



PR 2008/60 - Income tax: 2009 Willmott Forests Premium Forestry Blend Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 April 2009*



Product Ruling

Income tax: 2009 Willmott Forests Premium Forestry Blend Project

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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.

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. 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 Product Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the 2009 Willmott Forests Premium Forestry Blend Project, or simply as 'the Project'.
2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Ruling capitalised terms are specifically defined in the Project agreements.

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;

that are set out in the Ruling section of this Product Ruling.

4. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to in this Product Ruling as Growers.
5. Growers are those entities that:
 - meet the definition of 'initial participant' in subsection 394-15(5); and
 - are accepted to take part in the scheme specified below on or after the date this Product Ruling is made.
6. A Grower will have executed the relevant Project Agreements set out in paragraph 47 of this Ruling on or before 30 June 2009 and will hold a 'forestry interest'¹ in the Project.
7. The class of entities who can rely on this Product Ruling does **not** include:
 - Growers who are accepted into this scheme before the date that this Ruling is made or after 30 June 2009;
 - Growers whose Application Price, including all loan monies, is not paid in full to Willmott Forests Limited (WFL) by 30 June 2009, either by the Grower, and/or on the Grower's behalf by a lending institution;

¹ See subsection 394-15(3).

- Growers who make a payment by transferring property to WFL under clause 4.2 of the Constitution; or
- Growers who participate in the scheme through offers made other than through the Product Disclosure Statement (PDS).

Qualifications

8. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 47 to 111 of this Ruling.

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

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

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Superannuation Industry (Supervision) Act 1993

11. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The 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.

Date of effect

12. This Product Ruling applies prospectively from 23 July 2008, the date that the Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 23 July 2008 until 30 June 2009. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for all income years up to the income year in which the scheme is terminated in accordance with the Constitution.

13. 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.

14. 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)).

15. 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.

16. 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

17. 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.

18. 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

19. 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

20. 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 that it makes it must be registered or required to be registered for GST and hold a valid tax invoice.

21. [Omitted.]

Ruling

Structure of the Project

22. The Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of Radiata Pine, She-oak and Silky Oak Trees for felling in Australia.

23. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an 'initial participant'² in the defined class of entities (see paragraphs 4 to 7 of this Ruling) who is accepted to participate in the 'forestry managed investment scheme', described below at paragraphs 47 to 111 of this Ruling, from 23 July 2008 to 30 June 2009 inclusive.

24. An entity that takes part in the Project as a 'subsequent participant'³ is not covered by this Product Ruling, but may request a private ruling on their participation in the Project. A 'subsequent participant' is an entity that does not meet the definition of 'initial participant' in subsection 394-15(5).

Carrying on a business

24A. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 (see paragraphs 45A to 45B of this Ruling).

² See subsection 394-15(5).

³ See section 394-30.

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

25. The taxation obligations and benefits set out below have been determined using the information provided to the Commissioner by WFL. On the basis of that information the Commissioner has decided that it will be reasonable to expect that the '70% direct forestry expenditure rule'⁴ will be satisfied on 30 June 2009. The Tax Office may undertake review activities during the term of the Project to verify the information relied on for the purposes of the '70% DFE rule'.

26. The Ruling will only apply if WFL establishes all of the Trees that were intended to be established under the Project within 18 months of the end of the income year in which the first 'participant' in the Project is accepted⁵. For this Project the Trees must be established on or before 31 December 2010.

27. In the context of this Project, the Trees will be established when they are planted on the Land acquired for the purposes of the Project, at the average rate per hectare of 737 for Radiata Pine, 431 for Silky Oak and 1,319 for She-oak. WFL is required by section 394-10 of Schedule 1 of the TAA to notify the Tax Office if the Trees are not established by 31 December 2010.

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

28. A Grower in the Project can claim, on a per Woodlot basis, deductions for the amounts shown in the table below that are paid to WFL (sections 8-5 and 394-10).

| Fee | Amount | Year(s) deductible |
|----------------------------|---|--|
| Establishment Services Fee | \$5,500 See Note (i) | 2009 |
| Land Rental Fee | 5% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak | Any year in which this amount is paid See Note (ii) |
| Maintenance Fee | 4% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak | Any year in which this amount is paid See Note (ii) |
| Marketing Fee | 1% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak | Any year in which this amount is paid See Note (ii) |

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

⁵ See subsection 394-10(4)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of the outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Growers will be notified by WFL of the years in which these amounts are paid.

29. [Omitted.]

30. The deductibility of these amounts remains subject to a requirement that a 'CGT event'⁶ does not happen in relation to the Grower's Woodlot before 1 July 2013 (see paragraphs 33 to 35 of this Ruling).

31. The amount is deductible in the income year in which it is paid, or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). Where a Grower does not fully pay an amount, or it is not fully paid on their behalf in an income year, it is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

32. Clause 4.2 of the Constitution also allows a Grower to make a payment by transferring property to WFL. Growers who make a payment by transferring property to WFL are excluded from the class of entities to whom this Ruling applies and cannot rely on this Product Ruling. Such Growers may apply for a private ruling on the tax consequences of their participation in the Project.

