PARTIES:	BRAMBLES AUSTRALIA LTD -v- COMMISSIONER OF TAXES
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Appeal under the *Taxation (Administration) Act*
FILES NUMBERS:	SCC 139 of 1992 SCC 140 of 1992
DELIVERED:	Delivered at Darwin on 27 November 1992
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JUDGMENT OF:	Thomas J

CATCHWORDS:

STAMP DUTY - What transactions or instruments are liable - meaning of the term "hiring arrangement" - whether hiring arrangement includes the hire of equipment with an operator.

Taxation (Administration) Act (NT) s4

FC of T v Brambles Holdings Ltd 91 ATC 4285 applied

STATUTES - interpretation - meaning of definitions commencing with "means" compared with those commencing with "includes".

Taxation (Administration) Act (NT), s4

Dilworth v Commissioner of Stamps [1899] AC 99 distinguished

YZ Finance Co Pty Ltd v Cummings (1964) 109 CLR 395, considered

Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation (1979) 24 ALR 658, applied

STATUTES - interpretation - meaning of the word "use".

Taxation Administration Act, s4

REPRESENTATION:

Counsel
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Defendant: C.E.K. Hampson QC with him M. Spargo

Solicitors:
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Defendant: Solicitor for the NT

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(THO92005)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 139 of 1992
(9210788)
No. 140 of 1992
(9210789)

IN THE MATTER OF APPEALS UNDER THE TAXATION (ADMINISTRATION) ACT

BETWEEN:

BRAMBLES AUSTRALIA LTD
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 27 November 1992)

This case concerns the hire of cranes and whether a crane that is hired, with an operator also made available, known in the industry as a "wet hire", is liable for duty.

The Appellant appeals from the decision of the Commissioner of Taxes disallowing the objections of the Appellant contained in a Notice of Objection No. D13-063 dated 21 February 1992 and being objections in relation to the payment of $104097.41 in respect of the 1988/89 and 1989/90 years and $127567.64 in respect of the 1985/86, 1986/87 and 1987/88 years.

The Notice of Assessment was dated 23 January 1992.

Section 4 of the *Stamp Duty Act* states:

"Subject to this Act, stamp duty is imposed on the instruments included in the classes of instruments specified in Schedule 1."

Item 9 in Schedule 1 specifies as a class of instrument for this purpose a "hiring arrangement".

Under the provisions of s3 of the *Stamp Duties Act* it is incorporated into and read as one with the *Taxation (Administration) Act*.

The Appellant is a registered lender under the provisions of s73 of the *Taxation (Administration) Act*.

The Appellant included in its monthly returns and paid duty on its "dry hires". It did not include in its returns or pay duty on its "wet hires".

When plant is made available without an operator it is known in the industry as a "dry hire".

When plant is made available with an operator it is known in the industry as a "wet hire".

The main issue for this court is whether or not a "wet hire" is a hiring arrangement within the meaning of the *Taxation (Administration) Act* and liable for duty.

The plant being hired are cranes owned by the Appellant.

Section 4 of the *Taxation (Administration) Act* defines "hiring arrangement" as:

"includes an arrangement under which goods are or may be used at or during any time by a person other than the owner of those goods where -

(a) the arrangement is entered into in the Territory;

(b) the goods are supplied or delivered or agreed to be supplied or delivered in the Territory; or

(c) the goods may be used in the Territory,

but does not include -

(d) an arrangement made under a hire-purchase agreement;

(e) an arrangement relating to the use of an electricity, gas or water meter, a motion picture film or a book or a caravan on a site in a caravan park (within the meaning of the *Caravan Parks Act*); or

(f) an arrangement made under a lease of real property where the rental or other consideration in respect of which duty is chargeable also includes rental or other consideration for goods;"

The Appellant argues the "wet hire" of the cranes disclosed by the evidence does not constitute a "hiring arrangement" as defined under s4 *Taxation (Administration) Act* and is not liable for duty.

The Respondent argues that on the facts of this case the arrangement entered into for the hire of the cranes constitutes a "hiring arrangement" under s4 of the *Taxation (Administration) Act* and is liable for duty as assessed.

The Respondent alleging that the Appellant had failed to include in its returns particulars required under the *Taxation (Administration) Act* made assessments pursuant to s94(a) and served notices under s95 of the *Taxation (Administration) Act* on 23 January 1992.

