



PR 2002/9 - Income tax: Yelloch Creek Estate Vineyard Project (revised arrangement)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *30 January 2002*



Product Ruling

Income tax: Yelloch Creek Estate Vineyard Project (revised arrangement)

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the Taxation Administration Act 1953. Product Ruling PR1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

Participants may wish to refer to the ATO’s Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

The Australian Taxation Office (ATO) **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.

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, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

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

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

Participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement 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 person(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 Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'Tax law' identified below applies to the defined class of persons, who took part in the arrangement to which this Ruling relates. In this Ruling, this arrangement is sometimes referred to as the Yelloch Creek Estate Vineyard Project (revised arrangement), or just simply as 'the Project', or the 'product'.

Tax law

2. The tax law dealt with in this Ruling is:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Changes in the Law

3. The Government is currently evaluating further changes to the tax system in response to the Ralph Review of Business Taxation and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

4. Taxpayers who participated in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to Promoters and Advisers

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

Class of persons

6. The class of persons to whom this Ruling applies is those who entered into the arrangement described below between 16 June 1999 and 17 May 2000. They will have had a purpose of staying in the arrangement until it is completed (ie. 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 arrangement. In this Ruling these persons are referred to as 'Growers'.

7. The class of persons to whom this Ruling applies does not include persons who have terminated or intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from the Project.

Qualifications

8. The Commissioner rules on the precise arrangement identified in this Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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Date of effect

10. This Ruling applies prospectively from 30 January 2002 for Growers who entered into the arrangement as set out below between 16 June 1999 and 17 May 2000. 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).

11. 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 arrangement 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

12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. Even following its withdrawal, this Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement that is set out below between 16 June 1999 and 17 May 2000. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

13. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 10 September 2001;
- **The Management Agreement supplied with the Application and the amended Management Agreement supplied on 12 May 1999, between Yelloch Creek Estate Ltd ('the Manager') and the Grower;**
- The Head Lease supplied with the Application and the subsequently amended Head Lease supplied on 12 May 1999, between Ronlae Vineyard Pty Ltd ('the Lessor') and Yelloch Creek Estate Limited ('the Lessee');
- **The Vineyard Lease supplied with the Application, between Yelloch Creek Estate Limited ('the Lessor') and the Grower ('the Lessee');**
- Deed of Assignment of Lease between Yelloch Creek Estate Limited, ARG Management Limited and Ronlae Vineyard Pty Ltd (undated);
- **The Option Agreement supplied with the Application, between Ronlae Vineyard Pty Ltd ('the Land Owner') and the Grower;**
- The Constitution for the Yelloch Creek Estate Vineyard Project supplied with the Application, between Yelloch Creek Estate Limited ('the Responsible Entity') and the Growers;
- The Compliance Plan for the Yelloch Creek Estate Vineyard Project supplied on 13 April 1999 and the

subsequently amended Compliance Plan supplied on 12 May 1999;

- The Development Plan (which forms part of the Management Agreement as Annexure 'E'), supplied on 13 April 1999;
- The Management Plan (which forms part of the Management Agreement as Annexure 'F'), supplied on 13 April 1999;
- The Fruit Purchase and Sale Agreement supplied on 13 April 1999, between BRL Hardy and Yelloch Creek Estate Limited (as Grower);
- The Fruit Purchase and Sale Agreement dated 22 June 2001 between BRL Hardy and ARG Management Limited (as Grower);
- Copy of initial draft Prospectus received 14 April 1999, a second draft Prospectus supplied on 12 May 1999 and the final Prospectus supplied on 20 May 1999;
- Copy of the (unsettled) Contract of Sale between Ronlae Vineyard Pty Ltd ('the Purchaser') and Heather Bourne and Jeanette Rodda ('the Vendors'), supplied on 22 April 1999; and
- Additional correspondence from the Applicant dated 30 October 2001, 15 November 2001, 7 December 2001 and 11 January 2002.

