


# ***CR 2004/19 - Income tax: Rinker Group Limited - Universal Share Plan***

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## Class Ruling

### Income tax: Rinker Group Limited – Universal Share Plan

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#### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class 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.*

#### **What this Class Ruling is about**

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1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are:
- 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - 139BA of the ITAA 1936;
  - 139C of the ITAA 1936;
  - 139CA of the ITAA 1936;
  - 139CC of the ITAA 1936;
  - 139CD of the ITAA 1936;
  - 139CE of the ITAA 1936;
  - 139E of the ITAA 1936;
  - 139FA of the ITAA 1936
  - 139GF of the ITAA 1936;
  - 102-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - 104-10 of the ITAA 1997;

- 109-5 of the ITAA 1997;
- 109-10 of the ITAA 1997;
- 110-25 of the ITAA 1997;
- 115-5 of the ITAA 1997;
- 115-10 of the ITAA 1997;
- 115-15 of the ITAA 1997;
- 115-20 of the ITAA 1997;
- 115-25 of the ITAA 1997;
- 115-100 of the ITAA 1997;
- 130-80 of the ITAA 1997; and
- 130-83 of the ITAA 1997.

## **Class of persons**

3. The class of persons to which this Ruling applies are all Australian resident employees of Rinker Group Limited (RGL) and its subsidiaries (RGL Group) who are granted shares under the Rinker Group Limited Universal Share Plan (the Plan). The RGL Group comprises Rinker Group Ltd, Readymix Holdings P/L, Readymix Cement P/L, Excel Concrete (NSW) P/L, Excel Concrete P/L, Minicon P/L, Ballestrin Concrete Constructions P/L, Bettaform Constructions P/L, Readymix Emoleum Services P/L, Readymix Roads Group P/L, Readymix Properties P/L, Rinker Materials (Tianjin) Co Ltd, Broadway & Frame Premix Concrete Pty Limited and Rinker Materials (Qingdao) Co limited.

4. This Ruling does not apply to a person who, immediately after participating in the Plan, either holds a legal or beneficial interest in more than 5% of the shares in RGL, or is in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of RGL.

## **Qualifications**

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is in accordance with the arrangement described below at paragraphs 10 to 19 in this Ruling.

7. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
- (b) this Ruling may be withdrawn or modified.

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## **Date of effect**

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9. This Ruling applies from the 2002/2003 year of income. 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 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette; or
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

## **Arrangement**

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10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents.

- Class Ruling application dated 9 December 2002; and
- Plan rules of the Rinker Group Limited (RGL) Universal Share Plan (USP).

Further correspondence by facsimile received by the Australian Taxation Office from RGL dated 28 March 2003.

**Note:** certain information received has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

11. The Plan is established as part of the employee share plan strategy of the RGL Group. Participation is offered to all Australian employees of the RGL Group that have completed a minimum of 12 months continuous or non-continuous service.

12. Prior to the demerger of RGL from the CSR Group, RGL did not have any Australian resident employees. Some employees from the CSR Group transferred employment to the RGL Group prior to and immediately after the demerger of RGL. Any such employment with the CSR Group, immediately before the demerger, will be deemed to be employment with RGL for the purposes of determining eligibility under the Plan.

13. The RGL Board of Directors will supervise the administration and implementation of the Plan. The Plan will be conducted on a non discriminatory basis. The terms and conditions of offers made under the Plan will be the same for all employees. The RGL Group will not provide any financial assistance in respect of acquisitions under the Plan.

14. RGL may make offers to eligible employees in the RGL Group to participate in the Plan. These offers will entitle employees to purchase fully paid ordinary shares in the capital of RGL up to a maximum number determined by the Board.

15. The consideration paid for the purchased shares will be the shares' market price. Market price is defined in the Plan rules as the weighted average price for all shares sold on the Australian Stock Exchange (ASX) during such three consecutive trading days preceding the date on which shares are to be allotted, as the Board nominates. These three consecutive trading days may be up to one month before allotment.

16. An eligible employee who applies, and pays, for shares will be entitled to receive an equal number of additional fully paid ordinary shares in the capital of RGL for no further consideration (i.e. the additional shares).

17. RGL will issue, allot or transfer to each participant the parcel of shares applied for under the Plan including the purchased and the additional shares.