'CGT event' within 4 years for Growers who are 'initial participants'***Subsections 394-10(5) and (6)***

33. Deductions for the Establishment Services Fee, the Land Rental Fee, Maintenance Fee and Marketing Fee are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of a Grower before 1 July 2013 (subsection 394-10(5)).

34. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years of the 'CGT event' happening (subsection 394-10(6)). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

35. Growers whose deductions are disallowed because of subsection 394-10(5) are still required to include in assessable income the market value of the 'forestry interest' at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event'.

⁶ Defined in section 995-1.

Interest on loans to finance the ‘forestry interest’ of a Grower

Section 8-1

36. A Grower in the Project can claim deductions for interest incurred on a loan to fund their investment in the Project (paragraph 8-1(1)(a)). The deduction is allowable in the year in which the interest is incurred.

37. This Ruling only applies to interest incurred on the loans between a Grower and the Commonwealth Bank of Australia (the CBA) as set out in paragraphs 103 to 108 of this Ruling. Growers who borrow from other financiers may apply for a private ruling on the deductibility of loan interest or may self assess the deductibility of the interest. Prepayments of interest to any lender, including the CBA are also not covered by this Ruling. Growers who prepay interest may request a private ruling on the deductibility of the interest incurred.

Borrowing costs

Section 25-25

38. A Loan Application Fee of 0.25% of the loan amount, or \$250, whichever is greater, is payable to the CBA. This amount is a borrowing expense and is deductible under section 25-25. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter, on a straight line basis from the date the loan begins.

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

40. A stamp duty fee may also be payable by the borrower and this will be charged at a later date. This is also deductible as a borrowing expense under section 25-25.

Assessable income, ‘CGT events’ and the ‘forestry interests’ of Growers who are ‘initial participants’

Sections 6-10 and 394-25

41. Where a ‘CGT event’ (other than a ‘CGT event’ in respect of a Thinning⁷ – see paragraph 44 of this Ruling) happens to a ‘forestry interest’ held by a Grower in this Project, the market value of the ‘forestry interest’, or the decrease in the market value of the ‘forestry interest’, is included in the assessable income of the Grower (sections 6-10 and 394-25).

⁷ 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.

42. The relevant amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 394-25(2)).

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

- a **Clear Fell Harvest of all or part of the Trees** grown under the Project;
- the **sale, or any other disposal**, of all or part of the Forestry Interest held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'forestry interest' held by the Grower.

Amounts received by Growers for Thinning the Project Trees and for Carbon Sequestration Rights

Section 6-5

44. An amount received by a Grower in respect of a Thinning of the Trees grown in this Project is not received as a result of a 'CGT event' and is not otherwise assessable under Division 394. The amount is a distribution of ordinary income that arises as an incident of a Grower holding a 'forestry 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).

45. An amount received by a Grower in respect of sales of Carbon Sequestration Rights constitutes a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include such amounts received in their assessable income in the income year in which those amounts are derived under section 6-5.

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

Section 35-55 – exercise of Commissioner's discretion

45A. A Grower who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such a Grower, who is an individual, and accepted into the Project in the year ended 30 June 2009, may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35. Division 35 does not apply however, to Growers who do not carry on a business.

46A. The discretion in paragraph 35-55(1)(b) will be exercised for a Grower to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2023. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 47 to 111 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 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA

46. Where a Grower is accepted to participate in the Project set out at paragraphs 47 to 111 of this Ruling the following provisions have application as indicated:

- interest incurred by a Grower on the loans with the CBA set out in paragraphs 103 to 108 of this Ruling does not fall within the scope of sections 82KZM, 82KZME and 82KZMF of the ITAA 1936;
- section 82KL of the ITAA 1936 does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA of the ITAA 1936 will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

47. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following:

- Application for a Product Ruling with accompanying attachments, including those specifically listed below;
- Additional correspondence received on 11 and 27 March 2008, 1, 2, 9, 14 and 26 May 2008, 13, 15, 16, 18, 25 and 30 June 2008, 1, 2, 9 and 15 July 2008 and 2, 3 and 17 March 2009;
- Revised Draft Willmott Forests Premium Forestry Blend 2009 Project Product Disclosure Statement (PDS), undated, to be issued by WFL (the Responsible Entity), received on 15 July 2008;
- Revised Draft **Constitution** for the 2009 Willmott Forests Premium Forestry Blend Project received on 13 June 2008;
- Draft Compliance Plan for the Willmott Forests Project, as amended in December 2007, received on 11 March 2008;

- Draft **Land Sourcing and Forestry Management Agreement** between WFL (as Manager) and each Grower, received on 11 March 2008;
- Forestry Rights Agreement (unsigned) between WFL and Willmott Forests Investment Management Pty Ltd (as Trustee for the Growers), received on 11 March 2008;
- Draft **Lease Agreement** between WFL and each Grower, received on 11 March 2008;
- Draft Origination Deed between the CBA and WFL (as the Originator), received on 15 June 2008;
- Draft Declaration of Trust between Willmott Forests Investment Management Pty Ltd and each Grower, received on 11 March 2008;
- Draft **2009 Willmott Forests Premium Forestry Blend Loan Agreements** between the CBA and each Grower, received on 18 June 2008;
- Draft **2009 Willmott Finance Pty Ltd 12 month Interest Free Loan Agreement**, between Willmott Finance Pty Ltd (Willmott Finance) and each Grower, received on 25 June 2008.

