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CONTENTS

EDITORIAL

Now in its eighth year, the Journal of Law & Financial Management has achieved a number of important milestones including quality ratings by both The Australian Business Deans Council (ABDC) and the Australian Research Council (ARC) in their respective journal ranking lists. Another important development for the Journal of Law & Financial Management has been the partnering with the Social Science Research Network (SSRN) for the electronic distribution of each issue. Since 2006, the Journal of Law & Financial Management has been distrusted exclusively via SSRN to more than 130,000 subscribers worldwide through the SSRN eLibrary. This online international distribution has greatly increased the reach and impact of the journal.

This issue the Journal of Law & Financial Management looks at issues associated with business regulation, particularly in relation to taxation, accounting and market operation. In this issue, Juliette Overland examines the use of margin loans by directors of listed companies and important regulatory issues related to insider trading. In the wake of extreme volatility in capital markets and triggered margin loan sales, this article provides a timely commentary. Next, Les Nethercott and Tony Anamourlis examine the interface of taxation and accounting to investigate issues in relation to the treatment of intangible assets and their impairment. Finally, Eva Huang provides a commentary of the cross-regulatory arbitrage between accounting and taxation as it relates to leasing and examines the case of David Jones in a sales and lease back transaction.

Tyrone M Carlin & Guy Ford, Sydney

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Cross-Regulatory Arbitrage: An Illustration from Leasing

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Abstract

When a corporation is making financing decisions, accounting/regulatory arbitrage and tax arbitrage are important considerations. In November 2000, David Jones entered into an in-substance sale and leaseback transaction with Deutsche Bank in relation to its flagship stores in Sydney and Melbourne.1 This transaction differs from the more traditional sale and leaseback transactions such as those in Metal Manufactures Ltd v Federal Commissioner of Taxation (1999) 43 ATR 375 *and Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 46 ATR 474 . *In both cases, a form of proprietary interest in the leased properties vested in the lessors. In the David Jones transaction, David Jones retained freehold title to the buildings and transferred economic control of the property to Deutsche Bank through a finance lease, then subsequently leased back the buildings through an operating lease. In this paper, the transaction is analysed as a case study to illustrate that tax arbitrage and accounting regulatory arbitrage are not separate considerations in the financing decision-making process. Therefore, regulators and business decision-makers cannot look at regulation in a vacuum.*

Keywords: Tax Arbitrage, Accounting Regulatory Arbitrage, Regulation.

1. Introduction

When a corporation is making financing decisions, accounting/regulatory arbitrage and tax arbitrage are important considerations. These are joint considerations rather than separate ones. In Australia, financial instruments are regulated by accounting standards and the tax law. However, the principles embodied in the tax and accounting rules which bear on a range of commonly-employed financial instruments and arrangements do not entirely coincide. This raises the possibility of regulatory arbitrage employed with a view to exploiting the gaps, differences and inconsistencies existing between the tax and accounting regulatory regimes.

There are consequences and risks associated with this cross-arbitrage. This has been broadly recognised and elicited a range of policy responses. One of these was the Taxation of Financial Arrangements (TOFA) review process which arose out of the Ralph Review of Business Taxation[2] and a long consultative process.[3] This operates parallel to the existing regulations[4] governing financial instruments.

The TOFA process evidences, in part, the gravity of the problem adverted to above. However, the TOFA regime does not cover all financial instruments. Notwithstanding the policy review processes underway, there is the strong likelihood that substantial regulatory inconsistencies will continue to exist, leaving the way open for regulatory arbitrage activities.

Leasing is a widely-used business financing technique, which has been excluded from the TOFA process. However, it is subject to different treatment under Accounting Standards and the Tax Law. This difference may represent a possible focal point for regulatory arbitrage activity.

