



# ***PR 2006/101 - Income tax: NTT Mahogany Project No. 2 - 2007 Growers (finance options)***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *31 May 2006*



## Product Ruling

### Income tax: NTT Mahogany Project No. 2 – 2007 Growers (finance options)

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>13</b>
<b>Withdrawal</b>	<b>17</b>
<b>Scheme</b>	<b>18</b>
<b>Ruling</b>	<b>59</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<i>Explanation</i>	71
<b>Appendix 2:</b>	
<i>Detailed contents list</i>	116

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

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

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

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

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

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

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. 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. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme include in their income tax returns income derived in those future years.

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

This Product Ruling has been given on the basis that the entity(s) who applied for the 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 Ruling.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling, this scheme is referred to as the NTT Mahogany Project No. 2 or simply as 'the Project'.

### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 8-1 of the ITAA 1997;
  - section 17-5 of the ITAA 1997;
  - section 25-25 of the ITAA 1997;
  - Division 27 of the ITAA 1997;
  - Division 35 of the ITAA 1997;
  - Subdivision 61-J of the ITAA 1997;
  - Division 328 of the ITAA 1997;
  - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
  - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 82KZL of the ITAA 1936;
  - sections 82KZME to 82KZMG of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

### Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include Goods and Services Tax ('GST') where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

**Changes in the Law**

4. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.
5. Entities who are considering participating in the Project 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 advisors**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects 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 Ruling is issued.

**Class of entities**

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling (refer to paragraph 59) and who enter into the scheme described below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.
8. The class of entities to whom this Ruling applies only includes entities who:
- enter into the Scheme described below during the period from 1 July 2006 to 30 June 2007; and
  - enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Limited.
9. The class of entities to whom this Ruling applies does not include entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it. Growers who elect to market and sell their own timber produce are also excluded from the class of entities to whom this Ruling applies.

**Qualifications**

10. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 18 to 58.

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

- this 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 Ruling may be withdrawn or modified.

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## Date of effect

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13. This Ruling applies prospectively from 31 May 2006, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- 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).

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## Withdrawal

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17. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the specified scheme during the term of the Ruling. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

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## Scheme

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

- Application for Product Ruling dated 20 April 2006, received 20 April 2006;
- Additional correspondence including emails, received 28 April 2006 and 1 May 2006;
- Product Disclosure Statement (PDS) for the NTT Mahogany Project No. 2, received 22 March 2006;
- **Constitution** for the NTT Mahogany Project No. 2, received 22 March 2006;
- Rules for the NTT Mahogany Project No. 2 by Primary Securities Ltd, received 20 December 2005;
- **Project Operations Agreement** between Primary Securities Ltd and the Grower, received 20 December 2005;
- Planting Agreement for the NTT Mahogany Project No. 2 between Primary Securities Ltd and Northern Tropical Timbers Pty Ltd ('Planting Co'), received 27 February 2006;
- Compliance Plan for the NTT Mahogany Project No. 2, dated 28 January 2003, received 20 December 2005;
- Draft Maintenance Agreement for the NTT Mahogany Project No. 2 between Primary Securities Ltd and NTT Forestry Pty Ltd ('Land Co'), received 20 December 2005;
- Draft Processing and Marketing Agreement for the NTT Mahogany Project No. 2 between Primary Securities Ltd and NTT Timber Products Pty Ltd ('Timber Co'), received 20 December 2005;

- Draft Option to Purchase between NTT Land Holdings Pty Ltd (as the Land Owner) and NTT Forestry Pty Ltd, received 20 December 2005;
- Draft Head Lease between NTT Land Holdings Pty Ltd and NTT Forestry Pty Ltd, received 20 December 2005;
- Lease to Primary Securities Ltd for the NTT Mahogany Project No. 2 between NTT Forestry Pty Ltd and Primary Securities Ltd, received 20 December 2005;
- **Woodlot Licence** for the NTT Mahogany Project No. 2 between Primary Securities Ltd and the Grower, received 27 February 2006;
- **Grower's Agreement to License** for the NTT Mahogany Project No. 2 No 2 between Primary Securities Ltd and the Grower, received 20 December 2005;
- Performance Guarantee & Indemnity for the NTT Mahogany Project No. 2 by NTT Land Holdings Pty Ltd in favour of Primary Securities Ltd, received 20 December 2005;
- Responsible Entity Services Agreement for the NTT Mahogany Project No. 2 between Primary Securities Ltd and Northern Tropical Timbers Pty Ltd, NTT Forestry Pty Ltd and NTT Timber Products Pty Ltd, received 20 December 2005; and
- Draft **Loan Agreements** and loan documents including Application Forms received 20 April 2006 and 1 May 2006.

