



PR 2002/42 - Income tax: Howcroft Estate No. 1

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 This document has changed over time. This is a consolidated version of the ruling which was published on *24 April 2002*



Product Ruling

Income tax: Howcroft Estate No. 1

Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	40
Explanations	44
Detailed contents list	56

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.

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

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 Howcroft Estate Project No. 1, 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 Growers) 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 February 1998 and May 1998. 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 February 1998 and May 1998, 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

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 2002. 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 February 1998 and May 1998. 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 specified below. This arrangement incorporates the following documents:

- Application for product ruling from Specific Vineyard Management Ltd (SVM) ('Manager') dated 11 December 2001;
- Howcroft Estate Project Prospectus dated 6 March 1998;
- Project Deed dated 18 February 1998 between Specific Vineyard Management Ltd ('Manager'), and Australian Rural Group Limited ('Trustee');
- Trust Deed for the Howcroft Estate Unit Trust (HEUT) ('Landowning Trust') dated 18 February 1998 between Specific Vineyard Management Ltd ('Manager'), and Australian Rural Group Limited ('Trustee');
- **Vineyard Agreement** between Australian Rural Group Limited ('Trustee') and the Member;
- **Development and Maintenance Agreement** between Specific Vineyard Management Ltd ('Manager') and the Member;
- **Grape Sale Agreement** between Brian McGuigan Wines Ltd ('Buyer'), Specific Vineyard Management Ltd ('Manager') and the Member;
- Land Preparation Agreement dated 3 June 1998 between Specific Vineyard Management Ltd

(‘Manager’), and Australian Rural Group Limited (‘Trustee’);

- Development and Management Agreement dated 18 June 1998 between Specific Vineyard Management Ltd (‘Manager’), and Brian McGuigan Wines Ltd (‘Subcontractor’).

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.

15. The documents highlighted are those that the Members entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Member, or an associate of the Member, 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. The salient features and effect of these arrangements are summarised below:

Location	‘Howcroft Estate Vineyard’ at Mundulla near Bordertown on the South Australian / Victorian border.
Type of business each participant is carrying on	Commercial growing and harvesting of grapevines for the sale of the fruit
Number of Vineyard Lots on offer	110
Size of each Vineyard Lot	Approximately 2.0 hectares (made up of 2 separate parts of approximately 1.0 hectare each)
Number of trees per hectare	Approximately 2000 trees per hectare
The term of the project	Approximately 15 years (to 30 June 2013).
Initial cost	\$12,000 per Vineyard Lot. (including \$516 Establishment Fee/Legal Costs/Trustee Fee)
Initial cost per hectare	\$6,000.
Ongoing costs	Licence Fees Development Fees Maintenance Fees

18. The Prospectus invited Members to participate in two specific interests. The first was a right to participate in a project called 'Howcroft Estate Project'. The second was a right to purchase units in the HEUT, the Project's landowning trust. The right to purchase units in HEUT could be taken up by the Member, or by an associate of the Member.

19. Members participating in the project entered into a Vineyard Agreement, a Development and Maintenance Agreement and a Grape Sale Agreement for the Project. These Agreements are set out in schedules to the Project Deed. The Vineyard Agreement gives a Member a licence over an identifiable area of land called a Vineyard Lot until the Project is terminated pursuant to the provisions of the Project Deed. Each Vineyard Lot is approximately 2.0 hectares in size and has water rights attached.

20. The Project is being conducted at a site known as the Howcroft Estate Vineyard, located at Mundulla near Bordertown on the South Australian/Victorian border. A Member participated in the Project by:

- subscribing or procuring an associate to subscribe for 5 units (one landowners' interest) in HEUT at \$3,700 each (total \$18,500);
- entering into a 'Vineyard Agreement' with the Landowning Trust in respect of a Vineyard Lot (2.0 hectares) for the period to 30 June 2013;
- entering into a 'Development and Maintenance Agreement' under which the Manager agrees to cultivate and maintain the Vineyard Lot, to harvest and sell the Grapes produced for the term of the Project; and
- entering into a 'Grape Sale Agreement' that relates to the sale of grapes from the time of the first commercial harvest to 30 June 2013. The Buyer has agreed to purchase all of the grapes produced from the Grapevines grown on the Vineyard Lot, for the term of the Grape Sale Agreement.