Leasing is treated very differently under tax law and under accounting standards. Accounting standards embody a clear distinction between finance and operating leases[5] (with substantial consequences for subsequent financial reporting treatment), while tax law is informed by a property law-based approach to leases.[6] The *Income Tax Assessment Act 1997* (*ITAA 1997*) looks at a specific type of asset called a 'depreciating asset' and leasing arrangements relating to these assets. Section 40-30 defines a 'depreciating asset' as 'an asset that has a limited effective life and can reasonably be expected to decline in value over the time it is used' with a few exceptions. Section 995-1 defines a 'depreciating asset lease' as 'an agreement (including a renewal of an agreement) under which the entity that holds the depreciating asset grants a right to use the asset to another entity. However, a depreciating asset lease does not include a hire purchase agreement or a short-term hire agreement'.

Australian Accounting Standards Board (AASB) accounting standard 117 – *Leases* defines a finance lease at paragraph 4 as 'a lease that transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred'. Paragraph 8 distinguishes finance and operating leases by whether the lease transfers substantially all the risks and rewards incidental to ownership. The *ITAA 1997* only refers to the granting of a right to use the depreciable asset — the emphasis is on the right to use. Comparing this emphasis to the accounting concept of leases, the risks and rewards incidental to ownership appear not to have to be substantially transferred to the lessee in the tax law. Therefore, the tax law seems to be treating all leases as if they were operating leases, allowing deduction of the whole repayment by the lessee under s 6-5 of the *ITAA 1997* as general deductions, and gives rise to capital allowances for the lessor as the lessor is holding a depreciating asset under s 40-30 of the *ITAA 1997*.

This differential approach to the regulation of leases may have the effect on corporations of stimulating the recourse to complex structures which reduce the transparency and decision usefulness of financial reports whilst driving a wedge between the treatment of transactions for financial reporting and taxation purposes. Arguably, many sale and leaseback arrangements could be said to fall within this rubric. The David Jones in-substance sale and leaseback transaction is one of these complex structures. This paper focuses on identifying the cross-arbitrage possibilities arising from financial arrangements through the example of leasing. It aims to compare the David Jones in-substance sale and leaseback transaction with the more traditional sale and leaseback transactions in the leading cases of *Metal Manufactures Ltd v Federal Commissioner of Taxation*[7] (‘*Metal Manufactures*’) and *Eastern Nitrogen Ltd v Federal Commissioner of Taxation*[8] (‘*Eastern Nitrogen*’). As these cases do not directly deal with TOFA, this paper deliberately does not discuss the merits or disadvantages of TOFA. Rather, it covers an area which is a clear gap in TOFA and the related literature. It focuses on the issue of fixtures and a transfer of equitable interest to the lessor that reflects a need for policy change.

2. *Metal Manufactures Ltd v FCT* (1999) 43 ATR 375 and *Eastern Nitrogen Ltd v FCT* (2001) 108 FCR 27; 46 ATR 474

Metal Manufactures [9] and *Eastern Nitrogen*[10] are leading cases in sale and leaseback transactions. Researchers have often referred to these transactions and Emmett J’s first instance judgment in *Metal Manufactures* when looking at leasing issues.[11]

These cases dealt with the sale and leaseback of plant and equipment without selling the underlying land.[12] The rental payments were deductible by the lessee because the lessor had sufficient equitable title in the fixtures to charge rent, and the dominant purpose of the scheme was the provision of finance. These two cases had similar facts, although the final decision was that tax avoidance was not the dominant purpose in either case. The courts at first instance gave differing judgments.[13] The full Federal Court[14] agreed with Emmett J’s decision in *Metal Manufactures.*

2.1 The transaction and issues in *Metal Manufactures*

Metal Manufactures (MM) for many years manufactured and sold energy cables and other electrical, electronic and lighting products. With its wholly owned subsidiary, Austral Bronze Metal Manufacturers Pty Ltd (ABMM), MM owned adjoining land where factory premises were erected and occupied by MM. Various items of heavy plant and equipment were held in the factory.

