


# ***PR 2007/82 - Income tax: BioForest Sustainable Timber and Biofuel Project 2007 (2008 Growers)***

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## Product Ruling

# Income tax: BioForest Sustainable Timber and Biofuel Project 2007 (2008 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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## **No guarantee of commercial success**

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

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

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

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

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

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as the BioForest Sustainable Timber and Biofuel Project 2007 or simply as 'the Project'.

### Class of entities

2. 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.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as initial participants<sup>1</sup> on or after the date this Product Ruling is made. They will have executed the relevant Project Agreements set out in paragraph 36 of this Ruling on or before 30 June 2008.

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:

- participate in the scheme other than as initial participants;
- are accepted into this Project before the date of this Ruling, or after 30 June 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS);
- are associates of BioForest Ltd, BioEnergy Australia Ltd or Willmott Forests Ltd;
- enter into finance arrangements with entities associated with this Project, other than those specified in paragraphs 81 to 92 of this Ruling; and
- have their application conditionally accepted subject to finance, where the funds for the Establishment Services fee are not paid to BioForest Ltd by 30 June 2008.

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<sup>1</sup> For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

**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 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 36 to 95 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 26 September 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 26 September 2007 until 30 June 2008, 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 2010.

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;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

14. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## **Changes in the law**

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

16. 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**

17. 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**

18. 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 its expenditure, 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**

19. 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 36 to 95 of this Ruling.

20. 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 Land Sourcing and Management Agreement.

21. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

**Concessions for 'small business entities'<sup>2</sup>**

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

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

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<sup>2</sup> The meaning of 'small business entity' is explained in section 328-110.

**Deductions for the Establishment Services fee****Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936**

24. Other than where a 'CGT event'<sup>3</sup> happens to their interest within 4 years of 30 June 2008 (see paragraph 25 of this Ruling), a Grower who is an initial participant in the scheme may claim tax deductions for the following amount on a per Timberlot basis.

| Fee Type                   | Year ending<br>30 June 2008     | Year ending<br>30 June 2009 | Year ending<br>30 June 2010 |
|----------------------------|---------------------------------|-----------------------------|-----------------------------|
| Establishment Services fee | \$5,500<br>See Notes (i) & (ii) |                             |                             |

**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) Under section 82KZMG of the *Income Tax Assessment Act 1936* (ITAA 1936) the Establishment Services fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 110 to 115 of this Ruling) and is deductible in the income year in which it is incurred.

**'CGT event' within 4 years for Growers who are 'initial participants'****Section 82KZMGA**

25. A deduction for the Establishment Services fee is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

26. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

27. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 116 to 118 of this Ruling).

<sup>3</sup> Defined in section 995-1.

**Deductions for loan interest, borrowing costs and administration fees****Sections 8-1, 25-25 and 40-880 and Division 27**

28. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a per Timberlot basis, as set out in the Table below.

| <b>Fee Type</b>  | <b>Year ending<br/>30 June 2008</b>  | <b>Year ending<br/>30 June 2009</b>  | <b>Year ending<br/>30 June 2010</b>  |
|--|--------------------------------------|--------------------------------------|--------------------------------------|
| <b>Interest on loans with the Preferred Financiers</b> | As incurred<br>See Note (iii)        | As incurred<br>See Note (iii)        | As incurred<br>See Note (iii)        |
| <b>Loan establishment fee</b>                          | Must be calculated<br>See Note (iv)  | Must be calculated<br>See Note (iv)  | Must be calculated<br>See Note (iv)  |
| <b>Establishment Fee</b>                               | Must be calculated<br>See Note (v)   | Must be calculated<br>See Note (v)   | Must be calculated<br>See Note (v)   |
| <b>Loan Application Fee</b>                            | Must be calculated<br>See Note (vi)  | Must be calculated<br>See Note (vi)  | Must be calculated<br>See Note (vi)  |
| <b>Instalment Agreement Administration Fee</b>         | Must be calculated<br>See Note (vii) | Must be calculated<br>See Note (vii) | Must be calculated<br>See Note (vii) |

**Notes:**

- (iii) Interest on loans with Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1, United Pacific Finance Pty Ltd, or MIS Funding No. 1 Pty Ltd is deductible in the year in which it is incurred (section 8-1). The deductibility or otherwise of interest arising from agreements entered into with financiers other than Allco Managed Investments Ltd as trustee for the Gateway Momentum Trading Trust No. 1, United Pacific Finance Pty Ltd, or MIS Funding No. 1 Pty Ltd, is outside the scope of this Ruling. Prepayments of interest to any lender, including Allco Managed Investments Ltd as trustee for the Gateway Momentum Trading Trust No. 1, United Pacific Finance Pty Ltd or MIS Funding No. 1 Pty Ltd, are also 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 (see paragraph 109 of this Ruling).