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

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

49. 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 agreements highlighted are those that a Grower may enter into. The effect of these agreements is summarised as follows.

Overview

50. The main features of the 2009 Willmott Forests Premium Forestry Blend Project are as follows:

| | |
|-----------|--|
| Locations | NSW – Bombala, Murray Valley and North-Coast regions Victoria – North-East, South-West, Central Gippsland, Ballarat, and Central regions Southern Queensland |
|-----------|--|

| | |
|---|--|
| Species of Trees to be planted under the scheme | Radiata Pine Silky Oak She-oak |
| Term of the Project | 16 years |
| Date all Trees are due to be planted on scheme Land | 31 December 2010 |
| Number of hectares offered for cultivation | Approximately 8,000 (15,385 Woodlots) |
| Size of each Woodlot | Approximately 0.520 hectares |
| Number of Seedlings planted per Woodlot | <ul style="list-style-type: none"> • Radiata Pine – 383 • Silky Oak – 224 • She-oak – 686 |
| Minimum allocation of Woodlots per Grower | 1 |
| Minimum subscription | None |
| Initial cost per Woodlot | \$5,500 |
| Ongoing costs per Woodlot | Marketing, Maintenance and Land Rental fees equal to 10% of the aggregate of the Radiata Pine, Silky Oak and She-oak Pool amounts |
| Other costs | <ul style="list-style-type: none"> • Compulsory insurance premium from the end of year 7 to the end of the Project • Interest payments under a Loan Agreement (if applicable) • 50% of the amount equal to the proceeds from the Control of Carbon Sequestration Rights less any expenses for which WFL is entitled to be indemnified • Any other amounts agreed upon in writing between WFL and Growers |

51. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. WFL has been issued with an Australian Financial Services Licence (Number 233215) and will be the Responsible Entity for the Project.

52. The objective of the Project is to establish and manage long term commercial Plantations of timber for the purpose of Harvesting and sale. The Project is a blend of three Plantation forestry species:

- (a) Radiata Pine
- (b) Silky Oak, and
- (c) She-oak.

53. An offer to participate in the Project will be made through the PDS. The offer under the PDS is for approximately 8,000 hectares, which corresponds to approximately 15,385 Woodlots in the Project.

54. An entity that participates in the Project as a Grower will do so by acquiring at least one Woodlot in the Project on or before 30 June 2009. There is no minimum amount that must be raised under the PDS.

55. To participate in the Project as a Grower each applicant must complete the 2009 Application Form in the PDS and make a payment, or enter into a payment arrangement under a Loan Agreement, equal to the Application Price for the Woodlots subscribed.

56. Following acceptance of an application for Woodlots, WFL will execute on behalf of the Grower (as attorney) the Land Tenancy Agreement and the Land Sourcing and Forestry Management Agreement. The Growers' details will also be placed in a Register and WFL will allocate Woodlots to each Grower.

57. WFL will secure all the necessary and appropriate rights to operate Plantation forestry activities on the Land upon which the Plantations are established for the benefit of Growers in the Project. WFL has identified Land for the Project and will apply appropriate and practical criteria for selection of optimum sites which:

- WFL already owns; or
- has entered into an option agreement to purchase; or
- is currently negotiating an agreement to purchase or an option to purchase with the owner of the Land.

58. A Grower will Lease, Sub-Lease, Licence or Sub-Licence at least one Woodlot. Each Woodlot will be approximately 0.520 hectares in size.

59. During the term of the Project, Growers will establish and maintain a commercial Plantation of Radiata Pine, Silky Oak and She-oak.

60. Pursuant to the Land Sourcing and Forestry Management Agreement, Growers will engage WFL to manage the Project and be responsible for establishing, tending and Harvesting the Silky Oak and She-oak Trees and marketing the Wood products produced on the Growers' behalf. WFL will also be responsible for marketing and selling the standing Radiata Pine in year 16.

61. It is anticipated that the final Harvest of the She-oak will take place in year 9 of the Project, the Silky Oak will be thinned in year 10 and the Radiata Pine will be thinned in year 13.

62. The Project will be terminated after the final Harvest of the Silky Oak Trees and the sale of the standing Radiata Pine timber, at approximately year 16 of the Project.

63. It should be noted that the She-oak Trees will not be Harvested within 4 years after the end of the income year in which the Grower is issued with Woodlots. For Growers entering into the Project on or before 30 June 2009, the She-oak Trees will not be Harvested prior to 1 July 2013.

Constitution

64. The Constitution establishes the Project and operates as a deed binding all Growers and WFL, as Responsible Entity. The Constitution sets out the general functions, powers and duties under which WFL agrees to act for the Growers 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.

65. Woodlots are taken to be issued when WFL accepts the application (clause 4.5). WFL is required to notify the Applicant in writing of such acceptance within 30 days of the issue of the Woodlots (clause 4.7).

66. As soon as practicable after the issue of the Woodlots, WFL must use its best endeavours to create a Forestry Right in respect of the Land on which Woodlots are located for the benefit of all Growers who have acquired Woodlots on that Land. The Forestry Right (which includes a Carbon Sequestration Right) may be granted to a third party as trustee, custodian or agent for the Growers (clause 4.9).