In April 1988, MM entered into a sale and leaseback arrangement with the State Bank of New South Wales (the Bank) whereby, under a Credit Purchase Agreement (the Agreement), MM paid to the Bank regular half-yearly amounts of rent.[15] MM made an initial stamp duty payment of $10,000. MM claimed the rental payments as deductions under s 51(1) of the *Income Tax Assessment Act 1936 (ITAA 1936)*.[16]

The Commissioner of Taxation made four contentions[17] relating to the case:

1. The plant and equipment were fixtures and the Agreement therefore did not vest title in the bank so the lease was ineffective. Therefore, the payments were not lease payments.
2. The Agreement should be regarded as a loan by the bank to MM. Therefore, only the interest component of the payments by the taxpayer should be deductible.
3. The payments were of a capital nature as they were consideration for MM to reacquire the rights to the plant and equipment from the bank at the end of the lease. Therefore the treatment of the transaction would be similar to a hire purchase agreement;[18]only the interest component may be deductible.
4. The arrangement was a scheme under *Part IVA* of the *ITAA 1936*, therefore the payments were not deductible.

As Hart[19] and Hart and Mackenzie[20] have addressed these contentions in relation to tax avoidance, this paper will focus on the first contention in relation to fixtures. This was the major reason Emmett J disallowed the Australian Taxation Office’s (ATO) other three contentions, and decided that MM had not engaged in a tax avoidance scheme under Part IVA of the *ITAA 1936*, and that the dominant purpose for the transaction was a genuine need for finance.

2.2 The Arrangements by Macquarie Bank at inception contained in Schedule 2 of the credit purchase agreement

The Sale Transaction

MM (the vendor) had a factory built on adjoining land it jointly owned with its wholly-owned subsidiary ABMM. As the factory was a fixture,[21] both MM and ABMM only had beneficial ownership, rather than legal ownership of the land. MM had some plant and equipment, which according to clause 2.1 of the Lease, were ‘Goods’[22] or chattels.[23] Accordingly, the legal ownership of these ‘Goods’ passed to the State Bank of New South Wales (the Bank), who was the purchaser. The total amount of the transaction was A$50,000,000.

The Leaseback Transaction

Considering the tax advantages arising from a finance lease[24] compared to that of a hire purchase agreement,[25] MM accounted for the lease on its balance sheet as a finance lease by effectively excluding the possibility of repurchasing the fixture.[26] A hire purchase agreement is subject to capital gains tax (CGT) under s 104-15 of the *ITAA 1997* as it is CGT event B1.[27] MM would only be able to deduct the interest component in the transaction, therefore consistent with the accounting treatment of finance leases through AAS 17[28] at the time. Treating the transaction as an accounting finance lease, which would be a depreciating asset lease under *ITAA 1997*, the lessor would continue to deduct capital allowances (depreciation), and treat the lease repayments as income, and the lessee would deduct the whole repayment.

The arrangement underwent two amendments. It was effective from 19 April 1988 to 19 April 2003, for 15 years. At the time of the judgment, the lease term had not expired, and the amendment to capital allowance rules had not taken effect. This amendment from s 59(2) of *ITAA 1936* to Div 40 of *ITAA 1997* will be discussed in detail later in this paper.

The following is a comparison between the sale and leaseback arrangement and conventional borrowing, made by the Corporate Taxation Manager of MM in a memorandum to the Executive Director of Finance and to the board of directors of MM which reflects the benefits of the transaction.[29]

Principal:	*$50 million*	
Lessor:	*State Bank of New South Wales*	
Arranger:	*Macquarie Bank Limited*	
	PROPOSAL	***CONVENTIONAL BORROWING***
After-tax effective interest rate	*2%*	*8%*
Decrease on gearing	*8%*	*No change **
Increase in net tangible assets	*$48.0 m*	*No change ***
Reduction in operating profit before tax over estimated life of plant	*$22.6 m*	*$22.2 m*
Increase (decrease) in operating profit after tax over estimated life of plant	*$12.0 m*	*($11.3 m)*
*Reduction in dividend franking account per annum ****	*$5.0 m*	*$2.5 m*
Savings after tax over conventional borrowing over term discounted at 10% p.a.	*$10.0 m*	-