Interest paid or payable to participate in the Willmott Forests Project is beyond the scope of this Ruling.

- (iv) The loan establishment fee \$250 plus 0.60% of the Establishment Services fee borrowed (to a maximum of \$1,250) payable to United Pacific Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. Where the term of the loan is less than 5 years, the deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins. Where the term of the loan is 5 years or more, the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.
- (v) The loan Establishment Fee of \$250 plus 0.5% of the Establishment Services fee borrowed payable to Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1 is a borrowing expense and is deductible under section 25-25. Where the term of the loan is less than 5 years, the deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins. Where the term of the loan is 5 years or more, the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.
- (vi) The Loan Application Fee of 0.3% of the Establishment Services fee borrowed payable to MIS Funding No. 1 Pty Ltd is a borrowing expense and is deductible under section 25-25. Where the term of the loan is less than 5 years, the deduction for the borrowing expense is spread over the period of the loan on a straight line basis from the date the loan begins. Where the term of the loan is 5 years or more, the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.  

The Loan Application Fee paid or payable to participate in the Willmott Forests Project is beyond the scope of this Ruling.
- (vii) The Administration Fee of \$220 per Timberlot payable to BioForest Ltd in respect of the Instalment Agreement is not deductible in full when it is incurred. Under section 40-880 it is deductible in equal proportions over five income years beginning in the year in which the administration fee is incurred (see paragraphs 132 and 133 of this Ruling).

**Assessable income from 'CGT events' for Growers who are initial participants*****Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936***

29. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning<sup>4</sup> – see paragraph 33 of this Ruling) happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower's assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

30. The amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 82KZMGB(2) of the ITAA 1936).

31. 'CGT events' for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown on the Grower's Timberlot;
- the **sale, or any other disposal** of all or part of the 'interest' in the Project held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'interest' in the Project held by the Grower.

32. Where an amount arising from a 'CGT event' is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936 the anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

**Amounts received by Growers where the Project trees are thinned*****Sections 6-5 and 17-5***

33. An amount received by a Grower in respect of a thinning of the trees grown in this Project is not an amount received as a result of a 'CGT event' and is not otherwise assessable under section 82KZMGB. The amount is a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5) less any GST payable on those proceeds (section 17-5).

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<sup>4</sup> A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

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

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

34. A Grower who is an individual accepted into the Project in the year ended 30 June 2008 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **30 June 2008 to 30 June 2022**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

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

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

35. For a Grower who commences participation in the Project and incurs expenditure as required by the Land Sourcing 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;
- 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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36. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following:

- Application for a Product Ruling as constituted by documents provided on 1 and 17 February 2006, 26 and 27 October 2006, 13, 15, 20, 21 and 23 December 2006, 9 January 2007, 12 March 2007, 6 and 9 July 2007, 21, 28 and 29 August 2007, and 10 and 12 September 2007;
- Product Disclosure Statement for the BioForest Sustainable Timber and Biofuel Project 2007 dated 8 March 2007, received on 9 July 2007;
- First Supplementary Product Disclosure Statement for the BioForest Sustainable Timber and Biofuel Project 2007 dated 16 May 2007, received 9 July 2007;

