

PR 2010/4 - Income tax: Willmott Forests Premium Forestry Blend 2010 Project

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *3 March 2010*



Product Ruling

Income tax: Willmott Forests Premium Forestry Blend 2010 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

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

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

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

Terms of use of this Product Ruling

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

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 Willmott Forests Premium Forestry Blend 2010 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, terms defined in the Project agreements have been capitalised.

Class of entities

3. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

4. The 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 Investors.

5. Investors 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. An Investor will have executed the relevant Project Agreements set out in paragraph 39 of this Ruling on or before 30 June 2010 and will hold a 'forestry interest' in the Project.

7. The class of entities who can rely on this Product Ruling does **not** include:

- entities who are accepted into this Project before the date of this Ruling or after 30 June 2010;
- entities who participate in the scheme through offers made other than through the Willmott Forests Premium Blend 2010 Project Product Disclosure Statement or who enter into an undisclosed arrangement with:
 - the promoter or a promoter associate, or

- an independent adviser,
that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way;
- entities whose application fee, including all loan moneys, are not paid in full to Willmott Forests Limited (WFL) by 30 June 2010, either by the Investor and/or on the Investor's behalf by a lending institution; or
- entities who enter into finance agreements with Willmott Finance Pty Ltd (Willmott Finance) outside the terms specified in paragraphs 74 to 81 of this Ruling.

Superannuation Industry (Supervision) Act 1993

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

Qualifications

9. 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 39 to 81 of this Ruling.

10. 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

12. This Product Ruling applies prospectively from 3 March 2010, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme on or before 30 June 2010, 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 all income years up to the income year in which the scheme is terminated in accordance with the Project 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.

Changes in the law

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

15. 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

16. 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

17. All amounts and percentages referred to in this Product Ruling exclude the Goods and Services Tax (GST), unless otherwise specified. The transactions in respect of this scheme may, where appropriate, have GST implications. Those GST implications are outside the scope of this Product Ruling.

Ruling

Structure of the Project

18. The Willmott Premium Forestry Blend 2010 Project is a 'forestry managed investment scheme' as defined in subsection 394-15(1). Its purpose is the establishment and tending of trees for felling in Australia.

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for an 'initial participant'¹ in the defined class of entities (see paragraphs 3 to 7 of this Ruling) who is accepted to participate in the 'forestry managed investment scheme' described below at paragraphs 39 to 81 of this Ruling on or before 30 June 2010.

20. An entity that takes part in the Project as a 'subsequent participant'² 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

21. An Investor (as described in paragraphs 3 to 7 of this Ruling) in the Project is not considered to be carrying on a business of primary production.

The '70% DFE rule' and the establishment of the trees

22. 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 on 30 June 2010 it will be reasonable to expect that the '70% DFE rule'³ will be satisfied. 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'.

23. 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 accepted.⁴ For this Project the trees must be established no later than 31 December 2011.

¹ See subsection 394-15(5).

² See section 394-30.

³ The '70% DFE rule' is set out in section 394-35.

⁴ See subsection 394-10(4).

24. 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 stocking rates per hectare set out in the Product Disclosure Statement. WFL is required by section 394-10 of Schedule 1 of the TAA to notify the Tax Office if all of the trees are not established by 31 December 2011.

Allowable deductions

Sections 8-5, 394-10 and 394-20

25. An Investor in the Project can claim deductions for the amounts shown in the Table below that are paid to WFL (sections 8-5 and 394-10).

26. The deductibility of these amounts remains subject to a requirement that a CGT event⁵ does not happen in relation to the Investor's 'forestry interest' before 1 July 2014 (see paragraphs 30 to 32 of this Ruling).

27. The amount is deductible in the income year in which it is paid, or is paid on behalf of the Investor (subsection 394-10(2) and section 394-20). This requires cash to flow from the Investor, or from another entity on the Investor's behalf, to WFL's bank account in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into WFL's bank account will not qualify for a deduction under subsection 394-10(2).

