

# ***PR 2009/33 - Income tax: Gunns Plantations Walnut Project No. 3 - Early Growers***

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## Product Ruling

### Income tax: Gunns Plantations Walnut Project No. 3 – Early Growers

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

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

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

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

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

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

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

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

### **Terms of use of this Product Ruling**

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This Product Ruling has been given on the basis that the entity(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 Gunns Plantations Walnut Project No. 3 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 28 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:

- Growers who terminate their involvement in the scheme prior to its completion; or do not derive assessable income from it;
- Growers who are accepted into this Project before the date of this Ruling or after 15 June 2009;
- Growers who participate in the scheme through offers made other than through the Product Disclosure Statement (PDS); or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way;

- subject to paragraph 77 of this Ruling, Growers whose Application Fee, other than an Application Fee payable under a Terms Arrangement with Gunns Plantations Limited (GPL), is not paid in full to GPL on or before 15 June 2009, either by the Grower and/or on the Grower's behalf by a lending institution;
- Growers who finance their participation in the Project with loans from Gunns Finance Pty Ltd (Gunns Finance), other than as described at paragraphs 79 to 82 of this Ruling; or
- Growers who are GPL or its associates.

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

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

### **Qualifications**

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 28 to 83 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 13 May 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 13 May 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 2011. 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 this Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

### Changes in the law

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 Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

### Goods and Services Tax

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.

## **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 at paragraphs 28 to 83 of this Ruling.

17. The Grower's participation in the Project must constitute the carrying on of a 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 and Orchard Right Agreement on or before 15 June 2009.

### **Small business concessions**

18. 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').

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

### **Assessable income**

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

20. 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.

**Deduction for Initial Services Fee, Operating Fees, Water Fees, Orchard Right Fees, interest, Loan Establishment Fee and Terms Establishment Fee**

**Sections 8-1, 25-25 and 40-880 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

21. A Grower may claim tax deductions for the following fees and expenses on a per Walnut Lot basis, as set out in the table below.

| <b>Fee Type</b>                             | <b>Year ending<br/>30 June 2009</b>     | <b>Year ending<br/>30 June 2010</b>   | <b>Year ending<br/>30 June 2011</b>  |
|---|---|---|--|
| <b>Initial Services Fee</b>                 | \$6,126.63<br>See Notes<br>(i) & (ii)   | Nil   | Nil  |
| <b>Operating Fees</b>                       | Nil                                     | \$1,133, plus<br>23.1% of the<br>Gross<br>Proceeds<br>Entitlement<br>See Notes<br>(i), (iii) & (iv) | \$1,133 (Varied<br>by Indexation),<br>plus 23.1% of the<br>Gross Proceeds<br>Entitlement<br>See Notes<br>(i), (iii) & (iv) |
| <b>Water Fees</b>                           | Nil                                     | \$517<br>See Notes<br>(i), (iii) & (iv)   | \$517 (Varied by<br>Indexation), plus<br>2% of the fee so<br>varied<br>See Notes<br>(i), (iii) & (iv)                      |
| <b>Orchard Right Fees</b>                   | \$9.17<br>See Notes<br>(i) & (iii)      | \$220<br>See Notes<br>(i), (iii) & (iv)   | \$220 (Varied by<br>Indexation)<br>See Notes<br>(i), (iii) & (iv)  |
| <b>Interest on loans with Gunns Finance</b> | As incurred<br>See Notes<br>(iv) & (v)  | As incurred<br>See Notes<br>(iv) & (v)  | As incurred<br>See Notes<br>(iv) & (v)   |
| <b>Loan Establishment Fee</b>               | Must be<br>calculated<br>See Note (vi)  | Must be<br>calculated<br>See Note (vi)  | Must be<br>calculated<br>See Note (vi)   |
| <b>Terms Establishment Fee</b>              | Must be<br>calculated<br>See Note (vii) | Must be<br>calculated<br>See Note (vii)   | Must be<br>calculated<br>See Note (vii)  |

