



# ***PR 2006/28 - Income tax: Macquarie Forestry Investment 2006 (Pre 1 July 2006 Growers)***

 This cover sheet is provided for information only. It does not form part of *PR 2006/28 - Income tax: Macquarie Forestry Investment 2006 (Pre 1 July 2006 Growers)*

 This document has changed over time. This is a consolidated version of the ruling which was published on *29 March 2006*



## Product Ruling

### Income tax: Macquarie Forestry Investment 2006 (Pre 1 July 2006 Growers)

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

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

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

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

## No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme is not carried out as described, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

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

## Terms of use of this Product Ruling

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

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant taxation provision(s)

2. The tax laws 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;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 82KZL of the ITAA 1936;
- sections 82KZME to 82KZMG of the ITAA 1936; and
- Part IVA of the ITAA 1936.

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

### Class of entities

3. The class of entities to which this Ruling applies are the entities more specifically identified in the Ruling part of this Product Ruling and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

4. The class of entities to whom this Ruling applies does not include entities who:

- intend to terminate their involvement in the scheme prior to its completion;
- do not intend to derive assessable income from the scheme; and
- are accepted to participate in the scheme after 30 June 2006 (a separate Product Ruling will issue for these entities).

### **Qualifications**

5. 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 11 to 79.

6. 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**

8. This Ruling applies prospectively from 29 March 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

9. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the scheme covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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10. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

## Scheme

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

- Application for a Product Ruling dated 12 December 2005 as constituted by documents provided on 15 December 2005, 27 February 2006, 2 March 2006, 9 March 2006 and 13 March 2006 and additional correspondence dated 16 January 2006, 30 January 2006 and 13 March 2006;
- Draft Product Disclosure Statement of the Macquarie Forestry Investment 2006 received by the Tax Office on 9 March 2006;
- Macquarie Eucalypt Project 2006 Constitution, dated 16 January 2006;
- Amending Deed dated 28 February 2006, in relation to the Macquarie Eucalypt Project 2006 Constitution;
- Draft Macquarie Eucalypt Project 2006 Compliance Plan, dated December 2005;
- Draft Agreement for Ground Lease and Forest Property Agreement between Macquarie Bank Limited ('Landlord') and Macquarie Alternative Assets Management Limited ('Responsible Entity of the Macquarie Eucalypt Project 2006') received with the Application for a Product Ruling on 15 December 2005;

- Draft Form of Forest Property Agreement between Macquarie Bank Limited ('Grantor') and Macquarie Alternative Assets Management Limited ('Grantee') received with the Application for a Product Ruling on 15 December 2005;
- Draft Form of Lease between Macquarie Bank Limited ('Lessor') and Macquarie Alternative Assets Management Limited ('Lessee') received by the Tax Office on 9 March 2006;
- Draft MFSPL Management Agreement 2006 between Macquarie Forestry Services Pty Limited and Macquarie Alternative Assets Management Limited received by the Tax Office on 9 March 2006;
- Draft Midway Management Agreement 2006 between Midway Pty Limited, Macquarie Forestry Services Pty Ltd, Macquarie Alternative Assets Management Limited and Macquarie Bank Limited received by the Tax Office on 9 March 2006;
- Draft McEwens Management Agreement 2006 between McEwens Contracting Pty Limited, Macquarie Forestry Services Pty Limited, Macquarie Alternative Assets Management Limited and Macquarie Bank Limited received by the Tax Office on 9 March 2006;
- Draft Midway Off-Take Agreement 2006 (incorporating the Draft Pricing and Payment Schedule 2006) between Midway Pty Limited and Macquarie Alternative Assets Management Limited ('the Manager') received by the Tax Office on 9 March 2006;
- Eucalypt Pulpwood Agreement between Macquarie Alternative Assets Management Limited and Paper Australia Pty Limited dated 24 August 2005;
- Draft Greening Australia Services Deed 2006 between Greening Australia Limited ('Service Provider'), Macquarie Forestry Services Pty Limited, Macquarie Alternative Assets Management Limited and Macquarie Financial Products Limited received with the Application for a Product Ruling on 15 December 2005;
- Custody Agreement between Macquarie Alternative Assets Management Limited ('Manager') and Bond Street Custodians Limited ('Custodian') received with the Application for a Product Ruling on 15 December 2005;
- Draft Notice of Addition to the Custody Agreement between Macquarie Alternative Assets Management Limited and Bond Street Custodians Limited received with the Application for a Product Ruling on 15 December 2005;

- Macquarie Timber Land Trust 2006 Constitution dated 16 January 2006;
- Draft Macquarie Timber Land Trust 2006 Compliance Plan, dated December 2005;
- Custody Agreement between Macquarie Financial Products Management Limited ('Manager') and Bond Street Custodians Limited ('Custodian') received with the Application for a Product Ruling on 15 December 2005;
- Draft Notice of Addition to the Custody Agreement between Macquarie Financial Products Management Limited and Bond Street Custodians Limited received with the Application for a Product Ruling on 15 December 2005;
- Draft Agreement for Sale and related Contracts of Sale of land between Macquarie Bank Limited ('Owner') and Macquarie Financial Products Management Limited ('Transferee') received with the Application for a Product Ruling on 15 December 2005; and
- Draft Loan & Security Agreement and Notice of Mortgage between Macquarie Bank Limited ('the Bank') and the Borrower received by the Tax Office on 9 March 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.

12. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

13. 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**

14. The salient features of the Macquarie Forestry Investment 2006 are as follows:

Location	The land will be located within an economic haulage distance of a log processor's mill gate in Victoria, eg Midway's log processing facilities at the port of Geelong Victoria or log processing facilities located in the Morwell region of Eastern Victoria or processing facilities based near Portland Victoria
Type of business to be carried on by each participant	Commercial growing and cultivation of varieties of eucalyptus trees including <i>Eucalyptus globulus</i> and <i>Eucalyptus nitens</i> for the purpose of harvesting and selling trees for woodchips and other timber products
Number of hectares offered for cultivation	Approximately 7,000
Size of each interest	1 hectare
Minimum allocation	1 Interest for the Timber Project; 1 Unit for the Land Project
Number of trees per hectare	Approximately 1,000
Term of the Project	Approximately 11.5 years
Initial cost	\$9,020 Plantation Establishment Fee for an Interest in the Timber Project and/or \$1,950 application fee for a Unit in the Land Project
Ongoing costs	Deferred Management Fee of 5% of Net Sale Proceeds or any Tree Insurance Proceeds; Licence Fee of 10% of Net Sale Proceeds or any Tree Insurance Proceeds.
Other costs	Annual Tree Insurance premiums payable by the Growers; Productivity Performance Fee of 15% of Net Sale Proceeds from the region (being either Portland, Geelong or Gippsland) in excess of \$13,500 per Plantation Lot if the average amount of All Timber from the region produced is greater than 240 GMT per hectare for the Plantation Lot for the region.



15. The scheme is called the Macquarie Forestry Investment 2006. The Project consists of the Macquarie Eucalypt Project 2006 ('the Timber Project') and the Macquarie Timber Land Trust 2006 ('the Land Project'). This Ruling only applies to participants in the Timber Project who take out insurance in respect of the trees, at or before the time of planting, against damage or destruction in terms of clause 5.1(b) of Schedule 1 of the Constitution of the Macquarie Eucalypt Project 2006. The Ruling does not address the tax consequences of disposing of Units in the Land Project.

16. Under the Product Disclosure Statement ('PDS'), Macquarie Alternative Assets Management Limited ('MAAML') is offering Interests in the Timber Project at an application price of \$9,020 per Interest and Macquarie Financial Projects Management Limited ('MFPML') is offering Units in the Land Project at an application price of \$1,950 per Unit. The Timber Project and the Land Project are not stapled securities and investors may apply for Interests in the Timber Project ('Growers'), Units in the Land Project ('Land Investors') or both Interests in the Timber Project and Units in the Land Project ('Growers'). The minimum application for each Grower and Land Investor is one Interest in the Timber Project and/or one Unit in the Land Project. In this Ruling, reference to 'Growers' includes reference to investors who invest in either the Timber Project, or the Timber and Land Projects, as the context requires.

17. MAAML will act as the Responsible Entity for the Timber Project and MFPML will act as the Responsible Entity for the Land Project. An Interest in the Timber Project is comprised of one Plantation Lot having a total area of one hectare which will be licensed by the Grower from the Timber Project Responsible Entity to carry on the business of growing eucalypt trees.

18. At the termination of the Project, on or around 31 December 2017, Midway Pty Limited ('Midway') will harvest and purchase the Grower's trees in the Geelong and Portland regions and Paper Australia Pty Limited ('Australian Paper') will harvest and purchase the Grower's trees in the Gippsland region.

19. The Sale Period, being the period during which the Timber Project trees will be harvested or otherwise sold, is defined in the PDS as running from 1 January 2017 to 31 December 2017. The Growers will receive their Net Sale Proceeds (this term is defined in paragraph 35) in instalments, which are expected to be on a monthly basis, throughout the Sale Period. The Sale Period will not be longer than 12 months. It is envisaged that upon purchase by Midway or Australian Paper the Timber will be harvested in accordance with the Midway Off-Take Agreement or Eucalypt Pulpwood Agreement as applicable.

20. Under the Midway Management Agreement and McEwens Management Agreement, Midway and McEwens Contracting Pty Limited ('McEwens') respectively will select land in Victoria for the Project which satisfies a detailed protocol for land selection which has been developed by Macquarie Bank Limited ('MBL'). The protocol employs a site classification system based on climate and soils that correlates with plantation productivity predictions.

21. MBL will purchase suitable land recommended by Midway (in respect of the Gippsland and Geelong regions) or McEwens (in respect of the Portland region). Once it has acquired the land, MBL will, pursuant to the Agreement for Lease and Forestry Property Agreement, enter the Lease and Forest Property Agreement with MAAML for the term of the Project. MAAML will grant each Grower a Licence to access and conduct their afforestation business on their Plantation Lot. The Macquarie Timber Land Trust 2006 will then enter into an Agreement to acquire the land from MBL and the land will be transferred to the Macquarie Timber Land Trust 2006 subject to the Lease and the Forest Property Agreement. The Licence and Forestry Rights granted to the Grower under the Constitution will not be affected by the transfer of the land.

22. The land will be acquired and the Lease and Forest Property Agreement granted before the first of:

- (a) the expiry of 9 months after the grant of the Interest to the Investor; and
- (b) the date that is three months before the end of the Initial Term for that Interest.

MFPML, as the Macquarie Timber Land Trust 2006 Responsible Entity, will hold the land on behalf of the Land Investors. The Macquarie Timber Land Trust 2006 will derive rental income and proceeds from the sale of the Project land at the termination of the Project. The Unit holders may receive distributions from the Macquarie Timber Land Trust 2006.

### **Constitution of the Macquarie Eucalypt Project 2006**

23. The Constitution establishes the Scheme known as the Macquarie Eucalypt Project 2006 and operates as a deed declared to be for the benefit of and binding on the Growers. It sets out the terms and conditions under which MAAML agrees to act as the Manager of the Scheme.

24. Following entry into a Lease or the issuance of Interests (whichever occurs later):

- (a) Plantation Lots shall be granted to Growers in the order in which Interests were issued;
- (b) a Plantation Lot granted to a Grower may be in any region and, where a Grower has multiple Interests, Plantation Lots may be granted across the regions as determined by the Manager in its absolute discretion and on the basis that the allocation to Growers of Plantation Lots between regions may be different as between Growers; and
- (c) a Licence and Forest Property Right in respect of the Grower's Plantation Lots on the Land shall, by virtue of the issuance of the Interests and allocation of Plantation Lots, be granted to the Grower.

25. Under the Constitution the Manager must hold any Scheme Property on trust for Growers or cause it to be held by a Custodian.