The benefits included:[30]

1. Increased reported profit after tax, to a positive $12m, rather than a negative $11.3m;
2. Improved balance sheet by virtue of a lower debt to equity ratio;
3. Lower after-tax finance costs (effective interest rate of 2 per cent rather than 8 per cent);
4. Reduced income tax payable and improved cash flow; and
5. Reduced effective rate of tax on pre-tax profits.

2.3 The Arrangements as viewed by Emmett J

Emmett J viewed the plant and equipment in question as fixtures rather than chattels, as the degree of annexation was high.

It is difficult to see how items, the removal of which may require months to complete, considerable modifications to the buildings surrounding them (at least for the duration of the removal works) and digging up part of the underlying floor space, can still be said not to exhibit an objective intention that they were to become part of the land. [31]

His Honour conceded that it did not matter whether the plant and equipment were chattels or fixtures, as the parties did intend for the Bank to have rights to the plant and equipment.

It is clear that the parties intended by the Credit Purchase Agreement that the Bank would have rights in respect of the Plant and Equipment. Specifically, there can be no doubt that the Bank acquired contractual rights in respect of the Plant and Equipment. Whether or not the Credit Purchase Agreement also secured to the Bank some proprietary right in relation to the Plant and Equipment, the Bank clearly had enforceable rights against the Taxpayer in respect of them. Those rights, if enforced, would have interfered with the Taxpayer's right to unfettered use of the Plant and Equipment. [32]

His Honour concluded that the rights vested in the Bank were equitable interests.

If the Plant and Equipment are fixtures, any interest of the Bank could not be a legal interest since, as a matter of law, the Plant and Equipment would form part of the land to which they were attached. It is beyond question that the Taxpayer was intending to vest legal ownership in the Bank. It agreed to do everything that was necessary to do so. If it has not achieved that stated object, it remained subject to a continuing obligation to do so. A court of equity would treat as having been done that which ought to have been done. I consider that the Credit Purchase Agreement was effective to vest in the Bank an interest in the nature of property which should be characterised as equitable.[33]

3. Legitimising the 'substance over form' view in the accounting standards

The significance of the *Eastern Nitrogen*[34] case lies in the distinguishing judgment by Drummond J at first instance. Drummond J allowed the Commissioner's contention that since the plant was a fixture, legal title had never passed from Eastern Nitrogen to the financier, therefore the lease agreement could not confer the right of possession or use on Eastern Nitrogen.[35] His Honour took a strict view in regards to the doctrine of fixtures in this case.[36] Although Lee, Carr and Sundberg JJ in the appeal case[37]agreed with Emmett J in *Metal Manufactures*[38], it reflects a different judicial view that argues for the tax law to continue to take a strict property law based approach to title in leasing cases.

However, as Lee, Carr and Sundberg JJ in the appeal case[39] agreed with Emmett J in *Metal Manufactures*[40], these judicial views legitimised the 'substance over form' view ostensibly taken in the accounting standards, where AASB 117 defines a finance lease as 'a lease that transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred'.[41]

By characterising the MM transaction as a lease under the tax law, Emmett J incorporated and legitimised the distinction between the accounting concepts of finance lease and operating lease. His Honour looked at the transfer of equitable interest to the lessor, in a substance over form manner. This legitimisation also gave rise to a broader range of assets that can be subject to a sale and leaseback transaction: chattels and land, because their legal title can be transferred and fixtures, because their equitable interest could be transferred to the purchaser/lessor in the transaction. Emmett J allowed the transfer of equitable interest, which opened the possibility of characterising the transaction as a hire purchase agreement as mentioned above. Therefore, this judgment also allowed for a real tax advantage through characterising a hire purchase agreement as a lease. Emmett J's judgment may have thus created a cross-arbitrage opportunity by allowing the possibility for businesses to create non-transparent transactions to take advantage of the tax benefits of depreciating asset leases.

