

PR 2007/74 - Income tax: 2007 Macgrove Project (Late Growers)

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Product Ruling

Income tax: 2007 Macgrove Project (Late Growers)

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

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

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

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

No guarantee of commercial success

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

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

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

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the 2007 Macgrove Project (Late Growers) or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 28 of this Ruling on or after 8 August 2007 and on or before 15 June 2008. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- intend to harvest and take as their own any Macadamia Nuts during the Term of the Project;
- are accepted into this Project before the Grower's Macgrove is established or after 15 June 2008; or
- participate in the scheme through offers made other than through the Product Disclosure Statement.

Superannuation Industry (Supervision) Act 1993

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

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 28 to 110 of this Ruling.

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

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

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Date of effect

9. This Product Ruling applies prospectively from 8 August 2007, the date this Product Ruling is made. It applies to the specified class of entities that enter into the scheme from 8 August 2007 until 15 June 2008, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2010.

10. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. 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)).

12. 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.

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

Changes in the law

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

15. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

16. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

Goods and Services Tax

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

Ruling

Application of this Ruling

18. Subject to paragraph 4, this Ruling applies only to Growers who are accepted to participate in the Project from 8 August 2007 to 15 June 2008, provided that on or before this date:

- the Grower's Macgrove has been established by Maccacorp;
- the Management Fee for the First Financial Year has been received by the Manager; and
- the Consolidated Management Agreement and Sub Leases have been executed.

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

Small business concessions

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

20. A small business entity can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Accordingly, unless otherwise stated, application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

Assessable income

Section 6-5

21. That part of the net 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 year in which it is derived.

Deductions for Management Fees, Rent, interest and borrowing costs

Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME to 82KZMF of the Income Tax Assessment Act 1936

22. A Grower who is accepted to participate in the Project on or before 15 June 2008 may claim deductions, on a per Macgrove basis, for the following expenditure set out in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Management fee	\$11,000 See Notes (i), (ii) & (iii)	\$2,200 See Notes (i), (ii) & (iii)	Must be calculated See Notes (i), (ii) & (iii)
Rent	Nil	\$792 See Notes (i), (ii) & (iii)	Must be calculated See Notes (i), (ii) & (iii)
Interest on loans with Maccfinance	As incurred See Note (iv)	As incurred See Note (iv)	As incurred See Note (iv)
Borrowing costs for loans with Maccfinance	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Management Fees and the Rent shown in the Consolidated Management Agreement and the Sub Leases are deductible in the year that they are incurred. As the Rent payable in the Year Ended 30 June 2010 is equal to the rent from the previous year, indexed by CPI, it needs to be calculated. The Responsible Entity will advise Growers of the Rent to be paid for 2010 and subsequent Financial Years.
- (iii) This Ruling does not apply to Growers who choose to prepay Management Fees or Rent (see paragraphs 130 to 133 of this Ruling). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

- (iv) Interest is deductible under a loan agreement with Macfinance as described at paragraphs 106 to 110 of this Ruling. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Macfinance, the internal financier, is outside the scope of this Ruling. However all Growers who finance their participation in the Project should read the discussion of the prepayment rules in paragraphs 130 to 133 of this Ruling as those rules may be applicable if interest is prepaid.
- (v) The Application fee payable to Macfinance is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread 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 Macfinance is outside the scope of this Ruling.

Deductions for capital expenditure

Division 40

23. Each Grower who is accepted to participate in the Project on or before 15 June 2008 will also be entitled to a tax deduction relating to the macadamia trees planted on the Macgrove as set out in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Establishment of macadamia trees	Nil See Note (vi)	Nil See Note (vi)	Nil See Note (vi)

Notes:

- (vi) Macadamia trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under Sub Leases, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the macadamia trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. If the macadamia trees have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%.

The deduction is allowable when the macadamia trees enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the macadamia trees enter their first commercial season as well as the amount incurred by the Manager in establishing the macadamia trees on the established Macgroves.

24. A Joint Venture Grower may claim deductions, on a per Macgrove basis, for the following expenditure set out in the Tables and Notes in paragraph 22 of this Ruling:

First Joint Venturer

- in the year ending 30 June 2008, \$11,000 for the Management Fee;
- in the years ending 30 June 2008 to 30 June 2010 inclusive, any interest incurred on funds borrowed from Macfinance as outlined in Note (iv) to the Table above; and
- the borrowing costs payable to Macfinance as outlined in Note (v) to the Table above.

Second Joint Venturer

- in the years ending 30 June 2009 and 30 June 2010 inclusive, the Management Fee and Rent; and
- in the years ending 30 June 2008 to 30 June 2010 inclusive, the Grower's Expenses.

25. Each Joint Venturer can also claim deductions for its 50% proportional share of the horticultural plant write-off as discussed in Note (vi) to the Table above.

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

Section 35-55 – exercise of Commissioner's discretion

26. A Grower who is an individual accepted into the Project on or before 15 June 2008 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers as follows:

- for the income years ending **30 June 2008 to 30 June 2010**, for First Joint Venturers; and
- for the income years ending **30 June 2008 to 30 June 2014**, for all other Growers.

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

27. For a Grower who participates in the Project and incurs expenditure as required by the Constitution 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.

