

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION**

No 386 of 2011

**IN THE MATTER OF WILLMOTT FORESTS LIMITED (RECEIVERS AND  
MANAGERS APPOINTED) (IN LIQUIDATION) ACN 063 263 650**

**WILLMOTT FORESTS LIMITED  
(RECEIVERS AND MANAGERS  
APPOINTED) (IN LIQUIDATION)  
ACN 063 263 650**

First Plaintiff

**CRAIG DAVID CROSBIE**

Second Plaintiff

**IAN MENZIES CARSON**

Third Plaintiff

**OUTLINE OF SUBMISSIONS OF THE RECEIVERS AND MANAGERS**

1. Messrs Webster, Korda and Mentha (the **Receivers**) are the receivers and managers of certain assets of Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation) (**WFL**).
2. WFL is the responsible entity (**RE**) of a number of registered managed investment schemes and the manager of a number of unregistered managed investment schemes that are listed in the Schedules to the Originating Process.
3. On 6 September 2010, the Receivers were appointed as the joint and several Receivers and managers of the assets charged by WFL under Deeds of Charge dated 17 March 2009.
4. By Deeds of Partial Termination executed in September 2010 and October 2010, the Receivers' appointment to WFL's rights, title and interest in, and rights and obligations arising under any agreement, deed or document appointing WFL as RE or manager of the managed investment schemes (the **RE/Manager Function**), was terminated (other than in respect of certain schemes established between 1980 and 1982, which are not the subject of this proceeding because they are not under the control of the Liquidators).<sup>1</sup> The effect of the Deeds of Partial Termination was to exclude from the Receivers'

appointment WFL's role as RE or manager of certain of the managed investment schemes operated by WFL.

5. In the result, the assets of WFL over which the Receivers are appointed **include:**

- 5.1. WFL's freehold land located in the Murray Valley and North Coast regions of New South Wales, and in the Katherine region in the Northern Territory;
- 5.2. WFL's rights and interests as lessee of land located in Victoria and New South Wales;
- 5.3. WFL's interests in farming equipment and inventories; and
- 5.4. interests held by WFL in its own right in the managed investment schemes operated by WFL,

but **exclude:**

- 5.5. any land located within a radius of approximately 150 kilometres around the township of Bombala, New South Wales (the Bombala Land);
  - 5.6. any property held by WFL in its capacity as RE, trustee or custodian in respect of the managed investment schemes operated by WFL or any other property held by WFL or its wholly-owned subsidiaries in their capacity as a trustee or custodian; and
  - 5.7. the RE/Manager Function (following the partial termination of the Receivers' appointment).
6. The Receivers make these submissions in support of the plaintiffs' application for directions under s 511 of the Corporations Act, with minor variations to the form of directions sought. They rely on the affidavit of Bryan Webster affirmed on 17 June 2011 (the **Webster Affidavit**) and the affidavit of Craig David Crosbie sworn on 11 May 2011 and filed on behalf of the Liquidators (the **Crosbie Affidavit**). The Receivers also refer to the 2<sup>nd</sup> Affidavit of Mark Albert Bland made on or around 20 June 2011 (the **2<sup>nd</sup> Bland Affidavit**) and the exhibits thereto.

---

<sup>1</sup> Webster Affidavit, [116]-[129].