- Draft Constitution establishing the BioForest Sustainable Timber and Biofuel Project 2007 dated 8 March 2007, received 9 July 2007;
- 1<sup>st</sup> Supplemental deed to the Constitution dated 29 August 2007, received 10 September 2007;
- Draft Compliance Plan for the BioForest Sustainable Timber and Biofuel Project 2007 dated 8 March 2007, received 9 July 2007;
- Draft NSW Head Lease agreement between the Lessor and BioForest Ltd (the Responsible Entity), dated and received 1 February 2006;
- Draft Transfer Creating Profit a Prendre Forestry Right between each Grower and BioForest Ltd, received 10 September 2007;
- Draft Lease (New South Wales) to be entered into by each Grower and BioForest Ltd, received 10 September 2007;
- Draft Profit A Prendre (Queensland) between each Grower and BioForest Ltd, received 10 September 2007;
- Draft Forest Operations Manual received 17 February 2006;
- Draft **Land Sourcing and Management Agreement**, to be entered into by each Grower and BioForest Ltd, received 12 September 2007;
- Draft **Finance Application** and **Loan Agreement** to be entered into by each Grower and United Pacific Finance Pty Ltd, received 29 August 2007;
- Draft **Finance Application** to be entered by each Grower and Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1, received 21 August 2007;
- 'Momentum' Indicative Term Sheet dated 15 December 2006 received 21 December 2006;
- United Pacific Finance Pty Ltd Indicative Loan Terms and Conditions received 20 December 2006;
- Draft **Instalment Agreement** to be entered into by each Grower and BioForest Ltd, dated and received 20 December 2006;
- Draft **Loan Agreement** 2007 Premium Forestry Blend (principal & interest), received 12 March 2007;
- Draft **Loan Agreement** 2007 Premium Forestry Blend (optional interest only), received 12 March 2007; and

- Draft 2007 Premium Forestry Blend **Application Form** to be entered by each Grower and BioForest Ltd and Willmott Forests Ltd, dated 16 May 2007, received 9 July 2007.

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

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

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. The effect of these agreements is summarised as follows.

39. The main features of the BioForest Sustainable Timber and Biofuel Project 2007 Project are as follows:

|  |  |
|--|--|
| Location   | North East Coast of New South Wales and South East Queensland  |
| Type of business to be carried on by each Grower | Commercial growing and cultivation of: <ul style="list-style-type: none"> <li>• Silky Oak (<i>Grevillea robusta</i>); and</li> <li>• She-oak (<i>Casuarina cunninghamiana</i>),</li> </ul> for the purpose of harvesting and selling the produce             |
| Term of the Project                              | Approximately 15 years   |
| Number of hectares offered for cultivation       | 2000<br>(oversubscriptions may be accepted)  |
| Size of each interest (Timberlot)                | Approximately 0.5 hectares   |
| Minimum subscription for the Project             | nil  |
| Minimum allocation per Grower                    | 2 Timberlots   |
| Initial cost                                     | \$11,000 for 2 Timberlots  |
| Ongoing costs                                    | Insurance  |
| Deferred costs                                   | Management and Maintenance fees – 10% of Net Proceeds of Sale.<br>Land Rent – 25% of Gross Proceeds of She-oak harvest, and 7% of Gross Proceeds of Silky oak harvest.<br>Costs of Felling, Sale, and Processing – deducted from the Gross Proceeds of Sale. |

40. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. BioForest Limited has been issued with an Australian Financial Service Licence 297650 and will be the Responsible Entity for the Project.

41. The Project will involve establishing and cultivating a Silky Oak and She-oak plantation, and then harvesting and selling the timber produce. The Project may also involve processing of Silky Oak timber produce before sale. The term of the Project is approximately 15 years.

42. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 2000 hectares, which corresponds to 4000 Timberlots in the Project. Oversubscriptions may be accepted.

43. An entity that participates in the Project will do so by acquiring an interest in the Project on or before 30 June 2008, which will consist of a minimum of 2 Timberlots each of 0.5 hectares in size. The initial cost of a single Timberlot is \$5,500.

44. The Application Form attached to the PDS contains a Power of Attorney which irrevocably appoints BioForest Ltd to enter into, on behalf of the Grower, all necessary Land Sourcing and Management Agreements and any other documents required to hold an interest in the Project.

45. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Land Sourcing and Management Agreement on or before 30 June 2008 will become 2008 Growers.

46. BioForest Ltd is seeking suitable sites for the Project in New South Wales and Queensland. Land utilised by the Project must meet the requirements set out by the Independent Forester at pages 48-49 of the PDS, and include

- minimum land area is 40 hectares;
- long term rainfall must be greater than 800 millimetres per annum;
- sites will be cleared of trees; and
- sites will have a recent history of fertilizer application.

47. The land will then be divided into 0.5 hectare lots leased or sub-leased to the Growers accepted in the Project.

48. Each Grower will use their Timberlots for the purpose of carrying on a business of cultivating and harvesting Silky Oak and She-oak, and the sale of harvested produce.

## Constitution

49. The Constitution establishes the Project and operates as a deed binding all Growers and BioForest Ltd. The Constitution sets out the terms and conditions under which BioForest 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.

