance with an 'Almond Orchard Management Plan'. A draft 'Almond Orchard Management Plan' prepared by Select for the 'Financial Year' ending 30 June 2005 forms part of the application for this Product Ruling.

### **Pooling of amounts and distribution of 'Proceeds'**

53. Both the Constitution (clause 13) and the Almondlot Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts from the sale of the 'Participant Growers' 'Almonds', 'Crop' or 'Product' and the distribution of 'Proceeds' from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only 'Participant Growers' who have contributed 'Almonds', 'Crop' or 'Product' or insurance proceeds to the pool making up the 'Proceeds' are entitled to benefit from distributions from those 'Proceeds'; and
- any pools of 'Almonds', 'Crop' or 'Product' or other 'Proceeds' must consist only of 'Almonds', 'Crop' or 'Product' or other 'Proceeds' contributed by 'Participant Growers' in the 2005 Timbercorp Almond Project.

## Fees

54. 'Participant Growers' will pay the annual fees and charges per **Almondlot**, set out in clause 11 of the Almondlot Management Agreement and the 'Rent', set out in clause 7 of the Sub-lease. These are as follows:

- for the 'Orchard Services' and all other services to be provided in the period from the Commencement Date to 30 June 2006, **\$8,500** is payable upon 'Application';
- for the 'Orchard Services' and all other services in the period from 1 July 2006 to 30 June 2007, **\$1,500** is payable on 31 October 2006, **plus a deferred amount of 4.95%** of the 'Gross Proceeds' of the sale of 'Crop' and 'Product' is payable in each 'Financial Year' of the Project that 'Proceeds' are paid (see paragraph 55);
- for the 'Orchard Services' and all other services in each subsequent 'Financial Year' after 30 June 2007, the **estimated costs** of operating the 'Almondlot' are payable on 31 October 2007 and each 31 October thereafter (see paragraph 56);
- in any 'Financial Year' where 'Net Proceeds' exceed the 'Incentive Fee Threshold' an **incentive fee of 25%** of the excess is payable;
- from the Commencement Date to 30 June 2006, **\$500** is payable for 'Rent' upon 'Application';
- from 1 July 2006 to 30 June 2010, **\$500** is payable for 'Rent' on 31 October of each 'Financial Year';
- from 30 June 2011 **\$1,400** is payable for 'Rent' on 31 October of each 'Financial Year'; and
- on 31 October of each subsequent 'Financial Year' during the 'Term' an amount equal to the 'Rent' payable on the immediately preceding 31 October, 'Indexed'.

55. As noted above, the annual fee in the 2007 'Financial Years' (as relevant) consists of a set dollar amount and a deferred amount paid out of any 'Proceeds' payable to the 'Participant Grower'. The deferred amount is calculated as a percentage of the 'Participant Grower's' 'Gross Proceeds' and becomes payable at any time 'Proceeds' are paid over the term of the Project.

56. As noted above, from the 2008 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Almondlot'. The estimated costs of operating the 'Almondlot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Almondlot' during the preceding 'Financial Year'.

**Finance**

57. 'Participant Growers' can fund their involvement in the Project by borrowing from independent sources or from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with the Responsible Entity.

58. The Financier will offer two optional 'Loan Terms' on a commercial basis and approve 'Loan Amounts' of up to 90% of the 'Application Money'. The Financier will provide 'Participant Growers' with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to 'Participant Growers' by the Financier are set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms'.

59. Common features contained in each of these optional 'Loan Terms' are that:

- on 'Application' the 'Participant Grower' will be required to pay the deposit, being the balance still to be paid for their 'Almondlots' after deducting the 'Loan Amount';
- the 'Participant Grower' is entitled to repay the whole or any part of the 'Total Amount Owed' without penalty for early repayment;
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate';
- during the 'Loan Term' the 'Participant Grower' will assign and transfer over to the Financier by way of fixed charge, all its rights, title and interest at any time in the Project including 'Almondlots' and the Project Agreements; and
- during the 'Loan Term' the 'Participant Grower' must maintain fire insurance over the 'Almondlots' on a full replacement basis.