Note: Certain information received from the applicant has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

14. The documents highlighted in paragraph 13 in bold are those that the Grower entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower or any associate of the Grower is, or was a party.

15. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

Overview

Location	Rochow Wrays Road, Naracoorte, South Australia
Type of business each participant is carrying on	Viticulture business.

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Number of hectares under cultivation	Up to a maximum 74 hectares
Size of each Vineyard Allotment	Approximately 580 vines on 0.4 hectares
Number of vines per hectare	1450
Minimum subscription	50 Vineyard Allotments
The term of the project in years	15 years
Initial cost per Grower	\$20,862
Initial costs on a per hectare basis	\$52,155
2 nd year's costs per Grower	\$6,189
3 rd year's costs per Grower	\$3,119 plus GST if applicable
Ongoing costs per Grower	Ongoing Management Fees and Rent.

16. This arrangement is called the 'Yelloch Creek Estate Vineyard Project (revised arrangement)' and has been registered as a managed investment scheme under the Corporations Law.

17. In general terms, the Project involved Yelloch Creek Estate Ltd ('YCEL') entering into a Lease with Ronlae Vineyard Pty Ltd ('Ronlae') for the lease of the Vineyard Land. The Vineyard Land comprised 80 hectares on Rochow Wrays Road, Naracoorte, South Australia of which 74 hectares are stated as suitable for growing vines.

18. Growers taking part in the Project appointed YCEL as their attorney to enter into the following agreements on their behalf:

- a Management Agreement under which Growers appoint YCEL as Manager of their Vineyard;
- a Vineyard Lease under which YCEL subleases to Growers one or more Vineyard Allotments; and
- an Option Agreement under which Ronlae grants an option for Growers to sell the Grower's Improvements to it at or around the termination of the Vineyard Lease.

19. There were 185 Vineyard Allotments on offer of 0.4 hectare each and Growers had to subscribe for a minimum of one Vineyard Allotment. Growers subscribed to 50 Vineyard Allotments in the project. The Term of Vineyard Leases will be until 30 June 2014.

Fees

20. Growers who entered the Project were required to make the following payments for each 0.4 hectare Vineyard Allotment:

- \$20,862 by 30 June 1999 comprised of \$1,624 for the purchase and installation of trellising; \$1,924 for the

purchase and installation of irrigation infrastructure; \$1,158 for the purchase and planting of rootlings; \$70 for other capital costs; a Management Fee of \$15,830 for Vineyard Services to be provided in the Financial Year ended 30 June 2000; and \$256 for Rent for the Financial Year ended 30 June 2000;

- a Management Fee of \$5,926 by 30 June 2000 for Vineyard Services to be provided in the Financial Year ended 30 June 2001 plus an amount for Rent calculated as the amount payable for the previous Financial Year, indexed;
- a Management Fee of \$2,850 by 30 June 2001 for Vineyard Services to be provided in the Financial Year ended 30 June 2002 plus an amount for Rent calculated as the amount payable for the previous Financial Year, indexed; and
- thereafter, a Management Fee determined in accordance with Annexure 'B' of the Management Agreement plus an amount for Rent calculated as the amount payable for the previous Financial Year, indexed.

Years 1 to 3 fees

21. The fees payable by a participant in the Project in the first three years assuming Rent is indexed at 2.5%, were:

	Year 1	Year 2	Year 3
Management fee	\$15,830	\$5,926	\$2,850
Rent	\$256	\$263	\$269
Irrigation	\$1,924	Nil	Nil
Purchase and planting of rootlings	\$1,158	Nil	Nil
Trellising	\$1,624	Nil	Nil
Other capital costs	\$70		
Total	\$20,862	\$6,189	\$3,119

The total years 1 to 3 cost to the Grower is \$30,170 per Vineyard Allotment.

Head Lease

22. Ronlae entered into an agreement to lease the Vineyard Land to YCEL for the Term of the Project (cl 2.1). YCEL can only use the land for the purpose of the Project (cl 5) and it undertakes to use Best

Viticultural Practice in its Development of the Vineyard Allotments (cl 6).