50. In order to acquire an interest in the Project, the Grower must make an application for Timberlots in accordance with clause 4. The requirements of this clause include that the application be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

51. Under clause 5 of the Constitution, BioForest Ltd holds all Application Money on bare trust. For all moneys that accompany a completed application form, BioForest Ltd will deposit all Application Moneys received from applicants into a special trust account.

52. Once BioForest Ltd has accepted the application and all of the Project Documents have been executed and remain in force (clauses 6 and 7) the Application Money may be transferred and applied against the fees due to BioForest Ltd (clause 8).

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

- BioForest Ltd entitlements to payments, reimbursement of costs, and remuneration (clauses 9, 25 and 31);
- the register of Applicants and Growers (clause 27);
- distributions to Growers (clause 30); and
- complaint procedures (clause 34).

## Compliance Plan

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

## Land Sourcing and Management Agreement

55. A Land Sourcing and Management Agreement will be entered between BioForest Ltd (as the Grantor and Manager) and the Grower.

56. Within 9 months of executing the Land Sourcing and Management Agreement, BioForest Ltd must:

- secure the land for the Project;
- determine the location of the Growers Timberlot(s) (clause 2.1); and
- grant the Grower a lease or profit a prendre or Forestry Right over the Timberlot(s) (clause 2.2).

57. Within 12 months of execution of the Land Sourcing and Management Agreement, BioForest Ltd must complete the Establishment Services on the Growers Timberlot(s) (clause 5), being the ground preparation and planting services defined at clause 1.1 of the agreement.

### **Harvesting and sale**

58. The Grower appoints BioForest Ltd as the Grower's agent for the purpose of harvesting and thinning the Forest Produce grown on the Grower's Timberlots (clause 7).

59. The Silky Oak trees will be thinned when the cubic metres of Forest Produce per Timberlot equals or exceeds an average of 14-18 cubic metres per Timberlot, or 10 years after execution of the Lease and Management Agreement, or at some later date by the agreement of the Growers. The Silky Oak will be clear felled when the Forest Produce per Timberlot equals or exceeds an average of 28-36 cubic metres per Timberlot, or 15 years after execution of the Lease and Management Agreement, or at some later date by the agreement of the Growers.

60. The She-oak trees, which will regrow after harvest, will be clearfelled when the Forest Produce per Timberlot equals or exceeds an average of 30-39 tonnes per Timberlot, or in the financial years ended 30 June 2011, 30 June 2013, 30 June 2015 and 30 June 2017, or at later dates by the agreement of the Growers.

61. Under clause 8, the Grower also appoints BioForest Ltd as the Grower's agent for the purpose of processing Silky Oak, and sale of all Forest Produce. When determining whether to process Silky Oak before sale, BioForest Ltd must select the option which produces the greatest Net Proceeds of Sale for each Grower.

62. Under clause 10, the proceeds from sale of Forest Produce are paid into the Proceeds Fund for the Project. BioForest Ltd deducts the costs of felling, processing, and sale from the 'Gross Proceeds of Sale'. From the remaining 'Net Proceeds of Sale', BioForest Ltd deducts any outstanding Establishment Services fees, the 10% Maintenance and Management Fees, and the Rent.

63. In the event of a partial or complete loss or destruction of a Growers Timberlot, any insurance proceeds will be held in the Proceeds Fund. The Grower's entitlement to the insurance proceeds is governed by the Lease/Forestry Right/Profit a Prendre agreements.

64. BioForest Ltd will commence the provision of the Services after the completion of the Establishment Services and shall continue to provide the Services until the termination of the Land Sourcing and Management Agreement.

65. The Services are defined at clause 1.1 of the agreement, and means all commercial silvicultural activities to be carried out on the Timberlot.

### **Pooling of timber and Grower's entitlement to net proceeds**

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

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

### **Head lease**

67. BioForest Ltd has provided a draft Head Lease Agreement which they intend to enter with one or a number of a Lessor(s) in respect of Land required for the Project.

68. BioForest Ltd must use the Land only for 'Commercial Silviculture'.

69. BioForest Ltd may also grant a forestry right in relation to the land or sub-lease the land or any part of the land without prior approval of the Lessor.

### **Lease or Profit a Prendre or Forestry Right**

70. Where a Grower's Timberlots will be located in New South Wales, BioForest Ltd will execute a Lease or Forestry Right on behalf of the Grower to lease Timberlots to the Grower. Where the Timberlots will be located in Queensland, BioForest Ltd will execute a Profit a Prendre or Forestry Right on behalf of the Grower to lease Timberlots to the Grower. Growers may have Timberlots in both states.