18. The participating employee's shares, both purchased and additional, will be subject to a restriction which prohibits the shares from being sold unless:

- three years have elapsed since issue or allotment of the shares; or
- the employee's employment within the RGL Group has been terminated.

RGL will apply a holding lock to enforce the restriction on the sale of the shares. The shares will not be subject to conditions that could result in the participant's forfeiture of shares.

19. At no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares in RGL or be in a position to vote or control the casting of more than 5% of the votes that may be cast at a general meeting of RGL.

## **Ruling**

*[All legislative references are to the ITAA 1936 unless stated otherwise]*

20. Where under the Plan a participating employee acquires shares under an employee share scheme (ESS) pursuant to section 139C, the discount is included in the employee's assessable income pursuant to section 139B. For a share to have been acquired under an ESS any consideration paid for the share must have been less than the market value of the share as determined under section 139FA, i.e. the share must have been acquired at a discount.

### **Shares acquired under an ESS – where the participating employee makes an election under section 139E**

21. Where a participating employee acquires shares under the Plan at a discount, and makes an election under section 139E, the discount on the shares will be included in their assessable income in the year of income in which the shares are acquired pursuant to subsection 139B(2).

22. The discount will be calculated in accordance with subsection 139CC(2). The discount is the market value of the share as calculated under section 139FA at the time it is acquired less any consideration paid by the employee. Provided that the share plan is operated in a manner that continues to satisfy the exemption conditions in section 139CE, only the amount of discount in excess of \$1,000 will be included in the employee's assessable income pursuant to section 139BA.

23. The first element of the cost base or reduced cost base of the share upon a capital gains tax (CGT) event happening will be their market value on acquisition under subsection 130-80(2) of the ITAA 1997.

24. Where an employee disposes of the shares, CGT event A1 will happen; section 104-10. The capital gain or capital loss arising from this CGT event will be the difference between the capital proceeds and the cost base or reduced cost base of the share.

25. Where the employee disposes of the shares 12 months or more after their acquisition, any capital gain that results from the disposal will be a discount capital gain under subdivision 115A of the ITAA 1997.

## **Shares acquired under an ESS – where the participating employee does not make an election under section 139E**

26. Where a participating employee acquires shares under the Plan at a discount, and does not make an election under section 139E, the amount of discount on the shares will be included in assessable income pursuant to subsection 139B(3) in the year of income in which section 139CA determines the cessation time occurs.

27. As there is a disposal restriction on shares acquired under the Plan, the cessation time will be determined pursuant to subsection 139CA(2). The cessation time for a share acquired by a participating employee under the Plan will be the earlier of:

- when the participating employee disposes of the shares;
- 3 years after acquisition of the Plan shares; and
- the time when the employee's employment in respect of which the share was acquired ceases. This will be when the employee is no longer employed by their employer company at the time that the share was acquired or a holding company of the employer or a subsidiary, pursuant to subsection 139CA(3).

28. Where the employee subsequently disposes of the share in an arm's length transaction within 30 days of cessation time, the discount included in assessable income at cessation time under subsection 139B(3) will be calculated in accordance with subsection 139CC(3). It will be the consideration received on disposal of the share reduced by any consideration paid by the employee to acquire the share.

29. A capital gain or capital loss made as a consequence of such a disposal will be disregarded pursuant to subsection 130-83(2) of the ITAA 1997.

30. Where shares are not subsequently disposed of by the employee in an arm's length transaction within 30 days of the cessation time, the discount included in assessable income at cessation time under subsection 139B(3) is calculated in accordance with subsection 139CC(4). The discount will be the market value of the share at the cessation time (worked out under section 139FA) reduced by any consideration paid by the employee to acquire the share.

31. The first element of the cost base or reduced cost base of the share upon a CGT event happening will be its market value at the cessation time pursuant to subsection 130-83(3) of the ITAA 1997.

32. When the employee disposes of the share, CGT event A1 will happen; section 104-10. The capital gain or capital loss arising on this CGT event will be the difference between the capital proceeds and the cost base or reduced cost base of the share.

33. Where the employee disposes of the shares 12 months or more after their acquisition, any capital gain that results from the disposal will be a discount capital gain under subdivision 115A of the ITAA 1997.

#### **Where the shares are not acquired at a discount**

34. Where under the Plan the participating employee pays consideration for the acquisition of the share that is equal to, or more than, its market value under section 139FA, the employee does not acquire the share under an employee share scheme. There is no discount given on the share to be included in the employee's assessable income pursuant to section 139B.