26. An applicant for Interests must complete the Application Form attached to the PDS issued by the Manager in connection with the Scheme. Payment in a form acceptable to the Manager, of the part (if any) of the Plantation Establishment Fee which is not being provided by MBL as Lender for the applicant, must:

- (a) accompany the Grower's Application; or
- (b) be received by or made available to the Manager or the Custodian within such period before or after the Manager receives the Grower's Application as the Manager determines from time to time. This will be no later than one month after receipt of the Grower's Application.

27. The balance (if any) of the Plantation Establishment Fee which is being provided by MBL as Lender for the applicant must also be received by the Manager before an Interest will be issued.

28. Money paid with or in relation to a Grower's Application for an Interest is to be held by the Manager in a trust account in accordance with the Corporations Act pending the issue of the Interest. Once the Interest is issued the Manager may retain the Plantation Establishment Fee on its own account.

29. If the Manager rejects a Grower's application, the Application Fee is to be refunded to the Grower at the time that they are notified of the rejection.

30. MAAML grants each Grower a Licence to access and conduct their afforestation business on their Plantation Lot. MAAML also grants each Grower certain Forestry Rights in relation to their Plantation Lot, which include the vesting in the Grower of ownership of the Trees, Carbon Sequestration Rights and Environmental Credits (as defined in clause 25 of the Timber Project Constitution) in respect of the Grower's Plantation Lot.

31. The Constitution states the various fees and expenses to which the Manager is entitled during the term of the Project and the Amending Deed clarifies the payment of the Productivity Performance Fee. Schedule 1 of the Constitution lists the Manager's obligations in respect of each Grower during both the Initial Term and the period following the Initial Term, as follows:

- (i) the Manager shall purchase seedling trees selected from stock which it believes will produce yields in accordance with the assumptions outlined in the PDS;
- (ii) the Manager will plant approximately the Required Number of trees (being such number as the Manager believes is reasonable for the Plantation Lots in the region, namely 1,000) per hectare during the Initial Term for each Interest and will do all things necessary to ensure that the seedling trees are tended according to principles of good farming practice and sound agricultural methods; and
- (iii) the Manager will:
  - (a) not use the Land except for the purpose of the Grower's Business and purposes ancillary to the Grower's Business;
  - (b) control vermin and weeds to maintain satisfactory tree growth and to fulfil regulatory requirements with respect to noxious weeds and vermin;
  - (c) manage tree nutrition (monitoring and if reasonably required, treatment) to achieve or maintain satisfactory tree growth;
  - (d) maintain firebreaks, access tracks and water supply points for fire suppression purposes and comply with all reasonable directions and all statutory requirements in relation to the prevention and control of fire;
  - (e) liaise with the relevant government authorities with respect to fire suppression and prevention;
  - (f) maintain a plantation inventory for the establishment of permanent growth plots and measurement at regular intervals (nominally at 1, 3, 5, 7 and 9 years of age);

- (g) monitor plantation health throughout the year;
- (h) liaise with the community and government in terms of dealings with neighbours, local government and regulatory authorities etc with respect to the ongoing management of the Grower's Plantation Lots;
- (i) manage any grazing by livestock on their Plantation Lots and the Other Land after 2 years following planting;
- (j) generally keep the Grower's Plantation Lots and the Other Land (defined as the other land which the Manager requires access and use in order to perform its obligations) clean, tidy and in a condition suitable for the conduct of the Grower's Business;
- (k) where reasonably required, maintain fencing for the protection of the Grower's Plantation Lots and thereby the Trees of that Grower;
- (l) not make any structural alterations or additions to the Grower's Plantation Lots without the consent of Lessor;
- (m) not store nor use, nor permit to be stored or used, on the Grower's Plantation Lots or Other Land any inflammable or dangerous substances, except as may be reasonably required for the ordinary conduct of the permitted use of the Land or the Other Land for the Grower's Business and in accordance with regulatory requirements;
- (n) employ such staff and labour as are necessary for the purposes of performing its obligations including, without limitation, engaging the services of such consulting experts as may be necessary to assist the Manager in providing expert advice and assistance with respect to the growing of the Trees;
- (o) do all other things that are necessary or incidental to the carrying out of the Grower's Business to produce a viable business of growing of the Trees for felling or sale when they are sufficiently mature;
- (p) if necessary, arrange for either or both harvesting and sale of the Timber;
- (q) report to the Grower on an annual basis as to matters which the Manager determines the Grower should be informed of;

- (r) perform its obligations under the Manager's Forestry Documents;
- (s) act as the Grower's representative and exercise all of the Grower's rights and perform all of the Grower's obligations in respect of their Plantation Lot and the Trees; and
- (t) collect any other revenue derived from the Grower's Plantation Lot.

32. The activities set out above in respect of an Interest shall commence no earlier than the start of the Initial Term for that Interest. The only activities to be carried out during the Initial Term are those associated with the planting of seedling trees (including ordering and receiving seed and seedlings, preparing the Plantation Lots for planting, weed control in conjunction with planting, cultivation and planting), which, excluding refilling, are to be completed during the Initial Term for that Interest.

33. The Initial Term for an Interest, which will be for a period of no more than 12 months, will vary depending on the date on which a Grower's Interest is allotted. The Initial Term will be:

- (a) for an Interest issued on or before 30 June 2006 – the period commencing on 30 June 2006 and ending on the first anniversary of that date; and
- (b) for an Interest issued on or after 1 July 2006 – the period commencing on the later of:
  - (i) the Allotment Date for that Interest (being the date of allotment of Interests to Growers); and
  - (ii) 1 October 2006,and ending on the first anniversary of that date (a separate Product Ruling exists for these Growers).