67. If WFL fails to grant to the Grower a Land Tenure Agreement and create a Forestry Right in respect of the Grower's Woodlots within 15 months of the end of the Income Year in which the first payment is made by the Grower, WFL must, within 14 days of receiving a written request from the Grower, issue to the Grower a full refund of the application monies against which the Woodlots were issued (clause 4.10).

68. WFL provides a Stocking Guarantee for a period of 2 years (called the Guarantee Period) from the date that the Grower is registered as the holder of a Woodlot. If survival rates of the initial Radiata Pine, Silky Oak and She-oak stems planted across the Plantations fall below 85%, WFL will replant the failed areas to reach this minimum (clause 12).

69. During the Guarantee Period, WFL will, at its own expense, remove Trees that are Materially Damaged, prepare the ground, and acquire and plant new Seedlings. Trees will be Materially Damaged when, other than in certain specified circumstances set out in the Constitution, they are damaged or destroyed (clause 12.2).

70. WFL will maintain an insurance policy to cover the cost of planting new Trees on the Land to replace any Radiata Pine, Silky Oak and She-oak Trees that may be damaged or destroyed by fire, until the end of the 7th year, and may at its discretion and expense obtain an insurance policy to cover the cost of planting new Trees on the Land to replace any Radiata Pine, Silky Oak and She-oak Trees as may be damaged by an event other than fire.

71. In respect of the She-oak Trees only, WFL may delay Harvesting and sale where it considers it prudent to do so. In particular, the She-oak will not be Harvested within 4 years after the end of the income year in which the Grower is issued with Woodlots.

72. Among other things, the Constitution also sets out in detail the following:

- the powers, rights and liabilities of WFL (clauses 6 and 7);
- the liability of Growers (clause 9);
- the remuneration and expenses of the Manager (clause 10);
- the retirement of the Manager (clause 11);
- the Stocking Guarantee (clause 12);
- insurances (clause 13);
- the Harvesting and sale of Trees (clause 14);
- Carbon Sequestration Rights (clause 15);
- the transfer of Woodlots (clause 17);
- convening meetings of Growers and voting requirements (clause 18);
- procedures on termination (clause 20); and
- complaints procedures (clause 25).

Compliance Plan

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

Land Sourcing and Forestry Management Agreement

74. Each Grower will enter into a Land Sourcing and Forestry Management Agreement with WFL. Under this agreement a Grower enters into a contract with WFL to carry out services as required. These include the preparation, planting and maintenance of the Grower's Woodlots until the end of the Project at approximately Year 16.

75. In accordance with good forestry practices WFL will use all reasonable endeavours to carry out its obligations specified in Part 1 (Preparation and Planting Services) and Part 2 (Establishment and Maintenance Services) of Schedule 1 to the Land Sourcing and Forestry Management Agreement in respect of the Grower's Woodlots.

76. The Preparation and Planting Services will be provided to the Grower within the first 18 months of the end of the income year in which the first Grower is accepted into the Project.

77. The Preparation and Planting Services include preparation works such as ripping, mounding and/or ploughing, pre-planting, weedicide treatments as required, the supply and planting of high quality Radiata Pine, She-oak and Silky Oak cuttings or Seedlings, fertilising and pest control (Schedule 1 Part 1).

78. The Establishment and Maintenance Services include establishment work in year 2, including supplying and replanting Radiata Pine, She-oak and Silky Oak Seedlings where required, treatment of regrowth, post planting weedicide treatments as required, folia analysis of planted stock, construction and maintenance of access roads and firebreaks, fertilising and general maintenance including ongoing monitoring (Schedule 1 Part 2).

79. The Establishment and Maintenance Services also include general maintenance such as monitoring, fertilising attention to regrowth, and access roads and firebreaks where required in years 3 and 4. These services are also to be provided in each year subsequent to year 4, in addition to selective pruning (Schedule 1 Part 2).

80. Under clause 9, the Harvesting and sale of the Grower's Silky Oak Trees and She-oak Trees and the Harvesting (if applicable) and sale of the Growers' Radiata Pine Trees is to be carried out, or arranged to be carried out, by WFL.

Land Tenure Agreements

81. Land is allocated to Growers on a random basis. Depending upon the Land allocated to a Grower, each Land Tenure Agreement may be any of, or a combination of, a Lease Agreement, Sublease Agreement, Licence Agreement or Sub Licence. A separate Land Tenancy Agreement will be executed in respect of Land on which She-oak Trees will be planted.

82. The Land Tenure Agreements are between WFL and each Grower.

83. WFL reserves unrestricted rights of way over any present or future pathway or firebreak. WFL also reserves the right to agist the Land as part of its silvicultural management. The Land Tenure Agreement is subject to any encumbrances affecting the Land.

84. The date of issue of Woodlots to the Grower will be the date of acceptance for Woodlots under the Land Tenure Agreement.

85. The tenancy is for a term of 16 years (in respect of Land on which Radiata Pine and Silky Oak will be planted) and 9 years (in respect of Land on which She-oak will be planted) but may be renewed after that period.

86. A Grower's permitted use of the Land is restricted to using the Land for the purposes of participating in the Project.