**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) For the year ended 30 June 2009, \$6,126.63 of the Initial Services Fee of \$6,414.83 payable under the Management Agreement is deductible under section 8-1 in the income year incurred. The difference of \$288.20 is attributable to Native Vegetation Management and discussed further at paragraph 22 of this Ruling.
- (iii) The Operating Fees and Water Fees under the Management Agreement and the Orchard Right Fees under the Orchard Right Agreement are deductible under section 8-1 in the income year that the relevant fee is incurred.
- (iv) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 94 to 98 of this Ruling). 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.
- (v) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Gunns Finance is outside the scope of this Ruling. Prepayments of interest to any lender, including Gunns Finance, are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.
- (vi) The Loan Establishment Fee payable to Gunns Finance is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is 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 Gunns Finance is outside the scope of this Ruling.
- (vii) The Terms Establishment Fee payable to GPL in respect of the Terms Arrangement is not deductible in full when it is incurred. Under section 40-880 it is deductible on a straight line basis over five income years (see paragraphs 92 to 93 of this Ruling).

**Deductions for capital expenditure*****Division 40***

22. A Grower will be entitled to tax deductions relating to the cost of establishing the Walnut Trees under Subdivision 40-F and the cost of a landcare operation under Subdivision 40-G on a per Walnut Lot basis, as set out in the table below.

| <b>Fee Type</b>                   | <b>Year ending<br/>30 June 2009</b> | <b>Year ending<br/>30 June 2010</b>      | <b>Year ending<br/>30 June 2011</b>      |
|-----------------------------------|-------------------------------------|--|--|
| <b>Establishment<br/>of Trees</b> | Nil                                 | Must be<br>calculated<br>See Note (viii) | Must be<br>calculated<br>See Note (viii) |
| <b>Landcare<br/>operation</b>     | \$288.20<br>See Note (ix)           | Nil                                      | Nil                                      |

**Notes:**

- (viii) Walnut trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under an Orchard Right, 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. The deduction for the Trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. As the Trees have an 'effective life' of 25 years 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 Trees enter their first commercial season (section 40-530, item 2). GPL will inform Growers when their Trees enter their first commercial season and the amount that may be claimed in relation to the establishment of the Trees.
- (ix) The capital expenditure of \$288.20 incurred in respect of Native Vegetation Management is considered a 'landcare operation' (as defined in section 40-635) and is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.

**Joint Venturers**

23. A Joint Venturer may claim deductions under section 8-1, 25-25, 40-515, 40-630 and 40-880 on a per Walnut Lot basis, for the following expenditure:

***First Joint Venturer***

- for the year ending 30 June 2009, \$6,126.63 in respect of the Initial Services Fee;

- for the year ending 30 June 2009, \$288.20 in respect of that part of the Initial Services Fee that relates to a landcare operation;
- for the year ending 30 June 2009, \$9.17 incurred in respect of the Orchard Right Fee;
- for the years ending 30 June 2009, 2010 and 2011, any interest and Loan Establishment Fee incurred on and payable in respect of funds borrowed from Gunns Finance to finance the Application Fee;
- for the years ending 30 June 2009, 2010 and 2011, any Terms Establishment Fee payable to GPL under a Terms Arrangement; and
- for the years ending 30 June 2010 and 2011, 50% of the horticultural plant write-off.

***Second Joint Venturer***

- for the year ending 30 June 2010, \$1,133 plus 23.1% of the Gross Proceeds Entitlement, in respect of the Operating Fee;
- for the year ending 30 June 2011, \$1,133 (Varied by Indexation) plus 23.1% of the Gross Proceeds Entitlement, in respect of the Operating Fee;
- for the year ending 30 June 2010, \$517 in respect of the Water Fee;
- for the year ending 30 June 2011, \$517 (Varied by Indexation) plus 2% of the fee so varied, in respect of the Water Fee;
- for the year ending 30 June 2010, \$220 in respect of the Orchard Right Fee;
- for the year ending 30 June 2011, \$220 (Varied by Indexation) in respect of Orchard Right Fee;
- for the years ending 30 June 2010 and 2011, any interest incurred on funds borrowed from Gunns Finance to finance the Ongoing Fees; and
- for the years ending 30 June 2010 and 2011, 50% of the horticultural plant write-off.