34. The Manager will distribute or retain the Net Sale Proceeds and Other Income of each Grower in the following order of priority:

- (a) retain an amount representing any liabilities incurred by the Manager in respect of that Grower for the account of the Manager;
- (b) pay any provision for Environmental Debits to the Responsible Entity of the Macquarie Timber Land Trust 2006;
- (c) retain the Deferred Management Fee as set out in clause 18.2 of the Constitution for the account of the Manager;
- (d) distribute the Licence Fee in accordance with clause 7.1 of the schedule to the MAAML;

- (e) when the Net Sale Proceeds received by the Manager for the Grower and all other Growers from that region exceed \$13,500 per Plantation Lot if the average yield of All Timber is greater than 240 GMT per Plantation Lot in that Region (or the average mean annual increment of All Timber is greater than 24.0), retain the Productivity Performance Fee; and
- (f) distribute the balance to the Grower.

35. The Net Sale Proceeds in relation to a Grower is defined as the Grower's Proportional Interest of the proceeds of sale of All Timber of the Scheme less the cost of harvest, handling, loading, transport, processing, shipping and delivery costs which are received by the Manager.

36. A Grower's Proportional Interest is the proportion which the aggregate Interests issued to that Grower bears to all Interests issued to all the Growers in the Scheme at that time. If a Plantation Lot is affected by an Event (being destruction or damage to any of the Trees) then the Grower's Proportional Interest will be as determined by the Manager. In this situation the Manager will determine the proportion of that Grower's Trees which remain, and the relative market value of those remaining Trees, as they relate to the Trees which would have been expected on the Plantation Lot licensed to that Investor.

37. If an Event occurs and Tree Insurance has been arranged by the Manager for a Grower, the Manager will use the proceeds of the claim to replant the affected parts of that Grower's Plantation Lot, if so directed by the Grower before 30 June 2008. If the Manager is not so directed by the Grower, the Manager must determine whether the proceeds are to be used to replant the affected parts of that Grower's Plantation Lot or the proceeds shall accrue to the Manager on behalf of the Grower.

38. The Scheme terminates on the earlier of:

- (a) the termination or expiration of every Lease and the last payment of the Net Sale Proceeds and Other Income; or
- (b) such later date in accordance with any extensions of time as determined by agreement by at least:
  - (i) a resolution or written agreement of Growers with at least 75% of all Interests;
  - (ii) the unit holders who have at least 75% of the Units in the Macquarie Timber Land Trust 2006; or
  - (iii) Off-Takers, to the extent that the Off-Take Agreements have not terminated and are affected by the determination.

**Form of Lease**

39. Under the Lease, MBL grants a lease to MAAML who takes a lease of the Land for the Term of the Project, on and subject to the terms of the Lease.

40. MBL also grants to MAAML a licence to access and use the Other Land for all purposes having regard to the Permitted Use (as defined in clause 21 of the Lease) of the Land. This right is contractual, non-exclusive and irrevocable for the duration of the Term of the Project.

41. MAAML may:

- (a) sub-let any part of the Land for the Permitted Use of it sees fit without the consent of MBL;
- (b) grant non-exclusive licences or sublicences for the use of the Land and non-exclusive licences for the use of the Other Land for the Permitted Use as it sees fit; or
- (c) assign the Lease in accordance with the Scheme Constitution without the consent of MBL.

42. The Term of the Lease is the period commencing on the Commencement Date and expiring on the Termination Date. The Termination Date is 30 June 2022; however MBL may terminate the Lease by notice to MAAML at any time in its absolute discretion after the later to occur of:

- (a) 31 December 2017; and
- (b) the final payment of the Net Sale Proceeds and the final payment of Other Income under the Scheme Constitution.

43. The Rent payable by the MAAML to the Landlord in relation to the Lease is the amount which is \$1 plus 10% of:

- (a) Net Sale Proceeds in arrears when the Net Sale Proceeds in respect of the Land are distributed by the Tenant to Growers of the Scheme; or
- (b) Upon the occurrence of an Event, any Tree Insurance Proceeds (that are not applied in replanting the affected parts of the Land) when Tree Insurance Proceeds in respect of the Land are received by the Tenant (whether on its own behalf or for others).

44. If a Grower's trees are destroyed or damaged and there is no replanting of the affected parts of the Grower's Plantation Lot, at MAAML's election, MAAML may surrender that part of the Plantation Lot over which those trees were planted, by notice to the Landlord.



## **Form of Forest Property Agreement**

45. Under this Agreement, MBL, in consideration of MAAML paying the Rent under the Lease, vests ownership to MAAML of the Forest Property, Carbon Sequestration Rights and Environmental Credits in the Land for the Term of the Lease. MBL also acknowledges it has no interest in the Forest Property, Carbon Sequestration Rights and Environmental Credits for the Term of the Lease.

46. Clause 13.1 states that Forest Property Rights means the right to ownership of the Forest Property on the Land, the Carbon Sequestration Rights and any Environmental Credits.

## **Agreement for Ground Lease and Forest Property Agreement**

47. MBL agrees to grant, or procure the grant, and MAAML agrees to accept the grant of the Lease and the Forest Property Agreement from and including the Commencement Date, being the settlement date under the relevant contract for the purchase of Project Land.

48. Under the Agreement, MAAML must deliver to MBL with this Agreement the Form of Lease and the Form of Forest Property Agreement in duplicate executed by MAAML to be held in escrow by MBL.

## **MFSP Management Agreement 2006**

49. Under this Agreement MAAML engages Macquarie Forestry Services Pty Limited ('MFSP') to undertake certain of its obligations under the Constitution for the Term of the Project. In particular, MFSP will:

- (i) undertake all the activities listed at paragraph 31 with the exception of the activities listed at paragraph 31(iii)(p), (q), (r), (s) and (t);
- (ii) provide a grid identifying the Plantation Lot of all Growers;
- (iii) provide progress reports to MAAML detailing growth measurements;
- (iv) procure that annually or at such other intervals as are agreed an independent forestry advisor reviews the performance of its obligations under this agreement and the growth of the Trees and provides a copy of their report to MAAML;
- (v) enter into an agreement with Greening Australia Limited (or such other entities as MAAML requires) regarding, amongst other things, environmental services relating to the Scheme and comply with the terms of that Agreement; and
- (vi) where appropriate, advise MAAML on the availability of forestry techniques which may improve the returns to the Growers.