87. At the expiration of the Land Tenure Agreement, the Grower must deliver up the Land to WFL in a reasonable state of repair.

88. Re-entry by WFL ends the Land Tenure Agreement, but WFL still retains all rights under general law.

Lease Agreement

89. If the Grower leases Land under the Land Tenure Agreement, the Grower will enter into a Lease Agreement. In that case an unregistered Lease is granted by WFL (the Lessor) to each Grower (the Lessee) upon the acceptance of the application. The term of the Lease is 16 years (in respect of Land on which Radiata Pine and Silky Oak will be planted) and 9 years (in respect of Land on which She-oak will be planted) but may be renewed after that period.

90. Among other things, the Lease Agreement also sets out in detail the following matters:

- the Lessee may use the Land only as part of a managed investment scheme under which Growers, including the Lessee, participate in the establishment and maintenance of the Trees (clause 3);
- the Lessee agrees not to do or permit anything to be done on the Land, or keep anything therein, which may in any way invalidate or violate the conditions of any insurance policies relating thereto or increase or cause to be increased the premiums payable in respect thereof (clause 11); and
- the Lessee will permit the Lessor at all reasonable times to enter upon the Land (clause 13).

Fees

91. The Application Price for each Woodlot is \$5,500.

92. WFL will also charge a Land Rental Fee equal to 5%, a Maintenance Fee of 4%, and a Marketing Fee equal to 1% of the aggregate of the Radiata Pine, Silky Oak and She-oak Pool amounts (clause 10.1 of the Constitution).

93. These amounts will be paid from the proceeds of the Harvesting (if applicable) and sale of Radiata Pine, Silky Oak and She-oak Trees, less any expenses for which WFL is entitled to be indemnified under clause 8.4 of the Constitution.

94. WFL may charge additional interest under the Land Sourcing and Forestry Management Agreement on any amounts outstanding at the rate of 5% per annum (clause 7.1(a)).

95. The Responsible Entity will meet all insurance costs until the end of Year 7. Growers will need to pay a portion of the pro-rata insurance costs in respect of the relevant Pool's Radiata Pine and Silky Oak Trees from Year 8 until all such Trees in respect of the Pool are sold.

96. Where a Grower receives payments of insurance claims in respect of damage to, or destruction of, all or any Trees on the Woodlots under an insurance policy, the Grower must pay 10% of the insurance proceeds to WFL (clause 10.1 of the Constitution) within 14 days of their receipt to discharge their liabilities under the Land Sourcing and Forestry Management Agreement and Land Tenure Agreements.

Pooling of Trees and distribution of proceeds

97. The Constitution sets out the principles relating to the Pooling of Growers' Trees and the distribution of proceeds from sale (clause 4.17 and clause 14).

98. Any outstanding Rental, Maintenance or Marketing Fees will be deducted from the Distribution Amount received from the relevant Pool, and the balance of the Distribution Amount will be distributed to the Growers pro rata (clause 14.7 and clause 14.8).

99. Unless WFL reasonably considers that it is impracticable to do so, WFL must distribute the proceeds from the Harvesting (if applicable) and sale of Trees within a period of 6 months, commencing on the date on which the proceeds are received by WFL. If WFL reasonably considers that it is impractical to distribute the proceeds within 6 months, it must do so as soon as reasonably practicable thereafter.

Forestry Right Agreement

100. Under the Forestry Right Agreement, WFL and Willmott Forests Investment Management Pty Ltd (WFIM) have agreed that WFL will grant the Forestry Right to WFIM. WFIM will enter into the Agreement on behalf of the Growers.

Finance

101. A Grower can fund their involvement in the Project by borrowing from independent sources, Willmott Finance or the CBA, as the Preferred Financier.

Loans with Willmott Finance

102. Willmott Finance will offer finance on a fixed 12 month interest free basis to fund Growers' application fees. This will involve 12 equal monthly repayments. Penalty interest of 15% per annum will be charged on overdue payments. The loan will be secured by the Grower granting a mortgage to Willmott Finance over the Trees on the Grower's Allotment(s).

Loans with the CBA

103. The CBA, as Preferred Financier, will offer loan terms on a commercial basis and consider loans up to 100% of the Application Price. The CBA will provide Growers with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to a Grower by the CBA are set out in the Loan Agreement and on the Loan Application Form.

104. Common features contained in the Loan Agreement are:

- the CBA will advance to the Grower the Principal Amount by payment of this amount to WFL in order to meet the Grower's obligations under the relevant Agreements (clause 3(a));
- the advance to the Grower of the Principal Amount will not be made unless the CBA is satisfied that:
 - the Project Application has been, or will be, accepted by WFL (clause 4(a));
 - the Loan Application has been accepted by the CBA (clause 4(b));
 - the Loan Agreement has been executed by the Grower, or an irrevocable power of attorney has been granted by the Grower to WFL to enable execution of the Loan Agreement on behalf of the Grower (clause 4(c));
 - the Grower has provided an irrevocable power of attorney to WFL to execute all the relevant Agreements on behalf of the Grower (clause 4(d)); and
 - any guarantees that are required to be executed by the Grower at the request of the CBA have been executed (clause 4(e));

- the Grower is required to pay the monies owing by a Monthly Payment on each Payment Date in the manner indicated by the Loan Application and in accordance with the Loan Agreement (clause 5(a));
- in consideration for the loan, a Grower mortgages all their interest in the Woodlot(s) in favour of the CBA for securing payment of all monies owing and the performance of their obligations under the Loan Agreement and the Loan Application (clause 6(a));
- where a Grower defaults on their loan obligations Default Interest will be charged at 5% per annum in addition to the standard interest rates. Default Interest will be calculated daily and accrued monthly (clause 10);
- interest will be calculated daily and accrued monthly at the Interest Rate on the amount of any monies owing commencing on 1 July 2009 (clause 11); and
- a Loan Application Fee is payable by the borrower to the CBA, which comprises an up-front fee of 0.25% of the Loan amount, or \$250, whichever is greater (clause 15).