28. Where an Investor 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.

29. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

| Fee | Amount per Forestry Interest | Deductible in income year ended |
|--------------------------------|---|---|
| Application Price | \$5,000 | 30 June 2010 |
| Forestry Management Fee | 10% of the Investor's proportionate share of the Gross Timber Proceeds, or insurance proceeds (see Note (i)). | Any income year in which this amount is paid. |

Notes

- (i) If WFL becomes insolvent during the Term of the Project the deferred Forestry Management Fee will become a fixed annual Forestry Management Fee of \$142.50. This amount, if payable, will be deductible in the income year in which it is paid.

⁵ Defined in section 995-1.

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

30. Deductions for the Application Price and for the Forestry Management Fee that have been allowed as deductions under section 394-10 in the first four years are not allowable where a 'CGT event' happens in relation to the 'forestry interest' of an Investor before 1 July 2014 (subsection 394-10(5)).

31. Where deductions for these amounts have already been claimed by an Investor the Commissioner may amend their assessment at any time within two years of the 'CGT event' happening (subsection 394-10(6) of the ITAA 1997). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

32. Investors 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'.

Deductions for interest and borrowing costs on loans to finance the 'forestry interest' of an Investor***Section 8-1 and 25-25***

33. An Investor may claim tax deductions for the fees and expenses set out in the following table.

| Fee Type | Deductible in income year ended |
|--|---|
| Interest payable to Willmott Finance | 30 June of the income year in which the interest is incurred See Note (ii) |
| Borrowing Costs payable to Willmott Finance | Not deductible in full when incurred. Note (iii) describes how the amount deductible in each year is calculated. Note (iv) applies to borrowing costs incurred with financiers other than Willmott Finance. |

Notes:

- (ii) Monthly payments of interest on principal and interest loans with Willmott Finance are deductible under section 8-1 in the year in which they are incurred. However, the deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Willmott Finance is outside the scope of this Ruling. Investors who borrow from lenders other than Willmott Finance or who choose to prepay their interest may request a private ruling on the deductibility of the interest incurred or may self assess the deductibility of the interest incurred.
- (iii) The following borrowing expenses, where incurred, are deductible under section 25-25:
- a Loan Application Fee of the higher of \$250 or 0.30% of the Principal Amount, payable to Willmott Finance;
 - For principal and interest loans with Willmott Finance of 3 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; and
 - For principal and interest loans of 5, 7, or 10 years with Willmott Finance the deduction for the borrowing expense is spread over 5 years on a straight line basis from the date the loan begins.
- (iv) The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Willmott Finance is outside the scope of this Ruling.

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

Sections 6-10 and 394-25

34. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁶ – see paragraph 37 of this Ruling) happens to a 'forestry interest' held by an Investor 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 Investor (sections 6-10 and 394-25) less any GST payable on those proceeds (section 17-5).

⁶ 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.

35. The relevant amount is included in the Investor's assessable income in the income year in which the 'CGT event' happens (subsection 394-25(2)).
36. '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 Investor; or
 - any other 'CGT event' that results in a reduction of the market value of the 'forestry interest held by the Investor.

Amounts received by Investors where the Project trees are thinned

Section 6-5

37. An amount received by an Investor 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 a result of an Investor holding a 'forestry interest' in the Project. Investors include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5).

Prepayment provisions, non commercial losses and anti-avoidance provisions

Division 35 of the ITAA 1997 and sections 82KZM, 82KZME, 82KZMF and 82KL and Part IVA of the ITAA 1936

38. Where an Investor is accepted to participate in the Project set out at paragraphs 39 to 81 of this Ruling, the following provisions of the ITAA 1936 or the ITAA 1997 have application as indicated:
- Interest paid by an Investor to Willmott Finance in accordance to the Loan Agreements to which this Ruling applies does not fall within the scope of sections 82KZM, 82KZME and 82KZMF of the ITAA 1936;
 - losses arising from participation in the Project are not within the scope of Division 35 of the ITAA 1997;
 - 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