Scheme

28. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling dated 13 September 2006 as constituted by documents provided on 14 September 2006, 10 and 30 October 2006, 3, 6, 9, 21, 23 and 28 November 2006, 3, 4, 6 and 7 December 2006, 5 and 25 January 2007, 1, 6, 7 and 8 February 2007, 23 May 2007 and 4, 21, 22, 27 and 28 June 2007 and additional correspondence dated 10 and 30 October 2006, 3, 6, 9, 17, 21, 23 and 24 November 2006, 5 and 25 January 2007, 1 and 7 February 2007, 23 May 2007 and 21 June 2007;
- Product Disclosure Statement of the 2007 Macgrove Project dated 8 January 2007;
- Supplementary Product Disclosure Statement of the 2007 Macgrove Project dated 21 February 2007;
- Expert's Report (additional land at Moore Park) for the 2007 Macgrove Project received on 6 February 2007;
- **Constitution** of the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and each Grower received on 28 June 2007;
- **Supplementary Constitution** of the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and each Grower dated 21 December 2006;

- Compliance Plan of the 2007 Macgrove Project, received on 22 June 2007;
- Supplementary Compliance Plan of the 2007 Macgrove Project dated 9 October 2006;
- **Consolidated Management Agreement** of the 2007 Macgrove Project between Maccacorp Limited (Manager) and each Grower received on 7 December 2006;
- Lease (Kenzler Road Lease) for the 2007 Macgrove Project between Maccland Pty Ltd (Lessor) and Maccacorp Limited (Lessee) dated 30 September 2006;
- three **Sub Leases** in relation to the Kenzler Road Lease for the 2007 Macgrove Project between Maccacorp Limited (Lessor) and each Grower (Lessee) received on 3 December 2006;
- Lease (Moore Park Lease) for the 2007 Macgrove Project between Brian Gerrard Grant (Lessor) and Maccacorp (Lessee) dated 5 April 2007;
- three Sub Leases in relation to the Moore Park Lease for the 2007 Macgrove Project between Maccacorp and individual Growers received on 6 February 2007;
- Lease Put and Call Option Deed for the 2007 Macgrove Project between Brian Gerrard Grant (Landowner)(Moore Park Landowner) and Maccacorp Limited (Maccacorp) dated 9 March 2007;
- Draft **Caveat** to be lodged on behalf of each investor (Caveator) with the Queensland Land Registry, received on 23 November 2006;
- Principal Subcontractor's Agreement for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and Maccmanagement Pty Limited (Principal Contractor) dated 3 December 2006;
- Nut-In-Shell Supply Agreement (Sale Agreement) for the Macgrove 2007 Project between Maccacorp Limited (Responsible Entity) and Macadamia Processing Co Limited (the Company) dated 9 December 2005;
- Custody Agreement for the Macgrove 2007 Project between Maccacorp Limited (Responsible Entity) and Perpetual Nominees Limited (Custodian) dated 8 May 2006;
- **Finance Package** (Loan Terms and Conditions) of the 2007 Macgrove Project, received by the Tax Office with the Application for a Product Ruling on 14 September 2006; and

- **Finance Package** (Loan Application Form) of the 2007 Macgrove Project, received on 9 November 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.

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

30. 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

31. Following is a summary of the scheme:

Location	92 Kenzler Road, Sharon via Bundaberg, Queensland and 351-353 Booyang Road, Moore Park, Queensland
Type of business to be carried on by each participant	Commercial growing, cultivation and harvesting of macadamia nuts for sale
Number of hectares offered for cultivation	209
Size of each Macgrove	0.4 hectare
Minimum allocation	1 Macgrove
Number of trees per Macgrove	Approximately 125
Term of the Project	Approximately 20 years
Initial cost	\$11,000 Management Fee per Macgrove
Ongoing costs	Annual Management Fees and Annual Rent
Other costs	Orchard Operating Expenses, Annual Insurance premiums and Performance Incentive Fee

32. The Project is a registered managed investment scheme under the *Corporations Act 2001* (Corporations Act). Maccacorp Limited (Maccacorp) has been granted an Australian Financial Services Licence (Licence No 296213) and will be the Responsible Entity for the Project.

33. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 520 established Macgroves totalling approximately 209 hectares in the Project. Participants will be invited to subscribe for a minimum of 1 Macgrove, comprising 0.4 hectares. The Trees will be planted on each Grower's Macgrove and all establishment activities will be completed by the time of acceptance of each Grower's application to participate in the Project. This ruling has no application to Growers accepted to participate in the Project before 8 August 2007 and after 15 June 2008.

34. A minimum of 100 established Macgroves must be issued under the PDS for the Project to commence. Entities associated with Maccacorp may apply for established Macgroves, including, to ensure that the minimum subscription is met. However, entities associated with Maccacorp will not take up more than 20 percent of the total number of issued established Macgroves. Each of the entities associated with Maccacorp will be Growers as defined in the Constitution, will be bound by the Project Agreements in the same way as other Growers and will be required to pay the same fees at the same time as other Growers. PR 2006/163 was issued on 20 December 2006 for the Project's Early Growers, on the basis of a Minimum Subscription of 100 established Macgroves. Minimum Subscription was achieved on 7 May 2007.

35. This Product Ruling will have no application if entities associated with Maccacorp purchase Macgroves and fail to pay the same fees at the same time as other Growers. In this context payment means that Maccacorp is put into funds with real money. Payment does not include the use of bridging finance, promissory notes or other such instruments.

36. The Project involves the commercial growing, cultivation and harvesting of macadamia nuts for sale.

37. Applications to participate in the Project must be made using the Application and Power of Attorney Form included in the PDS. By completing this Form the Grower agrees to allow Maccacorp to enter into, execute and otherwise deal with Project Agreements (being the Sub Leases, Consolidated Management Agreement and Sale Agreement) on their behalf. A custodian will be appointed under the Custody Agreement to hold the Project Assets for the Growers.