60. The terms specific to each optional 'Loan Term' offered by the Financier are summarised below:

**Type A – Loans with equal monthly instalments**

- 1 year term with an interest rate of 0.0%p.a;
- 3 year term with an interest rate of 9.0%p.a;
- 4 year term with an interest rate of 10.0%p.a;
- 5 year term with an interest rate of 11.0%p.a;
- 7 year term with an interest rate of 11.0%p.a;

**Type B – Loans with an 'Interest Only Period', then a 'Principal and Interest Period'**

The 'Interest Only Period' and 'Principal and Interest Period' from the following ranges can be a **maximum of 8 years** combined;

- the 'Interest Only Period' can be for a period from 1 to 3 years;
- the 'Principal and Interest Period' can be for a period from 1 to 7 years;
- during the 'Interest Only Period' the monthly 'Instalments' will be sufficient to pay the accrual of interest only;
- during the 'Principal and Interest Period' the monthly 'Instalments' will be sufficient to repay the loan in full by the end of the 'Loan Term'; and
- an application and administration fee of \$250 is payable plus stamp duty, if any, on the 'Loan Amount'.

61. Subject to circumstances where a 'Participant Grower' defaults, the 'Applicable Lower Interest Rate' under this loan Type B is 11.0% which represents the maximum rate charged by the Financier, however it is subject to negotiation, after which it will be fixed for the term of the loan.

62. 'Participant Growers' cannot rely on this Product Ruling if they enter into a finance agreement with the Financier that materially differs from that set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by TSL with the application for this Product Ruling. Examples of such situations would be where a 'Participant Grower' enters into finance agreement for a period longer than 8 years or enters into a loan with an interest only period longer than 3 years.

63. 'Participant Growers' also cannot rely on this Product Ruling if 'Application Moneys' otherwise remain unpaid by 15 June 2006. Where an application is accepted subject to finance approval by any lending institution, 'Participant Growers' cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 15 June 2006.

64. This Ruling also does not apply if the finance arrangement entered into by the 'Participant Grower' with the Financier or any other lender 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 or the funding arrangements transform the Project into a 'scheme' to which Part IVA 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 Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to 'Participant Growers' for the Project.

## **Ruling**

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### **Application of this Ruling**

65. Subject to paragraph 8, this Ruling applies only to 'Participant Growers' who are accepted to participate in the Project and who have executed an Almondlot Management Agreement and a Sub-lease Deed on or after 1 July 2005 and on or before 15 June 2006.

66. The 'Participant Grower's' participation in the Project must constitute the carrying on of a business of primary production. A 'Participant Grower' is not eligible to claim any tax deductions until the 'Participant Grower's' application to enter the Project is accepted and the Project has commenced.

### **The Simplified Tax System ('STS')**

#### ***Division 328***

67. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer'. Changes to the STS rules apply from 1 July 2005. From that date, STS taxpayers may use the accruals accounting method or can continue to use the cash accounting method (called the 'STS accounting method' – see section 328-125).

### **Qualification**

68. This Product Ruling assumes that a 'Participant Grower' who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A 'Participant Grower' may become an 'STS taxpayer' at a later point in time. Also, a 'Participant Grower' who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the

circumstances of individual 'Participant Growers' that cannot be accommodated in this Ruling. Such 'Participant Growers' can ask for a private ruling on how the taxation legislation applies to them.

### **Assessable Income**

#### **Sections 6-5 and 328-105**

69. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the 'Participant Grower' under section 6-5.

70. Other than Growers referred to in paragraph 71, a Grower recognises ordinary income from carrying on their business of horticulture in the year in which that income is derived.

71. A Grower who is an 'STS taxpayer' continuing to use the cash accounting method recognises ordinary income from carrying on their business of horticulture in the year in which the income is received.

### **Deductions for 'Management Fees', 'Rent' Interest and the 'Loan Application Fee'**

#### **Section 8-1, section 328-105 and section 25-25**

72. A 'Participant Grower' who is accepted to participate in the Project or on before 15 June 2006 may claim deductions, on a per Almondlot basis, for the following expenditure.

73. [Omitted.]

<b>Fee Type</b>	<b>Year ended 30 June 2006</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>
<b>'Management Fee'</b>	\$8,500 See Notes (i), (ii) & (iii)	\$1,500 See Notes (i), (ii) & (iii)	Estimated costs See Notes (i), (ii), (iii) & (iv)
<b>'Rent'</b>	Must be calculated See Notes (i), (ii), (iii) & (v)	\$500 See Notes (i), (ii) & (iii)	\$500 See Notes (i), (ii) & (iii)
<b>Interest on loans with Timbercorp Finance Pty Ltd</b>	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting method)</b> or as paid	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting method)</b> or as paid <b>(STS taxpayers</b>	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting method)</b> or as paid <b>(STS taxpayers</b>

	(STS taxpayers using cash accounting method) See Notes (iii) & (vi)	using cash accounting method) See Notes (iii) & (vi)	using cash accounting method) See Notes (iii) & (vi)
'Loan Application Fee' for loans with Timbercorp Finance Pty Ltd	Must be calculated – See Note (vii)	Must be calculated - See Note (vii)	Must be calculated – See Note (vii)