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

- Application for a Product Ruling as constituted by documents and correspondence summarised below, received by the Tax Office on 20 November 2009;
- Amended documents and additional correspondence received on 2, 4, 8, and 23 December 2009, and 15, 21 and 28 January 2010; 2 February 2010; 16 February 2010; 17 February 2010;
- Draft Product Disclosure Statement for the Willmott Forests Premium Forestry Blend 2010 Project, issued by WFL, as the Responsible Entity, received 28 January 2010;
- Draft Investor **Application Forms** for the Willmott Forests Premium Forestry Blend 2010 Project, received 15 January 2010;
- **Amended Draft Constitution** for the Willmott Forests Premium Forestry Blend 2010 Project (the Constitution) received 23 December 2009; 17 February 2010;
- Draft Compliance Plan for the Willmott Forests Premium Forestry Blend 2010 Project, received on 20 November 2009;
- Draft Land Sourcing and Forestry Services Agreement between WFL (as Responsible Entity) and Willmott Forests Investment Management Pty Ltd (WFIM) (as Manager), received 23 December 2010;
- Independent Forestry Report for the Willmott Forests Premium Forestry Blend 2010 Project, received 20 November 2009;
- Head Lease between WFL (as Landlord) and WFIM (as Tenant), received 28 January 2010;
- Two sample third party head leases/licences, received 28 January 2010;
- Sub-Lease Agreement between WFIM (as Landlord) and WFL (as Tenant and Responsible Entity), received 20 November 2009;
- Draft Forestry Right Agreement between WFIM (as Grantor) and WFL (as Grantee and Responsible Entity), received 20 November 2009; and
- **Draft Loan Agreements** for principal and interest loans and 12 month interest free loans, between Willmott Finance and borrowing Investors, received 20 November 2009.

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

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

41. The documents highlighted are those that an Investor 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 an Investor, or any associate of an Investor, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

Overview

42. The main features of the Willmott Forests Premium Forestry Blend 2010 Project are as follows:

| | |
|---|--|
| Locations | New South Wales and Victoria including Central Tablelands, Murray Valley, Bombala, Central Gippsland, Ballarat-Otway, the Green Triangle and Northern Rivers regions Douglas Daly/Katherine region of the Northern Territory Southern Queensland and other areas that meet the land selection criteria |
| Species of trees to be planted under the scheme | Radiata Pine, African Mahogany, and Silky Oak |
| Term of the Project | Approximately 16 years from 30 June 2010. |
| Date all trees must be planted on scheme land | 31 December 2011. |
| Number of trees per hectare (depending on site characteristics) | Radiata Pine between 1,100 and 1,500. African Mahogany between 1250 and 1,600. Silky Oak between 1,000 and 1600. |
| Number of hectares offered for establishment | Approximately 7980 hectares (equivalent to 14,000 Forestry Interests). |
| Size of each 'forestry interest' | Equivalent to 0.57 hectares |
| Minimum allocation of 'forestry interests' per Investor | One Forestry Interest. |
| Minimum subscription | None |

| | |
|---------------|--|
| Initial cost | \$5,000 per Forestry Interest. |
| Ongoing costs | Forestry Management Fee of 10% of Gross Timber Proceeds. |
| Other costs | Annual insurance premiums and annual insurance administration fee (payable from the end of the Stocking Guarantee Period). |

43. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. WFL has been issued with Australian Financial Service Licence No. 233215 and will be the Responsible Entity for the Project.

44. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The Project will establish and manage long term commercial plantations of timber for the purpose of harvesting and sale, and for the sale of standing timber.

45. The Project is a blend of three plantation forestry species as follows:

- Radiata Pine 75%;
- African Mahogany 20%; and
- Silky Oak 5%.

46. The offer under the PDS is for approximately 7,980 hectares in total, which corresponds to approximately 14,000 'forestry interests' in the Project. WFL, as Responsible Entity, will engage WFIM, a wholly owned subsidiary, to manage the operational and technical aspects of the Project using WFL staff and experienced contractors to provide all forestry services to the Project.

47. An entity that participates in the Project as an Investor in the Willmott Forests Premium Forestry Blend 2010 Project will do so by acquiring a Forestry Interest in the Project during the period on or before 30 June 2010. There is no minimum amount that must be raised under the PDS

48. To participate in the Project Applicants must complete an Application Form attached to the PDS and pay the Application Price of \$5,000 per Forestry Interest in full by 30 June 2010. If applying for finance for the Application Price the Borrower must enter into a Loan Agreement with Willmott Finance which will pay the borrowed funds to WFL on their behalf by 30 June 2010.

