

PR 2006/128 - Income tax: Willmott Forests Project - 2007 Product Disclosure Statement (2008 Growers)



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Product Ruling

Income tax: Willmott Forests Project – 2007 Product Disclosure Statement (2008 Growers)

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① 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

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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 Willmott Forests Project – 2007 Product Disclosure Statement (2008 Growers) 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;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - sections 82KZME to 82KZMG of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

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

Goods and Services Tax

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

Changes in the Law

4. Although this Ruling deals with the laws 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. Taxpayers 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 advisers

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 potential participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to which this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling and which enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement 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, each of these entities, referred to as 'Growers'.

8. The class of entities to which this Ruling applies does **not** include:

- entities who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who elect to opt out of the marketing and harvesting arrangement with Willmott Forests Ltd and to organise the harvesting and marketing of Trees produced from their own Woodlots;
- entities who choose to pay by transferring property to the Manager, as set out in clause 4.2 of the Consolidated Constitution of the Willmott Forests Project;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- Willmott Forests Ltd or its associates; and
- entities who are accepted to participate in the Project before 1 July 2007 and after 30 June 2008.

Qualifications

9. 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 17 to 73 of this Ruling.

10. 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

12. This Ruling applies prospectively from 6 September 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.

13. 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)).

14. 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.

15. 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).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2010. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class which enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, which enter 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.

Scheme

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

- Application for a Product Ruling received 11 May 2006 as constituted by additional documents provided on 5 and 15 June 2006, 11, 12 and 19 July 2006 and 29 August 2006;
- Draft **Willmott Forests Project – 2007 Product Disclosure Statement** (PDS) issued by Willmott Forests Limited (WFL, the Responsible Entity), received on 11 May 2006;
- Draft Consolidated **Constitution** for the Willmott Forests Project (the Constitution), dated 2 September 1999, issued by WFL, received on 11 May 2006;
- Compliance Plan for the Willmott Forests Project, issued by WFL, received on 11 May 2006;
- Draft **Pre-lease Agreement** between WFL and the Grower, received on 11 May 2006;
- Draft **Land Tenancy Agreement** between WFL and the Grower, received on 11 May 2006;
- Draft **Lease Agreement** between WFL and the Grower received on 11 May 2006;
- Draft **Forestry Management Agreement** between WFL (as Manager) and the Grower, received on 11 May 2006;
- Draft Forestry Right Agreement, to be entered into by each Grantor, who is or is entitled to be the registered proprietor of the Land and Willmott Forests Investment Management Pty Ltd (the Grantee), a wholly owned subsidiary of the Manager, which acts as an agent on all the Growers behalf, received on 11 May 2006;

- Draft Forest Property Agreement, to be entered into by each Grantor, who is or is entitled to be the registered proprietor of the Land and the Grantee, which acts as an agent on all the Growers behalf, received on 11 May 2006;
- Wood Purchase Agreement between WFL and Willmott Timbers Pty Ltd, dated May 2006, received on 11 May 2006;
- **Terms Agreement** between WFL and the Grower, received on 11 May 2006;
- **Loan Agreement** between MIS Funding No. 1 Pty Limited (the Preferred Lender) and the Grower, received on 29 August 2006; and
- Origination and Management Deed between the Preferred Lender and WFL (as the Originator), received 29 August 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.

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

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

Overview

20. The main features of the Willmott Forests Project – 2007 Product Disclosure Statement are as follows:

Location	Bombala region of south east NSW, Murray Valley region of NSW and North East, South West, Central Gippsland, Ballarat, and Central regions of Victoria.
Type of business to be carried on by each participant	Cultivation of <i>Pinus radiata</i> for the purpose of harvesting as quality saw logs.
Number of hectares offered for cultivation	6,000
Size of each interest	0.5 hectares (one Woodlot)
Number of Trees per hectare	Minimum of 1,100 seedlings
Term of the Project	25 years

Initial cost	\$4,290 per Woodlot
Initial cost per hectare	\$8,580
Ongoing costs	Maintenance and rental costs will be 7% and 2% respectively of the Gross Timber Proceeds from the Thinning and the Clear Fell of the Trees on each Woodlot, or from insurance proceeds in the event of Material Damage to the Grower's Trees on a Woodlot.
Other costs	Harvesting Fee, of 1% of Gross Timber Proceeds from the Thinning and the Clear Fell of the Trees on each Woodlot; Compulsory insurance premium from year 3 to the year preceding the Clear Fell of the Trees; Interest payments under a Loan Agreement; and Any other amounts agreed upon in writing between WFL and Growers.