On 21 February 1992 the Appellant as a person aggrieved by an assessment duly lodged written objections pursuant to s100(1) of the *Taxation (Administration) Act*. (Annexure B to the affidavit of David Read dated 28 August 1992).

The Respondent disallowed the objections pursuant to s100(3) and served written notices thereof on the appellant in accordance with s100(4) on 30 April 1992.

On 29 May 1992 the Appellant appealed to the Supreme Court against the decision of the Commissioner of Taxes.

Section 101(2) of the *Taxation (Administration) Act* provides:

> "101(2) On appeal -
> (a) the objection shall be limited to the grounds stated in the objection; and
> (b) the burden of proving that any assessment objected to is excessive lies on the objector."

It is the Appellant's submission that under a "wet hire" the Appellant's operator maintains physical control of the plant at all times except on wharves where a ticketed member of the Waterside Workers Union operates the plant while the Appellant's operator acts as supervisor.

The Appellant maintains that there is no difference in the end result between the two types of "wet hire". On the Appellant's submission neither form of "wet hire" is subject to duty.

Provision for the collection of duty is made in Division 13 of the *Taxation (Administration) Act* which proceeds on the basis that there are two parties to a "hiring arrangement", namely a lender and a user s71(2).

Section 4(1) of the *Taxation (Administration) Act* defines lender as:

> "means the person from whom goods are hired under a hiring arrangement."

Section 4(1) defines user as:

> "means the person to whom goods are hired under a hiring arrangement."

The Appellant submits that the definition of the term "hiring arrangement" contained in section 4(1) is an

exhaustive definition, notwithstanding the use of the word "includes" at the beginning of the definition. The Appellant states that the definition itself is of the widest import and that the word "includes" should therefore be construed as meaning "means and includes".

The following passage in *Dilworth v Commissioner of Stamps* [1899] AC 99 at pages 105-106 has been cited as authority for this:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to the words or expressions."

Counsel have also referred me to the decision of *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, in particular the judgement of Kitto J. at page 401-402:

> "Unlike the verb 'means','includes' has no exclusive force of its own. It indicates that the whole of its object is within its subject, but not that its object is the whole of its subject. Whether its object is the whole of its subject is a question of the true construction of the entire provision in which it appears. The well-known statement of Lord Watson in *Dilworth v Commissioner of Stamps* [1899] AC 99, at pp 105,106 should not be taken so literally as to reduce the inquiry in a case like the present to an inquiry into the meaning of the word 'includes'. Strictly speaking, that word cannot be equivalent to 'means and includes'. But a provision in which it appears may or may not be enacted as a complete and therefore exclusive statement of what the subject expression includes. A provision which is of that character has the same effect as if 'means' had been the verb instead of 'includes'. The question whether a particular

> provision is exclusive although 'includes' is the only verb employed is therefore a question of the intention to be gathered from the provision as a whole."

The Respondent submits that on a reading of section 4 of the *Taxation Administration Act* it is clear that the legislative draftsman has been careful in the way the various terms have been defined, and that there has been a careful and deliberate use of the word "means" and the word "includes"; some definitions having the word "means" and others the word "includes". The respondent argues that the court should therefore find that the definition of "hiring arrangement" is not exclusive, and that it should not be read as "means and includes".

Because of the decision I have ultimately reached in this matter, it is not necessary for me to decide this point. I have, however, had reference to a case not referred to me by counsel that I believe sheds some light on the point. The decision is that of the full court of the Supreme Court of Victoria, sitting in the exercise of Federal Jurisdiction, in *Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation* 24 ALR 658. The court said, at page 660,:

> "When one turns to the remainder of [the legislation in question] one is immediately struck by the fact that throughout it the draftsman carefully distinguished between 'means' and 'includes'. It is unnecessary to set out the whole of the sub-section which is long, but an examination of it justifies the conclusion in our opinion that leaving aside for the moment the definition of 'manufacture' and allied words, the draftsman uses the word 'means' to introduce an exhaustive definition and includes to introduce an enlarging but not exhaustive definition."

The court went on to consider a definition that did not seem to fit this pattern. The definition, for the word 'company', was stated in the legislation in question to 'include' a definition which was so broad as to appear exhaustive. The court said at page 660:

> "... the definition given to the word 'company' may be said not only to enlarge the meaning of the word, but also to provide an exhaustive definition of it. But even if this be the case, the definition has been made exhaustive by chance, so to speak, that is by choosing a very wide definition, rather than by exhibiting any intention that the definition is to be exhaustive."