35. The participating employee will acquire the share for CGT purposes on the day the share is issued, allotted or transferred to them.

36. The first element of the cost base of the share is the money paid by the employee to acquire the share: subsection 110-25(2) of the ITAA 1997.

37. When the employee disposes of the share, CGT event A1 will happen. The capital gain or capital loss made as a consequence of such disposal will be the difference between the capital proceeds and the cost base or reduced cost base of the share: subsection 104-10.

38. Where the employee disposes of the share 12 months or more after its acquisition, any capital gain that arises from the disposal will be a discount capital gain under subdivision 115A of the ITAA 1997.



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## Explanation

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### Employee Share Schemes

39. To be dealt with under the provisions of Division 13A, the share must be acquired under an employee share scheme in accordance with section 139C. Subsection 139C(1) provides that a share is acquired under an employee share scheme if the share is acquired in respect of, or in relation directly or indirectly to, any employment of the taxpayer.

40. Subsection 139C(3) provides that a share is not acquired under an employee share scheme unless it is acquired for less than its market value under section 139FA. The shares in Rinker Group Limited are listed on an approved stock exchange. The market value of an ordinary share under section 139FA is:

- if there was at least one transaction on the ASX in those shares in the week up to and including the date of acquisition – the weighted average of the prices at which those shares were traded on the ASX during that week; or
- if there were no such transactions in the week up to and including the date of acquisition – the last price at which an offer was made on the ASX in that period to buy such a share, or if no offer was made, the value of the share determined as if section 139FB applied to the share.

41. Eligible employees purchase shares at market price under the plan. The market price of a share under the plan is similar to the method used in paragraph 139FA(1)(a) however it is not identical. Market price under the plan is the weighted average for shares sold on the ASX during any three consecutive trading days within the last month as determined by the Board. This method may produce a market price at which shares are acquired different to the valuation under section 139FA. The valuation for Division 13A purposes outlined at paragraph 40 must be used in determining whether the shares were acquired at a discount.

42. Where under the Plan a participating employee does not pay consideration for the acquisition of shares or the consideration paid is less than their market value under section 139FA, the conditions in subsections 139C(1) and (3) are met. The employee acquires the shares under an employee share scheme as they are acquired for less than market value and in respect of their employment.

43. The Plan is a broad based plan as all Australian resident RGL Group employees with at least 12 months service are invited to participate in all offers under the Plan.

44. The Commissioner accepts that the six conditions in section 139CD are satisfied for all eligible employees to whom this Ruling applies, in respect of shares acquired for less than market value as determined under section 139FA. These shares will be qualifying shares under Division 13A.

**Shares acquired under an ESS – where the participating employee makes an election under section 139E**

45. A participating employee can elect under section 139E that subsection 139B(2) applies for a year of income. The election will apply to each qualifying share and qualifying right to acquire a share in the year of income. Subsection 139B(2) provides that the discount is included in the employee's assessable income in the year of acquisition of the share, that is, in the year when RGL issued, allotted or transferred the share to the employee.

46. An election under section 139E must be made in writing, in a form approved by the Commissioner before the employee lodges his or her return of income for the year of income, or within such further time as the Commissioner allows. Paragraph 3 of *Taxation Determination TD 97/23* provides that unless specifically requested to do so, employees should not forward their elections to the Australian Taxation Office.

47. For shares that are purchased by an employee, where the consideration paid is less than their market value as determined under section 139FA (see paragraph 40) at the date of acquisition, the discount is calculated in accordance with subsection 139CC(2). It is the market value (calculated in accordance with section 139FA) of the shares at the date they were acquired by the employee less any consideration paid for their acquisition.

48. For the additional shares, the discount is also calculated under subsection 139CC(2). It is the market value of the shares as determined under section 139FA (see paragraph 40) when they were acquired by the employee.

*\$1,000 tax-free threshold*

49. Section 139CE contains three exemption conditions that must be satisfied by the Plan for the participating employees to have access to the \$1,000 tax free threshold in subsection 139BA(2). The exemption conditions are:

- the first condition is that the scheme does not contain any conditions which could result in an employee forfeiting ownership of any shares that were acquired under the Plan, subsection 139CE(2);

- the second condition is that the scheme is operated so that no employee is permitted to dispose of shares acquired under the Plan until the earlier of:
  - three years after their acquisition; or
  - the time when the employee is no longer employed by the company that was their employer at the time the shares were acquired, unless the employee, on cessation of that employment is then employed by a holding company of the employer or a subsidiary, subsections 139CE(3) & (5); and
- the third condition is that the scheme is operated on a non discriminatory basis, subsection 139CE(4) and section 139GF.