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

19. The documents **highlighted** are those that Growers may enter into in addition to the application form in the Product Disclosure Statement. 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 to which this Ruling applies.

20. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

**Overview**

21. This scheme is called the NTT Mahogany Project No. 2. The salient features are as follows:

Location	M'Oganwo Station in the Douglas Daly region in the Northern Savanna area of the Northern Territory, 160km south of Darwin.
Type of business each participant is carrying on	Commercial growing and cultivation of <i>Khaya senegalensis</i> (African Mahogany) for the purpose of harvesting, milling and selling timber.
Number of hectares offered for cultivation	1,000 or more if oversubscriptions are accepted
Minimum subscription	100 Woodlots
Minimum allocation	2 Woodlots
Size of each Woodlot	0.25 hectares
Number of trees established	No less than 568 trees planted per hectare
The term of the Project	Approximately 16 years
Initial cost per woodlot	\$6,900
Minimum allocation cost	\$13,800
Other costs per woodlot	Licence Fee of 5% of net harvest proceeds Maintenance Fee of 5% of net harvest proceeds Marketing Fee of 5% of net harvest proceeds Costs of harvest and sale payable out of harvest proceeds Potential Incentive Fee Potential Fee of Last Resort

22. The Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. The Responsible Entity for the Project is Primary Securities Ltd. Primary Securities has been issued with Financial Services Licence Number 244107 by ASIC.

23. The Project will be conducted on land located in the Douglas Daly region of the Northern Territory on a property known as 'M'Oganwo Station' and on further land that will be acquired in the Douglas Daly region of the Northern Territory. M'Oganwo Station' is more particularly described as the land on NT Portion 6069 from plan(s) S2000/223A and being the whole of the land comprised in Certificate of Title Volume 689 Folio 208.

24. This Project pertains to 4,000 Woodlots of 0.25 hectares each offered under a Product Disclosure Statement ('PDS'). The minimum allocation per participant is two Woodlots totalling 0.5 hectares in size. There is a minimum subscription of 100 Woodlots for this Project. Growers must subscribe for a minimum of two Woodlots.

25. Growers participating in the scheme will enter into a Woodlot Licence. Under the Woodlot Licence, Growers license an area of land called a 'Woodlot' for a term of approximately 16 years for the purpose of Tree Farming. Each Woodlot will be planted with Mahogany seedlings at the rate of no less than 568 trees per hectare. In the event that there are oversubscriptions and no suitable land available, Growers will first enter into the Growers Agreement to License pending suitable land being selected upon which they will then enter into the Woodlot Licence.

26. The Growers will also enter into a Project Operations Agreement with the Responsible Entity for the management of their Woodlots. The Responsible Entity sub-contracts Northern Tropical Timbers Pty Ltd (the Planting Co) and NTT Forestry Pty Ltd (the Land Co) to provide the Planting Services and the Maintenance Services. The Planting Co will be responsible for planting the Trees and the Land Co for cultivating the Trees. Growers may elect to market and sell their own timber by notice in writing to the Responsible Entity by 30 June 2009. **This Ruling does not apply to Growers who make such an election.** Alternatively, the Responsible Entity will harvest, market and sell the timber on their behalf. A non-commercial thinning of 284 Trees per hectare will be undertaken prior to year 6. Harvests are expected to take place in year 11 and year 16.

27. The Responsible Entity will only accept applications made by Growers where Subscription Monies are paid in full except where a lender has provided written evidence of approval to lend any balance unpaid.

28. The Woodlot Licence and Project Operations Agreement come into effect on acceptance of a Grower's Application by the Responsible Entity.