**Notes:**

- (i) if the 'Participant Grower' is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27. See Example 1 at paragraph 114;
- (ii) the 'Management Fees' and the 'Rent' shown in the Almondlot Management Agreement and the Sub-lease Deed are deductible in full in the year that they are incurred (where the 'Participant Grower' is not an **'STS taxpayer'** or is an **'STS taxpayer' who uses the accruals accounting method**) or, in the year in which they are paid (where the 'Participant Grower' is an **'STS taxpayer' who continues to use the cash accounting method**);
- (iii) this Ruling does not apply to 'Participant Growers' who choose to prepay 'Management Fees' or 'Rent' or who choose, or who are required to prepay interest under a loan agreement (see paragraph 103 to 106). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any 'Participant Grower' who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project;
- (iv) the deduction for 'Management Fees' in each subsequent 'Financial Years' after 30 June 2007, will be based on the estimated annual operating costs for managing the 'Almondlot'. See paragraph 56;
- (v) the deduction for 'Rent' is \$41.67 per month for each month or part month that the 'Post 30 June Grower' is 'Sub-leasing' the use of their 'Almondlot'. This means that a 'Post 30 June Grower' accepted on or after

1 August 2005, the full \$500 Rent payable for the 2006 'Financial Year' will not be deductible. See paragraphs 97 and 98;

- (vi) the deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd, the internal financier, is outside the scope of this Ruling. Growers who borrow from lenders other than Timbercorp Finance Pty Ltd may request a private binding ruling on the deductibility of the interest incurred; and
- (vii) the 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling.

## **Deductions for capital expenditure**

### ***Division 40***

74. Each 'Participant Grower' will also be entitled to tax deductions relating to the 'Almond Trees' planted on the 'Almondlot'. If the 'Participant Grower' is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27. See example at paragraph 114.

75. An 'Almond Tree' is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A 'Participant Grower' holds a sub-lease to cultivate 'Almond Trees' on a designated area of land called an 'Almondlot' for the growing of 'Almonds' for commercial gain. As a 'Participant Grower' holds the 'Almondlot' under a sub-lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value.

76. The deduction is determined using the formula in section 40-545. Almond Trees' have an 'effective life' of greater than 13 but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Almond Trees' enter their first commercial season (section 40-530, item 2). TSL will notify 'Participant Growers' when their 'Almond Trees' enter their first commercial season and the amount that may be claimed.

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

77. A 'Participant Grower' who is an individual accepted into the Project from 1 July 2005 to 15 June 2006 as Post 30 June Grower, may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these 'Participant Growers' for the income years ending **30 June 2006 to 30 June 2010**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

**Sections 82KZME to 82KZMF, 82KL and Part IVA**

78. For a 'Participant Grower' who participates in the Project and incurs expenditure as required by the Almondlot Management Agreement and the Sub-lease Deed, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a 'Participant Grower' does not fall within the scope of sections 82KZME to 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.

**Explanation****Is the 'Participant Grower' carrying on a business?**

79. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2005 Timbercorp Almond Project must amount to the carrying on of a business of primary production.

80. Where there is a business, or a future business, the gross proceeds from the sale of the 'Almond' will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

81. For schemes such as that of the 2005 Timbercorp Almond Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out,

these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

82. Generally, a 'Participant Grower' will be carrying on a business of horticulture, and hence primary production, if:

- the 'Participant Grower' has an identifiable interest in land (by lease) or rights over the land (by licence) on which the Grower's 'Almond Trees' are established;
- the 'Participant Grower' has a right to harvest and sell the 'Almonds' from those 'Almond Trees';
- the horticultural activities are carried out on the Grower's behalf;
- the horticultural activities of the 'Participant Grower' are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

83. In this Project, each 'Participant Grower' enters into an Almondlot Management Agreement and a Sub-lease Deed.

84. Under the Sub-lease Deed each individual 'Participant Grower' will have rights over a specific and identifiable area of 0.25 hectares of land. The Sub-lease Deed provides the 'Participant Grower' with an ongoing interest in the specific 'Almond Trees' on the leased area for the 'Term' of the Project. Under the 'Sub-lease' the 'Participant Grower' must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The 'Sub-lease' allows the Manager to come onto the land to carry out its obligations under the Almondlot Management Agreement.