21. The Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. WFL has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

22. The objective of the Project is to establish and manage long term commercial plantations of softwood for the purpose of harvesting and sale.

23. Under the PDS applicants can apply for one or more Woodlots each of 0.5 hectare in size. Approximately 6,000 hectares is available to applicants for the Project.

24. To participate in the Project as Growers, applicants must complete the 2007 Application Form in the PDS and make a payment and or payment arrangement under a Terms Agreement or Loan Agreement for the Woodlots subscribed.

25. Growers' applications accepted between 1 July 2007 and 30 June 2008 will commence participation as 2008 Growers. **This Ruling only applies in respect of 2008 Growers. Note that a separate Product Ruling has been issued for Growers who enter into the Project on or before 30 June 2007.**

26. Following acceptance by the Manager of an application for Woodlots, the Manager will execute on behalf of the Grower (as attorney) the Land Tenancy Agreement and the Forestry Management Agreement with WFL.

27. Where there is no Project Land available for a Grower on or before 30 June 2008, the Manager may still accept the Grower's application and, the Manager and the Grower will enter into a Pre-Lease Agreement in which WFL undertakes to take all reasonable steps to grant a Lease in respect of the Grower's Woodlots within nine months of the date of acceptance of the Grower's application.

28. During the term of the Project Growers will establish and maintain a commercial plantation of *Pinus radiata* and carry on a commercial business of afforestation.

29. The Project will be terminated after Clear Fell of the Trees, a period of approximately 25 years.

Constitution

30. The Constitution for the Project sets out the general functions, powers and duties under which the Responsible Entity agrees to act for the Growers and manage the Project. It operates as a deed binding all the Growers and WFL. Growers are bound by the Constitution by virtue of their participation in the Project.

31. Woodlots are taken to be issued when the Manager accepts the application. The Manager is required to notify the Applicant in writing of such acceptance within 30 days of the issue of the Woodlots (clauses 4.5 and 4.7).

32. Where the application is accepted, the Manager will provide the Grower with at least 2 copies of each of the Forestry Management Agreement and the Lease Agreement or, if applicable, a Pre-Lease Agreement (clause 4.8).

33. As soon as practicable after the issue of the Woodlots, the Manager must use its best endeavours to create and grant, a Forestry Right in respect of the Land on which Woodlots are located to a third party who acts as an agent for the benefit of all the Growers who have acquired Woodlots on that Land (clause 4.9).

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

- powers, rights and liabilities of the Manager (clause 6 and 7);
- remuneration and expenses of the Manager (clause 10);
- Stocking Guarantee (clause 12);
- insurance (clause 13);
- harvesting and sale of Trees (clause 14);
- convening meetings of Growers and voting requirements (clause 16);
- procedure on termination (clause 18); and
- complaints procedures (clause 23).

Compliance Plan

35. As required by the *Corporation Act 2001*, WFL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that WFL, as the Manager, complied with its obligations and responsibilities under the *Corporations Act 2001* and the Constitution. The Compliance Plan is designed to protect the interests of the Growers.

Forestry Management Agreement

36. Each Grower will enter into a Forestry Management Agreement with WFL. Under the Forestry Management Agreement, a Grower contracts with WFL to carry out such services as required to prepare, plant and maintain the Grower's Leasehold Property until maturity at, approximately, Year 25.

37. In accordance with good forestry practices WFL will use all reasonable endeavours to carry out its obligations specified in Part 1 ('Preparation and Planting services') and Part 2 ('Maintenance services') of Schedule 1 to the Forestry Management Agreement in respect of the Leasehold Property.