29. Under this offer, Growers may enter the Project in either the 2006 income year or the 2007 income year.

30. **This Ruling only applies to Growers who are allotted Woodlots during the period from 1 July 2006 to 30 June 2007 and fund their participation in the Project using finance provided by Momentum Investment Finance Pty Limited or United Pacific Finance Limited.** Product Ruling PR 2006/35 may apply to Growers who are allotted Woodlots during the 2007 income year and do not enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Limited.

31. Note that PR 2006/100 may apply to Growers who are allotted Woodlots during the 2006 income year and fund their participation in the Project using finance provided by Momentum Investment Finance Pty Limited or United Pacific Finance Limited. Product Ruling PR 2006/34 may apply to Growers who are allotted Woodlots during the 2006 income year and do not enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Limited.

### **Constitution**

32. The Constitution establishes the Project and operates as a deed binding on all of the Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which Primary Securities Ltd agrees to act as Responsible Entity and thereby operates the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

### **Compliance Plan**

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

### **Woodlot Licence (or Grower's Agreement to License)**

34. Primary Securities Ltd procures the land from the Land Co via a Lease. Growers participating in the scheme will then enter into a Woodlot Licence with Primary Securities Ltd in its capacity as Responsible Entity. Growers are granted a Woodlot Licence to use their Woodlots for the purpose of conducting their afforestation business upon the terms and conditions as set out in the Woodlot Licence. The Woodlot Licence will commence on the date Woodlots are allotted to Growers and will continue for 12 years, the maximum allowed under Northern Territory law. After this date, the Woodlot Licence will be renewed until the completion of the final harvest approximately four years later. In the event that there are oversubscriptions and no suitable land available, Growers will enter into the Grower's Agreement to License pending suitable land being selected upon which they will enter into the Woodlot Licence. This Product Ruling will not apply to any Grower who does not enter into a Woodlot Licence within 9 months of the first 2007 Growers entering into a Grower's Agreement to License.

35. Each Grower must pay a Licence Fee to the Responsible Entity from net harvest proceeds.

## **Project Operations Agreement**

36. The Project Operations Agreement is between the Grower and Primary Securities Ltd as the Responsible Entity. Each Grower agrees to engage the Responsible Entity of the Project to perform services under the Agreement. The services include Planting Services, Maintenance Services and harvesting, processing, milling and sale of the Timber from the Trees.

37. The Planting Services include all services to be performed under the Project Operations Agreement relevant to the main planting and establishment of the Trees on the Woodlots. These include:

- preparation and grading of the Woodlots for the planting of Trees;
- selecting and purchasing high yielding plant stock;
- applying fertiliser or herbicide to the seedlings prior to and during planting; and
- planting the seedlings.

38. The Planting Services will be conducted after the Grower has been granted a Woodlot Licence and will be completed within 12 months of the Grower's application being accepted. The Responsible Entity will subcontract the performance of these services to the Planting Co under the terms of the Planting Agreement.

39. The Responsible Entity will subcontract the performance of the Maintenance Services to the Land Co under the terms of the Maintenance Agreement. These services include (among other things):

- planting additional Trees if at 13 months from the completion of planting, the average number of trees per Woodlot is less than 142;
- tending to the Trees according to the principles of good forestry; including such nutrient analysis, pruning, fertilising and fumigating, as the Land Co deems appropriate to promote Tree growth and yields;
- maintaining and repairing roads, fences and gates and all other improvements on the Land and keeping the Woodlots in good and substantial repair and condition;
- managing the Tree crop in accordance with the Planting Plan; and
- keeping the Woodlots and Land free of disease and pests.

**Planting**

40. Under the Project Operations Agreement the Grower agrees to engage the Responsible Entity to select and purchase plant-stock to enable the cultivation of trees. Within 12 months of Allotment of the Woodlots to the Grower, the Planting Co will plant sufficient Trees to an average of 142 trees per Woodlot. The Land Co will conduct a survival count within 13 months of planting the Trees and replant as necessary.

**Maintenance Agreement**

41. The Maintenance Agreement is between Primary Securities Ltd as the Responsible Entity and the Land Co. This Agreement appoints the Land Co to perform the maintenance obligations of the Responsible Entity under the Project Operations Agreement.