These judgments also allowed sale and leaseback transactions to take different forms, since an interest less than a legal title is enough for the transaction to be legitimate within the regulatory framework. The David Jones in-substance sale and leaseback transaction was one of these transactions, where an interest less than title transfer passed to the lessor, which at least allowed for the avoidance of stamp duty and gave rise to income tax and CGT advantages.

4. The David Jones in-substance sale and leaseback transaction

The David Jones in-substance sale and leaseback transaction occurred in November 2000 and therefore appeared in its 2001 financial reports. The financial statements and the notes to the financial statements in relation to the transaction showed what Emmett J at first instance agreed with MM[42] in *Metal Manufactures.*[43] This was a transaction that involved fixtures, which was similar to that in *Metal Manufactures,*[44] except for the lack of transfer of any proprietary interest.

David Jones Limited (DJ) in November 2000 entered into a complex in-substance sale and leaseback arrangement with Deutsche Retail Infrastructure Trust (DRIT), over its flagship stores in Sydney and Melbourne. The in-substance sale took the form of a 79- year head finance lease.[45] The leaseback transaction took the form of an operating lease.[46] DJ continued to keep the freehold of the properties.

There was a Put and Call Option at year 79 to which DRIT was expected to acquire legal title to the properties. DJ was not required to repurchase the properties and there was no penalty to be imposed if it did not, therefore allowing the transaction to be a depreciating asset lease under the *ITAA 1997*.

A question arises that the so-called 'sale and leaseback' transaction did not have a sale component, as DJ retained the freehold title to the property. However, this transaction only differs from the *Metal Manufactures* and *Eastern Nitrogen* transactions in the sense that the properties (flagship stores) were not delivered to the lessor (DRIT). As the flagship stores are fixtures, similar to that of the plant and equipment in both *Metal Manufactures* and *Eastern Nitrogen*, the lessor only had equitable interest in the property. Thus the differences between the transactions were not great. This lack of delivery allowed the lessor to avoid the payment of stamp duty, unlike the upfront payment the bank had to make in *Metal Manufactures*.

At the time, s 59(2) of the *ITAA 1936* applied to a sale and leaseback in the form adopted in *Metal Manufactures* and *Eastern Nitrogen* where only the amount between write-down value and historical cost would be taxed as revenue for depreciating assets. The rest would be treated as capital gain, in which case, if the asset was pre-CGT, there would be no consequences. After 2001, s 40-285 of the *ITAA 1997* applied to include the whole historical cost of the asset as assessable income. This section provided for balancing adjustments arising from balancing adjustment events,[47] such as the sale of a depreciating asset, to be assessable income. DJ was able to take advantage of this because of the similarity to the *Metal Manufactures* and *Eastern Nitrogen* transactions and the timing of the transactions — it occurred in November 2000.

This transaction with its many artificialities provided legitimate tax benefits to the parties to the transaction: DRIT was able to avoid stamp duty; DJ was able to avoid income tax liabilities arising from the in-substance sale as the leaseback transaction was characterised as a lease, not a hire purchase agreement; and as the building was a pre-CGT asset, DJ was not subject to CGT.

5. Conclusion

Metal Manufactures and *Eastern Nitrogen* and their appeals legitimised a 'substance over form' view ostensibly taken in the accounting standards towards leasing, especially sale and leaseback transactions. These cases allowed for a broader range of assets, including an interest that is less than a title transfer to be subject to a sale and leaseback. As leasing is a frequently-used business financing technique and is treated differently under the tax law and the accounting standards, it exemplifies the possibility for cross-arbitrage. Policies such as the TOFA regime have been developed in an attempt to deal with this cross-arbitrage. However, leasing is an area carved out48 from TOFA. There is a need for further policy responses in terms of regulatory convergence to prevent further cross-arbitrage activities.