105. The terms specific to each optional loan offered by the CBA are contained in the Finance Application form attached to the PDS, and are summarised below.

Principal and Interest Terms

106. Loans will be available at both fixed and variable interest rates plus a margin. A minimum investment of \$35,000 is required for 10 and 12 year terms. Fixed interest rates will be available for loans of \$10,000 or more. The interest rates for fixed loans will be set for the period of the loan on 30 June in the financial year of investment.

Optional Interest Only Period, then a Principal and Interest Period

107. The interest only period or combined principal and interest period from the following ranges can be a **maximum of 12 years combined**:

- 36 months interest only term.
- 5 year term (first 36 months interest only).
- 7 year term (first 36 months interest only).
- 10 year term (first 36 months interest only and minimum investment of 7 Woodlots).
- 12 year term (first 36 months interest only and minimum investment of 7 Woodlots).

108. Stamp duty may also be payable by the borrower and this will be charged at a later date.

109. Growers cannot rely on this Product Ruling if they enter into a finance agreement with Willmott Finance or the CBA that materially differs from that set out in the Loan Application and Loan Agreements provided to the Tax Office by WFL with the application for this Product Ruling.

110. Growers cannot rely on any part of this Product Ruling if the Application Price of \$5,500 per Woodlot, including any part of the Application Price payable to WFL by a financier on behalf of a Grower under a Loan Agreement, is not paid in full by 30 June 2009.

111. This Ruling also does not apply if the finance arrangement entered into by a Grower with Willmott Finance, the CBA or any other lender includes or has any of the following features:

- split loan features of a type referred to in Taxation Ruling TR 98/22;
- 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 Willmott Finance and the CBA 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.*

Structure of the Project

112. In return for payment of the Establishment Services Fee and the other fees and expenses required under the Project Agreements during the term of the Project, Growers will hold a 'forestry interest' in a 'forestry managed investment scheme'. The Project qualifies as a 'forestry managed investment scheme' because its purpose is for 'establishing and tending Trees for felling in Australia' (see subsection 394-15(1)).

113. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Grower a right to a share in the proceeds of the Harvest or sale of the Trees grown on the Project Land. That share of proceeds is determined using the number of 'forestry interests' held by a Grower as a proportion of all 'forestry interests' held by all 'participants'⁸ in the Project.

Is the Grower carrying on a business?

113A. 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?

113B. 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).

113C. Application of these principles to the arrangement set out above leads to the conclusion that a Grower as (described in paragraphs 4 to 6 of this Ruling), who stays in the Project until its completion will be carrying on a business of primary production involving afforestation activities.

⁸ The term 'participant' is defined in subsection 394-15(4).

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

114. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a 'forestry managed investment scheme' that meet the requirements of subsection 394-10(1).

The '70% DFE rule'***Paragraph 394-10(1)(c) and section 394-35***

115. The threshold test for Growers in the Project to be entitled to deductions under subsection 394-10(1) is the '70% DFE rule' in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that, on 30 June 2009, the amount of 'direct forestry expenditure'⁹ under the scheme will be no less than 70% of the amount of payments under the scheme¹⁰.

116. The amount of all 'direct forestry expenditure' is the amount of the net present value of all 'direct forestry expenditure' that WFL, as 'forestry manager'¹¹ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

117. The 'amount of payments under the scheme' is the amount of the net present value of all amounts (that is the fees and expenses) that all current and future 'participants' in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

118. Both of the above amounts are determined as at 30 June 2009 taking into account:

- the timing requirements in subsections 394-35(4) and (5);
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6));
- the discount rate in subsection 394-35(7); and
- the market value rule in subsection 394-35(8).

119. Applying all of these requirements to the information provided by WFL, the Commissioner has determined that the Project will satisfy the '70% DFE rule' on 30 June 2009.

⁹ See section 394-45.

¹⁰ See subsection 394-35(1) and section 394-40.

¹¹ Defined in section 394-15(2).

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

120. The requirement of paragraph 394-10(1)(d) that Growers in the Project not have day to day control over the operation of the Project is clear from the Project Agreements, as are the alternative elements of paragraph (e) relating to the number of Growers in the scheme and WFL's role in other managed investment schemes.

121. The final requirement for deductibility requires that all the Project Trees are established within 18 months of 30 June 2009 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting timeline provided with the application for this Ruling by WFL indicates that all the Trees required to be established under the scheme will be planted on the Project Land by 31 December 2010.