**Harvesting and marketing**

42. The Grower has an interest in the Trees to be planted on the Woodlot and a right to the Timber from those Trees. Harvesting will take place as and when deemed appropriate by the Responsible Entity and NTT Timber Products Pty Ltd (the Timber Co) in producing the best overall result for the Grower. The Manager expects to conduct non-commercial thinning of 50% of the Trees in year 6 and a harvest of 25% in year 11. The remaining Trees will be harvested in the final year of the Project.

43. The proceeds from sale of the Grower's Timber will be paid directly to the Responsible Entity which must then be deposited into a Trust Account. Proceeds received by the Responsible Entity are to be distributed in the following order of priority:

- to pay the Adjusted Prescribed Proportion of the costs of sale (unless the Grower has made an election to sell their Timber under the Projects Operations Agreement);
- to pay to the Responsible Entity any outstanding Project Fees or other fees (including the marketing fee), costs, interest or taxes owing by the Grower to the Responsible Entity under the Constitution;
- to pay to the Responsible Entity a reasonable estimate of the following 12 months estimated project fees that may be required;
- to pay the Responsible Entity any amounts due under the Project Operations Agreement;
- to pay any amounts due to the Responsible Entity under the Woodlot Licence; and

- distribute the balance to the Grower provided that if the aggregate sum to be distributed to all of the Growers is less than \$1,000, then, at the discretion of the Responsible Entity, distribution may be postponed (clause 12 of the Constitution).

## **Fees**

44. The fees payable under the Project Operations Agreement on a per Woodlot basis are an Application Fee of \$6,900 payable on application for the Planting Services.

## **Other fees**

45. Growers are required to pay the following fees out of Net Harvest Proceeds on a per Woodlot basis:

- Licence Fee of 5% of Net Harvest Proceeds;
- Maintenance Fee of 5% of Net Harvest Proceeds; and
- Marketing Fee of 5% of Net Harvest Proceeds.

46. The Responsible Entity may make a call for the 'Last Resort Management Fee'. This fee is payable when required. The amount of Maintenance fees taken out of Net Harvest Proceeds will be reduced by any Last Resort Management Fee paid.

47. The Grower is also required to pay an Incentive Fee to the Responsible Entity if the Net Harvest Return per Woodlot exceeds \$45,000.

## **Payment of fees**

48. Upon signing an Application Form, the Grower acknowledges that the full amount of the Subscription Money is immediately due and payable on allotment. All amounts are expressed on a per Woodlot basis.

## **Finance**

49. All Growers to whom this Ruling applies, will fund their participation in this Project through finance arrangements with preferred lenders Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited.

50. Growers can apply to borrow the Application Fee of \$6,900 per Woodlot from Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited, by completing the relevant Finance Application Form. A loan application fee of \$250 plus 0.5% of the amount of the loan is payable on application. This fee may be added to the loan.

51. Momentum Investment Finance Pty Limited will lend on a full-recourse commercial basis under the following arrangements:

- Facility 1 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest over 3 years;
- Facility 2 – monthly instalments of principal and interest over 5 years;
- Facility 3 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest over 5 years; and
- Facility 4 – monthly payments of interest only for 3 years plus monthly instalments of principal and interest over 7 years.

52. Payments/instalments commence on the first business day of the month following the loan drawdown date.

53. Facilities 1 and 2 are subject to an interest rate of 10.5% per annum, Facility 3 is subject to an interest rate of 10.75% per annum and Facility 4 is subject to an interest rate of 10.95% per annum based on current interest rates. Interest will accrue on the unpaid balance of the loan and is charged monthly in arrears.

54. United Pacific Finance Pty Limited will lend on a full-recourse commercial basis at an interest rate of 10.95% per annum (based on current interest rates) under the following arrangements:

- Facility 1 – monthly instalments of principal and interest over 5 years;
- Facility 2 – monthly payments of interest only for 1 year plus monthly instalments of principal and interest over 4 years;
- Facility 3 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest over 5 years; and
- Facility 4 – monthly payments of interest only for 3 years plus monthly instalments of principal and interest over 7 years.

55. Payments/instalments commence one month after loan drawdown date. Interest will accrue on the unpaid balance of the loan and is charged monthly in arrears.

