


# ***PR 2008/9 - Income tax: Kiri Park Project No. 2 Second Prospectus - NCL discretion***

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## Product Ruling

### Income tax: Kiri Park Project No. 2 Second Prospectus – NCL discretion

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

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

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

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law).

You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

#### **No guarantee of commercial success**

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

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

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

#### **Terms of use of this Product Ruling**

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

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Product Ruling relates. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the Kiri Park Project No. 2 Second Prospectus or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below and who executed the relevant Project Agreements set out in the Arrangement part of Product Ruling PR 2002/82 on or after 5 June 2002 and on or before 30 June 2002. They must have a purpose of staying in the scheme until it is completed (that is being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

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

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- were accepted into this Project before 5 June 2002 or after 30 June 2002;
- have elected to market and sell the timber grown on their Woodlots(s); or
- participate in the scheme through offers made other than through the Product Disclosure Statement.

### Superannuation Industry (Supervision) Act 1993

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

**Qualifications**

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 49 of Product Ruling PR 2002/82.

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

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

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Attorney General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

**Date of effect**

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9. This Product Ruling applies prospectively from 13 February 2008, the date this Product Ruling is made. It applies to the specified class of entities that entered into the scheme set out in paragraphs 16 to 49 of Product Ruling 2002/82 between 5 June 2002 and 30 June 2002. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the 2008-09 income year.

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

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

11. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

12. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the ruling relates has not begun; and
- the scheme to which the ruling relates has not begun to be carried out.

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

## **Changes in the law**

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

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

## **Note to promoters and advisers**

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

# **Ruling**

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## **Continuing application of Product Ruling PR 2002/82**

17. Although now withdrawn, the tax benefits set out in Product Ruling PR 2002/82 continue to apply to participants who are within the specified class of entities to which the Product Ruling applied and who entered into the specified scheme between 5 June 2002 and 30 June 2002. This is subject to there being no material difference in the scheme or in the entities' involvement in the scheme.

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

18. A Grower who is an individual accepted into the Project between 5 June 2002 and 30 June 2002 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 in paragraphs 16 to 49 of Product Ruling PR 2002/82, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the 2008-09 income year. 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.

**Scheme**

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19. The scheme that is the subject of this Product Ruling is specified in paragraphs 16 to 49 of Product Ruling PR 2002/82.

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**Commissioner of Taxation**13 February 2008

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## Appendix 1 – Explanation

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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.*

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

#### **Sections 35-55 – exercise of the Commissioner's discretion**

20. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the 2008-09 income year, the Commissioner has determined that for those income years:

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

21. 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.

22. 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 Product Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Product Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

## **Appendix 2 – Detailed contents list**

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23. The following is a detailed contents list for this Product Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

PR 2002/82; TR 2007/6

*Subject references:*

- Commissioner's discretion
- non-commercial loss
- product rulings

*Legislative references:*

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

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ATO references

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