38. The Preparation and Planting services will be provided to the Grower within the first 12 months from the date that the Grower is accepted into the Project. This Product Ruling will not apply to any Growers where WFL fails to complete the Preparation and Planting services within 12 months of the Grower's acceptance into the Project.

39. The Maintenance services include Establishment Work, General Maintenance and Sundries services. They will be provided after the completion of the Preparation and Planting services to Clear Fell of the Trees in Year 25.

40. The Responsible Entity provides a Stocking Guarantee for a period of 2 years (called the Guarantee Period) from the date that the Grower is registered as the holder of a Woodlot on the terms and conditions set out in the Constitution.

41. During the Guarantee Period the Manager will remove Trees that are Materially Damaged, prepare the ground, and acquire and plant new seedlings. Trees will be Materially Damaged when, other than in certain specified circumstances set out in the Constitution, they are damaged or destroyed.

42. Under clause 7 of the Forestry Management Agreement, the harvesting and sale of the Growers' Trees are to be carried out, or arranged to be carried out, by the Responsible Entity unless the Responsible Entity is otherwise notified by the Grower in accordance with the procedure set out in the PDS.

43. The Responsible Entity is responsible for insuring the 'Leasehold Property' against public risk for an amount of not less than \$10,000,000 during the life time of the Project.

Land Tenancy Agreement

44. An unregistered lease is granted by WFL (the Lessor) to each Grower (the Lessee) upon the acceptance of the application. The term of the lease is 25 years with an option for a further 5 years less one day or, until such time as the Trees have been harvested and the Land made good, whichever is the sooner.

45. As a consideration for the rent during the Term of the Project the Lessee will pay to the Lessor 2% of their Gross Timber Proceeds received from the Thinning and Clear Fell of the Trees on the Woodlots or, where relevant, 2% of insurance proceeds.

46. Among other things, the Land Tenancy Agreement also sets out in detail the following matters:

- the Lessee may use the Land only as part of a managed investment scheme under which Growers, including the Lessee, participate in the establishment and maintenance of the Trees (clause 3(a));
- the Lessee will comply with all relevant legislation and all requirements of any government or other public authority, local authority relating to the Permitted Use of the Land (clause 4);
- the Lessee must generally keep the Land and Other Land clean, tidy and in a condition suitable for the conduct of the Permitted Use (clause 5);
- the Lessee agrees not to do or permit anything to be done on the Land or keep anything therein which may in any way invalidate or violate the conditions of any insurance policies relating thereto or increase or cause to be increased the premiums payable in respect thereof (clause 10); and
- the Lessee will permit the Lessor or the Head Landlord at all reasonable times to enter upon the Land (clause 12).

Forestry Right Agreement

47. A Grower who is granted an unregistered lease will also be granted a Forestry Right over the Land by the Grantor who is, or is entitled to be, the registered proprietor of the title of the Land. Under the Forestry Right Agreement the Grower has a secured interest in the Land and is able to use the Land for the purpose of conducting the afforestation business, including the right to harvest the Trees grown on the Land.

48. The Forestry Right is held by Willmott Forests Investment Management Pty Ltd (the Grantee), a wholly owned subsidiary of the Responsible Entity, which acts as an agent on the Grower's behalf. The Forestry Right is registered with the applicable land titles office and provides protection for the Grower's Leasehold Interest over the Land.

Pre-Lease Agreement

49. Where there is no Land immediately available for WFL to grant a Lease to the Grower on or before 30 June 2008, the Grower will be required to enter into a Pre-Lease Agreement with WFL.

50. Pursuant to the terms of the Pre-Lease Agreement, WFL undertakes to take all reasonable steps to grant a Land Tenancy in respect of the Grower's Woodlots no later than a date being 9 months from the date on which WFL accepts the Grower's application.

51. Where WFL has not been able to grant a Lease and Forestry Right to the Grower in respect of the Grower's Woodlots within 9 months then either party may terminate the agreement by providing 7 days prior written notice. Within 14 days of the receipt or service of the notice WFL must (except in an event of default) refund any of the Grower's Application Monies paid in respect of the application.

