



# ***PR 2009/16 - Income tax: Arafura Pearl Project 2009***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *22 July 2009*



## Product Ruling

### Income tax: Arafura Pearl Project 2009

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

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

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

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

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

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

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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(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the Arafura Pearl Project 2009 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 class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 37 of this Ruling on or before 15 June 2009. They will stay in the scheme until its completion and derive assessable income from this involvement.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- terminate their involvement in the scheme prior to its completion; or do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 15 June 2009;
- participate in the scheme through offers made other than through the Product Disclosure Statement;
- do not pay the Application Money in full on or before 15 June 2009 or an amount consistent with the Terms Payment Facility offered;
- are not granted a Special Permit under paragraph 17(1)(e) of the *Fisheries Act 1988* (NT) (Fisheries Act) by 15 June 2009;

- enter into finance arrangements with Arafura Pearls Holdings Ltd or entities associated with this Project, other than a Terms Payment Facility as described in paragraphs 93 to 96 of this Ruling; or
- elect to collect the harvested Pearls and take sole responsibility for the marketing and sale of the harvested Pearls during the Term of the Project.

**Superannuation Industry (Supervision Act) 1993**

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

**Qualifications**

7. 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 37 to 97 of this Ruling.

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

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

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## Date of effect

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10. This Product Ruling applies prospectively from 1 April 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 1 April 2009 until 15 June 2009 being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2009 being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

11. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

### Changes in the law

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

13. 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

14. 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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

### Goods and Services Tax

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

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## **Ruling**

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### **Application of this Ruling**

16. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described below at paragraphs 37 to 97 of this Ruling.

17. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Management Agreement.

18. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted, the Management Agreement has been executed and the Project has commenced.

### **Small business concessions**

19. From the 2007-08 income year, a range of concessions previously available under the Simplified Tax System (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

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

### **Assessable income**

#### ***Sections 6-5 and 17-5***

21. 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 Grower under section 6-5.

**Treatment of trading stock****Section 328-285**

22. A Grower who is a 'small business entity' may, in some years, hold harvested pearls that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they can choose not to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

23. Where the small business entity chooses to account for changes in the value of their trading stock for an income year, they will have to do a stocktake and account for the change in the value of all their trading stock (Subdivision 70-C).

**Trading stock****Section 70-35**

24. A Grower who is not a 'small business entity' may, in some years, hold harvested pearls that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

25. Alternatively, where the value of trading stock on hand at the *start* of an income year exceeds the value of trading stock on hand at the *end* of an income year, a Grower may claim the amount of that excess as an allowable deduction.

**Deduction for Application Fees and Terms Payment administration fee****Sections 8-1 and 40-880 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZME of the ITAA 1936**

26. A Grower may claim tax deductions for the following fees and expenses on a per Project Interest basis as set out in the Table below. Growers must acquire a minimum of two interests in the Project:

<b>Fee Type</b>	<b>Year ending 30 June 2009</b>
<b>Application Fee</b>	\$1,067 See notes (i), (ii) & (iii)
<b>Terms Payment administration fee</b>	Must be calculated See note (iv)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits); Division 27.
- (ii) The Subscription Sum (see paragraph 82 of this Ruling) of \$6,930 for a Project Interest consists of a fee for acquiring the oyster Panels (Grower's Panels) totalling \$5,863 and an Application Fee of \$1,067 for Initial Management Services to be provided in the Initial Management Period. The Application Fee is deductible under section 8-1 in the income year ending 30 June 2009.
- (iii) This Ruling does not apply to Growers who choose to prepay fees. Subject to certain exclusions, 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 and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The administration fee payable to Arafura Pearls Holding Ltd in respect of a Terms Payment Facility is not deductible in full in the year in which it is incurred as the facility is not considered to be a loan and the payment is not a borrowing expense as per section 25-25. Under section 40-880 the application fee is deductible on a straight line basis over five income years (see paragraphs 104 and 105 of this Ruling).