38. For Applicants who are accepted as Growers in the Project, Maccacorp will allocate established Macgroves to those Applicants and establish and maintain a register of Growers throughout the term of the Project.

39. Under the PDS offer, Growers can enter the Project during the period up to 15 June 2007 and during the period from 8 August 2007 to 15 June 2008. Applicants will not be accepted into the Project from 16 June 2007 to 7 August 2007 and after 15 June 2008. This Ruling only applies to Growers who enter into the Project from 8 August 2007 to 15 June 2008. PR 2006/163 issued for Early Growers who entered the Project from 20 December 2006 to 15 June 2007.

40. The Project land on which Growers will be growing and cultivating the Trees for the production of macadamia nuts is situated at 92 Kenzler Road, Sharon via Bundaberg Queensland (Kenzler Road land), and 351-353 Booyang Road, Moore Park, Queensland (Moore Park land). Maccacorp will enter into a Lease with the Landowner for the Kenzler Road land, and a Lease with the Moore Park Landowner for the Moore Park land, in relation to the Land, access roads and the supply of Irrigation Water. There are three dams on the Kenzler Road land with a total capacity of approx 400 mega litres as well as Water Allocations Nos 360 and 379 for a total of 238 mega litres per annum. There will be one main dam on the Moore Park land with a total capacity of approximately 25 mega litres. Additionally, water to the Moore Park land is supplied by a Queensland Government irrigation scheme, the allocation being 296 mega litres per annum. Further, Maccacorp will obtain Additional Water totalling 200 mega litres annually. The Leases will be submitted for registration with the Registrar of Titles, Queensland.

41. Maccacorp will grant the Growers three consecutive Sub Leases to use and occupy one or more identifiable established Macgroves. The collective terms of the Sub Leases (ten years, nine years and one year) correspond to the 20 year term of the Project. Under the first Sub Lease, the Grower agrees to maintain the Orchard in accordance with the Management Plan and in a manner that is consistent with best agricultural practice. The Trees and all Improvements are and remain the property of the Land Owner. A Caveat for each Grower in respect of the established Macgroves held for each Grower will be submitted for registration with the Investment Registrar of Titles, Queensland.

42. Each Grower will enter into a Consolidated Management Agreement with Maccacorp to cultivate and maintain the Trees and be responsible for harvesting, procuring the processing of and selling the macadamia nuts on behalf of the Grower.

43. Maccacorp has entered into the Sale Agreement with Macadamia Processing Co Limited (MPC) to sell the entire macadamia crop produced from the Orchard during the duration of the Project at prices and on terms which are no less favourable than arms length terms.

44. As an alternative to participation by a Grower as a single entity, the terms of the Constitution and the Consolidated Management Agreement provide that two Growers may enter into a 'Joint Venture' to subscribe for a Macgrove(s).

Constitution

45. The Constitution establishes the Project and operates as a deed binding on each Grower and Maccacorp (clause 2.1). The Constitution sets out the terms and conditions under which Maccacorp agrees to act as the Responsible Entity and thereby manage the Project.

46. The Project is established for the purpose of:

- (a) inviting persons to become the proprietor of their own Macgrove and commencing a primary production business of growing, harvesting and selling Macadamia Nuts; and
- (b) enabling a person to become a Grower by:
 - (i) applying for and being issued an Interest;
 - (ii) entering into a Consolidated Management Agreement which appoints the Responsible Entity to manage the person's business;
 - (iii) entering into the Sub Leases; and
 - (iv) agreeing to be bound by the Constitution (clause 2.3).

47. The Project is established immediately upon ASIC registering the Project pursuant to Part 5C.1 of the Corporations Act and commences upon achievement of minimum subscription. The Term of the Project ends upon the earliest of:

- (a) the termination or expiry of the last of the Growers' Interests;
- (b) the termination of the Head Lease in circumstances where no satisfactory ongoing arrangement is made to ensure the Land remains available for the purpose of the Project;
- (c) the Project being wound up in accordance with clause 11 and the Corporations Act; and
- (d) the expiry of the period of 80 years from the date of the Constitution (clause 10.1).

Upon the termination of the Project all of the rights and obligations under the Project Agreements will cease and each Project Agreement will be automatically terminated.

48. In order to become a Grower in the Project, an Applicant must lodge an Application and pay to the Responsible Entity the amount of \$11,000 in respect of each established Macgrove on the terms and conditions specified in the PDS which is current at the date of lodging the relevant Application and the Application must be accepted by the Responsible Entity (clause 3). For this Product Ruling to apply the 'current' PDS under which a Grower is accepted must be materially the same as the draft PDS submitted to the Tax Office dated 8 January 2007.

49. The amount payable under clause 3 represents the Management Fee payable for the Initial Orchard Maintenance Services to be provided in the First Financial Year in respect of each established Macgrove, pursuant to the Consolidated Management Agreement.

50. Each Application for an Interest must:

- (a) be in the form included in or accompanying the PDS issued by the Responsible Entity and current at the time of lodgement of the Application;
- (b) be signed by the Applicant and lodged at the registered office of the Responsible Entity or such other place as the Responsible Entity nominates; and
- (c) be accompanied by such other information or evidence as the Responsible Entity may require (clause 13.1).

51. Upon accepting an Application, the Responsible Entity will allocate to the Applicant that number of established Macgroves in respect of which the Application has been accepted by the Responsible Entity (clause 14.1).