Fees

52. The application fee is consideration for Part 1 Preparation and Planting services under the Forestry Management Agreement on a per Woodlot basis and is payable under one of the following payment options:

- a cash payment payable on application for the cost of \$4,290 per Woodlot;
- under a Terms Agreement entered into between WFL and the Grower, and Monies Owed are payable in 12 monthly instalments as set out in paragraphs 63 to 66 of this Ruling; or
- Loan Agreement entered into between the Preferred Lender and the Grower as set out in paragraphs 67 to 73 of this Ruling.

Note: Clause 4.2 of the Constitution also allows a Grower to make a payment by transferring property to the Manager. Growers who make a payment by transferring property to the Manager cannot rely on this Product Ruling. Such Growers may apply for a private ruling on the tax consequences of their participation in the Project.

53. WFL may charge additional interest under the Forestry Management Agreement on the amounts outstanding at the rate of 5% per annum (clause 5.1(a)).

54. There are no ongoing payments for rent and maintenance. Instead, in return for providing the Maintenance services under the Forestry Management Agreement and for rental charges under the Land Tenancy Agreement, the Manager will be entitled to a fee of 9% of the Gross Timber Proceeds from Thinning and Clear Fell of the Trees on the Woodlots. This is to be paid as and when the Trees are thinned, or clear felled, and sold and will be deducted by the Manager from the Gross Timber Proceeds prior to being distributed to Growers.

55. Where a Grower receives payments of insurance claims in respect of damage, or destruction of, all or any Trees on the Woodlots under an insurance policy, the Grower must pay 9% of the insurance proceeds to the Responsible Entity within 14 days of their receipt to discharge their liabilities under the Forestry Management Agreement and Land Tenancy Agreement.

56. Under the Forestry Management Agreement, Growers who engage the Manager to carry out the harvesting and sales of the Trees are liable for a Harvesting Fee totalling 1% of the Gross Timber Proceeds. The Harvesting Fee will be deducted by the Manager from the Gross Timber Proceeds prior to being distributed to Growers.

Pooling of Trees and distribution of proceeds

57. The PDS sets out the circumstances relating to the pooling of Growers' Trees and the distribution of proceeds from the sale. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Trees from a harvested Woodlot to the pool making up the proceeds are entitled to benefit from distributions from those proceeds; and
- Trees can only be pooled with the Trees of Growers accepted to participate in the Project in the same financial year.

Application Form

58. Under the Application Form that forms part of the PDS, Growers who are accepted to participate in the Project grant WFL an irrevocable power of attorney. This allows WFL to execute and deliver the Project Documents, which consist of the Land Tenancy Agreement (and/or, if applicable, the Pre-Lease Agreement) and the Forestry Management Agreement. The power of attorney begins from the date of the application being signed, to the expiration of the Project Documents.

59. The Application Form also provides Growers with an opportunity to elect to opt out of harvesting and marketing arrangement for the Trees with the Manager. Growers who make this election are not be covered by this Product Ruling and may seek a private ruling on the tax consequences of participating in the Project.

60. Upon signing the Application Form a Grower who has not been approved to pay fees under a Terms Agreement or Loan Agreement acknowledges that the full amount of the Application Monies is immediately due and payable.

61. The Application Monies paid to WFL at the time of a Grower's application will be deposited into a trust account known as the Willmott Forests Limited Project – Application Account and will only be released and paid to WFL once the application is accepted.

Finance

62. A Grower can fund their involvement in the Project by borrowing from independent sources or from WFL under a Terms Agreement or from MIS Funding No. 1 Pty Ltd, a Lender that is a Preferred Lender of WFL.

Terms Agreement

63. A Grower who borrows from WFL under a Terms Agreement is required to pay the Monies Owning at interest free terms by Monthly Payments over a 12 month period on each Payment Date as indicated by WFL on the Application (clause 4(a)).

64. Where a Grower does not pay the Monies Owning by the Payment Date penalty interest will be charged at 14% per annum calculated and accrued daily on the balance of all monies owing and which are overdue for payment (clause 4(b)).

65. A Grower is required to pay all of the costs, charges and expenses of WFL relating to the Terms Agreement and all stamp and transaction duties, registration fees and taxes in connection with the Mortgaged Property or the Application or any other document (clause 4(d)).