56. The above loans are secured by a registered charge over the Grower's interest in the Project. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

57. This Ruling will not apply to Growers who enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited, with terms and conditions that differ in any way from those set out in paragraphs 50 to 56.

58. This Ruling also does not apply if a Grower enters into an agreement that 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' 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 terms are of a non-arm's length nature;
- repayments of the principal and 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) back to the lender or any associate;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project other than the Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited are involved or become involved, in the provision of finance to Growers for the Project.

## Ruling

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### Application of this Ruling

59. This Ruling applies only to Growers who:

- are accepted to participate in the Project during the period from 1 July 2006 to 30 June 2007 where the Grower has entered into Woodlot Licence and Project Operations Agreements on or before 30 June 2007 (2007 Growers);
- enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Limited; and
- do not elect to market and sell their own timber.

60. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

61. The Ruling does not apply to:

- Growers whose application has been conditionally accepted by the Responsible Entity subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to Primary Securities Ltd by 30 June 2007; or
- Growers who enter into finance arrangements with entities associated with the Responsible Entity other than the finance arrangements described at paragraphs 50 to 56 with Momentum Investment Finance Pty Limited and United Pacific Finance Pty Limited.

### **Minimum subscription**

62. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 Woodlots is achieved.

### **25% entrepreneurs tax offset**

#### ***Subdivision 61-J***

63. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

### **The Simplified Tax System (STS)**

#### ***Division 328***

64. To be an 'STS taxpayer', a Grower must be eligible to be an 'STS taxpayer' and must have elected to an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

65. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

### **Assessable income**

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

66. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

67. The Grower recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

### **Deductions for the Application Fee, Interest and Borrowing Expenses**

#### **Sections 8-1 and 25-25**

68. A Grower may claim tax deductions under section 8-1, for the revenue expenses in the following Table on a per Woodlot basis.

<b>Fee Type</b>	<b>ITAA 1997 section</b>	<b>Year ended 30 June 2007</b>
<b>Application Fee</b>	8-1	\$6,900 See Notes (i) & (ii)
<b>Interest</b>	8-1	See Note (iii)
<b>Borrowing Expenses</b>	25-25	See Note (iv)

#### **Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST.
- (ii) Under section 82KZMG of the ITAA 1936 the fee for plantation establishment services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 102 to 106) and is deductible in the income year in which it is incurred.

- (iii) Interest paid under a loan agreement with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited (as described at paragraphs 51 to 57) is deductible in the year in which it is incurred. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited is outside the scope of this Ruling. However, all Growers who finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraphs 94 to 101 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.
- (iv) The loan application fee (and stamp duty, if applicable) is a borrowing cost and is deductible under section 25-25. It is incurred for borrowing funds that are used or are to be used during the income year solely for income producing purposes. The deduction is spread on a straight line basis, over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited is outside the scope of this Ruling.

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

#### ***Section 35-55 – Commissioner's discretion***

69. A Grower who is an individual accepted into the Project during the year ended 30 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the years ending **30 June 2007 to 30 June 2023**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which losses arise.

## **Section 82KL and Part IVA**

70. For a Grower who participates in the Project and incurs expenditure as required by the Woodlot Licence Agreement and the Project Operations Agreement, the following provisions of the ITAA 1936 have application as indicated:

- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

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**Commissioner of Taxation**

31 May 2006

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## Appendix 1 – Explanation

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

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

71. For the amounts set out in the Tables above to constitute allowable deductions, the Grower's activities as a participant in the NTT Mahogany Project No. 2 must amount to the carrying on of a business of primary production.

72. Where there is a business, or a future business, the gross proceeds from the sale of timber from the Project will constitute assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

73. For schemes such as that of the NTT Mahogany Project No. 2, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

74. Generally, an investor will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest (by lease or licence) in the land on which the Grower's trees are established;
- the Grower has a right to harvest and sell the timber from those trees;
- the afforestation activities are carried out on the Grower's behalf;
- the afforestation activities of the Grower are typical of those associated with an afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

75. In this Project each Grower enters into a Woodlot Licence and a Project Operations Agreement.

76. Under the Woodlot Licence each individual Grower will have rights in the form of a licence over a specific and identifiable area of land. The Project Operations Agreement provides the Grower with an ongoing interest in the specific Trees on the licensed area for the term of the Project. Under the Woodlot Licence, the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Project Operations Agreement allows the Responsible Entity to come onto the land to carry out its obligations under any of the agreements.