**Deductions for capital expenditure (Non-small business entities)*****Division 40***

27. A Grower who is not a 'small business entity' will also be entitled to tax deductions for the Grower's Panels in accordance with Division 40.



28. The Application Fee of \$6,930 per Interest includes \$5,863 for the purchase of 13 Grower's Panels. Each Grower's Panel is a 'depreciating asset'. The cost of the asset is the amount paid by each Grower, which is \$451 per Grower's Panel. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (diminishing value method), subsection 40-75(1) (prime cost method) or section 40-440 (low value pool). An asset is eligible for the 'low value pool' where the asset is a 'low cost asset', that is, its cost is less than \$1,000, per subsection 40-425(2). If the Grower is registered or required to be registered for GST, the amount of an outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27

29. Both the diminishing value method and prime cost method formulas rely on the 'effective life' of the Grower's Panel. As there has been no determination of the 'effective life' of a Grower's Panel by the Commissioner, Growers must self-assess an 'effective life' (section 40-105). The Grower's Panels will be placed onto a long line system, in sea, and first used during the year ended 30 June 2009. The Responsible Entity will advise Growers when that occurs to enable Growers to calculate the deduction for the decline in value.

30. Each Grower's Panel in which they hold an interest is a 'low-cost asset' (see paragraph 32 of this Ruling) and can be allocated to a 'low-value pool'. Once any 'low-cost asset' of a Grower is allocated to a 'low-value pool', all other 'low-cost assets' the Grower starts to 'hold' in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a 'low-value pool', the Grower's Panels assets must also be allocated to that pool. Otherwise, the Grower must decide whether to create a 'low-value pool'. If the assets are allocated to a 'low-value pool', the capital expenditure on the Grower's Panels will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the Grower's Panels are first used and a rate of 37.5% in subsequent years (section 40-440).

## **Deductions for capital expenditure (small business entities)**

### ***Subdivisions 40-F and 40-G and 328-D***

31. A Grower who is a 'small business entity' will also be entitled to tax deductions relating to Grower's Panels. Deductions relating to the 'cost' of Grower's Panels must be determined under Division 328.

32. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1,000 (a low-cost asset), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is an 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

33. A Grower's Panel is a 'depreciating asset'. Each Grower holds an interest in each of their Grower's Panels which are a 'low-cost asset' as defined in subsection 40-525(2). It cannot be allocated to a 'general small business pool' (section 328-180). A deduction equal to the amount of the Grower's expenditure for the Grower's Panels is available in the income year in which they are used or 'installed ready for use'. The Grower's Panels will be placed onto an in sea long line system and first used during the year ended 30 June 2009.

### **Small business and general business tax break**

#### ***Division 41***

33A. The small business and general business tax break (the tax break) is an additional deduction for new investment in tangible 'depreciating assets'. The deduction is in addition to the deductions for capital expenditure referred to in paragraphs 27 to 33 of this Ruling.

33B. A Grower will be entitled to the tax break in relation to the Grower's Panels provided the amount of their investment meets the 'new investment threshold' as defined in section 41-35.

33C. The 'new investment threshold' is \$1,000 for a small business entity and \$10,000 for other entities. As the Grower's Panels are identical depreciating assets, paragraph 41-10(4)(b) allows Growers to aggregate the cost of the Grower's panels in order to meet the 'new investment threshold' and be entitled to the tax break.

33D. Growers acquire a minimum of two interests in the Project and cannot acquire Grower's Panels individually. They are not marketed for sale in any lower proportion than in an initial set of 26, and subsequent sets of 13 (each additional Interest). Therefore, as a minimum interest in the Project includes 26 Grower's Panels at a total cost of \$11,726, Growers will meet the 'new investment threshold' in relation to the Grower's Panels even if they are not a small business entity.