24. If a Joint Venturer 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.

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

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

25. 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 by 15 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

26. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply as follows:

- Second Joint Venturers who fund their Ongoing Fees through a Fee Facility with Gunns Finance, for the income years ending 30 June 2010 to 30 June 2014; and
- for all other Growers, for the income years ending 30 June 2009 to 30 June 2013.

Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 28 to 83 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 and 82KL and Part IVA***

27. For a Grower who commences participation in the Project and incurs expenditure as required by the Orchard Right Agreement and 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 96 to 98 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 Product Ruling.

## Scheme

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28. 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 information received on 27 January 2009, 11 February 2009, 20 March 2009, 23 March 2009, 15 April 2009, 17 April 2009 and 29 April 2009;
- Draft PDS for the Gunns Plantations Walnut Project No. 3, including a **Loan Contract** between Gunns Finance and a Grower, received on 15 April 2009;
- Draft **Constitution** for the Gunns Plantations Walnut Project No. 3, received on 27 January 2009;
- Draft Compliance Plan for the Gunns Plantations Walnut Project No. 3, received on 27 January 2009;
- Custody Agreement and draft Variation of Custody Agreement between GPL and Gunns Limited (Gunns), received on 27 January 2009;
- Draft **Management Agreement** between GPL and a Grower, received on 27 January 2009;
- Executed Lease between Gunns and GPL in respect of specific lots on the Tabbita Lane Property, received on 29 April 2009;
- Draft Lease between Gunns and GPL in respect of two titles at the Leeton Property, received on 20 March 2009;
- Draft Variation of Lease in respect of titles at the Tabbita Lane and Leeton Properties subject to executed Leases, received on 20 March 2009;
- Draft **Orchard Right Agreement** between GPL and a Grower, received on 20 March 2009;
- Draft Initial Services Sub-contracting Agreement between GPL and Gunns, received on 27 January 2009;
- Draft Maintenance and Harvest Services Sub-contracting Agreement between GPL and Gunns, received on 27 January 2009;
- Executed Heads of Agreement between Gunns, GPL and Webster Limited (Webster), received on 20 March 2009;
- Draft Webster Sub-contracting Agreement between Gunns, GPL and Webster, received on 15 April 2009;

- Draft Walnut Sale Agreement between GPL and Webster and associated draft Deed Poll to be executed by the Purchaser in favour of Growers, received on 11 February 2009;
- Draft **Fee Facility Deed** between Gunns Finance and a Grower, received on 20 March 2009; and
- Draft **Terms Arrangement** between GPL, a Grower and a Guarantor, received on 27 January 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.

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

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

### Overview

31. The main features of the Gunns Plantations Walnut Project No. 3 are as follows:

|  |   |
|--|---|
| Location   | Goolgowi and Leeton in the Riverina District of New South Wales   |
| Type of business to be carried on by each Grower | Commercial growing and cultivation of Walnut Trees for the purpose of harvesting Walnuts for sale                             |
| Term of the Project                              | 25 years, may be extended by a period of 2 years at GPL's discretion  |
| Number of hectares offered for cultivation       | Approximately 717.8 (approximately 3,589 Walnut Lots)   |
| Size of each Walnut Lot                          | 0.2 hectares  |
| Number of Trees per hectare                      | Approximately 310   |
| Minimum allocation per Grower                    | 1 Walnut Lot  |
| Minimum subscription                             | None  |
| Initial cost per Walnut Lot                      | \$6,424   |
| Ongoing costs per Walnut Lot                     | <ul style="list-style-type: none"> <li>• Orchard Right Fees;</li> <li>• Operating Fees; and</li> <li>• Water Fees.</li> </ul> |

32. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. GPL has been issued with an Australian Financial Services Licence (Number 238701) and will be the Responsible Entity for the Project.

