

Appl Corporate Affairs Comm v Austral Oil Estates Ltd (No 3) (1986) 4 NSWLR 648	Fed New South Wales Bar Assoc v Forbes Macfie Hansen Pty Ltd 82 ALR 431	Disced Woodlands B & Conca v Permanent Trustee Co Ltd (1996) 68 FCR 213
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[HIGH COURT OF AUSTRALIA.]

THE BROKEN HILL ASSOCIATED SMELTERS)
 PROPRIETARY LIMITED }

APPELLANT ;

AND

THE COLLECTOR OF IMPOSTS FOR)
 VICTORIA }

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Stamp Duties—Licence—Marine insurance—Foreign insurer—Insurance with British
 Government—Scheme of war risks insurance—"Company person or firm of
 persons"—Statute—Interpretation—Application to Crown—Stamps Act 1915
 (Vict.) (No. 2728), sec. 98—Government War Obligations Act 1914 (5 Geo. V.
 c. 11), sec. 1.

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Sec. 98 (1) of the *Stamps Act* 1915 (Vict.) provides that "Every company person or firm of persons whether corporate or unincorporate not licensed to carry on in Victoria marine assurance or insurance business who or which assures or insures, or enters into any agreement or undertaking to assure or insure, or in any way acts as agent for the assurance or insurance with, or effects an assurance or insurance with, or makes a declaration under any open or valued policy issued by any company person or firm of persons outside Victoria whether carrying on business within Victoria or not, for the assurance or insurance of any hulls freights goods or merchandise against marine risk or loss shall take out an annual licence, the duty upon which shall be assessed at five hundred pounds unless such company person or firm proves to the satisfaction of the Collector of Imposts that the duty payable by such company person or firm pursuant to this Act does not amount to such sum," &c.

*Held*, that the section does not apply to a marine insurance effected in England with the British Government under the war risks insurance scheme of that Government.

*Quære*, whether the section applies to an owner of goods in respect of a marine insurance of those goods.

Isaacs,  
Gavan Duffy  
and Rich JJ.



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Decision of the Supreme Court of Victoria (*Cussen J.*) : *Broken Hill Associated Smelting Proprietary Ltd. v. Collector of Imposts*, (1918) V.L.R., 31 ; 39 A.L.T., 128, reversed.

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APPEAL from the Supreme Court of Victoria.

A special case was stated by the Collector of Imposts for Victoria which, so far as material, was as follows :—

1. On 28th February 1917 the Broken Hill Associated Smelters Proprietary Limited of 360 Collins Street, Melbourne, in the State of Victoria, being a company not licenced to carry on in Victoria marine insurance business, made application by letter to the Collector of Imposts for an annual licence for the year 1917 on account of the Company having made declarations under open or valued policies issued by a company outside Victoria.

2. On 10th March 1917 the Company lodged with the Collector of Imposts, a statement of the total amount of the gross premiums on risks declared under open policy with Lloyd's, London, during the year 1916, such total amount being £6,321 17s. 5d.

3. On 15th March 1917, in reply to a requisition of the Collector of Imposts, the Company forwarded a letter to the Collector of Imposts stating that the amount paid by the Company during the year 1916 as premiums on declarations regarding war risk insurance under the scheme of war risk insurance introduced by His Majesty's Government in England was £18,287 8s. 1d.

4. On 19th March 1917 the Collector of Imposts assessed the amount of stamp duty payable on the Company's annual licence at £741, being 3 per cent. on £24,609 5s. 6d., the total amount of the two said sums of £6,321 17s. 5d. and £18,287 8s. 1d.

5. On 4th April 1917 Messrs. Arthur Robinson & Co. of 360 Collins Street, Melbourne, as solicitors for the Company, paid the amount of stamp duty as assessed by the Collector of Imposts, £741, and on the same day by letter required the Collector of Imposts to state and sign a case for the purpose of an appeal to the Supreme Court.

6. On 21st July 1917 the Collector of Imposts received from Messrs. Arthur Robinson & Co. a letter and a statutory declaration, and on 10th August 1917 a further letter and two statutory declarations, relative to the scheme of insurance under which the war risks



premiums amounting to the said sum of £18,287 8s. 1d. were paid. H. C. OF A.

7. On 24th August 1917 the Collector of Imposts, after a reconsideration of the matter, notified Messrs. Arthur Robinson & Co. that he was now of opinion that the stamp duty chargeable on the Company's annual licence was £500—the amount provided by sec. 98 of the *Stamps Act* 1915.

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8. On 28th August 1917 the Collector of Imposts forwarded a cheque for £241, the amount paid in excess of the said sum of £500, to Messrs. Arthur Robinson & Co., who on 24th August 1917 notified the Collector of Imposts that they would be glad to receive such amount without prejudice to the Company's right to a case stated upon the taxability of the difference between £500 and the amount upon which the Company claims it should have been taxed, viz., 3 per cent. on the said sum of £6,321 17s. 5d., equal to £192.