33E. If the Grower is registered, or required to be registered for GST, the cost of the Grower's Panels for capital allowance purposes, and therefore the tax break, is reduced for any input tax credits in relation to the cost of the assets.

33F. The tax break deduction will be 50% of the cost of the Grower's Panels for a small business entity and 30% for other entities.

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

### ***Section 35-55 – exercise of Commissioner’s discretion***

34. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals and accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

35. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ended **30 June 2009 to 30 June 2013** and **30 June 2015**. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 37 to 97 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

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

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

36. For a Grower who commences participation in the Project and incurs expenditure as required by the Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 106 to 110 of this Ruling);
- 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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37. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following documents:

- Application for a Product Ruling as constituted by documents and correspondence received on 6, 10, 24 and 25 February 2009, 20 March 2009 and 10 June 2009;
- Draft Product Disclosure Statement (PDS) for the Arafura Pearl Project 2009 to be issued by Arafura Pearls Holdings Ltd, received 24 February 2009;

- Draft Constitution for the Arafura Pearl Project 2009, received 20 March 2009;
- **Draft Management Agreement – Arafura Project 2009** between Arafura Pearls Holdings Ltd and the Grower, received 20 March 2009;
- Copy of English Company's Island – North Arnhem Land Agreement between Toomebridge Proprietary Limited, Arafura Pearls Proprietary Limited, The Arnhem Land Aboriginal Land Trust, The Aboriginal Owners and The Northern Land Council (Site Agreement) signed and dated 11 September 1997, received 25 February 2009;
- Copy of the Deed of Assignment of Lease between The Arnhem Land Aboriginal Land Trust (lessor), Toomebridge Pty Ltd (assignor), Arafura Pearls Holdings Ltd (assignee) and The Northern Land Council dated 27 April 2006, received 6 February 2009;
- **Draft Terms Application Form for the Arafura Pearl Project 2009**, received 6 February 2009;
- **Draft application for Section 17 Permit under the Northern territory Fisheries Act**, received 24 February 2009; and
- **Draft application to nominate a natural person to take control of a licensed operation under Section 14 of the Fisheries Act**, received 24 February 2009.

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

38. 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.

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

**Overview**

40. The main features of the Arafura Pearl Project 2009 are as follows:

Location	Elizabeth bay, Northern Territory
Type of business to be carried on by each Grower	Pearl farming
Term of the Project	Approximately 6.5 years
Number of Project Interests offered for cultivation	2,350 Project Interests
Size of each Project Interest	405 Spat
Minimum allocation per Grower	2 Project Interests
Initial cost	\$6,930 per Project Interest
Ongoing costs	Deferred Management Fees; Deferred Management Fees Shortfall; Sales and Marketing Fee; Manager's Bonus; and Insurance premiums.

41. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Arafura Pearls Holdings Limited has been issued with an Australian Financial Service Licence 296246 and will be the Responsible Entity for the Project.

42. Participants who will be accepted as Growers will participate in the aquaculture industry as Growers of Oysters for the cultivation, production and harvesting of Australian South Sea Pearls.

43. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for a maximum of 2,350 Project Interests.

44. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of 2 Project Interests, being a right to 405 Spat at the Commencement Date and 13 proprietary grow out Panels.

45. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Arafura Pearls Holdings Limited to enter into, on behalf of the Grower, a Management Agreement and any other documents required to hold an interest in the Project.

46. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Management Agreement on or before 15 June 2009 will become Growers in the Project.

47. There is no minimum subscription. The Responsible Entity may accept oversubscriptions subject to availability of Oysters and Pearl Oyster Culture Licence Units and Pearl Oyster Fishery Licence Units.

48. The Project is to be conducted at Elizabeth Bay in the Northern Territory (the Site) and will be run in conjunction with existing pearl farming operations on the Site.

49. The Land Bases and Sea Bases used by the Pearl Farm are granted under a Site Agreement.

50. Each Grower will enter into a Management Agreement with the Responsible Entity. Under the terms of the Management Agreement, the Grower appoints the Responsible Entity to provide access and services necessary for the cultivation, production and harvesting of Pearls.