50. As the reference to ‘the scheme’ in subsections 139CE(2) to (4) is a reference to the mechanism by which the participating employees acquire qualifying shares, the exemption conditions must, initially, be satisfied at the time an offer of shares is made to employees. However, as the purpose of subsection 139CE(3) is to ensure that qualifying shares are held for the nominated period in order to access the concession in section 139BA, satisfaction of the conditions at the time of the offer, alone, is not enough. If, for instance, a subsidiary leaves the RGL group taking with it employees who have shares under the Plan and as a result all or some of them are permitted to dispose of their shares, it will be necessary to reconsider whether the exemption conditions are still satisfied with respect to those shares.

51. For the exemption to be maintained, the share plan needs to continue to be operated in a manner that satisfies the exemption conditions. Subject to this necessary proviso, subsection 139BA(2) applies, so that only the amount of the discount in excess of \$1,000 for the year of income is included in the participating employee’s assessable income.

### *Capital gains tax*

*[All legislative references under this heading are to the ITAA 1997 unless otherwise stated]*

52. The first element of the cost base or reduced cost base of the share will be its market value (as determined under section 139FA see paragraph 40) on acquisition under subsection 130-80(2).

53. Where shares are allotted or transferred to the participating employee under the Plan, the employee becomes the owner of those shares and therefore acquires them for CGT purposes pursuant to subsection 109-5(1). Specifically, the shares will be acquired by the employee at the date the shares are allotted to the employee (Item 2 of the table in section 109-10). Where existing shares are transferred to the employee, the shares will be acquired by the employee at the date the shares are transferred into the employee's name (CGT event A1 (case 1) of the table in subsection 109-5(2)).

54. When the employee sells the shares, the disposal will constitute a CGT event A1 as a change of ownership occurs in relation to the shares pursuant to subsections 104-10(1) and (2).

55. The capital gain or capital loss arising on the CGT event A1 will be the difference between the capital proceeds received and the cost base/reduced cost base of the shares in accordance with subsection 104-10(4).

56. If the share is sold 12 months or more after acquisition, any capital gain resulting from the sale will be a discount capital gain for the purposes of section 115-5. The capital gain under subsection 102-5(1) will be reduced by the discount percentage of 50% as determined by paragraph 115-100(a). This is because the requirements of sections 115-10, 115-15, 115-20 and 115-25 are met as:

- any capital gain would be made by an individual (section 115-10);
- the capital gain results from CGT event A1 happening after 21 September 1999 (section 115-15);
- the cost base used in determining the capital gain was not indexed (section 115-20); and
- the CGT event arose at least 12 months after the share was acquired (section 115-25).

57. If the share is sold within 12 months of acquisition, any capital gain resulting from the sale cannot be a discount capital gain because the requirements of section 115-25 are not met.

**Shares acquired under an ESS – where the participating employee does not make an election under section 139E**

58. Where a participating employee has not made an election under section 139E, and as the shares are qualifying shares (see paragraph 44), the discount in relation to these shares will be included in assessable income pursuant to subsection 139B(3) in the year in which cessation time occurs. As the shares acquired under the plan

have restrictions on their disposal, i.e. an employee will be prohibited from disposing of the shares for the first 3 years after acquisition, subsection 139CA(2) will determine when cessation time occurs.

59. According to subsection 139CA(2), cessation time for shares acquired by the participating employee under the Plan will be the earliest of:

- the time when the employee disposes of the share (paragraph 139CA(2)(a));
- the time when the disposal restrictions cease to have effect (paragraph 139CA(2)(b)). As set out in the Plan Rules the restrictions effectively cease three years after an employee acquires the share as the employee can request the holding lock to be removed at that time. RGL must comply with this request;
- the time when the employee's employment in respect of which the share was acquired ceases. This will be when the employee is no longer employed by their employer company at the time that the share was acquired or a holding company of the employer or a subsidiary, (paragraph 139CA(2)(c) and subsection 139CA(3)); and
- 10 years after the allocation of the share to the employee (paragraph 139CA(2)(d)).