21. A Member entering into the Vineyard Agreement was liable to pay the following amounts for a right to use the Vineyard Lot for the cultivation of grapevines:

- for the period to 30 June 1998, \$710 payable on application;
- for the period 1 July 1998 to 30 June 2002, \$2,840 per annum; and

- for the period 1 July 2002 to 30 June 2003 and for each year the remainder of the agreement, the fee for the previous year increased by 5 percent.

22. A Member entering into the Development and Maintenance Agreement was liable to pay the following amounts in respect of each Vineyard Lot:

- Development fee for the period to 30 June 1998 of \$9,259 payable on application;
- Development fee for the period 1 July 1998 to 30 June 1999 of \$17,083;
- Development fee for the period 1 July 1999 to 30 June 2000 of \$7,917;
- Maintenance fee for the period to 30 June 1998 of \$1,515 payable on application;
- Maintenance fee for the period 1 July 1998 to 30 June 1999 of \$10,429;
- Maintenance fee for the period 1 July 1999 to 30 June 2000 of \$15,185;
- Maintenance fee for the period 1 July 2000 to 30 June 2001 of \$12,500; and
- Maintenance fee for the period 1 July 2001 to 30 June 2002 of \$12,500, and for each year thereafter until 30 June 2013 the fee for the previous year indexed to increases in the Consumer Price Index (all groups Melbourne) subject to a maximum increase in any year of 5 percent.

23. In addition the Manager is entitled to a performance fee equal to 75% of the proceeds from the sale of any Excess Production, which is defined as any grapes produced in any year in excess of 4 tonnes per acre, and to be reimbursed for fees paid to the Trustee and other establishment costs of \$357 per Vineyard Lot.

24. Each Member's Vineyard Lot was allocated by SVM upon acceptance and planted with approximately 2,000 grapevines in 1998. A further 2000 grapevines were planted in 1999. There is no variation between individual Members' Vineyard Lots within the Project or between rights attached thereto, except that the Manager was entitled to plant different varieties of grapevines on individual Vineyard Lots based on overall Project objectives.

25. Projected returns are outlined on pages 40 to 43 of the Prospectus, and are subject to the inherent risks of primary production and the commercial risks of a long term venture of cultivating,

growing, harvesting, and sale of grapes. The risks associated with the project have been outlined in the Prospectus.

Units in HEUT

26. Under the Project, a Member or their associate could purchase a minimum of one parcel of 5 units of \$3,700 each in HEUT. The Prospectus offered 110 parcels of 5 units. Members who purchased units agreed to be bound by the terms of the Trust Deed. HEUT derives income from licence fees and possibly may eventually derive capital gains from the sale of Project land. There is an expectation that Members will derive distributions. However the taxation consequences of any subsequent dealing or disposal of units in HEUT do not form part of this Ruling.

Vineyard Agreement

27. The Landowning Trust leases the Project land to the Trustee, which subleases the land back to the Landowning Trust. The Landowning Trust entered into licence agreements with the Members.

28. Members entering the Vineyard Agreement pay licence fees (clause 7) for a licence to use and occupy the Vineyard Lot for the limited purposes of planting, growing, harvesting and selling grapes for a period ending on 30 June 2013. A licence relates to an identifiable area of land and the Member has the option of appointing an agent under a Development and Maintenance Agreement to perform the licensed activities (clause 5.2).

29. The licence fee was payable on allocation of the Vineyard Lot for the period to 30 June 1998 and then payable annually until the end of the agreement.

Development and Maintenance Agreement

30. Members enter into an Agreement appointing SVM, as Manager, to manage the Member's interest in the Project on the terms and conditions set out in the Development and Maintenance Agreement. A summary of the key aspects of this Agreement is found in the Prospectus at pages 77 and 78.