#### **Fisheries Act and Fisheries Regulations 1992 (NT)**

51. In accordance with the Fisheries Act, the Responsible Entity holds Northern Territory Pearl Oyster Fishery Licences and Pearl Oyster Culture Licences (the Pearling Licences) which allows the Responsible Entity to aquaculture pearl oysters on the Site.

52. Under the Fisheries Act the Responsible Entity holds a combination of 140 Permanent Oyster Culture/Fishery Licence Units and has access to 80 Temporary Oyster Culture/Fishery Licence Units. The Responsible Entity has access to a further 60 Licence Units under a contract of purchase. In accordance with the Fisheries Regulations 1992 (NT) (Fisheries Regulations) the Responsible Entity can complete 1,150 first seeding operations for every Licence Unit held during the licensing year.

53. The Project will proceed on the basis that all Growers who enter into the Management Agreement will be granted a Special Permit under paragraph 17(1)(e) of the Fisheries Act by 15 June 2009. The Special Permit allows the Grower to do such things under the terms and conditions of the Management Agreement which would otherwise be unlawful without the Special Permit. This Ruling will not apply to Growers who have not been granted a Special Permit on or before 15 June 2009.

54. The Special Permit:

- expires on the 'Completion Date' specified in the Management Agreement;
- does not apply to persons who have ceased to be a 'Grower' under the Management Agreement;
- expires if the Responsible Entity's Pearling Licences are cancelled or not renewed;

- does not expire on the transfer of the Responsible Entity's Pearling Licences provided that the prospective transferee has satisfied the Director of Fisheries that the operation of the Management Agreement with the Growers will continue in the same manner as the arrangement with the Responsible Entity; and
- is suspended if at any time the Responsible Entity's Pearling Licences are suspended, but the suspension is lifted subject to the approval of the Director of Fisheries, at such time when the suspension on the Responsible Entity's Pearling Licences are lifted.

55. The Special Permit will impose the following conditions:

- a Grower shall only engage in aquaculture in accordance with the conditions specified in the Pearling Licences, and must comply with all provisions of the Fisheries Act, its Regulations, and the Pearl Oyster Culture Industry Management Plan;
- a Grower will only engage in pearl aquaculture in accordance with the terms and conditions of the Management Agreement;
- a Grower shall require the Responsible Entity to lodge an executed copy of the Management Agreement with the Director of Fisheries;
- a Grower shall not agree to vary the terms of the Management Agreement without first requiring the Responsible Entity to submit the proposed variation for approval by the Director of Fisheries;
- a Grower shall cause the Responsible Entity to notify the Director of Fisheries in writing if the Management Agreement is terminated; and
- a Grower shall provide to the licensee where required pearling sales data for the completion of the returns document.

## Constitution

56. The Constitution establishes the Project and operates as a deed binding all Growers and Arafura Pearls Holdings Ltd. The Constitution sets out the terms and conditions under which Arafura Pearls Holdings Ltd 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.

57. In order to acquire an interest in the Project, the Grower must make an application for Project Interests in accordance with clause 11. 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, unless subject to a Terms Payment Facility, in a form acceptable to the Responsible Entity.

58. Under clause 3.1 of the Constitution, the Responsible Entity holds the Application Money on bare trust. The Responsible Entity will deposit all Application Moneys received from applicants in the Application Fund (clause 11.3).

59. Once the Responsible Entity has accepted the application and the Management Agreement has been executed and remains in force (clause 12) the Application Money may be transferred and applied against the fees due under the Management Agreement (clause 14).