33. An offer to participate in the Project will be made through the PDS. The offer under the PDS is for approximately 717.8 hectares, which corresponds to approximately 3,589 Walnut Lots in the Project, although GPL reserves the right to accept oversubscriptions. An entity that participates in the Project as a Grower will do so by acquiring an interest in the Project which will consist of a minimum of 1 Walnut Lot. There is no minimum amount that must be raised under the PDS.

34. To participate in the Project, Applicants execute the Application and Power of Attorney Form contained in the PDS and lodge the executed form with GPL together with the Application Fee. Applications to participate in the Project must be made during the offer period which is:

- the period commencing from the date of issue of the PDS to 15 June 2009; and
- the period commencing from 1 July 2009 to 15 June 2010.

35. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Orchard Right Agreement and the Management Agreement on or after the date of this Ruling and on or before 15 June 2009 will commence participation as an Early Grower. This Ruling only applies to Early Growers (also referred to throughout this Ruling as Growers).

36. The Power of Attorney irrevocably appoints GPL to enter into, on behalf of the Grower, an Orchard Right Agreement and Management Agreement. The Orchard Rights granted to the Grower under the Orchard Right Agreement will comprise contractual rights in relation to each Walnut Lot of approximately 0.2 hectares in size.

37. Each Walnut Lot will have approximately 62 Walnut Trees on it. Approximately 0.19 hectares (or 95%) of each Walnut Lot will be Existing Orchard (trees planted prior to 1 January 2009) and 0.01 hectares (or 5%) will be New Orchard (trees planted after 1 January 2009).

38. Pursuant to the Management Agreement, Growers will engage GPL to perform the Services in respect of the Grower's Walnut Lot and act as sole agent to market, enter into negotiations and sell the Harvested Walnuts on the Grower's behalf.

39. As an alternative to participation by a Grower as a single entity, the terms of the Constitution, Management Agreement, and Orchard Right Agreement provide that two entities may participate in the Project as Joint Venture Growers on the terms specified in the Constitution.

## Constitution

40. The Constitution establishes the Project and operates as a deed binding all Growers and GPL. The Constitution sets out the general functions, powers and duties under which GPL 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.

41. On acceptance of an application, the Responsible Entity will allocate the Walnut Lot(s) to the Grower and prepare the Orchard Right Agreement and Management Agreement in accordance with clause 7.

42. Application Moneys are vested in and held by GPL on trust for the Growers in a bank account dedicated to the Growers (clauses 3.2 and 3.4(b)).

43. Before authorising or instructing the Custodian to release the Application Money in accordance with clause 9, the Responsible Entity must be satisfied, among other things, that:

- the Orchard Right Agreements have all been duly completed and executed;
- it has the capacity to grant the rights referred to in the Orchard Right Agreement; and
- the Leases are registered prior to, or immediately after the acceptance of an application in respect of the Orchard Right Agreement (clause 8).

44. The Responsible Entity is entitled to receive the fees provided for in the Orchard Right Agreement and Management Agreement (clause 12).

45. Among other things the Constitution sets out in detail the following:

- general functions, powers and duties of the Responsible Entity (clause 14);
- complaints procedures (clause 15);
- Compliance Committee requirements under the *Corporations Act 2001* (clause 16);
- the requirement for the Responsible Entity to procure a written report from the Independent Horticulturist and for Growers to receive copies of the Horticulturist's Report (clause 17);
- the transfer and transmission of a Growers' interest (clauses 19 and 20);
- the retirement or removal of the Responsible Entity (clause 23);
- the issue of a Walnut Lot Statement (clause 24);

- Register of Members (clause 25) and meetings of Members (clause 26);
- collections and payments (clause 27);
- the distribution from the Early Growers Proceeds Portion of the Fund (clause 28);
- deductions from income or profit (clause 29); and
- termination of the Project (clauses 32 and 33).