7. The Liquidators' proposal is brought to facilitate the sort of 'de facto' winding up of the schemes operated by WFL which has been undertaken in the case of other MIS group collapses, including Timbercorp and Great Southern. It is a cautious approach, intended to preserve the ability of investors in the schemes to claim a share of assets attributable to the schemes to the extent that they might have had an entitlement to the proceeds of sale of such assets if disposed of while the scheme was a going concern. It is an alternative to an application to wind up the schemes themselves, which would also result in the investors' rights being terminated.
8. Further, the Liquidators and Receivers agree<sup>2</sup> that the best possible price will be achieved by offering all of the freehold and certain leasehold land<sup>3</sup> at once. They have agreed to engage in a joint sale process.
9. The Liquidators' proposal is an important step in the sale process. Enabling the Liquidators to amend the constitutions to extinguish grower interests, or to disclaim the leases, on terms, will facilitate the realisation of the assets for the benefit of those entitled to them because it will allow the Liquidators (and Receivers) to jointly market the assets as effectively unencumbered. It is highly unlikely that there would be appetite in the market for acquisition of the land subject to the schemes – particularly given that (as set out further below) most of the schemes are structured so that the Growers pay an up-front fee, and then no rent or other fees until termination of the project by clear-felling of their trees.
10. Further, it is clear that the Liquidators' proposal has substantial built-in safeguards for Growers:<sup>4</sup>
  - (a) the Liquidators will not exercise any power to terminate the grower interests without confirmation from the Court;
  - (b) they will only do so on the basis that the Growers will receive the proceeds referable to sale of the Trees; and
  - (c) to this end, they will seek to have prospective purchaser apportion the offer price between Trees and other assets *and* obtain an independent opinion on the reasonableness of any such apportionment.

---

<sup>2</sup> See Crosbie Affidavit, [63] ff.

<sup>3</sup> Leased from the Forestry Commission in NSW.

<sup>4</sup> Crosbie Affidavit, [68].

## The schemes - overview

11. The schemes the subject of this proceeding comprise:
  - 11.1. 8 managed investment schemes registered under Part 5C of the Corporations Act;
  - 11.2. 6 unregistered “professional investor” managed investment schemes (the **Professional Investor Schemes**);
  - 11.3. 11 unregistered contractual schemes; and
  - 11.4. 5 unregistered partnership schemes.
  
12. As explained in the Crosbie Affidavit:
  - 12.1. in many instances, multiple schemes are conducted on individual plantations owned by WFL;<sup>5</sup> and
  - 12.2. within contiguous plantation areas that are used for a single scheme, Growers’ timberlots are allocated at random on a checkerboard-type plan, which are not visibly delineated or individually accessible by road.<sup>6</sup>
  
13. Under the schemes, Growers’ rights to use their respective timberlots for the purposes of the scheme are conferred by way of:
  - 13.1. lease or sub-lease, in most instances; and
  - 13.2. licence or profit a prendre, in certain schemes
  - 13.3. (collectively, the **Grower Leases**).
  
14. In each case, for the duration of the Grower Leases, Growers either own the trees standing on their respective timberlots (the **Trees**) or have the right to harvest and sell timber from the Trees.<sup>7</sup>
  
15. In a majority of cases, the Grower Leases and other project documents purport expressly to permit Growers to harvest their Trees individually. However, in practice, it is both physically impracticable and commercially unviable for

---

<sup>5</sup> Crosbie Affidavit, [31]-[32]; exhibits CDC-28, 29 and 30.

<sup>6</sup> Crosbie Affidavit, [30], [33], [34]; exhibit CDC-28.

<sup>7</sup> Crosbie Affidavit, [29(c)], [29(f)], [34]. For example, under the Willmott Forests 1995-1999 Scheme, see cl 13 of the Scheme Constitution (p 113 of exhibit MAB-2 to the affidavit of Mark Bland dated [20] June 2011). See also the 1995 prospectus: “Question & Answers: How is my timber marketed / sold?” – p 74 of exhibit MAB-2.