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

- the appointment of Arafura Pearls Holdings Limited as the Responsible Entity for the Project and the creation of the Application Fund and the Proceeds Fund (clause 2);
- the holding of Project Property by the Responsible Entity and the interest of the Applicants in the Application Fund and Growers in Project Property (clause 3);
- the Responsible Entity's powers in relation to investments (clause 4);
- resolution of complaints made by the Grower in relation to the Responsible Entity (clause 5);
- termination of the Project and the winding up of the Project and agreements that the Responsible Entity has entered into with the Growers relating to the Project (clause 6);
- the right of the Responsible Entity to be paid fees and recover costs (clause 7);
- the right of the Responsible Entity to indemnity out of Project Property (clause 8);
- the Responsible Entity's powers in relation to borrowing (clause 9);
- procedures relating to Applications and Application Money (clause 11);
- completion and execution of Management Agreements upon acceptance of an application by the Responsible Entity and the issue of interests in the Project (clause 12);



- procedures relating to the release of Application Money (clauses 13 and 14);
- distribution of Net Proceeds of Sale to Growers and pooling of monies received by the Responsible Entity (clause 16);
- the Responsible Entity's powers and duties relating to the management of the Project (clause 17);
- the appointment of agents to perform tasks (clause 19);
- assignment of a Grower's interest in the Project and the transmission of a Grower's interest in the Project as a consequence of the death, bankruptcy or mental incapacity of a Grower (clauses 21 and 22);
- the retirement and removal of the Responsible Entity (clause 25); and
- the keeping and maintenance of a register of Growers who hold an interest in the Project (clause 26).

### ***Acceptance of applications***

61. The Grower's participation in the Project commences on the date the Grower's Management Agreement is executed and Project Interests are allocated to the Grower.

62. Under clauses 11 and 12 of the Constitution, the Responsible Entity will accept an application and an applicant will be issued an interest in the Project and become a Grower where, amongst other things, the following conditions are satisfied:

- the Applicant has paid the amount of Application Money for Project Interests upon application as specified in the PDS, unless the Applicant has been accepted subject to the Terms Payment Facility (see paragraph 93 to 96 of this Ruling);
- the Responsible Entity has accepted the Applicant's Application;
- after its acceptance of an Application, the Responsible Entity must prepare a Management Agreement that specifies the Grower's Pearl Farms that have been allocated by the Responsible Entity;
- the Responsible Entity must execute the Management Agreement and execute the Management Agreement on behalf of the Applicant pursuant to the Power of Attorney; and
- the Responsible Entity is able to release the Application Moneys in accordance with clauses 13 and 14 of the Constitution.

63. Clause 11.3 details the following options for payment of the Application Money:

- payment in full at the time the application is lodged;
- where the application is accepted under the Terms Payment Facility offered by the Responsible Entity, 10% of the Application Money by 15 June 2009, the balance is payable in accordance with the terms and conditions of the Terms Payment Facility;
- a deposit, being a percentage of the Application Money, as determined by the Responsible Entity, with the balance due and payable, where a Management Agreement is executed, on or before 15 June 2009; and
- an Application will only be accepted subject to finance where the Responsible Entity is satisfied that the full amount of the Application Money will be paid to the Responsible Entity by 30 June 2009. Where Application Money is not received in full by 30 June 2009 the Management Agreement will be invalidated and the applicant will take no part in the Project.

64. The Responsible Entity may accept applications under the PDS on or before 15 June 2009. This Ruling only applies to Growers who commence participation in the Project on or before 15 June 2009.

### **Compliance Plan**

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

### **Management Agreement**

66. Under the Management Agreement, the Responsible Entity agrees to provide access and services to the Grower for the purpose of cultivating and producing Australian South Sea Pearls on the Grower's Pearl Farm. The Grower's Pearl Farm is defined as 'the Oysters, the Panels, the Grower's Panels and that part of the Project Area that the Grower has the right to use for the purpose of cultivating Pearls under this Agreement'.

67. The Commencement Date of the Management Agreement is 15 June 2009. The Completion Date is the earlier of, the date of payment of the final distribution of proceeds from the Second Harvest, or 31 December 2015.