From an examination of the other definitions contained in section 4 of the *Taxation (Administration) Act*, I conclude that the draftsman has deliberately used the word "means" to connote an exhaustive definition, and the word "includes" to connote an inclusive definition. The definition of the word "judge", for example, would be deficient if it were to be taken to be exhaustive. Whilst I do consider that persons who are to be liable for the payment of tax should be able to determine their potential for taxation with some certainty, and therefore that it is desirable that definitions in such legislation be as full and clear as possible, I consider nevertheless that the intention of the legislation is that the definition of the term "hiring arrangement' is not an exhaustive definition.

Whether there are interpretations of the term which arise from its ordinary meaning and which are not included in the definition, I make no comment, other than to say that if there are, then they are proper interpretations to be given to the term "hiring arrangement". If there are no other interpretations which arise from the ordinary meaning of the term, then the definition is exhaustive, in the same way that the term "company" is exhaustive in *Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation* (supra). As I have already stated, there is no need for me to decide the point, and at this stage I do not take the matter any further. Counsel for the Respondent did not address me on any specific alternative interpretations of the term.

On the finding of facts that I have made the "hiring arrangements" that are the subject of this dispute fall within the definition of "hiring arrangements" as it

appears in the *Taxation Administration Act* even if that definition were exhaustive.

For that reason nothing turns on a determination of that point.

The evidence in these proceedings is contained in the following affidavit material:

1. Affidavit of David Read sworn 28 August 1992.

2. Affidavit of Kenneth James Kelly sworn 14 September 1992.

3. Affidavit of William Alastair Anderson sworn 19 October 1992.

4. Affidavit of Rod Campbell sworn 14 September 1992.

5. Affidavit of Oliver Hans Barz sworn 14 September 1992.

Mr Campbell, Mr Anderson, Mr Kelly and Mr Barz were all cross examined by Counsel for the Respondent.

On the evidence before the court I make the following finding of facts:

The facts in this case are that the Appellant's primary activity in the Northern Territory is providing crane services by hiring its cranes to various users. A "wet hire" means that an operator, who is employed by the Appellant, is supplied with the equipment. However, some equipment is also available on a "dry hire" basis, which means that the equipment is provided to the hirer without an operator. There is no dispute that "dry hires" are subject to taxation under the *Stamp Duties Act* read with the *Taxation (Administration) Act*.

The usual arrangement in respect of a "wet hire" on a casual basis is that the customer contacts Brambles' office to indicate generally what type of equipment is required. The customer will advise the sort of work to be carried out. A Brambles employee will then determine, if necessary, what specific piece of equipment is appropriate for the job. The booking is then entered on a daily booking sheet specifying the type of equipment, the tonnage of equipment, the nature of the job involved and the time required on site. The job is then designated to a specific operator who has the necessary certificate to operate the specific crane.

At the required time the operator leaves the Brambles yard and travels with the equipment to the site designated by the hirer. On site the operator is given instructions by the site manager as to what actually has to be moved and where it is to be placed. Often the crane operator will be required to work with a dogman or rigger employed by some one other than the Appellant Company. It is the responsibility of the crane operator to ensure the job he has been asked to do can be carried out in a safe and satisfactory manner, that he has the right crane for the job and that it is not loaded beyond its rated capacity. Although the hirer will direct what work is to be done the operator of the crane is at all times responsible for his machine. At the conclusion of the hire the operator will drive the equipment back to the Appellant's premises. There may be times when a job extends for more than one day, when for the sake of convenience the crane will remain on the hirers site over night. For a casual "wet hire" the hirer is charged on an hourly basis. For lengthy periods of hire the parties enter into a written agreement for a sum that includes a figure for mobilisation and relocation of the crane and a figure for the cost of the equipment and the operator, estimated on the basis of a 60-70 hour week, depending on the particular job.

The exception to this arrangement is when the Appellant's cranes are involved in regular "wet hires" at Darwin Wharf. There are two Stevedoring Companies who have hired cranes during the relevant period 1985-1990. The practise of both Stevedoring Companies in respect of hiring cranes on the wharf is the same. There are cranes owned by the Appellant Company which when not in use remain in close proximity to the wharf. These are called pin jib cranes.