50. MAAML grants to MFSPL a licence to access and use (and to allow its subcontractors and agents to access and use) the Land and Other Land for all purposes necessary to carry out its obligations under this Agreement.

51. This Agreement commences on the Commencement Date and continues until the Termination Date. In terms of clause 12.4, the Termination Date is the same as that for the Scheme Constitution.

### **Midway Management Agreement 2006**

52. Under this Agreement MFSPL sub-contracts some of its obligations under the MFSPL Management Agreement to Midway in respect of the Geelong and Gippsland regions.

53. Midway and MFSPL agree that Midway will provide the following services in respect of the above regions:

- (i) undertake all the activities listed at paragraph 31 with the exception of the activities listed at paragraph 31(iii)(p), (q), (r), (s) and (t);
- (ii) purchase seedling *Eucalyptus globulus* and *Eucalyptus nitens* trees selected from stock which it believes will produce yields in accordance with the assumptions outlined in the PDS under which the Grower in respect of the relevant Plantation Lots applied for their interests in the Scheme in respect of those Plantation Lots;
- (iii) in relation to the planting of trees, plant approximately 1,000 trees per hectare during the Initial Term in a manner that results in a survival rate of at least 90% of the trees planted as measured 12 months from the time of planting and will do all things necessary to ensure that the seedling trees are tended according to principles of good farming practice and sound agricultural methods. In the event that less than 90% of the trees planted survive for 12 months following the date of planting, undertake such additional planting of trees which would result in there being at least 900 trees per hectare;
- (iv) produce progress reports detailing growth measurements;
- (v) discuss where appropriate with MFSPL and Greening Australia Limited methods of complying with any agreement between MFSPL and Greening Australia Limited and others;
- (vi) comply at all times with all laws and regulations applicable to the requirements of and the provision of the service by Midway under the Agreement;

- (vii) prepare and deliver to MFSPL silvicultural working plans detailing the net plantable area and plantation establishment and maintenance strategy for all Land together with a grid identifying the Plantation Lot;
- (viii) undertake such site preparation work as is required to prepare the Plantation Lot for planting including:
  - (a) performing all reasonably required clean-up works; and
  - (b) completing all reasonably required cultivation works;
- (ix) undertake such vermin control work as is reasonably required to protect the Plantation Lot from damage (both before and after planting);
- (x) undertake all reasonably required weed control work prior to and/or after planting to ensure that the Plantation Lot can be established and can achieve satisfactory growth;
- (xi) undertake such fertilisation as is required at or about the time of the planting to promote establishment and satisfactory early growth;
- (xii) in the season following the planting of the seedling trees, undertake nutrition monitoring and fertilisation of, and weed control in, the Plantation Lot if reasonably required to promote or maintain satisfactory growth of the trees; and
- (xiii) use its reasonable endeavours to identify on behalf of MBL land available for purchase which is suitable for the purposes of the Scheme, act in accordance with the Land Selection Protocol unless agreed otherwise with MBL, and generate a grid identifying the Plantation Lot.

54. MFSPL and Midway agree and acknowledge that the Growers are to sell Timber from Plantation Lots in the Geelong region to Midway and Timber from Plantation Lots in the Gippsland region to Australian Paper, in accordance with the terms of the Off-Take Agreements.

## **McEwens Management Agreement 2006**

55. Under this Agreement MFSPL sub-contracts some of its obligations under the MFSPL Management Agreement to McEwens in respect of the Portland region.

56. McEwens and MFSPL agree that McEwens will provide the following services in respect of the above regions:

- (i) undertake all the activities listed at paragraph 31 with the exception of the activities listed at paragraph 31(iii)(p), (q), (r), (s) and (t);
- (ii) locate seedling *Eucalyptus globulus* and *Eucalyptus nitens* trees for purchase by MFSPL that are selected from stock which McEwens Contracting believes will produce yields in accordance with the assumptions outlined in the PDS under which the Grower in respect of the relevant Plantation Lots applied for their interests in the Scheme in respect of those Plantation Lots;
- (iii) agree the proposed purchase price of the seedlings with MFSPL;
- (iv) purchase (at MFSPL's cost) the seedlings for and behalf of MFSPL as and when authorised by MFSPL;
- (v) in relation to the planting of trees, plant approximately 1,000 trees per hectare during the Initial Term in a manner that results in a survival rate of at least 90% of the trees planted as measured 12 months from the time of planting and will do all things necessary to ensure that the seedling trees are tended according to principles of good farming practice and sound agricultural methods. In the event that less than 90% of the trees planted survive for 12 months following the date of planting, undertake such additional planting of trees which would result in there being at least 900 trees per hectare;
- (vi) produce progress reports detailing growth measurements;
- (vii) discuss where appropriate with MFSPL and Greening Australia Limited methods of complying with any agreement between MFSPL and Greening Australia Limited and others;
- (viii) comply at all times with all laws and regulations applicable to the requirements of and the provision of the service by McEwens under the Agreement;
- (ix) take all reasonable steps to manage all contamination and other environmental risks or emanating from the Plantation Lots;
- (x) prepare and deliver to MFSPL silvicultural working plans detailing the net plantable area and plantation establishment and maintenance strategy for all Land together with a grid identifying the Plantation Lot;

- (xi) undertake such site preparation work as is required to prepare the Plantation Lot for planting including:
  - (a) performing all reasonably required clean-up works; and
  - (b) completing all reasonably required cultivation works;
- (xii) undertake such vermin control work as is reasonably required to protect the Plantation Lot from damage (both before and after planting);
- (xiii) undertake all reasonably required weed control work prior to and/or after planting to ensure that the Plantation Lot can be established and can achieve satisfactory growth;
- (xiv) undertake such fertilisation as is required at or about the time of the planting to promote establishment and satisfactory early growth;
- (xv) provide such information as is reasonably required by any entity engaged by MFSPL to perform services in relation to the Scheme, including but not limited to mapping services;
- (xvi) in the season following the planting of the seedling trees, undertake nutrition monitoring and fertilisation of, and weed control in, the Plantation Lot if reasonably required to promote or maintain satisfactory growth of the trees; and
- (xvii) use its reasonable endeavours to identify on behalf of MBL land available for purchase which is suitable for the purposes of the Scheme, act in accordance with the Land Selection Protocol unless agreed otherwise with MBL, and generate a grid identifying the Plantation Lot.