85. Under the Almondlot Management Agreement the Responsible Entity is engaged by the 'Participant Grower' to cultivate and maintain the 'Almond Trees' on the 'Participant Grower's' identifiable area of land during the 'Term' of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to cultivate and maintain the 'Almond Trees' on the 'Participant Grower's' behalf.

86. The Responsible Entity is also engaged to harvest and sell, on the 'Participant Grower's' behalf, the 'Almonds' grown on the 'Participant Grower's' 'Almond Trees'.

87. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the Project's description for all the indicators.

88. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a 'Participant Grower' in the Project will derive assessable income from the sale of the 'Almonds' that will

return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

89. The pooling of 'Almonds' from 'Almond Trees' grown on the 'Participant Grower's' 'Almondlot' with the 'Almonds of other 'Participant Growers' is consistent with general horticultural practices. Each 'Participant Grower's' proportionate share of the sale proceeds of the pooled 'Almonds' will reflect the proportion of the 'Almond Trees' contributed from their 'Almondlot'.

90. The Responsible Entity's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of a 'Almondlot' is relatively small, it is of a size and scale to allow it to be commercially viable.

91. The 'Participant Grower's' degree of control over the Manager as evidenced by the Almondlot Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the 'Term' of the Project, the Manager will provide the 'Participant Grower' with regular progress reports on the 'Participant Grower's' 'Almondlot' and the activities carried out on the 'Participant Grower's' behalf. 'Participant Growers' are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

92. The horticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the 'Participant Growers' horticultural activities in the 2005 Almond Timbercorp Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

93. Subdivision 328-F sets out the eligibility requirements that a 'Participant Grower' must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

94. The question of whether a 'Participant Grower' is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any 'Participant Grower' who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

## Deductibility of 'Management Fees', 'Rent' and Interest

### Section 8-1

95. Consideration of whether the 'Management Fees' and 'Rent' are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

96. The 'Management Fees' and 'Rent' associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Almonds') is to be gained from this business. They will thus be deductible under the first limb of section 8-1.

Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable.

Subject to paragraphs 97 and 98, there is no capital component of the 'Management Fee' and 'Rent'. The tests of deductibility under the first limb of section 8-1 are met. Subject to paragraphs 97 and 98, the exclusions do not apply.

97. One of the exclusions under section 8-1 relates to expenditure that is capital, or is capital in nature. Any part of the expenditure of a 'Participant Grower' entering into a horticulture business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that depending upon when they are accepted to participate in the Project, a portion of the initial 'Rent' payable by a 'Post 30 June Grower' will be capital expenditure. Therefore, the amount allowed as a deduction for 'Rent' under section 8-1 will be allowed as follows.

98. If a 'Post 30 June Grower' enters the Project on or before 31 July 2005 the 'Rent' of \$500 payable on application for the period from the 'Commencement Date' to 30 June 2006 will be deductible in full. However, 'Post 30 June Growers' accepted to participate in the Project on or after 1 August 2006 and on or before 15 June 2005, will

not be entitled to the full deduction. The deduction will be calculated on a pro-rata monthly basis of \$41.67 for each month or part month that the 'Post 30 June Grower' 'Sub-leases' the land from TSL.

### **Interest deductibility**

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

*(i) 'Participant Growers' who use Timbercorp Finance Pty Ltd as the finance provider*

99. Some 'Participant Growers' may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of 'Management Fees' and 'Rent'.

100. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations - the cultivation and growing 'Almond Trees' and the sub-lease of the land on which the 'Almond Trees' will have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

*(ii) 'Participant Growers' who DO NOT use Timbercorp Finance Pty Ltd as the finance provider*

101. The deductibility of interest incurred by 'Participant Growers' who finance their participation in the Project through a loan facility with a bank or financier other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

### **Prepayment provisions**

#### **Sections 82KZL to 82KZMF**

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

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

103. Under the Arrangement to which this Product Ruling applies 'Management Fees' and 'Rent' are incurred annually and interest payable to Timbercorp Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement.

104. A 'Participant Grower' who is an 'STS taxpayer' continuing to use the cash accounting method can, therefore, claim a deduction for each of the relevant amounts in the income year in which the amount is paid. A 'Participant Grower' who is not an 'STS taxpayer' or who is an 'STS taxpayer using the accruals accounting method can claim a deduction for each of the relevant amounts in the income year in which the fee is incurred.

105. However, sections 82KZME and 82KZMF may have relevance if a 'Participant Grower' in this Project prepays all or some of the expenditure payable under the Almondlot Management Agreement and/or the Sub-lease Deed or prepays interest under a loan agreement (including loan agreements with lenders other than Timbercorp Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

106. As noted in the Ruling section above, 'Participant Growers' who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

## **Expenditure of a capital nature**

### ***Division 40***

107. Any part of the expenditure if a 'Participant Grower' that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the 'Almond Trees is of a capital nature. This expenditure falls for consideration under Division 40 of the ITAA 1997.