Growers to exercise that right. In reality, Growers' rights of occupation of their respective timberlots are commercially valuable only on the basis that their Trees will be maintained, clear-felled and marketed collectively with neighbouring Growers.<sup>8</sup>

16. The schemes are generally structured on the basis that Grower contributions (rental, and planting and maintenance fees) are to be made by way of up-front levies, with minimal or no ongoing costs prior to harvesting and marketing fees paid from the eventual proceeds of harvest of the Trees.<sup>9</sup> The consequences of this are not only that WFL as RE/Manager is left without any cashflow to maintain the schemes through to their eventual harvest, but also that any restructuring of any one or more schemes under a new RE or Manager will (amongst other things) require a fundamental reworking of the Growers' financial obligations.
17. In the meantime, until any viable restructuring proposal emerges and is approved, the plantations are wasting.<sup>10</sup> The plantations will also pose significantly heightened fire risks if maintenance and fire mitigation works are not resumed before the onset of the next fire season.<sup>11</sup>
18. The Pöyry analysis of the schemes' viability is premised on the assumption that, for each scheme, in addition to finding and appointing a replacement RE:
  - 18.1. the Growers in the scheme would agree to the necessary amendments to the constitutions, investment deeds and other project documents to require each of them (other than WFL) to make an additional lump-sum contribution to cover the estimated maintenance, overheads and administration costs for the remaining life of the scheme, plus a "safety margin" of 15%; and
  - 18.2. that those additional up-front contributions will be fully paid in 2011.<sup>12</sup>

No proposal has been advanced that would require full up-front payment of the maintenance and administration costs required over the remaining life of the

---

<sup>8</sup> Crosbie Affidavit [34]-[36], Webster Affidavit [132]

<sup>9</sup> Crosbie Affidavit, [29(b)], [46]; Webster Affidavit, [17]

<sup>10</sup> Webster Affidavit, [42]-[45], [55]-[56], [61]-[64], [75], [89]-[91]

<sup>11</sup> Webster Affidavit [46]-[50]; [65]-[68]; [92]; exhibits BW-4 to BW-8; Crosbie Affidavit, [43(g)], [47]-[49]; exhibit CDC-15, (Crosbie affidavit of 4 February 2011), [15].

<sup>12</sup> Pöyry report, p 63.

schemes. No alternative RE or Manager has come forward for most of the schemes.<sup>13</sup>

19. The Pöyry discounted cashflow analysis further assumes an appropriate nominal discount rate of 11% pa.<sup>14</sup> The Receivers consider that this nominal discount rate is too low given the various uncertainties that would still affect the schemes after any restructuring. The sensitivity analysis set out in the Pöyry report (at alternative nominal discount rates of 13% and 15%) shows that the overall viability of the schemes – even if they were to be restructured and refunded on a wholly up-front basis – declines rapidly at nominal discount rates above 11%.<sup>15</sup>
20. Further, the Pöyry analysis assumes that the land upon which the schemes are currently conducted – which is owned or leased by a company in liquidation, namely the insolvent WFL – will continue to be available for the purposes of the schemes until they have run their course.
21. In the Receivers' submission, particularly given the absence of any restructuring proposal on terms similar to those assumed by Pöyry, the schemes are plainly no longer commercially viable when assessed globally.
22. That overall assessment does not alter significantly if the Pöyry analysis is applied to the schemes on a regional basis:
  - 22.1. assuming that up-front Grower contributions of approximately \$37 million are paid in 2011, the schemes on Murray Valley land are either marginally viable or marginally non-viable at nominal discount rates of 13% and 15% respectively;<sup>16</sup>
  - 22.2. assuming that up-front Grower contributions of approximately \$22 million are paid in 2011, the schemes on North Coast land are marginally non-viable or non-viable at nominal discount rates of 13% and 15% (and even at the 11% discount rate applied by Pöyry);<sup>17</sup>
  - 22.3. assuming that up-front Grower contributions of approximately \$650,000 are paid in 2011 (notwithstanding that WFL holds 91.8% of

---

<sup>13</sup> Webster Affidavit, [30]-[31(a)]; see also Crosbie Affidavit (sworn on 11 May 2011), [5].

<sup>14</sup> Pöyry report, p 61.

<sup>15</sup> Webster Affidavit, [20]-[26].