52. The Responsible Entity must establish and maintain a register of Growers throughout the term of the Project (clause 14.2).

53. If any Application is refused then the Responsible Entity must refund any Application Money to the Applicant concerned within five Business Days after the refusal (clause 13.3).

54. The Responsible Entity must open two Project accounts with a bank or other financial institution. One account will be the Application Fund (into which will be deposited all money received from Applicants) and the other will be the Proceeds Fund (into which will be deposited all money generated from the Project for the Growers of the Project). However, in certain limited circumstances the Responsible Entity may use one account only (clause 12.2). The Responsible Entity may transfer money paid by an Applicant from the Application Fund to the Responsible Entity for the purposes of the Project where the Responsible Entity has issued an Interest to the Applicant (clause 15.1).

55. Each Applicant has an interest in the Application Fund equal to the proportional interest that Applicant's Application Money bears to the total Application Money paid by all Applicants. However, an Applicant does not have any interest in any particular part of the Application Fund or in any Investment (clause 16.1).

56. Each Grower directly owns their Grower Interest, including:

- (a) the Grower's business of growing, and maintaining Trees on, and harvesting Macadamia Nuts from, each of its established Macgroves;
- (b) a share of any Crop equal to the Grower's Proportion (as defined in the Constitution); and

- (c) the net proceeds which result from the sale of Macadamia Nuts by the Grower carrying on its business of primary production (clause 16.3).

57. The Grower's Interest does not include the Trees or any of the Improvements which will at all times remain the property of the Land Owner (clause 16.3).

58. Each Grower has an interest in the Proceeds Fund equal to the Grower's Proportion, which is defined as the proportion that the area of the Grower's established Macgroves bears to the total area of all established Macgroves registered to Growers in that Financial Year (clause 16.2).

59. Where an event occurs to which any insurance policies apply, the insurance proceeds will be dealt with as follows:

- In the situation where the whole Orchard is destroyed, the proceeds of any insurance policies paid in respect of all established Macgroves will be paid into and form part of the Proceeds Fund and the proceeds of any insurance policy will be deemed to be attributable to all Growers' Interests (clause 25.4(a)).
- Where an event occurs which affects some but not all the Growers' established Macgroves, and those affected established Macgroves are fully destroyed, the proceeds of the insurance policies paid in respect of that event will be paid into and form a separate fund, and each Grower with a Macgrove affected by the event (Affected Grower) has an interest in the separate fund calculated as provided in clause 25.4(c)(iii) (clause 25.4(b)).
- Where an event occurs which affects some but not all the Grower's established Macgroves, and those affected established Macgroves are only partially destroyed, those Affected Grower's have an interest in both the Proceeds Funds (in relation to sale of Macadamia Nuts) and the separate fund (in relation to insurance proceeds) in accordance with the formulae shown at clause 25.4(c).

60. The Responsible Entity must harvest all of the Macadamia Nuts grown on Trees in each Grower's Macgrove in accordance with the Consolidated Management Agreements and may store, market and sell the Crop harvested in accordance with the terms of any Sale Agreement (clause 25.1). Macadamia Nuts grown during the term of the Project will be sold under the Nut in Shell Supply Agreement discussed in paragraphs 96 and 97 of this Ruling.

61. The Responsible Entity must pay into the Proceeds Fund:

- (a) proceeds from the sale of all Macadamia Nuts harvested from the Orchard;

- (b) proceeds of any insurance policy accruing to the Growers where the Orchard is totally destroyed; and
- (c) any other amount properly related to the proceeds of the Growers' Interests (clause 25.2).

Supplementary Constitution

62. The principal purposes of this document are to firstly, change the name of the Constitution of the 2006 Macgrove Project, to the Constitution of the 2007 Macgrove Project and secondly, to amend the Constitution and Consolidated Management Agreement to provide for the situation where two entities participate in the Project as Joint Venturers.

63. Joint Venturers are known as First Joint Venturer and Second Joint Venturer, and are apportioned specific responsibilities, rights and entitlements under clause 35 of the Constitution.

64. Each of the First Joint Venturer and the Second Joint Venturer are responsible for the payment of Management Fees and Rent over the Term of the Project in the manner stated at paragraph 102 to 105 of this Ruling. Both the First Joint Venturer and the Second Joint Venturer are entitled to a Prescribed Proportion of 50% of the Joint Venture Assets, as defined in clause 1.1.

Compliance Plan

65. The Plan describes how the Responsible Entity will operate the Project and ensure that it complies with the Corporations Act, the Constitution and with any other operating requirements set down by the board of Directors of the Responsible Entity.

66. The principal purpose of the Compliance Plan is to ensure that the interests of Growers are protected. The Plan sets out the systems and methods by which the Responsible Entity, its officers, agents, contractors and employees will ensure that the Project and the Responsible Entity continue to comply with all relevant parts of the Corporations Act and the Constitution and continuously monitor and review such compliance.

Supplementary Compliance Plan

67. This Plan changes all references to the 2006 Macgrove Project in the Compliance Plan to the 2007 Macgrove Project. It also amends certain definitions in clause 1 to reflect the changes in the arrangement from the 2006 Macgrove Project. The 2006 Macgrove Project did not proceed because Minimum Subscription was not reached.