23. Ronlae acknowledges that all plant, equipment and other property (cl 7.1) and Vines and vine rootlings (cl 7.2) installed on the Vineyard Land by YCEL, on behalf of the Growers, will be owned by the Growers. Growers will have the right to harvest and take as their own, all Grapes during the Term (cl 7.3).

Vineyard Lease

24. Under the Vineyard Lease, YCEL subleases to the Grower an area of the Vineyard Land called the Vineyard Allotment, as well as, in common with other Growers, the Common Area, for the Term of the Project (cl 2.1). The Grower is required to pay the Rent to YCEL annually in advance on or before the 30 June preceding the commencement of each Financial Year (cl 3).

25. The Grower is only able to use the Vineyard Allotment for the purposes of the Project (cl 6.1). YCEL will have no right, title, interest or claim in the Grower's Improvements (cl 8.1). Growers' Improvements are defined to include posts, trellises, vines, vine rootlings, grapes and irrigation equipment. Apart from the Grape Sale Agreement, the Grower will have the right to harvest and take as his/her own any Grapes during the period (cl 8.2). Dealings, including assignment, in respect of the Vineyard Allotment and Common Area, can only be effected in accordance with the Constitution (cl 12).

26. Clause 13 provides for the circumstances by which YCEL can terminate the Vineyard Lease. Under clause 13.1(a) this may happen if the Rent or any other amount payable is not made within one month of receiving a notice to pay the relevant amount. Under clause 13.1(b) this may happen if the Grower is in default of its obligations under the Lease and fails to remedy that default after being given written notice to do so.

Management Agreement

27. The Grower engages YCEL as an independent contractor to carry out the Development Services in consideration of the Subscription Fees and the Vineyard Services in consideration of the Management Fee (cl 4.1). The Manager has commenced or must commence to carry out the Development Services and the Vineyard Services on or before the Commencement Date (cls 4.3 and 4.4). The Commencement Date is defined in each agreement to be the date of that agreement. The Grower authorises the Manager to enter into Grape Sale Agreements and ratifies any such Agreements entered into prior to the Commencement Date (cl 4.6).

28. The Development Services are set out in Annexure 'D' of the Management Agreement and are described as preliminary works, choosing grape varieties, acquisition and planting of grapevines, and purchase and installation of irrigation and trellising.

29. The Vineyard Services must be provided in accordance with Annexure 'C', the Development Plan and the Management Plan (cl 5.1). Annexure 'C' details the Vineyard Services and the Development Plan and the Management Plan (Annexures 'E' and 'F') provide a timetable for the provision of those Services. The Vineyard Services include pruning, irrigation and fertilisation, soil management, control of vermin, insects and disease, spraying, culling of vines and grapes, nursery work, harvesting, transporting and selling the grapes, and other things related to the ongoing management of the Vineyard Allotment.

30. YCEL gives no warranty as to the yields and as to the quality and quantity of the Grapes from the Vineyard Allotment or the Vineyard (cl 5.2). Each Grower's Grapes will be pooled and the proceeds of sale will be shared amongst the Growers in accordance with the Constitution (cl 5.6). The Grower may make recommendations in respect of the performance of the Vineyard Services and YCEL must consider, but is not obliged to act, on the recommendations (cl 5.7).

31. The Grower will at all times during the Term, own all plant, equipment and other property installed on the Vineyard Allotment, including but not limited to, posts, trellises, rootlings and Vines, and the Grapes (cl 6.1).

32. The Grower must pay the Management Fee to YCEL annually in advance on or before the 30 June in the preceding Financial Year (cl 10.1) and the Subscription Fee on or before the 30 June 1999 (cl 10.2). The Grower also authorises YCEL to deduct the Harvest Fee from the Proceeds Fund (cl 10.4). The Harvest Fee is described in Item 6 of the Schedule as being 2% of the gross proceeds of the sale of the Grapes whether sold under the Grape Sale Agreements or otherwise. YCEL is also entitled to deduct any other amounts outstanding from moneys due to the Grower under the Grape Sale Agreements (cl 10.5).