<sup>16</sup> Webster Affidavit, [40]-[41].

the interests in the Willmott Forests Premium Timberland Fund No 1), that scheme on Northern Territory land is non-viable at nominal discount rates of 13% and 15%;<sup>18</sup> and

- 22.4. assuming that up-front Grower contributions of approximately \$46 million are paid in 2011, the schemes on Bombala land have an aggregate NPV of only \$14 million (at a 13% nominal discount rate) or \$8.6 million (at 15%).<sup>19</sup>
23. The 'viability' posited by the Pöyry analysis in respect of some of the schemes is theoretical only. The Liquidators and Receivers are faced with the *reality* that there is no money to continue the schemes, the assets are at imminent risk of wasting for want of maintenance and fertilisation<sup>20</sup> (or, worse, destruction during the fire season).<sup>21</sup> It is therefore appropriate that the Liquidators have the facility to embark on a sale process in respect of the assets on the basis that they will be in a position to give prospective purchasers a level of comfort about an unencumbered sale.
24. Accordingly, having regard to:
- 24.1. the absence of any restructuring proposal on terms comparable to the Pöyry assumptions;
- 24.2. the remote likelihood of any such proposal emerging and being approved in time to allow payment of the additional up-front contributions to be paid in 2011;
- 24.3. the continuing wastage and increasing fire risks on the plantations; and
- 24.4. the approach of the 2011/12 fire season,
- the Receivers submit that a more favourable, more certain and more immediate return can be obtained for creditors and Growers if orders are made that would

---

<sup>17</sup> Webster Affidavit, [53]-[54].

<sup>18</sup> Webster Affidavit, [71]-[72].

<sup>19</sup> Webster Affidavit, [87]-[88].

<sup>20</sup> Webster Affidavit, [42]-[45], [55]-[56], [61]-[64], [75], [89]-[91].

<sup>21</sup> Webster Affidavit, [46]-[50]; [65]-[68]; [92]; exhibits BW-4 to BW-8; Crosbie Affidavit, [43(g)], [47]-[49]; exhibit CDC-15 (Crosbie affidavit of 4 February 2011), [15].

permit the marketing and sale of the plantation properties on an unencumbered basis.<sup>22</sup>

### The form of orders sought

25. The orders sought on this application, and which are proposed to be sought prior to the Liquidators exercising the relevant powers, are to the same effect as orders that have been made in a series of other proceedings to approve the informal winding-up of other distressed managed investment schemes, most prominently in relation to insolvent Timbercorp schemes.<sup>23</sup>
26. In each of the above cases, the Court has given judicial advice that the Liquidators of the responsible entities of insolvent schemes would be justified in extinguishing or disclaiming growers' interests in the scheme in order to permit a sale of the scheme assets unencumbered by the scheme arrangements. In each case, appropriate provision has been made to ensure that any claims of growers and creditors over the proceeds of sale were preserved.<sup>24</sup>
27. For the managed investment schemes and the Professional Investor Schemes, the first step in the informal liquidation process is for the respective constitutions of those schemes to be amended to confer on the RE a power to extinguish Growers' interests in the scheme. We are aware of only 3 instances in which such an amendment of a scheme's constitution has been judicially considered. In the remaining cases noted at paragraph 25 above, the liquidators of the RE have made the necessary amendments unilaterally under the s 601GC(1)(b)

---

<sup>22</sup> Webster Affidavit, [32]-[33].

<sup>23</sup>

See:

- (i) Timbercorp forestry projects: *Re Timbercorp Securities Limited* [2009] VSC 597 (Pagone J); *Re Timbercorp Securities Limited* [2009] VSC 608 (Davies J);
- (ii) Timbercorp almond projects: *Re Timbercorp Securities Limited (No 2)* [2009] VSC 411 (Robson J); *Re Timbercorp Securities Limited (No 3)* (2009) 74 ACSR 626; [2009] VSC 510 (Robson J); *Re Timbercorp Securities Limited* [2009] VSC 590 (Davies J);
- (iii) Timbercorp olive schemes: *Re Timbercorp Securities Limited (No 4)* [2009] VSC 530 (Croft J);
- (iv) Timbercorp citrus projects: *Re Timbercorp Securities Limited* (2010) 77 ACSR 291, [2010] VSC 50 (Davies J); *Re Timbercorp Securities Limited (No 4)* [2011] VSC 83 (Judd J);
- (v) Timbercorp table grape projects: *Re Timbercorp Securities Limited (No 4)* [2011] VSC 24 (Davies J); and
- (vi) Great Southern olive projects: *Re Great Southern Managers Australia Ltd (in liq)* [2010] WASC 138 (La Miere J).