71. BioForest Ltd will grant to the Grower the right to 'peaceably possess and enjoy the Timberlot', the Timberlots can only be used for commercial silviculture, and the Grower has full rights and title to the Forest Produce.

72. The Lease or Profit a Prendre starts on the Commencement Date, and ends on 'the date on which the final harvest of the plantation will occur that would approximate 15 years from date of planting'.

73. Each Grower must pay Rent for the Timberlots to BioForest Ltd as a percentage of the gross proceeds of harvest.

74. BioForest Ltd will arrange insurance of the Timberlots on behalf of the Growers. If all or substantially all of the Forest Produce is destroyed or otherwise rendered unsuitable for further cultivation, the Lease or Profit a Prendre or Forestry Right (and also the Land Sourcing and Management Agreement) will terminate with effect from the date of the destructive event, though the Grower would remain entitled to proportional interest in any insurance proceeds.

### **Fees**

75. Under the terms of the Project agreements, a Grower will make payments as described below on a per Timberlot basis.

#### ***Fees payable under the Land Sourcing and Management Agreement to BioForest Ltd***

76. The Establishment Services fee of \$5,500 is to be paid by each Grower on application (Schedule item 3).

77. After the application year, the following ongoing fees are payable from the proceeds of the Project:

- the Growers Proportional Interest of the costs of felling, processing and sale are paid out of the Gross Proceeds of sale (clause 10); and
- Management and Maintenance fee, being 11% of Net Proceeds of Sale (Schedule, item 3).

#### ***Fees payable under the Lease or Profit a Prendre or Forestry Right***

78. Insurance is payable annually (clause 5.4 of the Lease or Profit a Prendre, clause 7.4 of the Forestry Right).

79. Rent is payable at the rate of 25% of the Gross Proceeds for She-oak, and 7% of the Gross Proceeds for Silky Oak.

80. In the event of the destruction of Timberlots, alternate calculations of the Management and Maintenance fees and Rent may apply.

## **Finance**

81. A Grower who does not pay the application monies in full upon application can execute an Instalment Agreement with BioForest Ltd, lodge a Terms Application with Willmott Forests Ltd, borrow from the Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1, or United Pacific Finance Pty Ltd, or MIS Funding No. 1 Pty Ltd (jointly referred to as the Preferred Financiers), or borrow from an independent lender external to the Project.

82. 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 BioForest Ltd or with the Preferred Financiers that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project (that is other than the Preferred Financiers) may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

83. Other than where an Instalment Agreement is in place with BioForest Ltd or where a Terms Application has been accepted by Willmott Forests Ltd, Growers cannot rely on any part of this Ruling if the Grower (or lending institution on Grower's behalf) does not pay the application monies in full on or before 30 June 2008. Where an application is accepted subject to finance approval by any lending institution other than BioForest Ltd, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution on or before 30 June 2008.

### ***Instalment Agreement – BioForest Ltd***

84. BioForest Ltd offers a one year interest free instalment option for payment of the Establishment Services fee. Growers who utilise this option enter into an Instalment Agreement with BioForest Ltd, which requires the Grower to pay a deposit of 15% of the application amount (\$825 per Timberlot) and an Administration Fee of \$220. This amount is required to be paid on the date of acceptance into the Project, with the balance payable by 11 equal monthly instalments. The full amount of the Establishment Services fee must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

***Terms Application – Willmott Forests Ltd***

85. Willmott Forests Pty Ltd offers 12 months interest free terms for the payment of the application price, which is only available where Timberlots in the BioForest Sustainable Timber and Biofuel Project 2007 are acquired together with woodlots of the separate Willmott Forests Premium Forestry Blend project. No deposit is required and there are no application or establishment fees. A minimum of 3 Timberlots must be applied for to obtain these terms.

***Finance offered by Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1***

86. The Loan Agreement offered by Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1 provides that:

- an Establishment Fee of \$250 plus 0.5% of the Establishment Services fee borrowed is added to the initial loan amount; and
- the Grower's interests in the Project are taken as security for the loan.

87. The loan repayment options are:

- 5 years principal and interest at 11.00% per annum;
- 2 years interest only followed by 3 years principal and interest at 11.00% per annum; or
- 3 years interest only followed by 7 years principal and interest at 11.25% per annum.

