



PR 2002/43 - Income tax: Hadley Hall Estate Vineyard Project

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Product Ruling

Income tax: Hadley Hall Estate Vineyard Project

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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 PR 1999/95 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 involves 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 this product 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 has been 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 laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Hadley Hall Estate Vineyard Project, or simply as 'the Project'.

Tax law(s)

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

Goods and Services Tax

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

Changes in the Law

4. 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.

5. Taxpayers participating 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

6. 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

7. The class of persons to whom this Ruling applies is those persons who were accepted into the Project between 4 May 1998 and 3 May 1999. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who have terminated or who 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

9. The Commissioner rules on the precise arrangement identified in the 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

11. This Ruling applies prospectively from 24 April 2002 for Growers who, between 4 May 1998 and 3 May 1999, entered into the specified arrangement that is set out below. 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).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on that private ruling if the income year to which it 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

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yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, even following its withdrawal, 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 4 May 1998 and 3 May 1999. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

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

- Prospectus of the The Hadley Hall Estate Vineyard Project, dated 4 May 1998;
- **Trust Deed of Hadley Hall Estate Vineyard project between H.H.E. Management Ltd ("The Manager"), Chartered Securities Pty Ltd ("The Trustee") and Hadley Hall Estate Holdings Ltd ("The Lessor"), dated 3 March 1998;**
- Memorandum and Articles of Association of Hadley Hall Estate Holdings Ltd, dated 24 February 1998;
- **Lease and Management Agreement between H.H.E. Management Ltd ("The Manager"), Chartered Securities Pty Ltd ("The Trustee") and Hadley Hall Estate Holdings Ltd ("The Lessor"), undated;**
- Product Ruling application received from the applicant dated 1 June 2001;
- Correspondence from the applicant's representative dated 15 July 2001, 11 February 2002, 11 March 2002, 12 March 2002, 10 April 2002;
- Telephone Notes of conversations with the applicant's representative, dated 12 June 2001, 24 July 2001, 2 August 2001, 8 August 2001, 13 August 2001, 14 August 2001, 8 October 2001, 10 October 2001, 30 January 2002, 7 February 2002, 12 February 2002,

11 March 2002, 12 March 2002, 4 April 2002,
9 April 2002 and 10 April 2002.

Note: certain information received from H.H.E. Management Ltd has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

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

16. 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

17. This arrangement is called the Hadley Hall Estate Vineyard Project.

Location	Frankland River Region of Western Australia near Mount Barker.
Type of business each participant is carrying on	A long term commercial viticulture business.
Number of hectares under cultivation	72.8 hectares.
Name used to describe the project	Hadley Hall Estate Vineyard Project.
Size of each vinelot	0.4 hectares.
Number of vines per hectare	1560
Expected production	12 tonnes/hectare.
The term of the investment in years	15 years.
Initial cost	\$24,110.00
Initial costs on a per hectare basis	\$59,551.70
2nd years costs	\$5,302
3rd years costs	\$4,169
Ongoing costs	Ongoing Management Fees, and Land Rental.
Cost of stapled investment being a share in Hadley Hall Estate Holdings Limited	\$2,950

18. Growers applying under the Prospectus, enter into a Lease and Management Agreement. The arrangements are set out in the Trust

Deed for the Project. The Lease Agreement gives a Grower a Lease over an identifiable area of land for the purpose of developing a vineyard until the Project is terminated on 30 June 2013. The term of the Project is expected to be 15 years. Each vinelot is 0.4 hectares in size. The allotment was planted in June 1999.

19. The Project Land is situated in the Frankland River Region of Western Australia, near Mount Barker. Hadley Hall Estate Holdings Ltd owns the land. Growers or their associates will be required to take up shares in Hadley Hall Estate Ltd.

20. Hadley Hall Estate will lease a vineyard lot of 0.4 hectares to the Grower for the purpose of carrying on a long term commercial viticulture project.

21. The minimum subscription was 100 Grower units. Each Grower may subscribe for a minimum of one vineyard lot. The Manager planted approximately 625 vines per vineyard lot (1560 per hectare) prior to 30 June 1999 following the execution of the Lease and Management Agreement.

22. Growers will execute a power of attorney enabling the Manager to act on their behalf to execute the Lease and Management Agreement.

23. Possible projected returns for Growers are outlined in the Prospectus. The Manager does not guarantee the success of the vineyard. Investors will be exposed to the usual business risks and agricultural risks inherent in primary production due to matters beyond the control of the Manager such as adverse weather conditions, insect attacks and variable market conditions. The projected returns are subject to the inherent risks of the long term nature of the venture. The Manager has outlined these risks in the Prospectus for the Project.