<sup>24</sup>

In relation to the Timbercorp Almond Projects, judgment has recently been given following a trial as to the appropriate apportionment of sale proceeds as between the secured creditors of Timbercorp Securities Limited and growers in those schemes: *BOSI Security Services Ltd v ANZ Banking Group Ltd* [2011] VSC 255 (Davies J).

power without seeking prior court approval, and the validity of the amendments was not contested.

- 27.1. In relation to the Timbercorp forestry projects, the liquidators applied to the Federal Court (proceeding VID 595 of 2009) for directions that they were justified in amending the relevant scheme constitutions by inserting a power for the RE to extinguish the growers' rights; Finkelstein J gave the directions (without written reasons), and the constitutional amendments were made.
- 27.2. In relation to the Timbercorp almond schemes, the liquidators applied to the Victorian Supreme Court (proceeding 7114 of 2009) for directions that they were justified in amending the relevant scheme constitutions by inserting a power for the RE to extinguish the growers' rights. Robson J gave the directions, and the constitutional amendments were made (again without written reasons).
- 27.3. In *Re Timbercorp Securities Limited* (2010) 77 ACSR 291 [2010] VSC 50, the Liquidators applied for judicial advice that they were justified in extinguishing growers' interests in the scheme in order to allow the completion of a conditional sale agreement. On the hearing of the application, the growers contested the validity of the constitutional amendment by which the power to so extinguish growers' interests was conferred on the RE. Following the test enunciated by Barrett J in *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444, Davies J upheld the validity of the impugned amendments:

*I am of the opinion that the evidence showed that the Liquidators formed the view that the constitutional amendment would not adversely affect members' rights. The decision was made in the context of the hopeless insolvency of TSL and the inability of the Citrus Scheme to continue under the original arrangements. ... In the process undertaken with the forestry and almond schemes, the Liquidators had sought directions from the Court that they would be justified in procuring TSL to amend the constitutions of those schemes to permit TSL to "assign, terminate, surrender or otherwise deal with any sub-lease/licence and joint venture agreement". Although it appears that there was no contradictor to the making of the directions, the fact that those directions were given provided the Liquidators with comfort that such an amendment was uncontroversial and indeed the evidence showed that the Liquidators had the olive scheme constitution amended similarly and later the Citrus Scheme Constitution without obtaining the*

---

*protection of a court direction because of their view that the amendment was “not controversial”. ...*

*[T]he Liquidators were doing no more than following the same strategy as they had in the other managed investment schemes to be able to facilitate the informal winding up of the Citrus Scheme, if that was the appropriate course to take in circumstances where the Court on two previous occasions had directed that TSL was justified in using the s 601GC(1)(b) power to amend the scheme constitutions to confer an explicit power of termination in TSL. The matters taken into consideration by the Liquidators bear out that they did not consider that members’ rights would be adversely affected.*

*The next issue is whether there was a reasonable basis for the view of the Liquidators that the amendment would not adversely affect members’ rights. An inquiry into the “reasonableness” of the state of mind is an objective inquiry and requires consideration of whether there were facts sufficient to induce that state of mind which, in turn, requires consideration of the matters that were taken into consideration. Contrary to the submission put by Mr Shavin QC, in my view the factual context is part of the material which the Court not only may, but should, consider in determining whether the Liquidators’ view was reasonably based.*