The artificialities in the David Jones in-substance sale and leaseback transaction reflect the inconsistencies between the accounting standard and the tax law in regulating leasing. There are different types of inconsistencies between the two bodies of regulations. Some may be inconsistencies arising from the lack of provision from one body of regulation, hence the silence; others may be contradictions between the provisions in the two bodies of regulations; still others may be somewhere in between. For example, the accounting classification of finance lease and operating lease, compared to the lack of classification in the tax law, reflects a silence in one body of regulation. These inconsistencies represent possibilities for cross-arbitrage activity, hence the possibility for further research.

The silence in the above example may exemplify that possible inducement of complexity through cross-arbitrage is to be regretted. This silence, manifested in Emmett J's judgment in *Metal Manufactures*, reflects a different form of regulatory inconsistency: contradiction. This judgment allowed what possibly could be a hire purchase agreement under the tax law[49] to be regarded as an accounting finance lease. This in turn allows the transaction to be characterised as a lease under the tax law. There is no different treatment of hire purchase agreements to that of finance leases under AASB 117, unlike under the tax law. A real tax advantage relating to a depreciating asset rather than a timing difference thus arose.

This contradiction shows that the current parallel regulations of accounting and taxation on leasing, operating separately, gives rise to uncertainty and regulatory risk faced both by the revenue authorities and the parties engaging in cross-arbitrage activities. Opportunities exist to enter into complex, non-transparent transactions to take advantage of real cash flow differences arising from inconsistencies between the accounting and tax systems. These opportunities may lead to deadweight losses[50] in the economy, such as:

- for the transacting parties — for example, transaction costs and increased compliance costs, both accounting regulatory and tax compliance;
- for regulators or government — for example, increased monitoring and administrative costs.

Policy makers and academics have considered possible policy responses. The Ralph Review[51] has argued for the determination of taxable income under a cash flow/tax value approach[52] (commonly called the tax value method or TVM). This policy proposal argued to bring the tax law in line with accounting principles to simplify the tax law. Further research would need to be performed to consider the merits of TVM as a policy of regulatory convergence. A survey of current accounting and tax regulation on leasing would make obvious the inconsistencies between the two bodies of regulations, therefore at least the silences can be addressed. Since Emmett J has legitimised the accounting concepts of leasing, it is also possible to argue that conceptual inconsistencies between the two bodies of regulations may conform to the substance over form view ostensibly taken by accounting standards.

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Notes

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2 J T Ralph et al, *Review of Business Taxation Report, A Tax System Redesigned More Certain, Equitable and Durable, Overview Recommendations Estimated Impacts,* Commonwealth of Australia, AGPS, Canberra (July 1999).

3 G S Cooper, 'Trying to Make Sense of TOFA' (2007) 36(3) *Australian Tax Review* 160–72.

4 For example, accounting standards such as AASB 139 — *Financial Instruments: Recognition and Measurement*; AASB 132 — *Financial Instruments: Presentation.*

5 AASB 117 — *Leases,* [8].

6 Geoffrey Hart, 'The Impact of Property Law and Contractual Principles in Taxation Law' (2004) 14 *Revenue Law Journal* 92–118.

7 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375.

8 *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 46 ATR 474.

9 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375.

10 *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 46 ATR 474.

11 Treasury, *Exposure Draft of Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008, Explanatory Material* <http://tofa.treasury.gov.au/content/downloads/Exposure_Draft_for_Consultation_Explanatory_Material_track_changes.rtf> at 20 November 2009; Geoffrey Hart, 'Operating and Finance Leases in an Income Tax Context' (2008) 3(1) *Journal of the Australasian Tax Teachers Association* 61–75; Andrew Broadfoot and Kevin Pose, 'Administration and Appeals' (2000) 29 *Australian Tax Review* 50–53.