68. The Grower will be allocated the right to 405 Spat (juvenile hatchery-reared oysters) and 13 Grower's Panels per Project Interest at the Commencement Date. The Grower's Project Interest will be located on Panels (both Growers' Panels and Responsible Entity owned Panels), which will be identified by a reference number. The Grower has the right to access the Grower's Pearl Farm for the purpose of cultivating, producing and harvesting Pearls (clauses 2 and 3).

69. Within 18 months of the Commencement Date, the Responsible Entity will replace any dead Spat with live Spat to ensure the Grower has at least 177 Spat for each Project Interest (clause 15).

70. At the expiration or termination of the Project the Grower must yield up to the Responsible Entity all surviving and dead Oysters, and the Panels (clause 6.3).

## ***Management Services***

71. Under the Management Agreement, the Grower appoints the Responsible Entity to supervise and manage all commercial pearling activities on the Grower's Pearl Farm and to perform the Services listed in the Schedule.

72. During the Initial Management Period, from 15 June 2009 to 30 June 2009, the Responsible Entity will provide Initial Management Services, including amongst other things:

- access for the Grower to the Grower's Pearl Farm;
- the right to utilise the benefit of the annual Quota;
- place the graded Spat and the Oysters in the 15 pocket Panels; and
- transport the Spat from the land based hatchery for placement on the Long Line System.

73. From 1 July 2009 until the Completion Date, the Responsible Entity will provide Ongoing Management Services, including amongst other things:

- the right to utilise the benefit of the annual Quota;
- establish a marketing plan to enable the orderly marketing of the Pearls and co-ordinate the marketing process;
- transfer Spat and Oysters into 15 and 8 pocket Panels;
- operate cleaning teams and cleaning vessels to assist with maintaining the Spat and the Oysters;
- clean the Spat and the Oysters by hand and by machine;
- assist with stock taking of the Spat and the Oysters;

- attend to pre-seeding routines, seeding and post seeding routines including turning and x-raying;
- attend to Harvest of the Pearls;
- attend to the marketing of the Pearls;
- maintain records of production results;
- provide administration, management information and accounting services;
- provide management reports to the Grower on an annual basis;
- access for the Grower to the Pearl Farm;
- the right to access, grow out and otherwise utilize the Spat/Oysters;
- provide proper identification of the Grower's Oysters;
- provide access to equipment and infrastructure; and
- provide access to the Panels for the Growers.

74. The Responsible Entity will not undertake any work on behalf of a Grower prior to the Grower being issued an interest in the Project.

### ***Seeding***

75. The Responsible Entity shall determine when to seed the Oysters. The timing of seeding is subject to Oyster health and seasonal conditions (clause 16). However, seeding of the Oysters over the Term of the Project is expected to take place as follows:

- the First Seeding Operation approximately two years after the Commencement Date; and
- the Second Seeding Operation of those Oysters which were successfully harvested and produced a commercially saleable pearl, at approximately four years after the Commencement Date.

76. When seeding, the Responsible Entity must comply with the Oyster Quota which allows the Responsible Entity to seed 115 Oysters per Project Interest held by the Grower per year.

77. If appropriate under the Fisheries Act, Fisheries Regulations and other relevant legislation, the Responsible Entity may replace healthy Vomit Oysters with Virgin Shell.

78. If the number of Oysters available to be seeded at the First Seeding Operation for all Growers in the Project exceeds the Quota limit, then the Responsible Entity must, in order to comply with the Quota limit, reduce the number of Oysters to be seeded on behalf of each Grower on a pro rata basis (clause 16.3).

## ***Harvesting and sale***

79. The Responsible Entity shall determine the times to harvest the Pearls in accordance with Good Industry Practice. The two main harvests will take place approximately four and six years after the Commencement Date.