77. Under the Project Operations Agreement the Responsible Entity is engaged by the Grower to establish and maintain the trees on the Grower's licensed area during the term of the Project. The Responsible Entity will subcontract the management services to the Land Co, under the Maintenance Agreement. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the trees on the licensed area on the Grower's behalf.

78. The Responsible Entity may also be engaged to harvest and sell, on the Grower's behalf, the timber grown on the Grower's licensed area.

79. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the Project's description for all the indicators.

80. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of timber that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

81. The pooling of timber grown on the Grower's licensed area with the timber of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled timber will reflect the proportion of the Trees contributed from their licensed area.

82. The Responsible Entity's services are also consistent with general afforestation practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the combined size of the Woodlots is relatively small, the Grower's interest is of a size and scale to allow it to be commercially viable (see Taxation Ruling TR 2000/8).

83. The Grower's degree of control over the Responsible Entity as evidenced by the Project Operations Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's licensed area and the activities carried out on the Grower's behalf. Growers are able to terminate schemes with the Responsible Entity in certain instances, such as cases of default or neglect.

84. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Grower's afforestation activities in the NTT Mahogany Project No. 2 will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

85. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

86. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

## **Deductibility of the Application Fee**

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

87. Consideration of whether the Application Fee is deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred before the business has commenced; and
- where all that happens in a year of income is that a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and, hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

88. The Application Fee associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of timber) is to be gained from this business. It will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the scheme. The fee appears to be reasonable. There is no capital component of the Application Fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Interest deductibility**

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

*(i) Growers who use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider*

89. Growers will finance the Application Fee through a loan facility with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the Application Fee.

90. The interest incurred for the first year of participation and subsequent years of income will be in respect of a loan to finance the Grower's business operations that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

91. In the absence of any application of the prepayment provisions (see paragraphs 94 to 101), interest is deductible in the year in which it is incurred.

*(ii) Growers who DO NOT use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider*

92. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

93. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 94 to 101).

**Prepayment provisions*****Sections 82KZL to 82KZMG***

94. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

95. For this Project only section 82KZL of the ITAA 1936 (an interpretative provision) and sections 82KZME, 82KZMF and 82KZMG of the ITAA 1936 are relevant. Subject to section 82KZMG, if the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

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

96. Other than expenditure deductible under section 82KZMG of the ITAA 1936, if the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

97. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the agreement (or scheme) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and

- either:
  - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

98. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4) of the ITAA 1936). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier. Although undertaken with an unrelated party, that financing would be an element of the scheme. The funds borrowed and the interest deduction is directly related to the activities under the scheme. If a Grower prepays interest under such financing schemes, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

99. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,100. Such expenditure is immediately deductible.

100. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

Expenditure ×  $\frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$

101. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

### **Section 82KZMG**

102. Under section 82KZMG(1) of the ITAA 1936, expenditure is excluded from the prepayment rules that would otherwise apply, to the extent that the prepaid amount satisfies the requirements of subsections 82KZMG(2) to (4).

103. Subsection 82KZMG(2) of the ITAA 1936 requires that the expenditure is:

- incurred on or after 2 October 2001 and on or before 30 June 2008;
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and
- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

104. To satisfy subsection 82KZMG(3) of the ITAA 1936 the agreement must satisfy the following requirements:

- it must be an agreement for planting and tending trees for felling;
- be an agreement where the taxpayer does not have day to day control over the operations arising out of the agreement (a right to be consulted or to give directions does not equate to day to day control for the purposes of this requirement); and
- either:
  - (i) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - (ii) the manager manages, arranges or promotes the agreement, or an associate of the manager, manages, arranges or promotes similar agreements.

105. Under subsection 82KZMG(4) of the ITAA 1936 the expenditure incurred by the taxpayer must be paid for 'seasonally dependent agronomic activities' undertaken by the manager during the 'establishment period' for the relevant planting of trees for felling. The term 'seasonally dependent agronomic activities' is explained in Taxation Determination TD 2003/12.