49. By signing the Application Form, the Applicant has agreed to be bound by the terms of the Constitution.

50. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who acquire a Forestry Interest after the date of issue of this Ruling and on or before 30 June 2010 will become Investors in the Project.

51. Based on the criteria outlined in the Independent Forester's Report WFL will identify suitable land to be used for the Project. The Land to be used for the Project will include:

- land that WFL already owns or leases; and
- land that WFL is currently negotiating to purchase or lease.

52. Each Investor will acquire at least one Forestry Interest. A Forestry Interest, which is equivalent to 0.57 hectares, gives an Investor a share in the beneficial interest in the Project Property, including a beneficial interest in the Trees and any income derived from the harvesting and sale of the Trees. Each Investor will be entitled to a pro rata share of the Gross Timber Proceeds received from thinning, harvesting, or sale of the Trees at various times during the Term of the Project.

53. The Trees will be thinned/harvested as follows:

- the Radiata Pine will be thinned at approximately age 13 and sold as standing timber at approximately age 15;
- the African Mahogany will be thinned at approximately age 8 and 12 and harvested at approximately age 16; and
- the Silky Oak will be thinned at approximately age 10 and harvested at approximately age 15.

54. Following the expiry of the Stocking Guarantee Period for each species of Trees, WFL will use reasonable endeavours to obtain and maintain an insurance policy over the Trees covering, at minimum, fire until completion of the final harvesting and sale of the Trees (other than those sold as standing timber) and other insurable events as available and commercially viable. Investors must pay their insurance premiums annually as well as an annual insurance administration fee.

55. Investors will receive an Annual Investors Report (following completion of the initial planting of the Trees) and an Annual Project Financial Report during the Term of the Project.

56. The Project will be terminated after the final harvest of the Silky Oak and the African Mahogany trees and the sale of the standing Radiata Pine trees at approximately year 16 of the Project.

Constitution

57. The Constitution establishes the Project and operates as a deed binding all Investors and WFL. The Constitution governs the Project and sets out the general functions, powers and duties under which WFL agrees to act as Responsible Entity and act for the Investors. Upon acceptance into the Project, Investors are bound by the Constitution by virtue of their participation in the Project.

58. Forestry Interests are taken to be issued when WFL accepts the application (clause 6.5(a)).

59. The beneficial interest in the Project Property is divided into Forestry Interests. Each Forestry Interest confers an equal interest in the Project Property. WFL may attach any terms and conditions to the issue of the Forestry Interests and entitlements to the Forestry Interests themselves as long as the terms and conditions are consistent with the Constitution and the Corporations Act (clause 4.1).

60. On or before the date of issue of the first Forestry Interest WFL will enter into the Land Sourcing and Forestry Services Agreement with WFIM, as Manager (clause 12.1(a)).

61. WFL, as Responsible Entity of the Project, will use reasonable endeavours to secure sufficient land on which to plant the number of Trees of the relevant species as specified in the PDS (clause 12.1(b)). WFL must procure the Forestry Rights in respect of the land as soon as practicable (clause 12.1(c)).

62. WFL provides a Stocking Guarantee for a period of 13 months (called the Guarantee Period) from the initial planting of the Trees. If more than 10% of the Trees of a species are Materially Damaged during the period, WFL will remove those Trees and plant new seedlings. (clause 12.1(f))

63. WFL will provide a guaranteed sale facility in regard to sales of Radiata Pine Trees. The facility is designed to ensure that the sale of the pine plantations is at a price that is close to their assessed market value. If the sale of the standing Radiata pine plantation cannot achieve a price of at least equal to 90% of the independently assessed or verified market value of that time, WFL will either:

- 'top-up' the sale proceeds from a third party sale, from its own resources, until it equals 90% of the assessed value of the timber; or
- it will purchase the standing timber for at least 90% of the assessed value of the timber (clause 13 and clause 8.1 of the PDS).