### **Joint Venture**

46. The Constitution also provides for two entities to enter the Project as Joint Venturers in an unincorporated joint venture (clause 5). Each of the Joint Venturers will be entitled to their Prescribed Proportion of the Joint Venture and any losses realised will be as tenants in common in their Prescribed Proportions. The First Joint Venturer and the Second Joint Venturer each have a 50% Prescribed Proportion. This Ruling will not apply to Joint Venturers comprised of more than two entities.

### **Compliance Plan**

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

### **Leases**

48. The Tabbita Lane and Leeton Properties (the 'Project Land') are owned by Gunns and are, or will be, leased by Gunns to GPL under a Lease for the purposes of the Project. The Tabbita Lane Property and four of the six titles at the Leeton Property are subject to existing Leases between Gunns, as lessor, and GPL, as lessee. A further Lease over the remaining titles at the Leeton Property will be executed if required.

49. The Leases set out the terms and conditions under which Gunns will lease the Project Land to GPL for the Term together with:

- an exclusive right to establish, plant, tend and maintain the Trees, maintain the Orchard Infrastructure and Harvest the Walnuts (Permitted Activities);
- an exclusive right to access, use and enjoy the benefit of the Trees and all Orchard Infrastructure;
- an exclusive right to Harvest the Walnuts; and

- and exclusive right to take all right, title and interest in the Harvested Walnuts.
50. Gunns undertakes to:
- complete planting of the Walnut Trees by on or before 31 October 2009; and
  - complete the balance of the Establishment Works, including the installation of the Orchard Infrastructure, by 15 June 2009.

## **Orchard Right Agreement**

51. Each Grower will enter into an Orchard Right Agreement in respect of their Walnut Lot(s) with GPL. A Walnut Lot is a parcel or parcels of land of approximately 0.2 hectares in total, made up of 0.19 hectares of Existing Orchard and 0.01 hectares of New Orchard.

52. Under clause 3, GPL grants to the Grower and the Grower takes from GPL an Orchard Right over the Walnut Lot(s) for the Term for the purpose of carrying out the Permitted Activities, including:

- a right to access the Walnut Lot(s);
- a right to access and use the Orchard Infrastructure;
- an exclusive right to access, use and enjoy the benefit of the Trees;
- an exclusive right to Harvest the Walnuts; and
- and exclusive right to take all right, title and interest in the Harvested Walnuts.

53. The Orchard Right will have a Term commencing on 15 June 2009 and ending upon termination of the Management Agreement.

54. The Orchard Right Agreement also sets out provisions relating to:

- the obligations of the Grower (clause 4.1);
- the obligations and warranty of GPL (clause 5);
- the Orchard Right Fee payable by Growers (clause 6 and item 2 of Schedule 1); and
- termination (clause 9).

## **Management Agreement**

55. Each Grower will engage GPL as Manager for the Term of the Project to perform the Initial Services, Maintenance Services and the Harvest and Processing services subject to the terms and conditions of the Management Agreement. GPL may delegate the responsibility to perform these Services.

56. The Management Agreement will commence on 15 June 2009 and terminate on the earlier of:

- the date of completion of the final distribution of Net Proceeds Entitlement to the Grower;
- 30 June 2034; or
- the date of termination otherwise specified in the Management Agreement.

The Term may be extended by a period of two years at GPL's discretion if at 30 June 2034 the Project does not reach an IRR of 9.5% and GPL is reasonably satisfied that it is in the best interests of the Growers to do so (clause 2).

57. The Initial Services, listed in clause 4, are the services which GPL must complete in relation to each Walnut Lot before 30 June 2009.

58. GPL must do all things necessary to rear the Trees and maintain the Walnut Lots by performing the Maintenance Services listed in clause 5 in a proper and efficient manner and in accordance with good horticultural practice.

59. GPL must do all things necessary to perform the Harvest and Processing services listed in clause 6 in a proper and efficient manner and in accordance with good horticultural practice.