106. Subsection 82KZMG(5) of the ITAA 1936 defines the 'establishment period to commence at the time that the first 'seasonally dependent agronomic activity' is performed in relation to a specific planting of trees and to conclude with the planting of trees. Where it is necessary to apply a fertiliser or herbicide to the trees at the same time as planting then those activities fall within the establishment period. Planting of trees refers to the main planting of the particular plantation and expressly excludes specific planting to replace existing seedlings that have not survived.

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

### ***Application Fee***

107. Under the Project Operations Agreement, a Grower incurs the Application Fee in the first year. This fee consists of expenditure for 'seasonally dependent agronomic activities'. As the requirements of section 82KZMG of the ITAA 1936 are met, a deduction is allowable in the same income year as the expenditure is incurred.

### ***Interest***

108. Growers who borrow funds in order to participate in the Project may either choose, or be required to prepay interest. Where this occurs, section 82KZMF of the ITAA 1936 will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

109. However, as noted above, prepaid interest of less than \$1,000 incurred in an expenditure year will be excluded expenditure and will not be subject to apportionment under section 82KZMF of the ITAA 1936.

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

110. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2007 to 30 June 2023 the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended **30 June 2007 up to and including 30 June 2023:**

- because of its nature the business activity will not satisfy one of the four tests set out in Division 35;
- 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; and
- 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.

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

**Section 82KL – recouped expenditure**

112. 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**

113. 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).

114. The NTT Mahogany Project No. 2 will be a ‘scheme’ commencing with the issue of the Product Disclosure Statement. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 50 and 54 that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

115. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There are no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing with each other at arm’s length, or, if any parties are not at arm’s length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

**Appendix 2 – Detailed contents list**

116. The following is a detailed contents list for this Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to Promoters and advisors	6
Class of entities	7
Qualifications	10
<b>Date of effect</b>	<b>13</b>
<b>Withdrawal</b>	<b>17</b>
<b>Scheme</b>	<b>18</b>
Overview	21
Constitution	32
Compliance Plan	33
Woodlot Licence (or Grower's Agreement to License)	34
Project Operations Agreement	36
Planting	40
Maintenance Agreement	41
Harvesting and Marketing	42
Fees	44
Other fees	45
Payment of fees	48
Finance	49
<b>Ruling</b>	<b>59</b>
Application of this Ruling	59
Minimum subscription	62
25% entrepreneurs tax offset	63
<i>Subdivision 61-J</i>	63
The Simplified Tax System (STS)	64
<i>Division 328</i>	64
Assessable income	66
<i>Section 6-5</i>	66

Deductions for the Application Fee, Interest and Borrowing Expenses	68
<i>Sections 8-1 and 25-25</i>	68
Division 35 – deferral of losses from non-commercial business activities	69
<i>Section 35-55 – Commissioner’s discretion</i>	69
Section 82KL and Part IVA	70
<b>Appendix 1 – Explanation</b>	<b>71</b>
Is the Grower carrying on a business?	71
The Simplified Tax System	85
<i>Division 328</i>	85
Deductibility of the Application Fee	87
<i>Section 8-1</i>	87
Interest Deductibility	89
<i>Section 8-1</i>	89
<i>(i) Growers who use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider</i>	89
<i>(ii) Growers who DO NOT use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider</i>	92
Prepayment provisions	94
<i>Sections 82KZL to 82KZMG</i>	94
<i>Sections 82KZME and 82KZMF</i>	96
<i>Section 82KZMG</i>	102
Application of the prepayment provisions to this Project	107
<i>Application Fee</i>	107
<i>Interest</i>	108
Division 35 – deferral of losses from non-commercial business activities	110
Section 82KL – recouped expenditure	112
Part IVA – general tax avoidance provisions	113
<b>Appendix 2 – Detailed contents list</b>	<b>116</b>

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  - carrying on a business
  - commencement of business
  - fee expenses
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  - non-commercial losses
  - producing assessable income
  - product rulings
  - public rulings
  - seasonally dependent agronomic activity
  - tax avoidance
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  - tax shelters
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