Trust Deed

24. The Trust Deed for the Project sets out the terms and conditions under which the Manager agrees to act for the Growers and to manage the Project. The Manager will keep a register of Growers. The Lease and Management Agreement will be executed on behalf of a Grower following the signing of the Application and a Power of Attorney Form attached to the Prospectus. Growers are bound by the Trust Deed and the Lease and Management Agreement by virtue of their participation in the Project.

Interest in land

25. The Land Owner grants a lease to each Grower under the terms of the Lease Agreement. Growers are granted an interest in land in the form of a lease to use their vineyard lot for the purpose of long term viticulture in the Project. Growers must pay rent annually to the land owner for the term of the Lease Agreement which is from the Commencement Date until 31 December 2013.

Management Agreement

26. Each Grower enters into a Management Agreement with the Manager. The termination of the Project is the earlier of the termination of the Grower's Interest and 30 June 2013. Growers contract with the Manager to carry out the initial services, to plant, develop, manage and maintain the vines. On application, Growers pay the primary lease and management fee and annual lease and management fees thereafter.

27. The Manager will carry out the following services for the Grower immediately upon entering into the Management Agreement. These services consist of:

- obtaining all relevant Government approvals for the project;
- developing with consultants an integrated irrigation and drainage plan for the project;
- engaging contractors to develop a soil plan and surveyors to develop contour maps;
- completing a soil survey and establishing varietal planting areas;
- finalising and marking out vineyard layout;
- removing remnant vegetation;
- eradicating weeds, pests and vermin from the vineyard lot;
- preparing the vineyard lot;
- establishing drainage on the vineyard lot in accordance with the drainage plan;
- providing supervision and management of the duties in this clause;
- supervising the growing of the rootlings set aside for the Grower in various nurseries;

- developing a management plan for all vineyard lots in conjunction with the anticipated requirements of the various grape purchasers;
- research and development services on the viticulture requirements best suited for the Vines and grapes; and
- all administration and compliance duties.

28. In addition to the duties specified above, the Manager will also arrange for the following services to be carried out on or in respect of the vineyard lot:

- establish dams on the land to service the vineyard lot;
- establish the Allotment Irrigation System; and
- commence and complete the establishment of a trellis system on the vineyard lot.

29. The Manager will pool for sale all produce of each Grower's business with that of each other Grower and will market and sell all such produce. The proceeds of the pooled sales will be paid to the Trustee for crediting to the account of each Grower on a proportional basis.

30. Income of the Project is to be held on behalf of the Growers by the Trustee and to be applied in the first instant in payment of the Growers' obligation under the Lease and Management Agreement should the Grower be in arrears with their payments. Any net income remaining after the payment of these fees is to be distributed to Growers after the final payment is received for each sale of produce.

31. The Grower may terminate the Lease and Management Agreement in certain instances, including where the Manager defaults in the performance of its duties.

32. All costs and expenses incurred by the Manager in carrying out its duties are to be borne by it and the Grower has no obligation to make any payment in addition to the fees prescribed by the various agreements.

33. The Manager will use its best endeavours to obtain a Grape Sale Agreement to be entered into with various contracted grape buyers to purchase 100% of the grapes harvested.

34. The Lease and Management Agreement and Project Trust Deed will bind a participant who enters into the Hadley Hall Estate Vineyard Project and utilises the services of the manager. These documents detail, among other things, the fees and charges for which an investor is liable. Once a Grower's application has been accepted, the Manager will be responsible for erecting trellis and irrigation on each allotment prior to 30 June of the financial year after the application was accepted. The Manager will advise Growers when

certain 'business operations' have been commenced on their behalf, for example, when their vines have been planted and have also provided independent viticultural reports to the Growers on the development and progress of the vineyard.

Vineyard Management Agreement

35. Pursuant to its right to delegate any functions required of it, the Manager has undertaken the obligations under the Management Agreement to establish the Vineyard and undertake all necessary viticultural work in future years.

36. The Manager is required to undertake all pre-planting activities, establish the trellis, plant vines, irrigation and maintenance of the Vineyard and other necessary operations over the life of the Project. The Manager is required to harvest the grapes on behalf of the Growers.

Contract for the Sale and Purchase of Wine Grapes

37. Pursuant to the various Grape Sales Agreements which have been obtained by the Manager subsequent to the Project commencing the Manager will endeavour to contract the sale, in each Vintage Year, 100% of the grapes grown on the property.