60. The Grower irrevocably and unconditionally appoints GPL as sole agent to market, enter into negotiations and sell the Walnuts on the Grower's behalf on substantially similar terms and conditions to those set out in the Walnut Sale Agreement (clause 10.1).

61. GPL must distribute and pay or procure that the Custodian distribute and pay to the Grower the Grower's Net Proceeds Entitlement (clause 18.3).

62. The Management Agreement also sets out provisions relating to:

- fees payable by Growers (clause 9);
- insurance (clause 13);
- GPL's undertakings (clause 14);
- termination (clause 15); and
- the deduction of fees from the Walnut Sale Proceeds (clause 18.2).

## **Pooling of Walnuts and Grower's entitlement to proceeds**

63. The Constitution and Management Agreement set out provisions relating to the Grower's entitlement to the Net Proceeds Entitlement. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Walnuts to a pool are entitled to benefit from distributions of the Net Proceeds Entitlement from the pool; and
- any pooled Walnuts must consist only of Walnuts contributed by Early Growers of the Project.

## **Initial Services Sub-contracting Agreement and Maintenance and Harvest Services Sub-contracting Agreement**

64. GPL engages Gunns as its sub-contractor, to perform the Initial Services under an Initial Services Sub-contracting Agreement, and the Maintenance Services and Harvest and Processing services under the Maintenance and Harvest Services Sub-contracting Agreement, in accordance with the terms and conditions set out in these Agreements.

## **Walnut Sale Agreement and Deed Poll**

65. The Deed poll records Webster's commitment to enter into an agreement to purchase the Walnuts on terms no less favourable than those in the Walnut Sale Agreement which among other conditions requires Webster to acquire at least 75% of the Walnuts harvested under the Project annually.

66. GPL, as agent for each Grower will agree to sell, and the Purchaser will agree to buy, the Processed Walnuts on the terms and conditions set out in the Walnut Sale Agreement.

## **Fees**

### ***Application Fee***

67. The Grower must pay an Application Fee of \$6,424 per Walnut Lot on application, applied towards the following:

- an Initial Services Fee of \$6,414.83 for the Initial Services to be provided from 15 June 2009 to 30 June 2009, \$288.20 of which is in respect of Native Vegetation Management; and
- an Orchard Right Fee of \$9.17 for the grant of an Orchard Right for the period from 15 June 2009 to 30 June 2009.

**Ongoing Fees**

68. Ongoing Fees means the Orchard Right Fees payable by the Grower under the Orchard Right Agreement and the Operating Fees and Water Fees payable by the Grower under the Management Agreement from and including the year ending 30 June 2010. On a per Walnut Lot basis, these are:

- an Orchard Right Fee of \$220 for the grant of an Orchard Right for the year ending 30 June 2010, payable on 1 June 2010. Thereafter, the annual Orchard Right Fee will be the previous year's fee, Varied by Indexation, and payable on 1 June in each subsequent year;
- an Operating Fee of \$1,133 plus 23.1% of the Gross Proceeds Entitlement in consideration of the performance of the Maintenance Services, performance of the Harvest and Processing services and procurement of the sale of the Walnuts, payable on 1 June 2010. Thereafter, the annual Operating Fee will be \$1,133, Varied by Indexation, plus 23.1% of the Gross Proceeds Entitlement and payable on 1 June in each subsequent year;
- a Water Fee in consideration for the provision of sufficient water to the Walnut Lot of:
  - \$517 for the years ending 30 June 2010 to 2012;
  - \$737 for the years ending 30 June 2013 to 2015; and
  - \$957 from and including the year ending 30 June 2016 for the remainder of the Term,payable on 1 June in each year. The Water Fee payable in the years ending 30 June 2011 onwards is Varied by Indexation on each Indexation Review Date, plus 2% of the fee so varied.

69. Varied by Indexation means where a fee is to be varied by indexation, the new fee will be the current fee:

- multiplied by the CPI published during the quarter ending immediately before the date the new fee is to take effect; and
- divided by the CPI published during the corresponding quarter of the previous year.