33. YCEL is required to prepare and provide the Grower with a proper Management Plan for the whole of the following Financial Year (cl 11.1). YCEL must also provide Growers with quarterly reports for the first four Financial Years in respect of the Vineyard Services provided, the progress and condition of the Vineyard and any other matters which are considered material (cl 13.1). A yearly report in respect of similar issues must also be prepared and forwarded by the YCEL to the Growers (cl 13.2). The Grower is also able to

request written information on other matters relating to the Project provided such requests are reasonable (cl 13.3).

34. The Grower may at any time terminate the Management Agreement if the Manager defaults in its performance, the Lease is terminated or the Manager retires or is removed as Responsible Entity (cl 15.1). The Manager may terminate the Management Agreement where the Grower fails to pay fees after being served with a notice to pay, the Grower defaults under the Agreement, the Lease is terminated or the Vineyard Project is terminated in accordance with the Constitution (cl 15.2).

Option Agreement

35. Under the Option Agreement the Land Owner grants an option to the Grower to sell the Grower's Improvements to Ronlae for the Improvements Fee (cl 2.1) of \$10,000.

36. This option can only be exercised during the period of 30 days prior to and 30 days after the termination of the Vineyard Lease (cl 3.1).

37. Where the Grower elects to exercise the Improvements Option, a notice in writing must be served on Ronlae that the option will be exercised (cl 4). Ronlae must pay the Improvements Fee within 90 days of receiving a valid Improvements Option Notice (cl 5.1).

38. Where a Grower does not validly exercise the Improvements Option, the Grower must remove the Grower's Improvements from the Vineyard Allotment within 30 days. If the Grower's Improvements are not removed the Grower's Improvements are deemed to be worthless and Ronlae is entitled to keep them and is not required to pay the Grower any compensation (cl 9.1).

The Compliance Plan

39. The purpose of the Compliance Plan is the protection of the Growers' interests. Among other things, Part 2 provides that YCEL will act in the interests of Growers in preference to its own, ensure that the Constitution and the Compliance Plan meet the relevant requirements of the Corporations Law, ensure that all property of the Project is clearly identified and held separately from any other property of YCEL or other managed investment schemes and ensure that the assets of the Project are regularly and appropriately valued. To address the risks to the Growers, all Project property will be held by the Custodian, and a Compliance Committee comprising a majority of external members has been appointed.

The Constitution

40. The parties to the Constitution are stated to be YCEL (the Responsible Entity but refer paragraph 44 below) and the Growers. Under clause 3, an Applicant acquired an Interest by paying YCEL the amount specified in the Prospectus.

41. Growers do not have the right to withdraw from the Project or require YCEL to purchase their Interests (cl 9). 'Interest' is defined to mean the Grower's interest in the Project including the interest in the Vineyard Lease, the Management Agreement and the Grape Sale Agreement.

42. Clause 18 provides that a Grower may sell or assign an Interest subject to the terms and conditions of the Project Agreements. Clause 18.2 provides for the form an assignment must take and clause 18.3 provides for the circumstances under which such assignment can be refused by YCEL.

43. Growers may remove YCEL as Responsible Entity by an extraordinary resolution passed at a meeting of Growers, provided that the Growers resolve to appoint a Company to act as new Responsible Entity of the Project (cl 31.2).

44. ASIC successfully applied to the Victorian Supreme Court on 2 June 2000 to have YCEL replaced by ARG Management Limited as a temporary Responsible Entity for the Project. This appointment was ratified by Growers at a meeting of Growers held on 25 July 2000 pursuant to section 601FP of the Corporations Law. ARG Management Limited, as new Responsible Entity, has appointed a new Vineyard Manager for the duration of the Project.