122. Accordingly, subject to the qualifications set out below, amounts paid by Growers to WFL in relation to their 'forestry interests' satisfy all requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

123. Where a Grower does not fully pay an amount, or the amount is not fully paid on their behalf in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the 'forestry manager' on or before 30 June in an income year.

Loss of deductions previously allowed under subsection 394-10(1)

124. Two situations may lead to a loss of deductions previously allowed to Growers.

125. The first of these situations will occur if WFL fails to establish the Trees on the Project Land within 18 months of the end of the income year in which the first Grower is accepted into the Project. Where this occurs WFL is required to notify the Commissioner within 3 months of the end of the 18 month period (section 394-10 of Schedule 1 to the TAA).

126. The second situation where a Grower may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within 4 years from 30 June of the income year in which they first paid an amount under the scheme, for example, the Establishment Services Fee (see subsection 394-10(5)).

127. For the purposes of this provision, the Commissioner is able to amend the assessment of a Grower within 2 years of the relevant 'CGT event' happening. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6) of the ITAA 1997).

128. Where a 'CGT event' happens to the 'forestry interest' of a Grower within 4 years, the market value of the 'forestry interest' at the time of the 'CGT event' or the decrease in the market value of the 'forestry interest' as a result of the 'CGT event' is still included in the assessable income of the Grower by section 394-25. The amount must be included in assessable income even where an amendment has disallowed or may disallow the deductions previously allowed under section 394-10.

Interest on loans to finance the 'forestry interest' of a Grower

Section 8-1

129. Where a Grower borrows money to fund their investment in the Project the deductibility of the interest incurred on the loan monies falls for consideration under the general deduction provisions of section 8-1. If the interest incurred by the Grower is deductible under the first positive limb in subsection 8-1(1) there is no requirement to consider whether it is also deductible under the second positive limb of that provision. Court decisions show that the same basic test applies to both limbs (see *Ronpibon Tin NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47; (1949) 8 ATD 431, at CLR 56; ATD 435).

130. Under the first positive limb of subsection 8-1(1) the interest incurred by a Grower will be deductible if it is incurred in gaining or producing a Grower's assessable income and is not excluded by one of the negative limbs in subsection 8-1(2).

'The question of whether an outgoing [is] ... incurred in gaining or producing the assessable income is a question of characterisation' (*Fletcher & Ors v. Federal Commissioner of Taxation* (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613, at CLR 17; ATC 4957; ATR 621).

'To the extent that ... outgoings of interest ... can properly be characterised as of a kind referred to in the first limb of [section 8-1] they must draw their character from the use of the borrowed funds' (*Fletcher*, at CLR 19; ATC 4958; ATR 623).

'[T]he characterisation of interest will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put' (*Federal Commissioner of Taxation v. Roberts* (1992) 37 FCR 246; 92 ATC 4380; (1992) 23 ATR 494, at FCR 257; ATC 4388; ATR 504).

131. Growers in the Project use the borrowed funds to acquire a 'forestry interest' in a 'forestry managed investment scheme'. The holding of that 'forestry interest' will produce assessable income for a Grower in the form of the proceeds of a full or part disposal of the 'forestry interest', or as a proportionate share of the Harvest proceeds. The tests of deductibility of interest under the first limb of subsection 8-1(1) are, therefore, met unless one of the exclusions in subsection 8-1(2) applies.

132. For the purposes of this Project, only the capital exclusion in paragraph 8-1(2)(a) is relevant. The use of borrowed funds to purchase a capital asset, such as a 'forestry interest', does not mean that the interest outgoings are on capital account (see *Steele v. Federal Commissioner of Taxation* (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139, at CLR 470; ATC 4249; ATR 148).

'Interest [is a] periodic payment for the use, but not the permanent acquisition of a capital item. Therefore, a consideration of the often-cited three matters identified by Dixon J in *Sun Newspapers Ltd v. FC of T ...* assigns interest ... to revenue' (*Australian National Hotels Ltd v. Federal Commissioner of Taxation* (1988); 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575, at FCR 241; ATC 4633-4634; ATR 1582).

133. Therefore, the capital exclusion in subsection 8-1(2) does not apply to the interest and, subject only to the potential application of the prepayment provisions, a deduction for the interest can be claimed in the year in which it is incurred (Note: the meaning of 'incurred' is explained in Taxation Ruling TR 97/7).

134. The deductibility of interest incurred by Growers who finance their participation in the Project through a finance facility with a financial institution other than the CBA is outside the scope of this Ruling.

Prepayment provisions

Sections 82KZL to 82KZMF

135. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and 82KZMF of the ITAA 1936.

136. However, subsection 394-10(7) of the ITAA 1997 specifically provides that sections 82KZMD and 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible under section 394-10 of the ITAA 1997.

137. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a loan with the CBA will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 103 and 104 of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to Growers who enter into those loans.

138. 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 CBA). As stated above, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private binding ruling on the tax consequences of the prepaid interest.

Borrowing costs

Section 25-25

139. 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)).

140. In this Project, the Loan Application Fee of 0.25% of the borrowed amount, or \$250, whichever is greater, is payable to the CBA and is 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.

141. 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)).

142. Stamp duty may also be payable by the borrower and this will be charged at a later date. This is deductible as a borrowing expense under section 25-25.