## ***Pooling of Pearls and Grower's Entitlement to Grower's Harvest Interest***

80. The Management Agreement sets out provisions relating to the Grower's Harvest Interest. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Pearls are entitled to benefit from distributions of Harvest Proceeds from the pool; and
- any pooled Pearls must consist only of Pearls contributed by Growers of the same Project Class.

## **Fees**

81. In consideration for the services performed and the rights granted under the terms of the Management Agreement, the following fees will be payable by the Grower:

- the Subscription Sum;
- Deferred Management Fees;
- Deferred Management Fee Shortfall;
- Sales and Marketing Fee; and
- Manager's Bonus.

## ***Subscription Sum***

82. The Subscription Sum (or Application Fee) of \$6,930 for a Project Interest consists of:

- a fee for acquiring the Grower's Panels totalling \$5,863;
- a fee for placement and transportation services of the Spat of \$996; and
- a responsible entity fee of \$71.

83. The Subscription Sum must be paid by 15 June 2009. The Application Fee of \$1,067 is for Initial Management Services to be provided in the Initial Management Period up to 30 June 2009.

***Deferred Management Fees***

84. Deferred Management Fees are payable in consideration for the Responsible Entity performing the Ongoing Management Services. The Deferred Management Fee is 33% of the Gross Pearl Sales. 'Gross Pearl Sales' means the gross amount received by the Responsible Entity from the sale of the Non-Electing Growers' Pearls.

85. The Deferred Management Fee is payable from the Grower's share of the Gross Pearl Sales at the conclusion of each Harvest (clause 17).

86. If, at the conclusion of the Project, there is a Deferred Management Fee Shortfall, the Responsible Entity will invoice the Grower for the amount of the Deferred Management Fee Shortfall. Growers may direct the Responsible Entity, in writing, to deduct the Deferred Management Fee Shortfall from the Grower's Proportional Interest in the Gross Pearl Sales.

87. The Deferred Management Fee Shortfall will be the difference between the sum of the Deferred Management Fees and the Sales and Marketing Fees charged under the terms of the Management Agreement and the sum of the following amounts:

<b>Income year</b>	<b>Amounts per Project Interest</b>
2009-10 (Year 1)	\$1,276
2010-11 (Year 2)	\$616
2011-12 (Year 3)	\$1,848
2012-13 (Year 4)	\$990
2013-14 (Year 5)	\$1,056
2014-15 (Year 6)	\$616
2015-16 (Year 7)	\$88
<b>Total</b>	<b>\$6,490</b>

***Sales and Marketing Fee***

88. In consideration for sales and marketing services performed as part of the Ongoing Management Services, the Grower will pay the Responsible Entity a Sales and Marketing Fee based on 11% of the Gross Pearl Sales. The Sales and Marketing Fee is payable following the sale of the Non-Electing Growers' Pearls from the Grower's share of the Gross Pearl Sales.

## ***Manager's Bonus***

89. At the end of the final harvest the Responsible Entity will be entitled to a Bonus equal to 11% of the total net return payable to each Grower where the internal rate of return exceeds 16% for each Interest (clause 18). The Bonus is paid from the Grower's share of the Gross Pearl Sales.

## **Finance**

90. A Grower who does not pay the Application Money in full upon application can apply for finance under the Terms Payment Facility.

91. Growers cannot rely on any part of this Ruling if the Application Amount is not paid in full on or before 15 June 2009 by the Grower or on the Grower's behalf by a lending institution. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to Responsible Entity by the lending institution on or before 15 June 2009. The lending institution must provide the full amount of the loan monies to Responsible Entity no later than 30 June 2009.

92. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Arafura Pearls Holdings Limited that materially differs from those set out in the documentation provided to the Tax Office with the application for this Product Ruling and summarised below. 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 that are not covered by this Product Ruling.