64. In accordance with prudent plantation management principles WFL must carry out or procure the carrying out of the services described in Schedule 2 until such time as all of the Trees have been either harvested and sold or sold as standing timber (clause 12.1(e)). Schedule 2 sets out services relating to:

- Preparation and planting;
- Maintenance;
- Harvesting and marketing; and
- General maintenance.

65. Among other things the Constitution also includes provisions relating to:

- Project Property (clause 3);
- the Forestry Interests, including the nature of a Forestry Interest in the Project (clause 4);
- the application procedure (clause 6);
- withdrawal rights (clause 7);
- Forestry Income, being the Gross Timber Proceeds received in that Financial Year, and distributions to Investors (clause 9);
- payments to Investors (clause 10);
- the rights and the liabilities of the Responsible Entity (clauses 18 and 19 respectively);
- the liability and restrictions on Investors (clause 20);
- the procedure on termination (clause 23); and
- the handling of complaints (clause 26).

Compliance Plan

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

Land Sourcing and Forestry Services Agreement

67. WFL, as Responsible Entity, will enter into a Land Sourcing and Forestry Services Agreement with WFIM (the Manager). As set out in Schedule 1 to the Agreement the Manager will procure land for the Project and provide Forestry Services.

68. The Manager will enter into head leases with WFL (as Landlord) in relation to land owned by WFL and head leases or licences with third parties in relation to land owned or licensed by those third parties. The Manager will then sub-lease or licence the procured land to WFL (as Responsible Entity).

69. The rental or licence fees under the head leases or licences between the Manager and third parties include a prepayment on commencement for the life of the leases or licences to eliminate the risk that these agreements may be terminated due to non-payment of rent or licence fees.

70. WFL (as Responsible Entity) will pay rent to the Manager on a deferred basis, equal to 2% of the Gross Timber Proceeds payable from the Project Property following receipt by the Responsible Entity.

71. The Forestry Services to be provided by the Manager during the Term of the Project will be the preparation and planting services, maintenance, any replanting required during the Stocking Guarantee Period, harvesting and marketing services, general management and, if requested by WFL, insurance services.

Forestry Right Agreement

72. WFIM, will also enter into a Forestry Right Agreement with Landowners where necessary and seek to register the Forestry Rights with the relevant state land titles offices. The Forestry Rights will provide security against the possibility of adverse or competing claims.

Fees and Costs

73. The fees payable by an Investor in the Project are set out in clauses 5, 21 and 22 of the Project Constitution. They are:

- \$5,000 payable as the Application Price for each Forestry Interest (clause 5);
- a Forestry Management Fee equal to 10% of the Gross Timber Proceeds, payable from the Project Property, following receipt of these proceeds by the Responsible Entity (clause 22.1). Amounts payable under clause 22.1 are reduced by any amounts payable under clause 22.2 (see next dot point);
- a fixed annual Forestry Management Fee of \$142.50 will be payable to any replacement Responsible Entity in the event that WFL becomes insolvent during the term of the Project (clause 22.2); and
- the Investor's share of any plantation insurance, plus an administration fee equal to the lesser of 10% of the annual premium or \$100 per Forestry Interest, payable by the Investor for each species commencing from the end of the Stocking Guarantee period (clause 21.3).

Finance

74. To finance the Application Price of their Forestry Interest an Investor can enter into a finance arrangement with Willmott Finance, a wholly owned subsidiary of WFL or, alternatively, borrow from an independent lender external to the Project.

75. Only the finance arrangements set out below are covered by this Product Ruling. An Investor cannot rely on this Product Ruling if they enter into any finance arrangement with Willmott Finance that materially differs from that set out in the documentation provided with the application for this Product Ruling. An Investor who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

76. An Investor cannot rely on any part of this Ruling if the Application Price of \$5,000 per Forestry Interest is not paid in full on or before 30 June 2010 by the Investor or, on the Investor's behalf, by another entity, including Willmott Finance or any other finance provider. Payment in this context is explained in paragraph 27 of this Ruling.

Finance offered by Willmott Finance

77. Subject to WFL accepting an Investor's Application to participate in the Project, the Investor will be bound by the terms and conditions of the relevant Loan Agreement with Willmott Finance and by the Constitution of the Project.