70. Where GPL procures insurance for the Grower against destruction or damage of the Grower's Walnuts, Growers will pay to GPL the relevant insurance premium together with an administration charge of 11% of the amount of the premium within 14 days of the date of the invoice.

## **Joint Venture – Fees**

71. The fees to which a Joint Venture Grower will be solely responsible for are stipulated in clause 5 of the Constitution and are expressed as percentages of the fees outlined in paragraphs 67 and 68 of this Ruling. These percentages are as follows:

### ***First Joint Venturer***

- 100% of the Application Fee set out in paragraph 67 of this Ruling for the year ending 30 June 2009; and
- 50% of the Orchard Right Fees, Operating Fees and Water Fees set out in paragraph 68 of this Ruling for the year ending 30 June 2014 and all subsequent years.

### ***Second Joint Venturer***

- 100% of the Orchard Right Fees, Operating Fees and Water Fees set out in paragraph 68 of this Ruling for the years ending 30 June 2010 to 30 June 2013; and
- 50% of the Orchard Right Fees, Operating Fees and Water Fees set out in paragraph 68 of this Ruling for the year ending 30 June 2014 and all subsequent years.

## **Terms Arrangement**

72. Via the execution of a terms application and Direct Debit Authority, Applicants may apply to GPL to pay the Application Fee of \$6,424 per Walnut Lot under a Terms Arrangement.

73. A deposit of 10% of the Application Fee is payable on application. The unpaid balance (plus the Terms Establishment Fee of \$150 plus 0.4% of the deferred amount) is payable by 11 equal consecutive monthly instalments as set out in Schedule 4 of the Terms Arrangement, with the first instalment to be made on the last business day of the month following the month in which the Grower's application is accepted and thereafter on the last business day of each successive month until fully paid.

74. The Grower will convey absolutely its rights, entitlements and interests in the Project to GPL as security for the unpaid amount of the Application Fee and upon repayment of the outstanding monies in full may require that they be reconveyed.

75. There will be no interest levied to the Grower, unless instalments are not paid on time in which case interest at a rate of 6% above the 5 year swap reference rate of the ANZ Bank (or Gunns' banker at the time) will be levied.

**Finance**

76. A Grower who does not pay the Application Fee upon application from their own financial resources or under a Terms Arrangement with GPL can borrow from Gunns Finance (a lender associated with GPL) or borrow from an independent lender external to the Project.

77. Growers cannot rely on any part of this Ruling if the Application Fee, other than an Application Fee payable subject to a Terms Arrangement with GPL, 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 GPL by the lending institution on or before 15 June 2009. The lending institution must provide the full amount of the loan monies to GPL no later than 30 June 2009.

78. 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 Gunns Finance 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.

***Finance of the Application Fee by Gunns Finance***

79. Subject to Gunns Finance accepting the Grower's application for finance of the Application Fee, the Grower will be bound by the terms and conditions of the Loan Contract set out in the PDS. Gunns Finance will provide the Grower with the loan on a full recourse basis and will pursue legal action against any defaulting borrowers.

80. The key features of the Loan Contract are:

- a nil deposit, although this may be varied within good commercial terms at the absolute discretion of Gunns Finance;
- a Loan Establishment Fee of \$150 plus 0.4% of the loan amount, comprising part of the loan amount and payable by the Grower at the time the loan is established;
- terms of 3, 5, 10 or 15 years;
- equal monthly principal and interest instalments by direct debit on the Repayment Date of each month during the term of the loan are payable, commencing on the last business day of July 2009;

- interest charged at 10.5% per annum for the first 5 years of the loan. This interest rate may be varied within good commercial terms at the absolute discretion of Gunns Finance and, where applicable, will be reviewed at the end of each 5 year period and fixed for each following 5 year period at a rate 4% above the 5 year swap reference rate of the ANZ Bank (or Gunns' banker at the time);
- an additional 2% interest per annum applying to repayments or payments in arrears;
- a break fee of \$400, immediately due and payable in the event of an early repayment of some or all of the Outstanding Balance; and
- the Grower will convey absolutely its rights, entitlements and interests in the Project to Gunns Finance as security for the payment of the Outstanding Monies and upon repayment of the Outstanding Monies in full may require that they be reconveyed.