12 Cynthia Coleman et al, *Australian Tax Analysis: Cases, Commentary, Commercial Applications and Questions* (6th ed, 2006) 768–9.

13 Emmett J in *Metal Manufactures* allowed for the deductions, holding that there was sufficient equitable interest for the lessor (the Bank) to charge rent; Drummond J in *Eastern Nitrogen* held that since legal title had not passed to the lessor, there was in effect no lease.

14 The court heard the appeals to *Eastern Nitrogen* and *Metal Manufactures* at the same time. See *Federal Commissioner of Taxation v Metal Manufactures Ltd* (2001) 46 ATR 497 and *Eastern Nitrogen Ltd v Commissioner of Taxation* (2001) 46 ATR 474.

15 Item 5 of the Credit Purchase Agreement.

16 Currently general deductions are provided under s 8-1 of

the *ITAA 1997*, specific deductions are provided under s 8-5 of the *ITAA 1997*.

17 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375, [26]–[31].

18 *Income Tax Assessment Act 1997*, s 995-1.

19 Geoffrey Hart, 'Operating and Finance Leases in an Income Tax Context' (2008) 3(1) *Journal of the Australasian Tax Teachers Association* 61–75; Andrew Broadfoot and Kevin Pose, 'Administration and Appeals' (2000) 29 *Australian Tax Review* 50–53.

20 Gordon Mackenzie and Geoffrey Hart, 'Finance Lease Taxation: Surviving the TOFA Tsunami' (2008) 23(2) *Australian Tax Forum* 165–89.

21 Joycey Tooher and Bryan Dwyer, 'Doctrine of Fixtures' in *Introduction to Property Law* (4th ed, LexisNexis Butterworths, Australia, 2002) 8–10.

22 *Metal Manufactures Ltd* v *Federal Commissioner of Taxation* (1999) 43 ATR 375, [17].

23 Ibid, in the summary provided by Emmett J.

24 Its original aim was to transfer legal ownership to the Bank.

25 Section 995-1 of *ITAA 1997* defines 'hire purchase agreement' as:

"(a) a contract for the hire of goods where:

(i) the hirer has the right, obligation or contingent obligation to buy the goods; and

(ii) the charge that is or may be made for the hire, together with any other amount payable under the contract (including an amount to buy the goods or to exercise an option to do so), exceeds the price of the goods; and

(iii) title in the goods does not pass to the hirer until the option referred to in subparagraph (a)(i) is exercised; or

(b) an agreement for the purchase of goods by instalments where title in the goods does not pass until the final instalment is paid."

26 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375, [41].

27 This is the ATO's third contention.

28 This is not much different from the current AASB 117.

29 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375, [50].

30 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375, [41].

31 Ibid, [182].

32 Ibid, [185].

33 Ibid, [189].

34 *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 108 FCR 27.

35 (1999) 43 ATR 112, at 112.

36 Tooher and Dwyer, above n 21, 8–10.

37 *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 108 FCR 27.

38 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375.

39 *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 108 FCR 27.

40 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375.

41 AASB 117, [4].

42 His Honour agreed that using finance leases had the advantages of reducing after-tax financing costs, increasing reporting profits, improving cash flow and improving the balance sheet.

43 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375 at 386.

44 *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375 at 386.

45 AASB 117 — *Leases*, [8].

46 AASB 117 — *Leases*, [8].

47 *ITAA 1997*, s 40-295.

48 Treasury, *Exposure Draft of Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008, Explanatory Material* <http://tofa.treasury.gov.au/content/downloads/Exposure_Draft_for_Consultation_Explanatory_Material_track_changes.rtf> at 20 November 2009.

49 *ITAA 1997*, s 995-1.

50 A definition can be found at James Gwartney, Richard Stroup and Russell Sobel, *Economics: Private and Public Choice* (9th ed, Thomson Learning Asia and CITIC Publishing House), 107.

51 J T Ralph et al, above n 2.

52 J T Ralph et al, above n 2, 39–40.