As the participating employee's shares have disposal restrictions for the first 3 years, the participant's cessation time will be the earlier of the second and third mentioned times.

#### *Disposal within 30 days of cessation time*

60. Subsection 139CC(3) calculates the discount to be included in the employee's assessable income where the shares are disposed of by the employee in an arm's length transaction within 30 days of the cessation time.

61. For shares purchased by the employee, the discount is the amount or value of any consideration received by the employee for the disposal of the shares less the consideration paid for their acquisition.

62. For the additional shares, the entire proceeds received by the employee on disposal will represent the discount as it appears that there is no consideration paid or given that is attributable to the acquisition of those shares.

63. As the share is a qualifying share and no election was made under section 139E in the year of income that the share was acquired, a capital gain or loss made on the disposal will be disregarded in accordance with subsection 130-83(2) of the ITAA 1997.

*No disposal within 30 days of cessation time*

64. For shares that are not disposed of by the employee in an arm's length transaction within 30 days of cessation time, the discount to be included in assessable income will be calculated in accordance with subsection 139CC(4).

65. For shares that are purchased by the employee, the discount is the market value of the shares at the cessation time less the consideration paid by the employee for their acquisition.

66. For the additional shares, the discount is the market value of the shares at cessation time without reduction as it appears that there is no consideration paid or given that is attributable to the acquisition of those shares.

67. As the shares are listed on an approved stock exchange the market value of the shares for the purposes of paragraph 139CC(4)(a) will be determined in accordance with section 139FA, as set out in paragraph 40.

*Capital gains tax*

68. The first element of the cost base or reduced cost base of the shares for the purposes of the CGT provisions will be determined in accordance with subsection 130-83(3) of the ITAA 1997, the first element being the market value of the shares worked out under section 139FA (see paragraph 40) at cessation time.

69. When the employee sells the shares, the disposal will constitute a CGT event A1 as a change of ownership occurs in relation to the shares pursuant to subsections 104-10(1) and (2) of the ITAA 1997. The discussion on CGT at paragraphs 54 to 57 applies to this CGT event A1.

**Where the shares are not acquired under an employee share scheme**

70. Where under the Plan the employee pays consideration for the acquisition of a share that is equal to, or more than, its market value under section 139FA, the employee does not acquire the share under an employee share scheme. The condition in subsection 139C(3) is not met as the share is acquired for equal to or more than its market

value. There is no discount given in relation to the acquisition to be included in assessable income in accordance with section 139B.

71. The first element of the cost base of the shares will be the money paid to acquire the shares in accordance with subsection 110-25(2) of the ITAA 1997.

72. When the employee sells the shares, the disposal will constitute a CGT event A1 as a change of ownership occurs in relation to the shares in accordance with subsections 104-10(1) and (2) of the ITAA 1997. The discussion on CGT at paragraphs 54 to 57 applies to this CGT event A1.

## Detailed contents list

73. Below is a detailed contents list for this Class Ruling:

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## **Commissioner of Taxation**

### **3 March 2004**

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*Previous Draft:*

Not previously released in draft form.

*Related Rulings/Determinations:*

CR 2001/1; TR 92/1; TR 97/16;  
TR 92/20; TD 97/23

*Subject references:*

- Employee Share Scheme
- election
- no election
- capital gains tax
- CGT event A1
- CGT Discount
- cost base
- market value
- cessation time
- discount

*Legislative references:*

- ITAA 1936
- ITAA 1936 139B
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139BA(2)
- ITAA 1936 139C
- ITAA 1936 139C(1)
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- ITAA 1936 139CA
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- ITAA 1936 139CA(2)(a)
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- ITAA 1936 139CA(3)
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- ITAA 1936 139CC(2)
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- ITAA 1936 139CC(4)
- ITAA 1936 139CC(4)(a)
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- ITAA 1936 139CE(5)
- ITAA 1936 139E
- ITAA 1936 139F(1)(a)
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139GF
- ITAA 1997 102-5
- ITAA 1997 102-5(1)
- ITAA 1997 104-10
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- ITAA 1997 104-10(4)
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- ITAA 1997 115-A
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- ITAA 1997 115-100
- ITAA 1997 115-100(a)
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- Copyright Act 1968

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**ATO References**

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