The distinction between "wet hires" of cranes on the wharf and "wet hires" elsewhere is that whilst the cranes are actually loading and unloading on the wharf they are always driven and operated by a certificated crane driver employed by one of the Stevedoring Companies and not by an employee of the Appellant Company.

The arrangement is that an employee of the Appellant Company attends the wharf each day and checks that the cranes, whether pin jib cranes or other types of crane, which may have been ordered and driven to the wharf by an employee of the Appellant Company, are in good working order. The fuel, oil and water are checked by an employee of the Appellant Company. An employee of the Appellant Company will start the crane, making sure that all parts of the crane are functional. If there are any running repairs to be done he will do them. If there is a mechanical problem he will telephone the Appellant Companies office for a mechanic. If the crane is not at the wharf then a certified crane driver employed by the Appellant Company will drive the crane to the wharf having made sure the crane is working in a safe and satisfactory manner.

For the purpose of loading and unloading ships, the drivers and operators of the cranes will be employees of one or other of the Stevedoring Companies and members of the Waterside Workers Union, whereas the crane drivers employed by the Appellant Company are members of the Transport Workers Union.

The crane driver employed by the Appellant Company will remain at the wharf all day whilst the crane is being driven and operated by an employee of the Stevedoring Company. Although he does not drive the crane, the crane operator employed by the Appellant Company is there to advise if there are any problems with the use of the crane or if any repairs are necessary. The crane driver from the Appellant Company will advise if the load is inappropriate for the capacity of the particular crane and will advise of any unsafe practices. The cost of time for an employee of Brambles to be present at the wharf at all times is included in the account rendered by the Appellant Company to the company hiring the crane.

It was suggested that the reason for this practice was that it was a requirement of the Waterside Workers Union that only members of that union drive and operate cranes on the wharf. However, none of the witnesses who gave evidence were clearly able to state the reason for the practice or how it had originated. It is obviously a practice that has been in effect for a number of years and accepted by all concerned as the standard practice when cranes are being operated on the wharf. The crane driver employed by the Appellant Company has the authority to stop the crane if it is being operated in an unsafe or unsatisfactory manner, but apart from that, unless he is called on for advice or to check any faults in the equipment, plays no part in the operation of the crane.

Between 1985 and 1986 "wet hires" of crane and plant were subject to general conditions of contract. A copy of the standard contract is Annexure "A" to the affidavit of Kenneth James Kelly dated 14 September 1992 and Annexure "C1" to the affidavit of David Read dated 28 August 1992. This form was used for both "wet" and "dry" hires.

The general conditions notwithstanding the use of the word "hire" provided for the retention of control over the plant in the Appellant, provided that the plant was delivered to the working site by the Appellant and were consistent with the absence of any transfer of possession.

From 1987 onwards "wet hires" of plant were subject to general conditions of contract a copy of the standard form being Annexure "B" to the affidavit Kenneth James Kelly dated 14 September 1992 and Annexure "C4" to the affidavit of David Read dated 28 August 1992.

Again, notwithstanding the use of the word hire, the general conditions provide for the retention of control over the plant in the Appellant, provide for delivery and return of the plant by the Appellant and are consistent with the absence of any transfer of possession.

Except where the "wet hire" is at the wharf the usual arrangement is for there to be the same operator for an individual crane. That operator is required to have a certificate to operate.

An operator for the Appellant Company delivers the crane to the site except in the case of pin jib cranes which remain at the wharf.

Again, except where the "wet hire" is at the wharf, the operator of the crane, employed by the Appellant Company, complies with the direction of the hirer as to what to lift and where to place the load. However, the operator has to ensure that the load is within the capacity of the particular crane and he has control over the manner in which the crane is operated so as to ensure safe and satisfactory work practices.

Counsel for the Appellant submits that a <u>hire</u> involves the transfer of possession in a chattel, an authority in the bailee to use it for his benefit, an

advantage or reward for the bailor and a promise by the hirer to re-deliver at a stated or determinable time.

> "At common law four principal qualities distinguish contracts of hire: the transfer of possession in a chattel, an authority in the bailee to use it for his benefit, an advantage or reward accruing to the bailor in return for this permission and a promise by the hirer to re-deliver the chattel at a stated or determinable time." Palmer Bailment 2nd Edition at 1208.

A number of statutory regimes build upon or modify the common law definition of contract of hire.