78. Two finance options will be offered by Willmott Finance to Investors to finance the Application Price of their Forest Interest(s) in the Project. The finance options are:

- a 12 month interest free loan under a 12 Month Interest Free Loan Agreement; or
- a principal and interest loan with a term of either 3, 5, 7 or 10 years under a Principal and Interest Loan Agreement.

Interest free loans

79. The 12 month interest free loan includes the following terms and conditions:

- the loan must be for 100% of the Application Price of the Investor's Forestry Interest(s);
- the loan will be full recourse;
- Willmott Finance will hold as security for the loan the borrower's Forestry Interest(s) and any other interests under the Constitution;
- interest free repayments of 12 equal monthly instalments will commence on 31 July 2010 and end on 30 June 2011;
- a penalty interest rate of 15% will apply to late payment of instalments; and
- a Loan Application Fee will not apply.

Principal and interest loans

80. The principal and interest loans include the following terms and conditions:

- the loan must be for 100% of the Application Price of the Investor's Forestry Interest(s), plus the Loan Application Fee;
- the loan will be full recourse;
- Willmott Finance will hold as security for the loan the borrower's Forestry Interest(s) and any other interests under the Constitution;
- interest will be calculated daily and accrued monthly at the Daily Interest Rate on the outstanding balance of the unpaid Principal Amount;
- in addition to the Daily Interest Rate a penalty interest rate of 5% will apply to late payment of instalments;
- loan repayments will consist of equal monthly instalments of principal and interest, commencing on 31 July 2010, during the term of the loan;
- a Loan Application Fee will apply, being the higher of \$250 or 0.30% of the Principal Amount; and
- Borrowers may make early repayments of Moneys Owing without penalty provided that the repayment instalment is equal to or greater than 20% of the Principal Amount at commencement of the loan.

Other qualifications relating to finance

81. This Ruling does not apply if the finance arrangement entered into by the Investor 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 Willmott Finance, are involved or become involved in the provision of finance to Investors for the Project.

Commissioner of Taxation3 March 2010

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

82. In return for payment of the Application Price and the other fees and expenses required under the Constitution during the term of the Project, Investors 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)).

83. Under the Constitution of the Project and the other supporting agreements, the holding of a 'forestry interest' in the Project gives each Investor a right to a share in the proceeds of the harvests, the sale of standing trees, and share of the proceeds of any thinning of the trees grown on the Project Land. That share of proceeds is determined using the number of 'forestry interests' held by an Investor as a proportion of all 'forestry interests' held by 'participants'⁷ in the Project.

Is the Investor carrying on a business?

84. 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?

85. 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 'Investors' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

86. Application of these principles to the arrangement set out above leads to the conclusion that an Investor in the Project (as described in paragraphs 3 to 7 of this Ruling), is not considered to be carrying on a business of primary production involving afforestation activities.

⁷ The term 'participant' is defined in subsection 394-15(4).

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

87. 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***

88. The threshold test for Investors 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 2010, the amount of 'direct forestry expenditure'⁸ under the scheme will be no less than 70% of the amount of payments under the scheme.⁹

89. 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'¹⁰ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

90. 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)).

91. Both of the above amounts are determined as at 30 June 2010 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).

92. 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 2010.

⁸ See section 394-45.

⁹ See subsection 394-35(1) and section 394-40.

¹⁰ Defined in section 394-15(2).

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

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

94. The final requirement for deductibility requires all the Project Trees to be established within 18 months of 30 June 2010 (see paragraph 394-10(1)(f) and subsection 394-10(4)). In the PDS for the Project WFL has stated that all Trees required to be established under the scheme will be planted on the Project land no later than 31 December 2011.

95. Accordingly, subject to the qualifications set out below, amounts paid by Investors to WFL in relation 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)).

96. Where an Investor 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 section 394-10(1)

97. Two situations may lead to a loss of deductions previously allowed to Investors.

98. The first of these situations will occur if WFL fails to establish the Trees on the Project land within 18 months. 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).

99. The second situation where an Investor may have deductions disallowed is where a 'CGT event' happens to their 'forestry interest' within 4 years from 30 June of the income year they paid an amount under the scheme, for example, the Application Price (see subsection 394-10(5)).