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The question for the opinion of the Court is: Was the Collector of Imposts right in taking into consideration the said sum of £18,287 8s. 1d. paid by the Company as premiums on declarations regarding war risk insurance as aforesaid in assessing the duty payable by the Company on its annual licence for the year 1917, and in assessing such duty at the sum of £500?

The letters and statutory declarations referred to above formed part of the case. In one of the statutory declarations it was stated that premiums paid in respect of insurances effected by the Company under His Majesty's Government's War Risks Insurance Scheme were paid directly to His Majesty's Government, and that certificates of insurance issued in respect of such insurances contained the following statements:—"Insurance limited to goods carried on a voyage upon which the vessel is insured under His Majesty's Government's War Risks Insurance Scheme. This is to certify that the undermentioned insurance has been effected with His Majesty's Government."

The special case was heard by *Cussen J.*, who answered the question asked by it in the affirmative: *Broken Hill Associated Smelting Proprietary Ltd. v. Collector of Imposts* (1).

From that decision the Company now appealed to the High Court.



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*Mann*, for the appellant. Sec. 98 of the *Stamps Act* 1915 is intended to render liable to duty persons who act as agents for foreign insurance companies, and is not intended to apply to persons who insure their own goods with foreign companies. Although the words of the section dealing with the persons making declarations under open policies would by themselves include the appellant, it is not within the description of persons intended to be hit by the section. The apparent object of those words was to make the section apply not only to the original insurer but also to a person who carries on business by effecting insurances of the property of others with a foreign company. Sec. 98 contemplates the duty being reduced below £500, but under sec. 84 it cannot be proved that a smaller amount of duty is payable except in the case of a person carrying on the business of insurance. Sec. 97, which imposes the penalty, is applicable only to a person carrying on the business of insurance. [Counsel referred to the *Stamp Act* 1882 *Amendment Act* 1885 (N.Z.), sec. 7.]

[ISAACS J. referred to *Arnould on Marine Insurance*, 9th ed., vol. I., pp. 12, 249.]

The contract of insurance was made by the appellant with the British Government, that is, with His Majesty the King, and neither the British Government nor the King is a "company person or firm of persons" within the meaning of the section. See *Butterworth v. Commonwealth Bank of Australia* (1).

*Davis*, for the respondent. It is reasonable that the Legislature should, for the protection of Victorian insurance companies, impose taxation upon persons who insure with foreign companies, and as the words of sec. 98 clearly include such persons there is no reason why their plain meaning should be limited. In the New Zealand Act there is a provision which negatives the liability to duty of a person who insures his own goods, but that provision is left out of sec. 98. See *Scales v. Hickson* (2). A person who insures with a foreign company may, for the purposes of taking out a licence, be said to carry on business. The object of the sections dealing with insurances is clear, and the Court should interpret them so as to give effect

(1) 22 C.L.R., 206.

(2) 19 N.Z.L.R., 304.



to that object (*South Brisbane Gas and Light Co. v. Hughes* (1)). Although the insurer is His Majesty the King acting through the British Government, this case falls within sec. 98. The Crown in issuing certificates of insurance under the scheme is acting as a trader (*R. v. Sutton* (2)). The Legislature intended to protect local insurance companies, and to impose a penalty on any person who did any of the acts mentioned in sec. 98. There is no attempt in this case to affect the Crown, nor is there any imposition of taxation upon the Crown. The word "person" in the phrase "company person or firm," being given a meaning which is effective for carrying out the purposes of the Act, includes the Crown. See *Tooth v. Kitto* (3); *Maxwell on Statutes*, 5th ed., p. 128.

[ISAACS J. referred to *Sloman v. Governor and Government of New Zealand* (4).]

*Cur. adv. vult.*

The following judgments were read :—

ISAACS AND RICH JJ. The necessary facts may be shortly stated. The appellant Company effected in England marine insurances with His Majesty's Government under His Majesty's Government's War Risks Insurance Scheme, provision for which was made by the Imperial Act 5 Geo. V. c. 11. The appellant made declarations under the Government certificates of insurance. The amount of premiums paid as premiums on these declarations was £18,287 8s. 1d. The appellant had also effected marine insurances in England with Lloyd's, had made declarations and paid £6,321 17s. 5d. premiums in connection therewith.

The Crown asserted the appellant's liability to take out an annual licence under the provisions of sec. 98 of the Victorian *Stamps Act* 1915, and claimed that the duty payable by the Company should be determined by taking into consideration both sets of premiums. This case raises no question with respect to the Lloyd's insurances or the sum of £6,321 17s. 5d. paid in connection therewith. It is confined to one question, namely, whether the sum of £18,287 8s. 1d. should have been taken into account by the Collector in fixing the sum of £500 as duty.

(1) 23 C.L.R., 396, at p. 407.

(2) 5 C.L.R., 789, at p. 811.

(3) 17 C.L.R., 421, at p. 429.

(4) 1 C.P.D., 563.