Leases

68. Under the Lease of the land at 92 Kenzler Road, Sharon via Bundaberg (Kenzler Road Lease), in return for the 'Rent', Maccland leases the Land to Maccacorp for the Term of the Project (clause 2.1). The Land is located at Bundaberg, Queensland, being Lots 1 and 2 on RP110202, Lots 3 and 4 on RP866764 and Lot 1 on CP RL5669. The Term of the Lease is the period commencing on 30 September 2006 and ending 30 June 2028. The Rent is the total of rental received by Maccacorp under all sub lease agreements including, but not limited to the Sub Leases between Maccacorp and the Growers, which shall be due and payable on 1 July in each Financial Year commencing 1 July 2008 (clause 3).

69. Maccacorp entered into a Put and Call Option Lease Deed in relation to the Moore Park land. Under the terms of the Deed, Maccacorp had a right to require the Moore Park Landowner, to lease the Moore Park land to Maccacorp (for use in the Project).

70. The Put and Call Option was exercised on 9 March 2007 and the Moore Park Landowner and Maccacorp entered into the Moore Park Lease on 5 April 2007.

71. Under the Moore Park Lease, in return for the 'Rent', the Moore Park Landowner leases the Land to Maccacorp for the Term of the Project (clause 2.1). The Land is located at Moore Park, Queensland, being Lots 1 and 2 on RP52762, Lot 1 on RP155035 and Lot 9 on RL199897. The Term of the Moore Park Lease will be 21 years, ending on 30 June 2028. The Rent is the total of rental received by Maccacorp under all sub lease agreements including, but not limited to the Sub Leases between Maccacorp and the Growers, which shall be due and payable on 1 July in each Financial Year commencing 1 July 2008.

72. The Lessee may give the Lessors a notice asking the Lessors to grant the Lessee a further lease for the period of five years commencing on the day following the expiration of the initial Term of these Leases. This is known as the First Option Period.

73. The Lessee may give the Lessors a notice asking the Lessors to grant the Lessee a further lease for the period of four years commencing on the day following the expiration of the First Option Period. This is known as the Second Option Period.

74. Under the Leases, Maccacorp:

- must undertake the Development Work at its own cost and expense, prior to Growers being accepted into the Project. The Lessors makes no representation or warranty that the Land is suitable for use as a commercial macadamia nut orchard (clause 7.1);

- is responsible to obtain all necessary permits or approvals that may be required from any Public Authority in relation to the use of the Land for the purpose of the Project and/or in relation to the performance of the Development Work (clause 7.2);
- acknowledges that the Trees and all Improvements are and remain the property of the Lessors and the Lessee (whether in its capacity as Responsible Entity of the Project or otherwise) will not have right, title, interest or claim in or to either the Trees or the Improvements (clause 7.3);
- must perform all Development Work in a good workmanlike manner and so as not to cause any nuisance, damage or injury to the Lessors or the Land or the occupiers of any adjoining land (clause 8.1);
- must cause to be planted, by the time of acceptance of each Grower's application to participate in the Project and in any event on or before 15 June 2008, macadamia nut trees which are sufficient to fully plant all established Macgroves for all Growers (clause 8.2);
- must undertake all necessary Orchard Maintenance in accordance with Best Agricultural Practice; and
- must at its own expense, obtain the Additional Water (being defined as 200 mega litres of water).

75. Under the Kenzler Road Lease, Maccland will provide Access Roads for use by Maccacorp and Maccacorp's employees and will maintain the supply of the Irrigation Water and will renew water allocations and licences as and when required (clauses 9.5 and 9.6).

76. Under the Moore Park Lease, the Moore Park Landowner will:

- provide Access Roads for use by Maccacorp and Maccacorp's employees and will maintain the supply of the Irrigation Water (clause 9.6);
- renew water allocations and licences as and when required (clause 9.8); and
- purchase the Additional Water from the Lessee on or before 1 July in the fourth Financial Year of the Project (clause 9.9).

77. The Leases will be submitted for registration with the Registrar of Titles, Queensland.

Sub Leases

78. Under the Sub Leases the Lessor leases to the Grower the Grower's established Macgrove together with the right to use in common with the Lessor and other participants in the Project the Common Area from the Commencement Date on and subject to the terms and conditions set out in the Sub Leases (clause 2). Common Area means those parts of the Land provided by the Lessor from time to time for common use by the Grower and the Lessor and/or other Growers who are occupants of the Land and is more particularly described in Item 5 of the Schedule. Caveats for the established Macgroves held by each Grower are to be submitted for registration within thirty days of execution of the Sub Leases.

79. Each Sub Lease will be entered at the same time. The commencement and expiry dates of each Sub Lease are as follows:

Sub Lease	Term (years)	Commencement Date	Expiry date
First	10	Date of execution of first Sub Lease (being the date of acceptance of Grower into Project)	10 years after the commencement date of the first Sub Lease
Second	9	10 years and one day after the commencement of the first Sub Lease	9 years after the commencement date of the second Sub Lease
Third	1	19 years and one day after the commencement of the first Sub Lease	One year after the commencement date of the third Sub Lease

80. The Grower may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of five years commencing on the day following the expiration of the initial Term of the Third Sub Lease. This is known as the First Option Period.

81. The Grower may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of four years commencing on the day following the expiration of the First Option Period. This is known as the Second Option Period.

82. The Growers must pay to Maccacorp, in respect of each Financial Year during the Term, the Rent in accordance with Item 3 of the Schedule. There is no Rent payable for the First Financial Year. The Rent for the second and each successive Financial Year of the Term must be paid annually in advance on 1 July in each Financial Year, commencing on 1 July 2008.