The argument of Counsel for the Appellant is that an essential feature of a bailment is that the user has possession of the goods. (Palmer Bailment 2nd Edition at 2). An arrangement under which goods may be used by a person other than the owner is an arrangement under which the person other than the owner has possession of the goods. The definition of the term "hiring arrangement" in subsection (4)(1) of the *Taxation (Administration) Act* excludes any use by the owner of the goods which can hardly be achieved unless possession has passed to the user. The exclusions from the definition are one such indication. A hire purchase agreement, an arrangement for the use of electricity, gas or water meters, an arrangement for the use of a motion picture film or a book, an arrangement for the use of a caravan in a caravan park, and a lease of real property which includes goods, all involve possession of the chattels by the user.

The Appellant argues that Division 13 of the *Taxation (Administration) Act* proceeds upon the basis that all hiring arrangements involve two parties, a lender and a user. The ordinary meaning of those terms connotes the passing of possession from one to the other. A lender is a person who grants the use, i.e. possession of a thing on the understanding that it will be returned. A user of a thing lent is the person in possession of it.

This indication of the meaning of the word used in the definition of the term "hiring arrangement" is enforced by the use of the technical term hired in the definition of the terms lender and user in subsection (4)(1) of the *Taxation (Administration) Act*. Those terms are not defined in terms of the person who owns the goods under a hiring arrangement on the one hand and the person who uses the goods under a hiring arrangement on the other hand. They are rather defined in terms of the law of bailment. The person from whom goods are hired under a hiring arrangement and the person to whom the goods are hired under a hiring arrangement.

A hiring arrangement in terms of the definition in subsection 4(1) of the *Taxation (Administration) Act* is an arrangement under which goods may be used by a person other than the owner in the sense that the user has possession of them.

The Respondent in a circular letter NT/4 (Exhibit 1) indicated that he would allow a deduction for the charge out rate of an operator. These are the words used HIRED PLANT WITH OPERATOR.

> "Where hired plant is supplied with an operator or driver and the carrying out of the job is not the responsibility of the lender, the arrangement is liable for duty. In these sort of hiring arrangements the equipment and the operator is under the direction and control of the person paying the hiring charge. The total amount of the hiring charge is to be included in the monthly return of the lender, but he may deduct the charge out rate for the operator's wages in calculating the tax."

It is the Appellant's contention that there is no legislative justification for such a deduction. Schedule 1 refers to a rate of stamp duty on a percentage of the total amount received under the hiring arrangement.

The Appellant asserts that the Commission's decision not to collect a tax for the wages component of the operator is just and equitable and a means of overcoming

what would otherwise be harsh interpretation of the legislation.

It is the submission of the Appellant that in both types of "wet hire" that is on the wharf or elsewhere possession of the crane is not transferred to the user, and that at all times the operator is using the crane on behalf of the owner.

The argument for the Appellant is that under the definition of "hiring arrangement" under the *Taxation (Administration) Act* a hiring arrangement in terms of subsection 4(1) is an arrangement under which goods may be used by a person other than the owner in the sense that the user has possession of them.

I do not accept this argument. I do not consider that the test is whether or not possession of the crane passes to the hirer.

I have concluded that the test for whether or not a "wet hire" of a crane either at the wharf or elsewhere is a "hiring arrangement" as defined under the *Taxation (Administration) Act* depends upon the ordinary and natural meaning of the words as they appear in the definition s4:

> ". . . are or may be used at or during any time by a person other than the owner by those goods where . . . ."

On the facts as I have found them I am of the opinion that a "wet hire" whether it be on the wharf or at some other site is a "hiring arrangement" within the meaning of s4(1) of the *Taxation (Administration) Act*.

In both arrangements made at the wharf or on any other site the hirer of the crane is the person who has "used" the crane within the ordinary meaning of that word. The word "use" is defined in the Shorter Oxford Dictionary as:

"The act of using a thing for any (especially a profitable) purpose; the fact, state or condition of being so used; utilization or employment for or with some aim or purpose; application or conversion to some (especially good or useful) end."

The definition in the Macquarie Dictionary is:

"1. To employ for some purpose; put into service; turn to account. 2. To avail oneself of; apply to one's own purposes."