100. For the purposes of this provision, the Commissioner is able to amend the assessment of an Investor 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).

101. Where a 'CGT event' happens to the 'forestry interest' of an Investor 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 Investor 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 an Investor

Section 8-1

102. Where an Investor borrows the Application Price of their Forestry Interest(s) from Willmott Finance 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 Investor are 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).

103. Under the first positive limb of subsection 8-1(1) the interest incurred by an Investor will be deductible if it is incurred in gaining or producing an Investor'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).

104. Investors 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 an Investor in the form of the proceeds of a full or part disposal of the 'forestry interest' or, as a proportionate share of the harvest and thinning 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.

105. 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 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).

106. 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 incurred. (Note: the meaning of 'incurred' is explained in Taxation Ruling TR 97/7.)

Prepayment provisions

Sections 82KZL to 82KZMF

107. 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 section 82KZMF of the ITAA 1936.

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

Application of the prepayment provisions to this Project

Sections 82KZME and 82KZMF

109. Accordingly, under the scheme to which this Product Ruling applies, only deductions for interest payable under a principal and interest loan with Willmott Finance will potentially fall within the prepayment provisions. However, the conditions applying to the loans to which this Ruling applies (see paragraphs 74 to 80 of this Ruling) do not require any prepayment of interest over the term of the loan. Accordingly, the prepayment provisions have no application to an Investor who enters into those loans.

110. If an Investor chooses to prepay interest on these loans that Investor may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

Borrowing costs**Section 25-25**

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

112. In this Project the Loan Application Fee of \$250 or 0.30% of the Principal Amount payable to Willmott Finance 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.

113. 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)).

Assessable income, 'CGT events' and the 'forestry interests' of Investors who are 'initial participants'**Sections 6-10, 10-5 and 394-25**

114. 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)

115. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)¹¹ happens to a 'forestry interest' held by an Investor in this Project, subsection 394-25(2) includes an amount in the assessable income of the Investor if:

- the Investor can deduct or has deducted an amount under section 394-10; or
- the Investor would have met the condition immediately above if subsection 394-10(5) had not applied to disallow the deduction(s). Paragraphs 30 to 32 and paragraphs 97 to 101 of this Ruling explain when deductions will be disallowed under subsection 394-10(5).

¹¹ A thinning under this scheme is not a 'CGT event'.

Market value rule applies to ‘CGT events’

116. If, as a result of the ‘CGT event’ the Investor either:

- no longer holds the ‘forestry interest’; or
- otherwise – where the Investor 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 Investor 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.

117. The market value amount included in the assessable income of an Investor is the value of the ‘forestry interest’ just before the ‘CGT event’, or where the Investor 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)).

118. 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 harvest of the trees grown under the Project.

Amounts received by Investors where the Project Trees are thinned

Section 6-5

119. 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)).

120. Thinning amounts received by an Investor 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 an incident of the Investor 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.

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

121. Division 35 has no application to losses arising from the Investor’s participation in the Project, as an Investor who is an ‘initial participant’ in the Project is not carrying on a business activity (see paragraphs 21 and 84 to 86 of this Ruling).

Section 82KL – recouped expenditure

122. 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 of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-5 of the ITAA 1997.

Part IVA – general tax avoidance provisions

123. 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).

124. The Willmott Forests Premium Forestry Blend 2010 Project will be a ‘scheme’ and an Investor will obtain a ‘tax benefit’ from entering into the ‘scheme’, in the form of tax deductions for the amounts detailed at paragraphs 29 and 33 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.

125. Investors 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 Investors 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 Investors will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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

Subject references:

- 4 year holding period
- 70 per cent DFE rule
- carrying on a business
- DFE
- direct forestry expenditure
- forestry interest
- forestry MIS
- interest expenses
- managed investment schemes
- market value substitution rule
- non commercial losses
- payments under the scheme
- producing assessable income
- product rulings
- reasonable expectation
- tax avoidance
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Legislative references:

- ITAA 1936
- 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
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- ITAA 1936 82KZME
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- ITAA 1936 Pt IVA
- ITAA 1936 170
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