83. Under the Sub Leases the Grower:
- will maintain the Orchard in accordance with the Management Plan and in a manner that is consistent with Best Agricultural Practice (clause 7.2);
 - acknowledges that Maccland is the owner of the Improvements and the Trees and the Grower will not have right, title, interest or claim in or to any of that property (clause 8.1); and
 - except as provided in the Project Agreements, will have the right to harvest and take as its own any Macadamia Nuts during the Term (clause 8.2).
84. Unless inconsistent with the Management Plan the Grower will do or will cause to be done, the following:
- (a) prune the Trees as and when required;
 - (b) provide the Grower's Macgrove with irrigation, fertilisers and nutrients;
 - (c) minimise soil erosion and maintain soil quality on the Grower's Macgrove;
 - (d) maintain any buildings, sheds, fire-breaks, windbreaks, fences, access roads or tracks on the Grower's Macgrove in the condition required by Maccacorp and in good repair and first class condition;
 - (e) keep the Grower's Macgrove free from Vermin and Vegetation;
 - (f) keep the Trees or the Macadamia Nuts free from insects and diseases;
 - (g) destroy, abandon or leave to rot any Trees or Macadamia Nuts which a reasonable horticulturalist would destroy, abandon or leave to rot consistent with Best Agricultural Practice;
 - (h) do all things required by the terms of the Management Plan; and
 - (i) harvest, dehusk, dry and store the Macadamia Nuts with a view to obtaining macadamia nuts that are of optimum quality (clause 9.1).

Consolidated Management Agreement

85. Under clauses 4 and 5 of this Agreement the Grower engages the Manager during the Term of the Project to perform all services necessary to maintain a macadamia nut tree orchard on the Grower's Macgrove, harvest the Macadamia Nuts and sell the Crop on behalf of the Grower. The Term of the Project commences on the Commencement Date (being the date of execution of the Consolidated Management Agreement) and is expected to end on 30 June 2028.

86. If the Grower exercises the first five year option to extend the term of the third Sub Lease, then the Term of this agreement is automatically deemed extended by five years. If the Grower exercises the second four year option to further extend the term of the third Sub Lease, then the Term of this agreement is automatically deemed extended by a further four years.

87. Specifically clause 5 of the Agreement states that the Manager will:

- (a) perform the Initial Orchard Maintenance Services in the first Financial Year;
- (b) perform the Orchard Maintenance Services in the second and subsequent Financial Years;
- (c) harvest the Macadamia Nuts in accordance with clause 7; and
- (d) sell the Crop on behalf of the Grower in accordance with clause 8.

88. The Initial Orchard Maintenance Services which must be provided by the Manager in the first Financial Year are set out in Schedule 2 to the Consolidated Management Agreement and the Orchard Maintenance Services which must be provided by the Manager in the second and subsequent Financial Years are set out in Schedule 3 of that Agreement.

89. The Grower must pay the Management Fee to the Manager for the Orchard Services set out in clause 5. The Management Fee for each Financial Year is specified in Column 2 of Item 5 of Schedule 1. 80% of the Management Fee is in respect of performing, or causing to be performed, the Orchard Services and the remaining 20% of the Management Fee is remuneration payable to the Manager as Responsible Entity of the Project for managing that performance. The Management Fee is payable in advance on the date stated in Column 3 of Item 5 of Schedule 1.

90. The Manager will, at the Grower's cost, maintain with a reputable insurer a policy of insurance against public risk and occupier's liability and against damage to the Grower's Macgrove which is caused by fire or other insurable risks provided that in the opinion of the Manager the costs of any such insurance are economically justified. The Manager is not required to take out crop insurance unless specifically agreed between the Manager and the Grower from year to year. All such policies of insurance must be in the names of or note the interests of the Land Owner and the Grower (clause 12).

Pooling of amounts and distribution of the Proceeds Fund

91. The Constitution (clause 25) set out provisions relating to the pooling of amounts from the sale of each Grower's Macadamia Nuts and the distribution of the Grower's Proportion of the Proceeds Fund from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a Grower who has contributed Macadamia Nuts or insurance proceeds to a pool making up a Proceeds Funds is entitled to benefit from distribution from those Proceeds; and
- any pool of Macadamia Nuts or other Proceeds must consist only of Macadamia Nuts or other Proceeds contributed by a Grower in the 2007 Macgrove Project.

Principal Subcontractor's Agreement

92. Under this Agreement, Maccmanagement Pty Limited (Maccmanagement) has agreed to provide the Orchard Establishment Services as detailed in Schedule 1, establish the Orchard and provide all necessary services to maintain the Orchard on the Land including the Initial Orchard Maintenance Services and the Orchard Maintenance Services (as defined in the Consolidated Management Agreement) (clause 3).

93. The Orchard Establishment Services include the preliminary works, selection of suitable macadamia trees, the planting of the macadamia trees and installation of a modern cost effective irrigation system.

94. The Principal Subcontractor must complete the Orchard Establishment Services in respect of the Macgroves of each Grower by the time of acceptance of each such Grower's application to participate in the Project.

95. This Agreement commences on the Commencement Date (being the date of the Agreement) and ends on the second anniversary of the Commencement Date (Initial Term). By mutual agreement, the Initial Term may be extended by two year periods or for such other period as may be agreed by the Parties (clause 6).

Nut-In-Shell Supply Agreement

96. Under this Agreement Maccacorp agrees to sell and MPC agrees to buy, all macadamia Nut-In-Shell produced on the Project Property from the date of the Agreement.

97. Each year MPC will pay to Maccacorp the average selling price per kilogram obtained by MPC for the finished product after deducting all reasonable expenses and provisions of MPC.