*In the circumstances of this case, I am satisfied that it was reasonable for the Liquidators to consider that the rights of the members would not be adversely affected by the amendment. Here the decision to effect the amendment was taken in the context of the insolvency of TSL and its inability to perform its task as responsible entity because of its insolvency. It was not a decision made in a vacuum or an isolated action on the part of the Liquidators, unconnected with the incapacity of the Citrus Scheme to continue because of the insolvency of TSL and other companies in the Timbercorp group. It was quite the contrary. The original scheme arrangements could not continue; TSL could not continue to fund the operation of the scheme; the amendment was made in anticipation of enabling an informal winding up of the Citrus Scheme.*

28. The factual context of the present application is materially the same as that against which Davies J upheld the validity of the amendments to the constitution of the Timbercorp Citrus Scheme.

**The proposed amendments to the constitutions of the registered schemes do not adversely affect Growers’ rights**

29. The proposed amendments cannot adversely affect Grower rights:
- (a) extinguishment will not actually occur without further order of the Court and will not occur except on condition that the Growers will get the net proceeds of sale of the assets belonging to them – ie, their Trees;

(b) the alternative is disclaimer of the Grower Leases, which would terminate the grower interests in any event.<sup>25</sup>

30. Further, as required by section 601GC(1)(b), the Liquidators have undertaken a process of comparison and assessment to ascertain whether, in the context of WFL's insolvency and the current circumstances of the schemes, the proposed amendments would adversely affect Growers' presently existing rights.<sup>26</sup> Through that process, the Liquidators have reasonably determined that the proposed amendments will not adversely affect Growers' rights.<sup>27</sup>

**The proposed amendments to the investment deeds of the Professional Investor Schemes do not adversely affect Growers' rights**

31. The investment deeds for each of the Professional Investor Schemes confers a power of amendment on the Manager if the Manager considers that the amendment will not adversely affect Growers' rights, alternatively by special resolution of the Growers. The test for permissible amendment of the investment deeds therefore reflects the test under s 601GC(1) of the Corporations Act.
32. The Liquidators' process of comparison and assessment described in paragraph 30 above also included consideration of the rights of Growers of the Professional Investor Schemes, through which the Liquidators have reasonably determined that the amendments proposed to those schemes will not adversely affect Growers' rights.

**The Liquidators would be justified in disclaiming the Project Documents**

33. In the case of the Grower Leases, the Liquidators are entitled to disclaim, regardless of whether the leases are onerous or unprofitable: s 568(1A) of the Corporations Act. Such disclaimer extinguishes the tenant's leasehold estate and accelerates the reversion. The leasehold estate ceases to exist.<sup>28</sup>
34. In any event, the Liquidators consider that both the Grower Leases and the Forestry Management Agreements are onerous and unprofitable.<sup>29</sup> Given that

---

<sup>25</sup> Growers would then be left to prove in the winding up for compensation (section 568D(2)).

<sup>26</sup> Cf *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444 at [100].

<sup>27</sup> Crosbie Affidavit, [57]-[62].

<sup>28</sup> *Hindcastle Ltd v Barbara Attenborough Ltd* [1997] AC 70 at 87E (Lord Nicholls of Birkenhead; Lord Keith of Kinkel, Lord Griffiths, Lord Browne-Wilkinson and Lord Lloyd of Berwick agreeing).

<sup>29</sup> Crosbie Affidavit, [41]-[44], [46]-[50].

those agreements will generate no (or no substantial) cashflow until the eventual clear-felling of each plantation, that assessment is plainly correct.