88. The interest charged is variable, and the rates shown above are indicative only. Growers will be advised of the actual rate of interest after the Loan Agreement has been entered into.

***Finance offered by United Pacific Finance Pty Ltd***

89. The Loan Agreement offered by United Pacific Finance Pty Ltd provides that:

- the Grower is obligated to repay the principal borrowed and interest by monthly direct debit from a nominated bank account or credit card;
- 'Break Costs' are payable to the financier if the loan agreement ends early;
- the Grower is obligated to pay other unspecified costs and expenses incurred by the financier in connection with the loan agreement, including costs associated with any default by the Grower;

- the Grower's interests in the Project are taken as security for the loan;
- a loan establishment fee is payable by Grower of \$250 plus 0.60% of the loan amount (to a maximum of \$1,250), which is capitalised to the loan amount;
- stamp Duty is payable by the Grower, which is capitalised to the loan amount; and
- legal fees payable by the Grower will be 'debited at settlement'.

90. The loan repayment options are:

- 5 years principal and interest at 10.45% per annum;
- 2 years interest only followed by 5 years principal and interest at 10.45% per annum; or
- 3 years interest only followed by 7 years principal and interest at 10.45% per annum.

91. The interest charged is variable, and the rates shown above are indicative only. Growers will be advised of the actual rate of interest after the Loan Agreement has been entered into.

### ***Finance offered by MIS Funding No. 1 Pty Ltd***

92. Finance from MIS Funding No. 1 Pty Ltd is only available where Timberlots in the BioForest Sustainable Timber and Biofuel Project 2007 are acquired together with woodlots of the separate Willmott Forests Premium Forestry Blend project. A minimum of 3 Timberlots must be applied for to obtain these terms. The Loan Agreements provide that:

- a Loan Application Fee is payable by the Grower of 0.3% of the loan amount, which is capitalised to the loan amount; and
- the Grower's interests in the Project are taken as security for the loan.

93. The loan repayment options are:

- 3 years principal and interest at 11.00% per annum;
- 5 years principal and interest at 11.00% per annum;
- 7 years principal and interest at 11.00% per annum;
- 10 years principal and interest at 11.00% per annum;
- 12 years principal and interest at 11.00% per annum;
- 3 years interest only at 11.00% per annum;
- 3 years interest only followed by 2 years principal and interest at 11.00% per annum;

- 3 years interest only followed by 4 years principal and interest at 11.00% per annum;
- 3 years interest only followed by 7 years principal and interest at 11.00% per annum; or
- 3 years interest only followed by 9 years principal and interest at 11.00% per annum.

94. The interest charged is fixed, and the rates shown above are indicative only. The actual rate of interest will be set for the period of the loan on 30 June 2008.

95. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than the Preferred Financiers, are involved or become involved in the provision of finance to Growers for the Project.

## Appendix 1 – Explanation

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

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

96. For the amounts set out in paragraphs 24 and 28 of this Ruling to constitute allowable deductions the Grower’s afforestation activities as a participant in the BioForest Sustainable Timber and Biofuel Project 2007 must amount to the carrying on of a business of primary production.

97. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

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

99. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the BioForest Sustainable Timber and Biofuel Project 2007. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

100. Having applied these principles to the arrangement set out above, a Grower in the BioForest Sustainable Timber and Biofuel Project 2007 is accepted to be carrying on a business of growing and harvesting wood produce for sale.

### **Deductibility of the Establishment Services fee and loan interest**

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

101. The initial Establishment Services fee is deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A ‘non-income producing’ purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Establishment Services fee (see paragraphs 49 to 51 of TR 2000/8).

102. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 105 to 115 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.)

103. Some Growers may finance their participation in the Project through a Loan Agreement with the Preferred Financiers. Applying the same principles as that used for the Establishment Services fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

104. Other than where the prepayment provisions apply (see paragraphs 105 to 109 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMG***

105. 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 income year, then it is not expenditure to which the prepayment rules apply.

106. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and section 82KZMG of the ITAA 1936 (an operative provision). References to sections 82KZME and 82KZMF of the ITAA 1936 are made only in respect of their interaction with section 82KZMG of the ITAA 1936 and to confirm that these provisions have no application to expenditure incurred by Growers who participate in the scheme set out in this Ruling.