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

### ***Section 35-55 – Exercise of Commissioner's discretion***

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2010** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 *Income tax: Division 35 – non commercial business losses*. Accordingly, based on the evidence supplied, the

Commissioner has determined that for those income years ended 30 June 2006 up to and including 30 June 2010:

- it is because of its nature the business activity of a 'Participant Grower' will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the almond industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxable profit; and
- a 'Participant Grower' who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

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

### Section 82KL – recouped expenditure

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

### Part IVA – general tax avoidance provisions

111. For Part IVA 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).

112. The 2005 Timbercorp Almond Project will be a 'scheme'. A 'Participant Grower' will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 72 to 77 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.

113. 'Participant Growers' to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Almonds'. There are no facts that would suggest that 'Participant Growers' have the opportunity of obtaining a tax advantage other than the tax advantages identified in

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Port Moresby  
Shanghai  
Singapore  
Sydney

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) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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## Example

### Entitlement to GST input tax credits

114. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

\*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 less \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

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## Detailed contents list

115. Below is a detailed contents list for this Product Ruling.

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**Paragraph**

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### What this Product Ruling is about

Tax law(s)

Goods and Services Tax

Changes in the Law

Note to promoters and advisers

Class of persons

Qualifications

Date of effect

Withdrawal

Arrangement

Overview

Constitution

Joint Venture

Compliance plan

Head Lease

Tree Supply and Capital Works Agreement

Sub-lease Deed

Almondlot Management Agreement

Management Agreement

Almond Orchard Management Agreement

Pooling of amounts and distribution of proceeds

Fees

Finance

**Ruling**

Application of this Ruling

The Simplified Tax System ('STS')

*Division 328*

Qualification

Assessable income

*Sections 6-5 and 328-105***1****2****3****4****6****7****9****11****13****14****17****27****31****36****37****39****43****48****51****52****53****54****57****65****65****67****67****68****68****69****69****69****69****69****69****69****69****69****69**

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Melbourne

Perth

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Deductions for 'Management Fees', 'Rent', interest and 'Loan Application Fee'	72
<i>Section 8-1, section 328-105 and section 25-25</i>	72
Deductions for capital expenditure	74
<i>Division 40</i>	74
Division 35 - deferral of losses from non-commercial business activities	77
<i>Section 35-55 – exercise of Commissioner's discretion</i>	77
Sections 82KZME to 82KZMF, 82KL and Part IVA	78
<b>Explanation</b>	79
Is the 'Participant Grower' carrying on a business?	79
The Simplified Tax System	93
<i>Division 328</i>	93
Deductibility of management fees and lease fees	95
<i>Section 8-1</i>	95
Interest deductibility	99
<i>Section 8-1</i>	99
<i>(i) 'Participant Growers' who use Timbercorp Finance Pty Ltd as the finance provider</i>	99
<i>(ii) 'Participant Growers' who DO NOT use Timbercorp Finance Pty Ltd as the finance provider</i>	101
Prepayment provisions	102
<i>Sections 82KZL to 82KZMF</i>	102
<i>Application of the prepayment provisions to this Project</i>	103
Expenditure of a capital nature	107
<i>Division 40</i>	107
Division 35 – Deferral of losses from non-commercial business activities	108
<i>Section 35-55 – Exercise of Commissioner's discretion</i>	108
Section 82KL recouped expenditure	110
Part IVA – general tax avoidance provisions	111
<b>Example</b>	114
Entitlement to GST input tax credits	114
<b>Detailed Contents List</b>	115

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*Previous draft:*

Not previously released in draft form

*Related Rulings/Determinations:*

PR 1999/95; TD 93/34; TR 92/1;  
TR 92/20; TR 97/11; TR 97/16;  
TR 98/22; TR 2000/8; TR 2001/14  
TR 2002/6; TR 2002/11

*Subject references:*

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non commercial losses
- producing assessable income
- product rulings
- public rulings
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

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- ITAA 1936 82KZL
- ITAA 1936 Pt 3 Div 3 Subdiv H
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- ITAA 1936 82KZME(1)
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- ITAA 1997 8-1
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- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
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- ITAA 1997 40-515(1)(b)
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- ITAA 1997 40-530, item 2
- ITAA 1997 40-545
- ITAA 1997 Div 328
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- TAA 1953 Pt IVAAA
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- Commissioner of Taxation v Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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