57. MFSPL and McEwens agree and acknowledge that MAAML are to sell Timber from Plantation Lots in the Portland region to Midway in accordance with the terms of the Off-Take Agreement. McEwens agrees to provide access at least annually for representatives of Midway to inspect the Plantation Lots in the Portland region. Such access will be granted at a mutually agreeable time.

## **Midway Off-Take Agreement 2006**

58. Under the Midway Off-Take Agreement, Midway agrees to buy and the Manager agrees to sell the Timber located in the Geelong and Portland regions at stump for the Selling Price. The Selling Price for All Timber at stump will be calculated and paid in accordance with the Pricing and Payment Schedule. This Schedule forms part of the Midway Off-Take Agreement and establishes the pricing and payment mechanisms for the Off-Take Agreement. Midway will pay to the Manager the Selling Price on behalf of each of the Growers.

59. Midway agrees with the Grower that it will, at its own cost and expense:

- (a) harvest the Timber by 31 December 2017 or such later date agreed in writing by Midway and the Manager but no later than 31 December 2022;
- (b) transport the Timber from the Land to Midway's Facility, Australian Paper's Maryvale Mill facility near Morwell, Victoria or to any other agreed place between Midway and the Manager prior to the end of the Sale Period (being the year in which all Standing Timber is to be harvested, currently expected to be 2017);
- (c) unless otherwise agreed, produce wood chips or other timber products from the Timber for sale to its Customers; and
- (d) unless otherwise agreed, market the wood chips to its Customers for sale.

60. MAAML grants to Midway a licence to access and use the Land and Other Land for all purposes necessary to carry out its obligations under this Agreement.

### **Eucalypt Pulpwood Agreement**

61. Under this Agreement, MAAML has agreed to use its reasonable endeavours to establish projects on an annual basis under which MAAML, as agent for and on behalf of the Growers, establishes and maintains Plantations and agrees to make those Plantations available for harvest by Australian Paper. Australian Paper has agreed to purchase Eucalypt Pulpwood in accordance with the terms of the Agreement.

62. MAAML must irrevocably grant to Australian Paper a licence to access and use the Land for all purposes required for Australian Paper to harvest the Standing Timber and haul the Eucalypt Pulpwood.

63. The Agreement will commence on the date of execution of the Agreement and terminate on the later of:

- (a) 31 December 2037; or
- (b) the Wood Availability Expiry Date (being 31 December 2037 or any agreed extended expiry date).

64. In selecting the Land on which to establish Plantations under the Schedule of Establishment as set out in Schedule 5 of the Agreement, MAAML will comply with the Land Selection Protocol as set out in Schedule 6.

65. In establishing the Plantations, MAAML must:

- (a) use good forestry practices with the aim that the Standing Timber can meet the Eucalypt Pulpwood Specifications; and
- (b) engage a suitably qualified and experienced Forestry Contractor in accordance with Clause 3.10 to perform the Plantation establishment.

66. By 1 October of each year the parties will meet to calculate the price to be paid for the following years Project using a worksheet which bases the calculation on factors such as CPI, green density, volume, the percentage value of projected future pulpwood per hectare payable as lease payments to Land owners and as management fees to MAAML and contractors, the expected average age that the plantation will be harvested, the costs of planting and establishment and harvesting and transport costs, tax and stamp duty effects, the term of the agreement and the targeted internal rate of return for investors. As well as price to be paid for the following years Project, this pricing formula also determines the estimated final delivered cost of Eucalypt Pulpwood to the Australian Paper Maryvale Mill. There are procedures in the Agreement for adjusting prices, based on prices paid for Eucalypt pulpwood by Australian Paper and the price of export pulpwood in Victoria.

67. In addition, a 'take or pay' concept has been incorporated, such that, in the event that Australian Paper's requirements are less than 80% of the contract quantity of Eucalypt Pulpwood under the agreement, MAAML and Australian Paper will work together to identify an Alternative Purchaser for the Eucalypt Pulpwood not required by Australian Paper. Further, Australian Paper may be liable to pay a penalty at the stumpage price determined under the Agreement.

68. Before 1 October each year, Australian Paper must provide MAAML with schedules of its expected Eucalypt Pulpwood requirements for the forthcoming calendar year and subsequent two calendar years. As soon as reasonably practicable after receipt of this information, but in any case not later than 90 days prior to the commencement of each calendar year, MAAML must deliver to Australian Paper a plan of operation in respect of making Standing Timber available for Eucalypt Pulpwood for the forthcoming calendar year and subsequent two calendar years. These plans of operation must in good faith specify Eucalypt Pulpwood quantities planned to be harvested and specific site details of each area to be harvested.

69. No later than 30 days prior to the commencement of each calendar year, Australian Paper must provide a harvesting plan to MAAML setting out the approximate dates on which Australian Paper intends to harvest each Plantation.

**Custody Agreements**

70. Under the Custody Agreement between MAAML and Bond Street Custodians Limited, MAAML appoints Bond Street Custodians Limited as the Custodian for the Macquarie Eucalypt Project 2006 and Bond Street Custodians Limited accepts the appointment as the Custodian of the Assets of the Macquarie Eucalypt Project 2006 on the terms and conditions of the Agreement.

71. Under the Custody Agreement between MFPML and Bond Street Custodians Limited MFPML appoints Bond Street Custodians Limited as the Custodian for the Macquarie Timber Land Trust 2006 and Bond Street Custodians Limited accepts the appointment as the Custodian of the Assets of the Macquarie Timber Land Trust 2006 on the terms and conditions of the Agreement.