### ***Fee Facility by Gunns Finance for Ongoing Fees***

81. Under a Fee Facility Deed, Gunns Finance will also offer finance for 90% of the Ongoing Fees payable by the Grower in the years ending 30 June 2010 to 30 June 2013 inclusive. Gunns Finance will provide the Grower with the loan(s) on a full recourse basis and will pursue legal action against any defaulting borrowers.

82. The key features of the Fee Facility are:

- a deposit of 10% of the Ongoing Fees payable by a Grower to GPL in each year a loan is provided for the Ongoing Fees;
- no application or establishment fee;
- a term of 10 years;
- Growers are required to make equal monthly principal and interest repayments of the Outstanding Balance on the Repayment Date of each month, commencing on the last business day of the month following the month of draw down;
- interest charged at 10.5% per annum;
- an additional 2% interest per annum applying to repayments on occurrence of an Event of Default; and
- a break fee of \$100, immediately due and payable in the event of an early repayment of some or all of the Outstanding Balance.

83. 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 Gunns Finance, 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?**

84. For the amounts set out in paragraphs 21 to 23 of this Ruling to constitute allowable deductions the Grower's walnut cultivation activities as a participant in the Gunns Plantations Walnut Project No. 3 must amount to the carrying on of a business of primary production.

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

86. 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).

87. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 3 and 4 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting Walnuts for sale.

### **Deductibility of the Initial Services Fee, Operating Fees, Water Fees, Orchard Right Fees and interest on loans with Gunns Finance**

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

88. The Initial Services Fee (excluding the expenditure of \$288.20 on a landcare operation), Orchard Right Fees, Operating Fees and Water Fees 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 these fees.

89. With the exception of the capital expenditure on a landcare operation, 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 96 to 98 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.)

90. Some Growers may finance their participation in the Project through a Loan Contract with Gunns Finance. Applying the same principles as that used for the Initial Services Fee, Orchard Right Fees, Operating Fees and Water Fees, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

91. Other than where the prepayment provisions apply (see paragraphs 96 to 98 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

### **Administration Fee payable under a Terms Arrangement**

#### ***Section 40-880***

92. Growers who elect to pay the Application Fee under the Terms Arrangement must pay a Terms Establishment Fee of \$150 plus 0.4% of the deferred amount. 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.

93. However, section 40-880 will allow the Terms Establishment 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***

94. 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.

95. 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***

96. Under the scheme to which this Product Ruling applies, fees payable to GPL under the Management Agreement and the Orchard Right Agreement are incurred annually and the interest payable to Gunns Finance is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

97. 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 and the Orchard Right Agreement, or prepays interest under the Loan Contract or Fee Facility Deed (including loan agreements with lenders other than Gunns Finance).

98. As noted in the Ruling section above, 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***

99. 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 establishment of the Trees and the Native Vegetation Management (a landcare operation) is of a capital nature. This expenditure falls for consideration under Division 40.

100. The tax treatment of capital expenditure has been dealt with in paragraph 22 of this Ruling in the table and accompanying notes.

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

101. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years referred to in paragraph 26 of this Ruling, 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 walnut industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

102. 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.

103. 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**

104. 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**

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

106. The Gunns Plantations Walnut Project No. 3 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 paragraphs 21 to 23 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.

107. 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 Walnuts. 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:*

- advance deductions and expenses for certain forestry expenses
- carrying on a business
- commencement of a business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
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- seasonally dependent agronomic activities
- tax avoidance
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- tax shelters
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- taxation administration

- ITAA 1936 177A
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- ITAA 1997 40-630
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*Legislative references:*

- ITAA 1936 82KL
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- ITAA 1936 82KZL
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