Custody Agreement

98. Under this Agreement, Maccacorp appoints Perpetual Nominees Limited (Perpetual) as custodian of the Project Assets and Perpetual accepts that appointment.

Fees

99. The fees payable under clause 14 of the Consolidated Management Agreement for each Macgrove are set out in Schedule 1, as follows:

Management fees

Financial Year of Project	Amount (\$)	Date Payable
2	\$11,000	Commencement Date
3	\$2,200	1 July 2008
4	As for Financial Year 3 Indexed by the percentage increase (if any) in the CPI during the 12 months preceding the date on which indexation is to occur	1 July 2009
5	As for Financial Year 4	1 July 2010
6	As for Financial Year 5 Indexed as above	1 July 2011
7	As for Financial Year 6 Indexed as above	1 July 2012
8-21 inclusive	Instalment 1 (the Management Fee Indexed from the previous Financial Year); plus Instalment 2 (the amount, if any, by which the Grower's Proportion of the Orchard Operating Expenses ¹ incurred in a Financial Year exceeds the amount of Instalment 1 for that Financial Year)	Instalment 1: 1 July in each Financial Year; Instalment 2: within 7 days of receipt of the Orchard Operating Expenses Statement

¹ The Orchard Operating Expenses are the total expenses properly and reasonably incurred by the Manager in performing the Orchard Services for all of the Grower's Macgroves on the Land plus 10% of such expenses.

Performance Incentive Fee

100. The Grower must pay a Performance Incentive Fee where applicable (clause 14.6). The Performance Incentive Fee payable in each Financial Year, is 25% of any net proceeds of sale of the Crop attributable to a Macgrove that exceeds the Performance Incentive Threshold (as defined in the Consolidated Management Agreement) in the Financial Year (Item 7 of Schedule 1).

Rent

101. The fee payable under clause 3 of the Sub Leases for each Macgrove is set out in Item 3 of Schedule 1, as follows:

Sub Lease	Year of Sub Lease	Financial Year of Project	Amount (\$)	Date Payable
First	1	2	Nil	Not applicable
	2	3	\$792	1 July 2008
	3	4	\$792 Indexed by the percentage increase (if any) in the CPI during the 12 months preceding the date on which indexation is to occur	1 July 2009
	4-10 inclusive	5-11 inclusive	The amount of Rent payable for the previous Financial Year Indexed as above	1 July in each Financial Year
Second	1	12	The amount of Rent payable in the last Financial Year of the first Sub Lease Indexed as above	1 July of the first Financial Year of this second Sub Lease
	2-10 Inclusive	13-20 inclusive	The amount of Rent payable for the previous Financial Year Indexed as above	1 July in each Financial Year

Third	1	21	The amount of Rent payable in the last Financial Year of the second Sub Lease Indexed as above	1 July of the Financial Year in which this third Sub Lease commences
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Joint Venture

102. Fees payable per Macgrove by a Grower who is in a Joint Venture are as stipulated in clause 35.5 of the Supplementary Constitution. Under this clause, the amounts of fees for which a Joint Venture Grower will be solely responsible are expressed as percentages of the fees outlined in paragraphs 99 to 102 of this Ruling.

103. The First Joint Venturer will be solely responsible for paying the following fees and other amounts:

- 100% of the Management Fee payable under the Consolidated Management Agreement in respect of management services for the year ended 30 June 2008;
- 50% of the Management Fee and Rent payable under the Consolidated Management Agreement and Sub Lease in respect of management services and all leasehold rights granted in all Financial Years commencing on and from the 2013 Financial Year;
- 50% of the Grower's Expenses (as defined at Item 1 of Schedule 1 of the Consolidated Management Agreement) in all Financial Years, commencing on and from the 2013 Financial Year;
- 50% of the Orchard Operating Expenses (as defined in clause 14.3 of the Consolidated Management Agreement) in all Financial Years, commencing on and from the 2014 Financial Year, and
- 100% of the interest incurred on the funds borrowed from Maccfinance Pty Ltd on and from the 2008 Financial Year for the Term of the loan.

104. The Second Joint Venturer will be solely responsible for paying the following fees and other amounts:

- 100% of the Management Fee and Rent payable under the Consolidated Management Agreement and Sub Lease in respect of management services and leasehold rights provided in all Financial Years commencing on and from the 2009 Financial Year up to and including the 2012 Financial Year;

- 50% of the Management Fee and Rent payable under the Consolidated Management Agreement and Sub Lease in respect of management services and leasehold rights provided in all Financial Years commencing on and from the 2013 Financial Year;
- 100% of the Grower's Expenses in all Financial Years, commencing on and from the 2008 Financial Year up to and including the 2012 Financial Year;
- 50% of the Grower's Expenses in all Financial Years, commencing on and from the 2013 Financial Year; and
- 50% of the Orchard Operating Expenses in all Financial Years, commencing on and from the 2014 Financial Year.

105. Each Joint Venturer is liable for paying their Prescribed Proportion (being defined in the Supplementary Constitution as 50% each) of any performance incentive fees and each will be entitled to the Prescribed Proportion of the Joint Venturer's Macadamia Nuts Crop and the Joint Venture Proceeds (clause 35.6 of the Supplementary Constitution).

Finance

106. Growers can fund their involvement in the Project themselves, borrow from Maccfinance (a lender associated with the Responsible Entity) or borrow from an independent lender. Growers cannot rely on this Product Ruling if they enter into a finance agreement with Maccfinance that materially differs from that set out in the finance documents provided to the Tax Office by Maccacorp with the application for this Product Ruling.