31. Members enter into the Agreement until the year ended 30 June 2013 (clause 3) unless the Agreement is terminated earlier. The Agreement may be terminated by either the Manager or the Member under specific conditions (clause 12). Upon termination of the Agreement by the Manager, the Member's interest in the Project may be sold to meet any unpaid fees (clause 6.4 of the Project Deed). The arrangement ruled on does not include the circumstance where the

Development and Maintenance Agreement is terminated or the Manager is otherwise removed. In such circumstance this Ruling will cease to have effect. The Development and Maintenance Agreement covers two periods, namely, the first 4 years (development period) and the remaining period to 30 June 2013 (maintenance period). The duties to be performed by the Manager specific to the development period are listed at clause 4 of the Agreement and include:

- supply of approximately 2000 vines per Vineyard Lot in 1998 and 2000 vines per Vineyard Lot in 1999 for the Member;
- installing irrigation works;
- erecting trellis;
- undertaking drainage and soil loss prevention works;
- preplanting preparation and the planting of the grape vines;
- tending the Member's Vineyard Lot and, if necessary, tending the vine rootlings;
- supplying water;
- eradicating weeds and repairing damage caused by the Manager; and
- undertaking certain preventative measures concerning land degradation.

32. After these initial duties have been performed, SVM must provide continuing maintenance of the Vineyard Lots (clause 5). Provision is made for the Member to elect to undertake certain ongoing maintenance tasks such as the weeding of the Vineyard Lot (clause 7).

33. The Manager may employ agents, contractors, professional advisers and other consultants to perform its obligations under the Agreement (clause 10).

The Project Deed

34. The Project Deed sets out the terms and conditions under which the Trustee agrees to act for the Members as their representative and the terms under which the Manager agrees to manage the project. Members are bound by the Project Deed by virtue of their participation in the Project.

35. The Project Deed details a number of procedures including:

- processing of applications;

- handling of subscription monies;
- maintenance of Members register;
- making of assignments and transmissions;
- meetings;
- provision of reports;
- payment of fees and expenses;
- accounts to be audited;
- Member's rights;
- any fees payable;
- termination and retirement provisions; and
- dispute resolution.

Application Form

36. Members enter into the arrangement through the completion of an Application Form together with the payment of application monies. The Application Form appoints SVM to act as Attorney for the Member for the purposes of entering into the Vineyard Agreement, Development and Maintenance Agreement and Grape Sale Agreement. The Application Form also provides for the issue of HEUT units to the Member or an associate of the Member.

Minimum Subscription

37. The minimum number of Vineyard Lots required for the commencement of the Project was sixty (60) Vineyard Lots.

Finance

38. Members are entitled to fund their participation in the Project themselves, or borrow from an independent lender.

39. This Ruling does not apply if a Member enters into a finance agreement that 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 Members for the Project.

Ruling

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

Section 35-55 – Commissioner’s discretion

40. For a Grower who is an individual and who entered the Project between February 1998 and May 1998, 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 year ended 30 June 2001 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 39 of this Product Ruling.

41. 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 50 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)).

42. 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.

43. 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

44. 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.

45. 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.

46. 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.

47. 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.

48. 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).

49. A Grower who was accepted into and who has participated in the Project since February 1998 is carrying on a business activity that is subject to these provisions.

50. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquired the minimum allocation of 1 interest in the Project is unlikely to have their business activity pass one of the tests until the income year ended 30 June 2002. Growers who acquired more than 2 interest(s) in the Project may however, find that their activity meets one of the tests in an earlier income year.

51. 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.

52. 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.

53. The information provided by the applicant indicates that a Grower who acquired the minimum allocation of 1 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 2002. 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 2001.

54. 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 39 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 40), 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 41). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent Viticultural Consultant and additional expert evidence provided with the application by the applicant;
- the binding Grape Sale Agreement with Brian McGuigan Wines Limited for the sale of the grapes setting out prices that realistically reflect the existing market and/or the projected market in the geographical region where the grapes are grown.

Detailed contents list

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

	Paragraph
What this Product Ruling is about	1
Tax law(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
Date of effect	11
Withdrawal	13
Arrangement	14
Overview	17
Units in HEUT	26
Vineyard Agreement	27
Development and Maintenance Agreement	30
The Project Deed	34
Application Form	36
Minimum Subscription	37
Finance	38
Ruling	40
Division 35 – Deferral of losses from non-commercial business activities	40
Section 35-55 – Commissioner’s discretion	40
Explanations	44
Division 35 – Deferral of losses from non-commercial business activities	44
Detailed contents list	56

PR 2002/42

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:

- product rulings
- public rulings
- non-commercial losses
- primary production expenses

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1936 Part IVA

ATO references:

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- 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