## ***Terms Payment Facility***

93. Where the Responsible Entity accepts an application from a Grower to pay the Application Fee under the Terms Payment Facility a deposit of 10% of the Application Fee is payable on or by 15 June 2009 with the balance payable by 9 equal monthly instalments with the first being due on 31 July 2009. Growers may pay out their Terms Payment Facility at any time prior to the expiry of the Terms Payment Facility period. The full amount of the Application Fee must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

94. Growers will only be considered for a Terms Payment Facility where they complete the required application form and the Responsible Entity is satisfied, on or prior to 15 June 2009, as to their capacity to pay the full amount of the Application Fee in accordance with the Terms Payment Facility. An application fee of \$140 is payable.

95. If a Grower does not pay the required instalments under the Terms Payment Facility, the Responsible Entity will give the Grower notice of default and the amount and any additional costs under the arrangement becomes immediately due and payable. The Responsible Entity may take legal proceedings to recover the amount due, including, taking legal possession of the Grower's Interest in the Project.

96. The total maximum number of Grower's Interests subject to the Terms Payment Facility will be 50% of the maximum number of Grower's Interests offered in the Project.

97. 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 the Terms Payment Facility outlined above, are involved or become involved in the provision of finance to Growers for the Project.



## Appendix 1 – Explanation

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

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

98. For the amounts set out in paragraphs 26 to 33 of this Ruling constitute allowable deductions the Grower's aquaculture activities as a participant in the Arafura Pearl Project 2009 must amount to the carrying on of a business of primary production.

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

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

101. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 4 and 5 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving cultivating, producing and harvesting Australian South sea Pearls for sale.

### **Deductibility of the Application Fee, Deferred Management Fees, Sales and Marketing Fees and Manager's Bonus**

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

102. The Application Fee, Deferred Management Fees, Sales and Marketing Fees and Manager's Bonus are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the Application Fee, Deferred Management Fees, Sales and Marketing Fees or Manager's Bonus.

103. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 106 to 110 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

**Administration fee payable under a Terms Payment Facility*****Section 40-880***

104. Growers who elect to pay their Grower's contribution under the Terms Payment Facility must pay an administration fee of \$140. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

105. However, section 40-880 will allow the application fee to be deducted on a straight line basis over five income years. Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law.

**Prepayment provisions*****Sections 82KZL to 82KZMF***

106. 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.

107. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

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

108. Under the scheme to which this Product Ruling applies Application Fee, Deferred Management Fees, Sales and Marketing Fees and Manager's Bonus are payable in the year in which they are incurred. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

109. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Management Agreement. Where such a prepayment is made these prepayment provisions will also apply to small business entities because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

110. As noted in the Ruling section above, Growers who prepay fees 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**

### ***Divisions 40, 41 and 328***

111. Any part of the expenditure of a 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 acquisition of the Grower's Panel is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

112. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity'.

113. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 27 to 33D of this Ruling.

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

114. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended **30 June 2009 to 30 June 2013 and 30 June 2015**, based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the aquaculture industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

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

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

**Section 82KL – recouped expenditure**

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

**Part IVA – general tax avoidance provisions**

118. 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.

119. The Arafura Pearl Project 2009 Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraph 26 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

120. 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 pearls. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## Appendix 2 – Detailed contents list

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

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

*Subject references:*

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

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 318
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- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-20
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-70(1)
- ITAA 1997 40-75(1)
- ITAA 1997 40-425(2)
- ITAA 1997 40-440
- ITAA 1997 40-525(2)
- ITAA 1997 40-880
- ITAA 1997 Div 70
- ITAA 1997 Subdiv 70-C
- ITAA 1997 70-35
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-D
- ITAA 1997 328-180
- ITAA 1997 328-285
- ITAA 1997 328-285(1)
- TAA 1953
- Copyright Act 1968
- SISA 1993
- Corporations Act 2001
- Fisheries Act 1988 (NT)
- Fisheries Act 1988 (NT) 17(1)(e)
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- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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NO: 2009/1553

ISSN: 1441-1172

ATOlaw topic: Income Tax ~~ Product ~~ aquaculture