35. The susceptibility to disclaimer of the Project Documents of the managed investment schemes and the Professional Investor Schemes is a relevant contextual matter that the Liquidators properly took account of in determining that the proposed amendments to the constitutions of those schemes do not adversely affect Growers' rights.<sup>30</sup>

**The orders sought provide are conditioned upon the sale proceeds being apportioned between creditors and Growers**

36. Consistently with the directions made to facilitate informal winding-up of schemes in the Timbercorp and Great Southern matters noted above, the orders sought by the Liquidators in this proceeding expressly provide that the eventual sale proceeds will be apportioned so that Growers will receive such portion of the proceeds received for or referable to the sale of the assets belonging to them – ie, the Trees.
37. The Trees are the only asset belonging to Growers which would be sold to a prospective purchaser. Further, in the present schemes, although the Growers (in most instances) enjoy proprietary rights in respect of their timberlots under the Grower Leases, those rights would not be sold to any purchaser of the land under an unencumbered sale and are, in any event, commercially valueless in the circumstances which presently prevail.
38. Accordingly, the Receivers submit that the order sought by the Liquidators should be amended to provide that Growers will be entitled to receive the portion of the proceeds of sale that is referable to the Trees: see the amended form of orders proposed at Exhibit BW-27.

**WGG's assertion that the land on which the 1995-1999 Scheme is conducted is "scheme property" is incorrect and, in any event, does not arise at this stage**

39. The Receivers dispute the assertion recently advanced that the freehold land on which the 1995-1999 Scheme is conducted is "scheme property".<sup>31</sup> The plain effect of the Project Documents for the 1995-1999 Scheme clearly provide that, in consideration of their payment of rent, the Growers obtain a **lease** of the

---

<sup>30</sup> Crosbie Affidavit, [60].

<sup>31</sup> 2<sup>nd</sup> Bland affidavit, [41]-[48].

Land, and no greater interest. Indeed, the McKenzie & Partners taxation report that was included with the 1995 Prospectus expressly stated:<sup>32</sup>

***Deductibility for the Grower***

*Expenditure incurred by each Grower will be an allowable deduction provided that the expenditure is incurred in gaining or producing assessable income or is necessarily incurred in the carrying on of a business for the purpose of gaining or producing assessable income and is not expenditure of a capital or private or domestic nature. ...*

*Expenditure incurred by Growers under the Preparation & Planting Agreement, the Maintenance Agreement and the Lease Agreement can be categorised as expenditure necessarily incurred in the carrying on of a business of forestry operations with a view to deriving assessable income from these operations. The expenditure is not expenditure of a capital or private or domestic nature and, therefore, will be an allowable deduction under Section 51(1) of the Income Tax Assessment Act 1936.*

The assertion that Growers contributed to the purchase of land by WFL, such that they derived some beneficial entitlement to the freehold, is inconsistent with tax efficient premise of the schemes, which assumed that contributions by Growers (by way of rent, and payments for preparation and maintenance) would be deductible on revenue account.<sup>33</sup>

40. Further and in any event, even if there were some basis for debate about whether some of the land on which the registered schemes were conducted were scheme land:
  - 40.1. that assertion would not alter the non-viability of the relevant schemes in their present form;
  - 40.2. the issue is not appropriate for determination at this stage but, rather, at the stage of apportioning any proceeds of sale – that is, after the second application for judicial advice that would be required for the Liquidators to exercise the power that is now sought to be included in that scheme’s constitution;
  - 40.3. the issue is of no relevance in respect of the unregistered schemes;
  - 40.4. the assertion with regard to scheme land therefore poses no impediment to the giving of the judicial advice that the Liquidators now seek, and which the Receivers support.

---

<sup>32</sup> Exhibit MAB-2, pp 64-65.

<sup>33</sup> This advice was subsequently confirmed by ATO product rulings: see, eg, Product Ruling PR 1999/20 *Income tax: Timber Capital Plantation Prospectus 1999* at [46].

**Conclusion**

41. Accordingly, in order that the process of realising the assets of the schemes for the benefit of both Growers and creditors may be gotten promptly underway, the Receivers support the orders sought by the Liquidators, subject to the modifications noted in the form of orders at exhibit BW-27.

22 June 2011

**WENDY HARRIS**

**TOM CLARKE**

Counsel for the Receivers

**ALLENS ARTHUR ROBINSON**

Solicitors for the Receivers