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Upon the language of sec. 98 the appellant's liability, if it exists, in respect of that sum, depends upon the co-existence of two factors, viz., that within the meaning of the section—(1) the “company person or firm” who “makes a declaration” includes a company in the situation of the appellant, and (2) the “company person or firm of persons” by whom the policy is issued includes His Majesty's Imperial Government acting under the British war scheme. If either factor be wanting, the question must be answered in favour of the appellant. We find it unnecessary to deal with the first factor, because we are clearly of opinion that the second does not exist.

The Victorian legislation as to “Annual Licences in relation to Assurance &c.” contained in the group of sections 84 to 99 inclusive of the *Stamps Act 1915* does not, in our opinion, include His Majesty's Government acting in relation to the war scheme. That legislation forbids “every company person or firm of persons whether corporate or unincorporate” from carrying on insurance business in Victoria except under annual licence from the Collector of Imposts, for which a variable fee must be paid. Power is given to summon persons, examine on oath, compel production of documents, and to impose fines for carrying on unlicensed business. Contracts of marine insurance are declared null and void unless made by a licensed insurer, or by one publicly held out as licensed under the Act.

We may apply to the section the language of the Privy Council in *Attorney-General for New South Wales v. Curator of Intestate Estates* (1):—“The question therefore arises whether the present Act binds the Crown. The Crown is not named in it, nor can their Lordships see any clear indication of an intention to bind the Crown. *Primâ facie*, therefore, the Crown is not affected by it.” There should be added the circumstance that in sec. 17 in another connection the Crown is expressly mentioned. The silence of the Act with reference to the Crown in relation to insurance is, therefore, doubly significant.

It was said that the present case does not attempt to affect the Crown but the subject only. That, however, is not an answer, because if the appellant is liable in respect of the £18,287 8s. 1d. paid to His Majesty's Government, it is because that Government

(1) (1907) A.C., 519, at p. 523.



is a "company person or firm" forbidden under penalty from issuing similar certificates of assurance in Victoria, unless licensed by the Victorian Collector of Imposts and paying duty on the premiums it receives here.

It was also argued that His Majesty's Government by engaging in marine insurance did not *quoad hoc* occupy the position of Sovereign but that of trader, and so took upon itself the ordinary character of "company person or firm" within the meaning of the term of the Act. But, notwithstanding the views so clearly and forcibly expressed by *Cussen J.*, we think that no such character can be attributed to the scheme under the Imperial Act. In the first place it is unduly straining the meanings of the terms "company person or firm" as used in the Victorian Act to apply any of them to His Majesty's Imperial Government at all. (See *Sloman v. Governor and Government of New Zealand* (1).) As to the scheme itself, it is a war measure, not a trading system. For the encouragement of Imperial transport for the purpose of utilizing the maritime resources of the Empire as a necessary and effective means of maintaining natural supplies and defeating the common enemy, the Sovereign through his Government undertakes what are called in the Imperial Statute "Government war obligations," which include the insurance against the risk of destruction of property at sea by the King's enemies. Whatever the agencies employed to carry out the scheme, whether they be corporate or unincorporate, they are but instrumentalities of His Majesty's Government, which means the Crown itself, as the principal for the more effectual prosecution of the War. Such an operation so carried out is in our opinion entirely outside the scope and object of sec. 98 of the *Stamps Act*, which therefore on ordinary principles of construction does not apply to such transactions as are involved in the question we have to consider. Consequently, without offering any opinion as to the first necessary element of the appellant's liability, we think that the appeal should succeed.

The question set out in the case stated is answered in the negative.

GAVAN DUFFY J. The appellant Company effected insurances against "King's enemy risks" with the British Government under

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His Majesty's Government's War Risks Insurance Scheme, and it is contended for the respondent that such insurances were effected with "a company person or firm of persons outside Victoria" within the meaning of section 98 of the *Stamps Act* 1918. I cannot accept this contention. I am disposed to think that these words have reference only to companies and individuals carrying on the business of insurance for profit in the ordinary way, but, be this as it may, I am satisfied that they do not include His Majesty's Government carrying on a great national undertaking for the purpose of encouraging British commerce by distributing the loss that must arise from capture by the enemy during the War of ships and cargoes in course of sea transit. The object of sec. 98 was to prevent evasion of the liability to pay duty in respect of licences to carry on ordinary marine insurance business within Victoria, and to protect those who had paid duty from undue competition by trade competitors who had not done so. This object cannot be attained nor can its attainment be facilitated by imposing a pecuniary obligation on persons within Victoria who avail themselves of the scheme designed and administered by the British Government for the protection of British commerce.

A further argument was made for the appellant Company before us which was not addressed to *Cussen J.* It was said that as the insurances which it had effected were in respect of its own goods, they did not come within sec. 98, which applied only to companies and persons insuring or assisting to insure the goods of others and doing this in the course of their business. It is unnecessary to determine this point, and, like the other members of the Court, I abstain from offering any opinion on it.

*Appeal allowed with costs. Question answered in the negative. Respondent to pay costs of special case. Order that amount overpaid be refunded.*

Solicitors for the appellant, *Arthur Robinson & Co.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.