107. Growers also cannot rely on this Product Ruling if Application Moneys are not paid in full on or before 15 June 2008 by the Grower or, on the Grower's behalf, by any lending institution, including Maccfinance.

108. Where Growers borrow from Maccfinance, all Application monies (both from Growers directly and from Maccfinance) will be paid directly to the Responsible Entity. Such application monies must be paid into the Application Fund on or before the issue date of the Interest. The finance made available by Maccfinance is offered on the following terms contained in the Indicative Term Sheet and 2007 Macgrove Project Finance Package:

PR 2007/74

Lender	Maccfinance	Maccfinance	Maccfinance
Term	3 years	4 years	5 years
Investment amount able to be borrowed	Up to 90% of GST exclusive Application Fee	Up to 90% of GST exclusive Application Fee	Up to 90% of GST exclusive Application Fee
Interest Rate	9.5%	10.4%	10.9%
Loan Approval and Drawdown Date	On or before 15 June 2008	On or before 15 June 2008	On or before 15 June 2008
Repayment Term	3 years of equal monthly repayments payable in arrears	4 years of equal monthly repayments payable in arrears	5 years of equal monthly repayments payable in arrears
Application Fee	\$250	\$250	\$250

109. In each case:

- maximum amount allowed to be borrowed is \$9,000 for every one Macgrove;
- the borrowing does not extend to GST. The GST payable in relation to the Application Fee (\$1,000 per established Macgrove) must be paid by the Borrower out of his/her own resources;
- a deposit equalling the total of the balance of the Application Fee, GST payable and the Loan Application Fee must be paid by the Grower to Maccfinance with the Loan Application;
- the date of the first repayment of the loans is the last business day of the month in which the loan funds are provided by Maccfinance to Maccacorp; and
- the above repayments must be paid irrespective of the amount of any distribution from the 2007 Macgrove Project.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;

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

Commissioner of Taxation8 August 2007

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?

111. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2007 Macgrove Project (Late Growers) must amount to the carrying on of a business of primary production.

112. Where there is a business, or a future business, the gross proceeds from the sale of the nuts in shell 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.

113. For schemes such as that of the 2007 Macgrove Project (Late Growers), 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.

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

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

115. In this Project, each Grower enters into a Consolidated Management Agreement and Sub Leases.

116. Under the Sub Leases, each individual Grower will have rights over specific and identifiable areas totalling 0.4 hectares of land for the Term of the Project. Under the Sub Leases the Grower must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The Sub Leases allows the Manager to come onto to the land to carry out its obligations under the Consolidated Management Agreement.

117. Under the Consolidated Management Agreement the Manager is engaged by the Grower to cultivate and maintain the Trees on the Grower's identifiable area of land during the Term of the Project.

118. The Manager is also engaged to harvest and sell, on the Grower's behalf, the nuts in shell grown on the Grower's macadamia trees.

119. 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.

120. 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 nuts in shell 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.

121. The pooling of nuts in shell from macadamia trees grown on the Grower's Macgrove with the nuts in shell of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled nuts in shell will reflect the proportion of the macadamia trees contributed from their Macgrove.

122. The Manager's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of a Macgrove is relatively small, it is of a size and scale to allow it to be commercially viable.

123. The Grower's degree of control over the Manager as evidenced by the Consolidated Management Agreement and supplemented by the Corporations Act, is sufficient. During the Term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's Macgrove and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

124. The horticulture 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 horticultural activities in the 2007 Macgrove Project (Late Growers) will constitute the carrying on of a business.

Deductibility of Management Fees and Rent

Section 8-1

125. Consideration of whether the Management Fee and Rent 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.

126. The Management Fee and Rent associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of nuts in shell) 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 scheme. 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 use Maccfinance as the finance provider

127. Some Growers may finance their participation in the Project through a loan facility with Maccfinance. 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 Fees and Rent.

128. The interest incurred for the year ended 30 June 2008 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of macadamia trees and the sub lease of the land on which the trees will have been planted – 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.

(ii) Growers who DO NOT use Maccfinance as the finance provider

129. 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 Maccfinance is outside the scope of this Ruling. Product Rulings only deal with schemes where all details and documentation have been provided to, and examined by the Tax Office.

Prepayment provisions

Sections 82KZL to 82KZMF

130. 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.

Application of the prepayment provisions to this Project

131. Under the scheme to which this Product Ruling applies Management Fees and Rent are incurred annually and interest on Maccfinance loans is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

132. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Consolidated Management Agreement and/or the Sub Leases or prepays interest under any loan agreement, including loan agreements with financiers other than Maccfinance. Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

133. As noted in the Ruling section above, Growers who prepay Management Fees and Rent or 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.

Expenditure of a capital nature

Division 40

134. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the macadamia trees is of a capital nature. This expenditure falls for consideration under Division 40.

135. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 23 of this Ruling in the Tables and the accompanying Notes.

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

Section 35-55 – exercise of Commissioner’s discretion

136. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2008 to 30 June 2010** (for First Joint Venturers) and **30 June 2008 to 30 June 2014** (for all other Growers) 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 2008 up to and including 30 June 2010 and for those income years ended 30 June 2008 up to and including 30 June 2014:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the macadamia 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.

137. 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

138. 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. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

139. 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).

140. The 2007 Macgrove Project (Late Growers) will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 22 and 23 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.

141. 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 nuts in shell. 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:*TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; PR 2006/163*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
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- ITAA 1936 82KZMC
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- ITAA 1936 177D
- ITAA 1936 177D(b)
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