**Constitution of the Macquarie Timber Land Trust 2006**

72. The Constitution establishes the Trust known as the Macquarie Timber Land Trust 2006 and operates as a deed under which the Manager holds assets on trust for the Growers. It sets out the terms and conditions under which MFPML agrees to act as the Manager of the Trust.

73. The beneficial interest in the Trust is divided into Units and each Unit confers an equal undivided interest. The Application Price for the Units is \$1,950 per Unit. Units will be issued to applicants where the Manager has accepted their application and received their application money.

**Fees**

74. The fees payable under the Constitution of the Macquarie Eucalypt Project 2006, on an Interest basis, are as follows:

- Plantation Establishment Fee of \$9,020 (inclusive of GST) payable on application for the maintenance and management of each Grower's Plantation Lot during the Initial Term;
- Deferred Management Fee for the maintenance and management of each Grower's Plantation Lot for the period commencing after the Initial Term and ending on the Termination Date being an amount equal to either 5% of the Net Sale Proceeds of each Grower or where an Event has occurred 5% of any Tree Insurance Proceeds;



- Productivity Performance Fee payable in respect of each Grower, being an amount equal to 15% of Net Sale Proceeds for a region in excess of \$13,500 per Plantation Lot if the average yield of All Timber from the region is greater than 240 GMT per Plantation Lot (or the average mean annual increment of All Timber is greater than 24.0) per Plantation Lot in the region. This Fee is payable for the maintenance and management of each Grower's Plantation Lot for the period commencing after the Initial Term and ending on the Termination Date;
- Licence Fee is payable by the Growers for the Licence. The Licence Fee is an amount equal to 10% of either Net Sale Proceeds or where an Event occurs, any Tree Insurance Proceeds; and
- Handling fee for arranging Tree Insurance will be invoiced to the Growers as soon as practicable (but within thirty days). The invoiced amount will be payable by the Growers within thirty days of the invoice date.

75. The Application Fee payable under the Constitution of the Macquarie Timber Land Trust 2006 is \$1,950 per Unit.

## Finance

76. Growers can fund their involvement in the Project themselves, borrow from MBL (a lender associated with the Responsible Entity) or borrow from an independent lender.

77. Where Growers borrow from MBL, all application monies received (both from Growers directly and from MBL) will be paid to the Managers to be held in separate trust accounts for the Timber Project and the Land Project in accordance with the *Corporations Act 2001*. Such application monies will be paid into the respective trust accounts on or before the issue date of the Interests or Units. The finance made available by MBL is offered on the following terms contained in the Loan and Security Agreement:

<b>Lender</b>	MBL	MBL	MBL
<b>Term<sup>1</sup></b>	1 year	5 years	8 years
<b>Investment amount able to be borrowed</b>	100%	100%	100%
<b>Indicative Interest Rate</b>	No interest	8.80%	9.90%
<b>Interest Rate Set Date</b>	N/A	Interest rates will be set on the first business day of the month in which the loan is approved.	Interest rates will be set on the first business day of the month in which the loan is approved.
<b>Loan Approval Date</b>	Within 1 month of the RE receiving the investor's application	Within 1 month of the RE receiving the investor's application	Within 1 month of the RE receiving the investor's application
<b>Amortisation Profile</b>	1 year of equal monthly principal repayments <sup>2</sup>	5 years of equal monthly total repayments <sup>2</sup>	8 years of equal monthly total repayments <sup>2</sup>
<b>Interest Payments</b>	N/A	Monthly in arrears	Monthly in arrears
<b>Application Fee</b>	1% of Loan Amount	\$0	\$0

\*1\* This assumes a Drawdown Date under the Investment Loan after 30 June 2006. If the Drawdown Date is on or before 30 June 2006, the Term of the Investment Loan will be longer, by an amount equal to the number of days from the Drawdown Date to 30 June 2006.

\*2\* Monthly payments of principal and interest will commence on the later of July 2006 and the month following the Drawdown Date. The amount of monthly principal repayable will increase and the amount of monthly interest will decrease over the term of the Facility.

In each case:

- maximum amount allowed to be borrowed is \$10,150 plus the Application Fee for every one Interest in the Timber Project and one Unit in the Land Project;
- the borrowing does not extend to GST. The GST payable in relation to the Plantation Establishment Fee (\$820) must be paid by the Borrower out of his/her own resources;
- the above repayments must be paid irrespective of the amount of any distribution from the Macquarie Eucalypt Project 2006 or the Macquarie Timber Land Trust 2006;

- the interest rate payable on the loan facility will be determined by MBL on the first business day of the month in which the loan is approved, and will be published on the Macquarie Forestry website. This indicative interest rate will be set on an arm's length commercial basis; and
- the Borrower is obliged to obtain and maintain Tree Insurance at all times during the term of any financial accommodation provided by MBL.

78. Growers cannot rely on this Product Ruling if a different finance arrangement is entered into with MBL or if application monies otherwise remain unpaid on 30 June 2006.

79. 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 MBL, are involved or become involved in the provision of finance to Growers for the Project.

## Ruling

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### Application of this Ruling

80. This Ruling applies only to Growers who are accepted to participate in the Project before 1 July 2006 provided that the Constitution of the Macquarie Eucalypt Project 2006 has been declared on or before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

81. 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***

82. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different 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 sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

#### **Qualification**

83. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

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

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

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

### **Assessable income**

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

85. 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.

86. Other than Growers referred to in paragraph 87, for the 2006-07 income year and later years, a Grower will be assessable on ordinary income from carrying on their business of afforestation in the income year in which that income is derived.

87. For the 2006-07 income year and later years, a Grower who is an 'STS taxpayer' using the cash accounting method will be assessable on ordinary income from carrying on their business of afforestation in the income year in which that income is received.