38. The proceeds of the sale are to be paid to the Trustee on behalf of all of the growers who will be responsible for the distribution of the proceeds to the Growers.

Fees

Year 1 to 3 payments:

39. The fees payable by a Grower in the Project in the first three years for one allotment are:

	Year 1 On Application	Year 1 June 30	Year 2 June 30	Year 3 June 30
Installation of Irrigation	\$2,150	\$0.00	\$0.00	\$0.00
Supply & Erection of Trellis	\$0.00	\$2,995 (1/7/1999)	\$0.00	\$0.00
Rent	\$305	\$307	\$319	\$332
Pre-Planting Activities	\$2069	\$0.00	\$0.00	\$0.00
Project Development	\$500	\$0.00	\$0.00	\$0.00
Dams and Water	\$2,200	\$0.00	\$0.00	\$0.00

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Catchment				
Irrigation System	\$2,150	\$0.00	\$0.00	\$0.00
Purchase and Planting Vines	\$2,800	\$0.00	\$0.00	\$0.00
Ongoing Management Fee	\$0.00	\$2,000	\$3,850	\$4,004
Pruning, Vine Training, Fertilising, Spraying	\$5,686	\$0.00	\$0.00	\$0.00
Compliance & Accounting	\$250	\$0.00	\$0.00	\$250
Government Fees, Stamp Duty, Rates & Taxes	\$1,500	\$0.00	\$0.00	\$0.00
Commissions & Marketing	\$1,500	\$0.00	\$0.00	\$0.00
Prospectus Costs	\$475	\$0.00	\$0.00	\$0.00
Administration, Corporate Management, Sundry Costs & Profit	\$2,525	\$0.00	\$0.00	\$0.00
Total	\$24,110	\$5,302	\$4,169	\$4,336

40. The Year 1 Lease and Management fees were only for work to be done up until 30 June 1999, for those Growers accepted into the Project up until 30 June 1998. The term of the Project will be for 15 years from 30 June 1998, at which time Growers will vote to decide on the future of the vineyard. The Project can be renewed, revert to the Land Owning Company and be run as a total vineyard complex or the vineyard may be sold.

41. For those Growers accepted into the Project prior to 30 June 1998, the fees payable for trellising costs are due and payable by the 31 July 1999.

42. Alternatively, the fees for Years 2 and 3 will be required to be paid by the 30 June each year.

Finance

43. Growers can fund their involvement in the Project themselves, borrow from a preferred Australian bank, or borrow from an independent lender.

44. 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 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 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 are involved or become involved in the provision of finance to Growers for the Project.

Ruling

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

Section 35-55 – Commissioner's discretion

45. For a Grower who is an individual and who entered the Project between 4 May 1998 and 3 May 1999 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 2004 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 that described in the arrangement that is set out in paragraphs 14 to 44 of this Product Ruling.

46. 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 52 in the Explanations part of this ruling, below);
- 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)).

47. 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.

48. 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

49. 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.

50. 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.

51. 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.

52. For the purposes of applying the 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.

53. 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).

54. A Grower who was accepted into and who has participated in the Project since between 4 May 1998 and 3 May 1999 is carrying on a business activity that is subject to these provisions.

55. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquired the minimum allocation of 0.4 hectares interest in the Project is unlikely to have their business activity pass one of the tests until the income year ended 30 June 2006. Growers who acquired more than 0.4 hectares interest in the Project may however, find that their activity meets one of the tests in an earlier income year.

56. Prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in

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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.

57. 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; and
- (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.

58. The information provided by the applicant indicates that a Grower who acquired the minimum allocation of 0.4 hectares interest in the Project is expected to be carrying on a business activity that will produce a taxation profit, for the year ended 30 June 2005. 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 2004.

59. 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 that is set out in paragraphs 14 to 44 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 45), 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 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent viticulturist and additional expert or scientific evidence provided with the application by the Responsible Entity.

Detailed contents list

61. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation

24 April 2002

Previous draft:

Not previously released in draft form

Related Rulings/Determinations:

PR 1999/95; TR 92/1; TR 97/16;
TR 92/20; TR 98/22; TD 93/34

Subject references:

- carrying on a business
- commencement of a business
- management fees
- non commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance
- tax benefits
- agricultural expenses

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1936 Part IVA
- ITAA 1936 82KL
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- Copyright Act 1968

ATO references:

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