Assessable income, 'CGT events' and the 'forestry interests' of Growers who are 'initial participants'

Sections 6-10, 10-5, and 394-25

143. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 and include amounts that are included in the assessable income of 'initial participants' of a 'forestry managed investment scheme' by subsection 394-25(2).

Subsection 394-25(2)

144. Where a 'CGT event' happens to a 'forestry interest' held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted an amount under section 394-10; or

- the Grower would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 33 to 35 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

Market value rule applies to 'CGT events'

145. If, as a result of the 'CGT event', the Grower either:

- no longer holds the 'forestry interest'; or
- where the Grower continues to hold the 'forestry interest', but there is a decrease in the market value of the 'forestry interest';

then the market value of the 'forestry interest' at the time of the event, or the reduction of the market value of the 'forestry interest' as a result of the event, is included in the assessable income of the Grower in the income year in which the 'CGT event' happens (subsection 394-25(2)). A market value rule applies rather than the amount of money actually received from the 'CGT event' (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

146. The market value amount included in the assessable income of a Grower is the value of the 'forestry interest' just before the 'CGT event', or where the Grower continues to hold their interest after the event, the amount by which the market value of the 'forestry interest' is reduced as a result of the 'CGT event' (subsection 394-25(2)).

147. Section 394-25 will apply where the 'forestry interest' is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the 'forestry interest' or from a full or partial Clear Fell or other Harvest of the Trees grown under the Project.

Section 6-5 – amounts received by Growers for Thinning the Project Trees and for Carbon Sequestration Rights

148. Section 394-25 specifically excludes from the operation of Division 394 a 'CGT event' that happens in respect of a Thinning (see paragraph 394-25(1)(c)).

149. Thinning amounts received by a Grower in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under Division 394. The receipt of an amount arising from a Thinning of the Project Trees is a distribution that arises as a result of the Grower holding a 'forestry interest' in the Project. It is an item of ordinary income and is assessable under section 6-5 in the year in which it is derived.

150. Amounts received by a Grower in respect of Carbon Sequestration Rights are also ordinary income and assessable under section 6-5.

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

150A. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2009 to 30 June 2023 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.

150B. 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.

150C. 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 out 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

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

Part IVA – general tax avoidance provisions

152. 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).

153. The 2009 Willmott Forests Premium Forestry Blend Project will be a 'scheme' and a Grower will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions for the amounts detailed at paragraphs 28 and 36 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.

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

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References

Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*TR 97/7; TR 98/22; TR 97/11;
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- 4 year holding period
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Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 170
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 318
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 8-1(1)
- ITAA 1997 8-1(1)(a)
- ITAA 1997 8-1(2)
- ITAA 1997 8-1(2)(a)
- ITAA 1997 8-5
- ITAA 1997 10-5
- ITAA 1997 12-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 25-25(4)
- ITAA 1997 Div 27
- ITAA 1997 Subdiv 27-A
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 394
- ITAA 1997 394-10
- ITAA 1997 394-10(1)
- ITAA 1997 394-10(1)(c)
- ITAA 1997 394-10(1)(d)
- ITAA 1997 394-10(1)(e)
- ITAA 1997 394-10(1)(f)
- ITAA 1997 394-10(2)
- ITAA 1997 394-10(4)
- ITAA 1997 394-10(5)
- ITAA 1997 394-10(6)
- ITAA 1997 394-10(7)
- ITAA 1997 394-15(1)
- ITAA 1997 394-15(2)
- ITAA 1997 394-15(4)
- ITAA 1997 394-15(3)
- ITAA 1997 394-15(5)
- ITAA 1997 394-20
- ITAA 1997 394-25
- ITAA 1997 394-25(1)(c)
- ITAA 1997 394-25(2)
- ITAA 1997 394-25(3)
- ITAA 1997 394-30
- ITAA 1997 394-35
- ITAA 1997 394-35(1)
- ITAA 1997 394-35(2)
- ITAA 1997 394-35(3)
- ITAA 1997 394-35(4)
- ITAA 1997 394-35(5)
- ITAA 1997 394-35(6)
- ITAA 1997 394-35(7)
- ITAA 1997 394-35(8)
- ITAA 1997 394-40
- ITAA 1997 394-45
- ITAA 1997 995-1
- TAA 1953 Sch 1 357-75(1)
- TAA 1953 Sch 1 394-10
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

- Australian National Hotels Ltd v. Commissioner of Taxation (1988) 19 FCR 234; 88 ATC 4627; (1988) 19 ATR 1575
 - Federal Commissioner of Taxation v. Roberts (1992) 37 FCR 246; 92 ATC 4380; (1992) 23 ATR 494
 - Fletcher & Ors v. Federal Commissioner of Taxation (1991) 173 CLR 1; 91 ATC 4950; (1991) 22 ATR 613
 - Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085
 - Ronpibon Tin NL v. Federal Commissioner of Taxation (1949) 78 CLR 47; (1949) 8 ATD 431
 - Steele v. Federal Commissioner of Taxation (1999) 197 CLR 459; 99 ATC 4242; (1999) 41 ATR 139
 - Sun Newspapers Ltd v. Federal Commissioner of Taxation (1938) 61 CLR 337; (1938) 5 ATD 87
-

ATO references

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