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

#### ***Sections 82KZME and 82KZMF***

107. Other than the initial Establishment Services fee (see below), the fees payable under the scheme to which this Product Ruling applies are payable as incurred and in the year incurred, or monthly in arrears, or out of harvest proceeds. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application.

108. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than the Preferred Financier or MIS Funding No. 1 Pty Ltd).

109. As stated in Note (iii) of paragraph 28 of this Ruling, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest.

## **Section 82KZMG**

110. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply.

111. Section 82KZMG provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure<sup>5</sup> incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

112. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

113. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

114. Under the Land Sourcing and Management Agreement each Grower incurs an initial Establishment Services fee of \$5,500 per Timberlot in the income year ended 30 June 2008 for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the trees.

115. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, other than where section 82KZMGA applies (see paragraphs 116 to 118 of this Ruling), a deduction is allowable in the income year ended 30 June 2008 for the full amount of expenditure incurred by the Grower for the Establishment Services fee.

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<sup>5</sup> The expenditure must be incurred on or before 30 June 2008 (subsection 82KZMG(2)).

**'CGT event' within 4 years for Growers who are initial participants*****Section 82KZMGA***

116. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the initial Establishment Services fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$5,500 per 'interest' for the Establishment Services fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

117. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

118. A Grower whose deduction for the Establishment Services fee is disallowed because of section 82KZMGA is still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

**Assessable income from 'CGT events' for Growers who are initial participants*****Sections 6-10, 10-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936***

119. Section 6-10 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

***Section 82KZMGB***

120. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)<sup>6</sup> happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted Establishment Services fee (shown in paragraph 25 of this Ruling); and

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<sup>6</sup> A thinning under this scheme is not a 'CGT event'.

- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of Establishment Services fee (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

### ***Market value rule applies to ‘CGT events’***

121. If, as a result of the ‘CGT event’ the Grower either:

- no longer holds the interest; or
- otherwise – where the Grower continues to hold the ‘forestry interest’ but there is a decrease in the market value of the interest;

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

122. The market value amount included in the assessable income of a Grower is the value of the interest just before the ‘CGT event’, or where the Grower continues to hold their interest after the ‘CGT event’, the amount by which the market value of the interest is reduced by the ‘CGT event’ (subsection 82KZMGB(2)).

123. This provision will apply where the interest is sold, is extinguished, or ceases, and will include ‘CGT events’ such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

### **Anti-overlap provisions**

#### ***Section 118-20***

124. Generally, where as a result of a ‘CGT event’ a capital gain would otherwise be included in a taxpayer’s assessable income. Section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA other than the CGT provisions includes an amount in the taxpayer’s assessable income.

125. In the case of interests held by Growers who are initial participants in this Project the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

**Amounts received by initial participants where the Project trees are thinned****Section 6-5**

126. Section 82KZMGB specifically excludes from its operation a 'CGT event' that happens in respect of a thinning (see paragraph 82KZMGB(1)(d)).

127. Thinning amounts received by a Grower who is an initial participant in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under section 82KZMGB of the ITAA 1936. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Grower holding an interest in the Project. It is an item of ordinary income and is assessable under section 6-5 of the ITAA 1997 in the year in which it is derived.

**Borrowing costs****Section 25-25**

128. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

129. In this Project the Loan establishment fee payable to United Pacific Finance Pty Ltd, the Establishment Fee payable to Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1, and the Loan Application Fee payable to MIS Funding No. 1 Pty Ltd are incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

130. Borrowing expenses of \$100 or less are deductible in the year in which they are incurred (subsection 25-25(6)), or where the amount exceeds \$100, the deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

131. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than the Preferred Financiers is outside the scope of this Ruling.

**Administration Fee payable under a Terms Payment Agreement****Section 40-880**

132. Growers who elect to pay their Establishment Services fee under the Instalment Agreement with BioForest Ltd must pay an Administration Fee of \$220 per Timberlot. 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.

133. However, section 40-880 will allow the administration fee to be deducted in equal proportions over five income years starting in the year in which the Grower incurred the amount (subsection 40-880(2)). 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 (subsection 40-880(1)).

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

134. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2008 to 30 June 2022**, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner’s discretion. 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 afforestation industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

135. 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.

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

### **Section 82KL – recouped expenditure**

137. 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**

138. 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).

139. The BioForest Sustainable Timber and Biofuel Project 2007 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 19 to 35 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.

140. 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 trees. 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.

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