66. In consideration for the terms of the payment, a Grower mortgages all of their interest in the Mortgaged Property in favour of WFL for securing payment of all Monies Owning (clause 5).

Loan Agreement

67. A Grower can fund their involvement in the Project by borrowing from MIS Funding No. 1 Pty Ltd, a Lender that is a preferred Lender of WFL.

68. The Preferred Lender will offer loan terms on a commercial basis and consider loans up to 100% of the application amount. The Preferred Lender will provide a Grower with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to a Grower by the Preferred Lender are set out in the Loan Agreement and the Loan Application.

69. Common features contained in the Loan Agreement are:

- the Preferred Lender will advance to the Grower the Principal Amount by payment of this amount to WFL in order to meet the Grower's obligations under the Relevant Agreements (clause 3(a));
- the advance to the Grower of the Principal Amount will not be made unless the Preferred Lender is satisfied that:
 - the Project Application has been, or will be, accepted by WFL (clause 4(a));
 - the Loan Application has been accepted by the Preferred Lender (clause 4(b));
 - the Loan Agreement has been executed by the Grower, or have provided an irrevocable power of attorney to WFL to execute the Loan Agreement on behalf of the Grower (clause 4(c));
 - the Grower has provided an irrevocable power of attorney to WFL to execute all the Relevant Agreements on behalf of the Grower (clause 4(d)); and
 - any guarantees that are required to be executed by the Grower at the request of the Preferred Lender have been executed (clause 4(e));
- the Grower is required to pay the Monies Owing by the Monthly Payment on each Payment Date in the manner indicated by the Loan Application and in accordance with this Loan Agreement (clause 5(a));
- in consideration for the loan, a Grower mortgages all their interest in the Mortgaged Property in favour of the Preferred Lender for securing payment of all Monies Owing and the performance of their obligations under the Loan Agreement and the Loan Application (clause 6(a));
- where a Grower defaults on their loan obligations Default Interest will be charged at 5% per annum in addition to the standard interest rates. Default Interest will be calculated daily and accrued monthly (clause 10);
- Interest will be calculated daily and accrued monthly at the Interest Rate on the amount of any Monies Owing commencing on 1 July 2007 (clause 11); and
- a loan Application Fee is payable by the borrower to the Preferred Lender which comprises an up-front fee of 0.3% of the Loan amount (clause 15).

70. The terms specific to each optional loan offered by the Preferred Lender are contained in the Finance Application form attached to the PDS, and are summarised below. The interest rates below are indicative rates only and for the purposes of the Loan Agreement, the Grower will be separately notified of the actual Interest Rate.

Principal and Interest Terms:

- 3 year term with an interest rate of 11.0%p.a.
- 5 year term with an interest rate of 11.0%p.a.
- 7 year term with an interest rate of 11.0%p.a.
- 10 year term with an interest rate of 11.0%p.a. (minimum investment of 10 Woodlots).
- 15 year term with an interest rate of 11.0%p.a. (minimum investment of 10 Woodlots).

Optional Interest Only Period, then a Principal and Interest Period:

The interest only period and principal and interest period from the following ranges can be a **maximum of 15 years combined**:

- 36 months interest only term with an interest rate of 11.0%p.a.
- 5 year term with an interest rate of 11.0%p.a. (first 36 months interest only).
- 7 year term with an interest rate of 11.0%p.a. (first 36 months interest only).
- 10 year term with an interest rate of 11.0%p.a. (first 36 months interest only and minimum investment of 10 Woodlots).
- 15 year term with an interest rate of 11.0%p.a. (first 36 months interest only and minimum investment of 10 Woodlots).

71. Growers cannot rely on this Product Ruling if they enter into a terms or finance agreement with WFL or the Preferred Lender that materially differs from that set out in the Terms Agreement, Loan Application and Loan Agreement provided to the Tax Office by WFL with the application for this Product Ruling.