Grape Sale Agreement

45. ARGM has entered into an agreement with BRL Hardy for the sale of grapes grown on 40 hectares of the Vineyard over a 10-year period commencing on 22 June 2001 (cl 1). This period may be extended by 3 years (cl 3). Both parties to the Grape Sale Agreement agree that the maximum yield in any year after 2006 (full production) will be 12.5 tonnes per hectare. The Responsible Entity will undertake suitable viticultural management aimed at not exceeding the maximum yield as agreed.

Finance

46. The applicant had stated in correspondence that neither YCEL nor Ronlae, nor any entity related to, or associated with either of these entities, will offer finance to Applicants to enable participation in the Project. However, discussions were held with an Australian bank for

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it to consider applications from Applicants for finance during the first three years of the Project. Such applications were on a case-by-case basis and were on the normal terms and conditions of the bank. The lender will have full recourse to the Grower and, as security, each Grower may have been required to provide a personal guarantee. Applicants were informed in the Prospectus that applications for finance are subject to approval and will not be binding on either party.

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

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

48. Finance arrangements organised directly by the Grower with another lender are outside the arrangement to which this Ruling applies.

Ruling

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

Section 35-55 - Commissioner’s discretion

49. For a Grower who is an individual and who entered the Project between 16 June 1999 and 17 May 2000, the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b), the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2005 inclusive that the rule in section 35-10 does not apply to this business activity. This is provided that the Project has been, and continues during the remainder of the term of the Project to be carried on in a manner that is not materially different to the arrangement described above in this Ruling.

50. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- the ‘exception’ in subsection 35-10(4) applies (see paragraph 56 in the Explanations part of this ruling, below); or
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or
- the Commissioner is precluded from exercising the discretion under paragraph 35-55(1)(b) because of subsection 35-55(2).

51. Where, the ‘exception’ in subsection 35-10(4) applies, the Grower’s business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any ‘loss’ from that activity, to a later year. Instead, this ‘loss’ can be offset against other assessable income for the year in which it arises.

52. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner’s decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An

assessment of the Project or the product from this perspective has not been made.

Explanations

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

53. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2) a deduction for a loss made by an individual (including an individual in a general law partnership) from certain business activities will not be taken into account in an income year unless:

- the exception in subsection 35-10(4) applies;
- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

54. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

55. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

56. For the purposes of applying Division 35, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

57. In broad terms, the tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);

- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property, or an interest in real property, (excluding any private dwelling) is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

58. A Grower, who was accepted into the Project between 16 June 1999 and 17 May 2000 and who has participated in the Project since the date of their acceptance into the Project, is carrying on a business activity that is subject to these provisions.

59. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquired the minimum allocation of one interest in the Project is unlikely to have his/her business activity pass one of the tests until the income year ended 30 June 2008. A Grower who acquired more than one interest in the Project may however, find that his/her business activity meets one of the tests in an earlier income year.

60. Prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

61. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on;
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

62. The information provided by the applicant indicates that a grower who acquired the minimum allocation of one interest in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation profit, for the year ended

30 June 2006. The Commissioner has decided for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2005. Subsection 35-55(2) prevents the Commissioner exercising the discretion for these Growers beyond the year ended 30 June 2005.

63. The applicant has stated that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement section of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 49), in the manner described in the arrangement, this Ruling may be affected. Specifically, the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 8). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

64. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the report of the independent viticultural consultant provided with the application by the Responsible Entity;
- the renegotiated binding Grape Sale Agreement with BRL Hardy Limited for the sale of grapes; and
- other expert opinion independently obtained by the Commissioner that specifically relates to viticulture.

Detailed contents list

65. Below is a detailed contents list for this Ruling:

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Commissioner of Taxation

30 January 2002

Previous Draft:

- viticulture

Not previously released in draft form

Legislative references:

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 98/22;
TD 93/34; TR 97/16; PR1999/62;
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