I adopt the following passages as it appears in *FCofT v Brambles Holdings Ltd* 91 ATC 4285 Shepherd J 4289:

"The question then is whether the various matters to which I have referred lead to the conclusion that the bins were goods for use by the Council. I think that the task of answering this question must involve questions of degree and proximity: cf. *D.F.C. of T v Stewart & Anor* 84 ATC 4146 (1983-1984) 154 CLR 385 per Brennan J at ATC 4153; CLR pp. 397-398. Plainly it is not necessary that the Council be the only person by whom the bins are to be used nor need its use be the principal or dominant use. The exemption will be attracted so long as the use is a substantial one. I refer again to *Stewart's* case. I think that, as a matter of ordinary use of language, it is apt, as the learned primary Judge thought, to say that the Council used the bins which had been hired to it for the purpose of discharging its obligations under the *Health Act* and the General Sanitary Regulations. It hired them from the contractor and it used them in the way that I have described in order to fulfil its obligation regularly to remove household refuse."

I am aware this is an interpretation of Item 78 of Schedule 1 to the *N.S.W. Sales Tax (Exemption and Classifications) Act* 1938 which exempts from sales tax inter alia: Goods for use (whether as goods or in some other form) and not for sale by: 1) A municipal shire or district council constituted for the general purposes of local government under any law of the Commonwealth or of a State or Territory.

With regard to the hire of Brambles cranes even in "dry hire" the lender uses the chattel to gain the reward, even though the user has possession. I agree with the submission made by Counsel for the Respondent that with a "hiring arrangement", lender's use excludes arrangements only where there is no use of goods, e.g. an agreement to erect scaffolding at a fixed price.

In summary, I do not accept that for a hire of a crane to be a hiring agreement within the definition of s4 *Taxation (Administration) Act* that it is necessary to demonstrate there is a transfer of possession of the crane to the hirer nor do I consider that the hirer be the only person by whom the crane is used nor need its use be the principal or dominant use. The hiring arrangement of a crane with an operator will be subject to duty provided the use of the crane is a substantial one.

On the facts I have found, whether a crane be hired as a "wet hire" on the wharf or elsewhere, the hirer has the responsibility for the work to be done and in the course of this responsibility makes use of a crane and operator hired from the lender.

Counsel for the Appellant submits that the court should direct the Respondent to exercise his discretion under subsection 96(6) of the *Taxation (Administration) Act* which states:

> "The Commissioner may, in a particular case, for such reasons as in his discretion he thinks sufficient, remit the whole or part of an amount payable by way of penalty under this section."

The submission is based on the Appellant's contention that the legislation in the Northern Territory is capable of being construed on the basis that a hiring arrangement encompasses a "dry hire" but does not encompass a "wet hire".

The Appellant tendered a circular from the Commissioner of Taxes relating to these hiring arrangements (Exhibit 1).

New South Wales rulings on similar provisions relating to duty payable on hiring arrangements in that state were tendered and marked Exhibit 2. A release from the N.S.W. Office of State Revenue was Exhibit 3 and a news release relating to proposed amendments to the legislation as it affects "wet hire" under the *N.S.W. Stamp Duties Act* was tendered and marked Exhibit 4.

Whilst I concede the Appellant may have reason to take some encouragement from the position in N.S.W. the fact is that there is to be legislation in that state which will specifically preclude "wet hire" from duty. There is no evidence that such legislation is pending in the Northern Territory and in the Northern Territory the Appellant is bound by the law as it is and on the findings of fact and law that I have made I do not consider it appropriate to give the Respondent a direction in respect of remitting penalty. My decision does not conflict with the advice in the circular (Exhibit 1).

The Respondent has now provided the Appellant with particulars of the basis on which there was a partial remission of penalties.

In the Appellant's Notice of Appeal one of the grounds of appeal was that the legislation imposes a duty of excise contrary to section 90 of the *Constitution of the Commonwealth*.

When such a question is raised, a court may not deal with it until the Attorneys-General of the Commonwealth and States have been notified.

The Respondent denies that an excise is imposed and alleges that section 90 of the *Constitution of the Commonwealth* does not apply to the Northern Territory.

This point has been raised in a matter recently before the High Court in *Capital Duplicators Pty Limited v Australian Capital Territory*.

Both parties invited the court to adjourn this issue sine die. I agree to that course and accordingly this issue is adjourned sine die.

For reasons set out above I find in favour of the Respondent in respect of the issues dealt with in this decision.

I will hear from Counsel as to the appropriate consequential orders following my decision and any argument on the question of costs.