### **Deductions for Plantation Establishment Fees, Interest and Borrowing Costs**

#### **Sections 8-1 & 328-105**

88. A Grower may claim tax deductions under section 8-1, for the revenue expenses in the Table below.

89. However, if for any reason, an amount shown or referred to in the Tables below is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' (for the 2006 income year) or an 'STS taxpayer' using the cash accounting method (for the 2006 and 2007 income years), then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the Table below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

<b>Fee Type</b>	<b>Year ended 30 June 2006</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>
<b>Plantation Establishment Fee</b>	\$9,020 See Notes (i) and (ii)		
<b>Interest (MBL)</b>	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting)</b> or as paid <b>(STS taxpayers using cash accounting)</b> See Note (iii)	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting)</b> or as paid <b>(STS taxpayers using cash accounting)</b> See Note (iii)	As incurred <b>(Non-STs taxpayers &amp; STS taxpayers using accruals accounting)</b> or as paid <b>(STS taxpayers using cash accounting)</b> See Note (iii)
<b>Borrowing costs for loans with MBL</b>	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 outgoing 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 establishment services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 119 to 125) and is deductible in the income year in which it is incurred (where the Grower is **not an 'STS taxpayer' using cash accounting**) or the year in which it is paid (where the Grower is an **'STS taxpayer' using cash accounting**).
- (iii) Interest is deductible under a loan agreement with MBL as described at paragraph 77. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than MBL, 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 111 to 118 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.
- (iv) The Application fee payable to MBL 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. However, where the total amount of a borrowing expense is \$100 or less, the full amount of the borrowing expense may be deducted in the year in which it is incurred and/or paid. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than MBL is outside the scope of this Ruling.

**Units****Part 3-1**

90. The Units in the Macquarie Timber Land Trust 2006 are CGT assets (section 108-5) and the amount paid by a Grower or Land Investor to acquire those assets is an outgoing of capital and not allowable as a deduction.

91. The amount paid for each Unit will represent the first element of the cost base of the Unit (subsection 110-25(2)). Any disposal of the Units by a Grower or Land Investor will be a CGT event and may give rise to a capital gain or loss.

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

### ***Section 35-55 – exercise of Commissioner’s discretion***

92. A Grower who is an individual accepted into the Project before 1 July 2006 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 2006 to 30 June 2017**. 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**

93. 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.

## 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?

94. For the amounts set out in the Tables above to constitute allowable deductions the Grower's afforestation activities as a participant in the Macquarie Forestry Investment 2006 must amount to the carrying on of a business of primary production.

95. Where there is a business, or a future business, the gross proceeds from the sale of the wood produce 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.

96. For schemes such as that of the Macquarie Forestry Investment 2006, 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.

97. 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 by licence) in the land 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.

98. Under the Constitution each individual Grower will have rights over a specific and identifiable area of one hectare of land. The Constitution provides the Grower with an ongoing interest in the specific trees on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The licence allows the Manager to come onto to the land to carry out its obligations under the Constitution.



99. Under the Constitution the Manager is engaged by the Grower to establish and maintain a Plantation Lot on the Grower's identifiable area of land during the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the Plantation Lot on the Grower's behalf.

100. The Manager is also engaged to harvest and sell, on the Grower's behalf, the wood produce grown on the Grower's Plantation Lot.

101. 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.

102. 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 wood produce 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.

103. The pooling of wood produce from trees grown on the Grower's Plantation Lot with the wood produce of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled wood products will reflect the proportion of the trees contributed from their Plantation Lot.

104. The Manager'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 Plantation Lot is relatively small, it is of a size and scale to allow it to be commercially viable.

105. The Grower's degree of control over the Manager as evidenced by the Constitution, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's Plantation Lot 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.

106. 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 Macquarie Forestry Investment 2006 will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

107. 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.

108. 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 Plantation Establishment Fee**

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

109. Consideration of whether the initial management fees and lease fees 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.

110. The Plantation Establishment Fee associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of wood produce) 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 Plantation Establishment Fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

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

111. 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.

112. For this Project, only sections 82KZL (an interpretive provision) and 82KZMG of the ITAA 1936 are relevant (but see paragraphs 113 to 118 for comments on the possible application of sections 82KZME and 82KZMF of the ITAA 1936).

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

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

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

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and
- either:
  - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - b) the entity who promotes, arranges or manages the agreement (or an associate of that entity) promotes similar agreements for other taxpayers.

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

116. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

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

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

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

### **Section 82KZMG**

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

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

- incurred on or after 2 October 2001 and on or before 30 June 2008;
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and

- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

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

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

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

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

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

124. Under the Constitution, a Grower incurs a Year 1 Plantation Establishment Fee consisting of expenditure of \$9,020 for 'seasonally dependent agronomic activities'.

125. As the requirements of section 82KZMG of the ITAA 1936 have been met, a deduction is allowable in the income year ended 30 June 2006 for the expenditure incurred under the Constitution for 'seasonally dependent agronomic activities'.

**Interest deductibility****Section 8-1***(i) Growers who use MBL as the finance provider*

126. Some Growers may finance their participation in the Project through a loan facility with MBL. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees.

127. The interest incurred for the year ended 30 June 2006 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 trees and the licence 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.

128. In the absence of any application of the prepayment provisions (see paragraphs 111 to 118), the timing of deductions for interest will again depend upon whether the Grower is an 'STS taxpayer' using the cash accounting method.

129. If the Grower is not an 'STS taxpayer' using the cash accounting method, interest is deductible in the year in which it is incurred.

130. If the Grower is an 'STS taxpayer' using the cash accounting method, interest is only deductible once it has been both incurred and paid by, or for the Grower. If interest that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid, or is paid for the Grower.

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

131. 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 MBL 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.

132. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 111 to 118).

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

133. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2017** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2007 up to and including 30 June 2017:

- 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.

134. 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.

135. 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**

136. 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.

**Part IVA – general tax avoidance provisions**

137. 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).

138. The Macquarie Forestry Investment 2006 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 89 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.

139. 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 wood produce. 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 93/34; TD 2003/12;  
TR 92/20; 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

### *Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
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