72. Growers cannot rely on any part of this Product Ruling if Application Monies, other than Application Monies payable subject to a Terms Agreement or Loan Agreement, are not paid in full by 30 June 2008. Where an application is accepted by WFL subject to finance approval by any lending institution, including WFL under the Terms Agreement and the Preferred Lender under the Loan Agreement, Growers cannot rely on this Ruling if written evidence of that approval has not been given to WFL by 30 June 2008.

73. This Ruling also does not apply if the finance arrangement entered into by the Grower with the Preferred Lender or any other lender includes or has any of the following features:

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

Ruling

Application of this Ruling

74. Subject to paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project:

- between 1 July 2007 and 30 June 2008;
- who have executed a Forestry Management Agreement and either a Land Tenancy Agreement or a Pre-Lease Agreement between that date; and
- whose Woodlots are established by 30 June 2009.

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

76. 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.

The Simplified Tax System (STS)***Division 328***

77. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer'. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a Grower who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method' – see section 328-115).

78. 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.

25% entrepreneurs' tax offset***Subdivision 61-J***

79. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides a 25% tax offset 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.

Assessable income***Section 6-5***

80. 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 in the income year in which that income is derived.

Deduction for the management fee for Preparation and Planting services under the Forestry Management Agreement, interest under a Loan Agreement with the Preferred Lender and borrowing costs

Section 8-1 and section 25-25

81. A Grower may claim tax deductions, on a per Woodlot basis, for the revenue expenses in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Management fee for Preparation and Planting services	\$4,290 See Notes (i) & (ii)	Nil	Nil
Interest payable to Preferred Lender under a Loan Agreement	As incurred See Note (iii)	As incurred See Note (ii)	As incurred See Note (iii)
Loan Application Fee for Loan entered into with Preferred Lender	Must be calculated See Note (iv)	Must be calculated See Note (iv)	Must be calculated See Note (iv)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Under section 82KZMG of the ITAA 1936 the fee for Preparation and Planting services under the Forestry Management Agreement is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 107 and 108 of this Ruling) and is deductible in the income year in which it is incurred.
- (iii) Growers who enter into a Loan Agreement with the Preferred Lender for payment of the management fee for Preparation and Planting services under the Forestry Management Agreement will incur interest monthly in arrears, as set out in the Agreements. The interest is deductible as incurred. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than the Preferred Lender, is outside the scope of this Ruling.

- (iv) A Loan Application Fee payable to the Preferred Lender 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 the Preferred Lender is outside the scope of this Ruling.

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

Section 35-55 – exercise of Commissioner’s discretion

82. A Grower who is an individual accepted into the Project 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 income years ending **30 June 2008 to 30 June 2032** or to the income year prior to Clear fell, whichever occurs sooner. This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which the losses arise.

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

83. For a Grower who participates in the Project and incurs expenditure as required by the Forestry Management Agreement, the Land Tenancy Agreement and any Loan Agreement (as applicable) the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Appendix 1 – Explanation

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

Is the Grower carrying on a business?

84. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the Willmott Forests Project – 2007 Product Disclosure Statement must amount to the carrying on of a business of primary production.

85. Where there is a business, or a future business, the gross proceeds from the sale of the Trees from the Woodlots will constitute gross 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.

86. For schemes such as that of the Willmott Forests Project – 2007 Product Disclosure Statement, 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 Taxation Ruling 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.

87. Generally, a Grower will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest (by lease) or rights over the land (by licence) on which the Grower's trees are established;
- the Grower has a right to harvest and sell the wood produce 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 a afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

88. In this Project, each Grower enters into a Forestry Management Agreement, a Land Tenancy Agreement and is also granted a Forestry Right over the Land.

89. Under the Land Tenancy Agreement and Forestry Right each individual Grower will have rights over a specific and identifiable area of at least 0.5 of a hectare of land. The Land Tenancy Agreement and the Forestry Right provides the Grower with an ongoing interest in the specific trees on the leased area for the term of the Project. Under the lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The lease allows the Manager to come onto the land to carry out its obligations under the Forestry Management Agreement.

90. Under the Forestry Management Agreement the Responsible Entity is engaged by the Grower to establish and maintain a Woodlot on the Grower's identifiable area of land during the term of the Project. 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 Woodlot on the Grower's behalf.

91. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the Trees grown on the Grower's Woodlot.

92. 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.

93. 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 the Trees 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.

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

95. The Responsible Entity's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a Woodlot is relatively small, it is of a size and scale to allow it to be commercially viable.

96. The Grower's degree of control over the Responsible Entity as evidenced by the Forestry Management 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 Woodlot and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

97. 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 Growers' afforestation activities in the Willmott Forests Project – 2007 Product Disclosure Statement will constitute the carrying on of a business.

The Simplified Tax System

Division 328

98. 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.

99. Changes to the STS rules apply from 1 July 2005. 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 management fee for Preparation and Planting services under the Forestry Management Agreement

Section 8-1

100. Consideration of whether the management fees for Preparation and Planting services under the Forestry Management Agreement are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing 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 when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed 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.

101. The management fee for Preparation and Planting services under the Forestry Management Agreement is associated with the afforestation activities and 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 the Trees) is to be gained from this business. They 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 arrangement. The fee appears to be reasonable. There is no capital component of the management 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 pay fees under a Loan Agreement with the Preferred Lender

102. Some Growers may finance their participation in the Project through a Loan Agreement with the Preferred Lender. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the management fee for Preparation and Planting services under the Forestry Management Agreement.

103. The interest incurred will be in respect of a Loan Agreement to finance the Grower's business operations – the cultivation and growing of the Trees – that will continue to 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 in the income year in which it is incurred (where the Grower is not an 'STS taxpayer' or is an 'STS taxpayer using the accruals accounting method) or the income year in which it is paid (where the Grower is a 'STS taxpayer' using the cash accounting method).

(ii) Growers who enter into finance arrangements with other finance providers

104. The deductibility of interest incurred by Growers who finance their participation in the Project through a finance facility with a financial institution other than the Preferred Lender is outside the scope of this Ruling. This Product Ruling only deals with arrangements where all details and documents have been provided to, and examined by the Tax Office.

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

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

Section 82KZMG

106. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules that would otherwise apply. Section 82KZMG provides a '12 month rule' that, in effect, facilitates a deduction for certain prepaid expenditure incurred under a plantation forestry managed agreement. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees. Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the following income year.

Application of the prepayment provisions to this Project***Section 82KZMG***

107. Under the Forestry Management Agreement, a Grower incurs a management fee for Preparation and Planting services of \$4,290 that:

- is for 'seasonally dependent agronomic activities'; and
- meets the other requirement of section 82KZMG of the ITAA 1936.

108. As the requirements of section 82KZMG of the ITAA 1936 have been met, a Grower can, therefore, claim an immediate deduction for the management fee for Preparation and Planting services in the income year in which the fee is incurred.

Sections 82KZME and 82KZMF

109. Under the arrangement to which this Product Ruling applies fees for rent under the Land Tenancy Agreement and fees under Part 2 of the Forestry Management Agreement are only payable when the Gross Timber Proceeds from Thinning and Clear Fell of the Trees are received respectively on year 13, year 18 and year 25, or on proceeds received from insurance claims. Interest payable under the Loan Agreement is incurred and payable monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Arrangement.

110. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chose to prepay interest under the Loan Agreement with the Preferred Lender, or chose or is required to prepay interest under a loan agreement with a lender other than the Preferred Lender. Where such a prepayment is made, these prepayment provisions will also apply to 'STS taxpayers' using the cash accounting method because there is no specific exclusion contained in sections 82KZME that excludes them from the operation of section 82KZMF.

111. Growers who choose to prepay interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Division 35 – deferral of losses from non-commercial business activities**Section 35-55 – exercise of Commissioner's discretion**

112. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years discussed in paragraph 78 of this Ruling 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:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

Therefore, 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.

113. 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

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

Part IVA – general tax avoidance provisions

115. 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).

116. The Willmott Forests Project – 2007 Product Disclosure Statement will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraph 81 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.

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

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2003/12; TR 97/11; TR 98/22;
TR 2000/8; TR 2001/14

Subject references:

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

- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
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- ITAA 1936 82KZL
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NO: 2006/9568
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ timber