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National Crime Authority Amendment Bill 2000

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National Crime Authority Amendment Bill 2000

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National Crime Authority Amendment Bill 2000

Date Introduced: 11 October 2000

House: Senate

Portfolio: Justice and Customs

Commencement: On Royal Assent

Purpose

To amend the *National Crime Authority Act 1984* (the Principal Act) to take account of the recent High Court decision in *R v. Hughes*.¹

Background

Commonwealth-State cooperative schemes

R v. Hughes concerned a Commonwealth-State cooperative scheme for corporate regulation implemented by interlocking and complex legislative regimes.

The Commonwealth Constitution provides for a division of legislative responsibility between the Commonwealth and the States. As a consequence there are deficiencies and limitations in the powers of each.² There are a number of possible ways of overcoming any problems that this situation creates. The first is through constitutional amendment via section 128—that is, by way of referendum. The second is through a referral of powers via section 51(xxxvii). Another is via Commonwealth-State cooperative schemes.

Kirby J recently said this about Commonwealth-State cooperative schemes:

It is true that the Constitution imposes an allocation of powers and functions between the constituent parts of the Commonwealth (on the one hand) and also between the respective branches of government (on the other). But the nature of the Australian federation is such that a high measure of cooperation is contemplated at all levels. Moreover, cooperation is often achieved.

Some of the provisions of the Constitution expressly envisage cooperative schemes between the Commonwealth and the States. Past decisions of this court accept the power of the legislatures of the States and self-governing Territories to cooperate with

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the Federal Parliament in the enactment of complementary legislation. Not only does this extend at an intergovernmental level to agreement between the polities themselves on matters such as the effective sharing of functions and revenues. It also extends to empowering officers and authorities of the Commonwealth, States and Territories to enforce each other's laws and to collect federal, State and Territory revenues. ...

The fact that such commingling of legislative and administrative powers has been accepted as constitutionally permissible has meant that, in the Australian federation, unlike some others, the constituent parts of the federation can, by cooperation, achieve objects and perform functions which, separately, would have been impossible.³

As His Honour pointed out many Commonwealth statutes contain provisions enabling State and Territory laws to confer functions and powers on Commonwealth officers or authorities. These statutes include the *Aboriginal and Torres Strait Islander Commission Act 1989*, the *Australian Federal Police Act 1979*, the *Child Support (Assessment) Act 1989*, the *Civil Aviation Act 1988*, the *Public Service Act 1999*, the *Taxation Administration Act 1953*, the *Trade Practices Act 1974* and the *Workplace Relations Act 1996*.⁴ The *National Crime Authority Act 1984* is another such law.

National Crime Authority

In 1984, the Senate Standing Committee on Constitutional and Legal Affairs remarked:

... it is trite to observe that the perpetrators [of organised crime] pursue their schemes without regard to territorial (national or state) boundaries. Yet, every royal commissioner who has reported on aspects of organised crime since Mr Justice Moffit in 1974, has remarked upon various difficulties caused by the fragmentation of power and responsibility for law enforcement inherent in the Australian federal system. Compounding these problems is the fact that responsibility for law enforcement is divided among the various agencies.⁵

Before the introduction of the National Crime Authority Bill 1983 discussions were held involving the Commonwealth, the States and the Territories, and Attorneys-General and Police Ministers met to consider a model for a national crime body. When introducing the Bill, Senator Gareth Evans commented that the Bill secured the '... the active involvement and co-operation of the States.'⁶

The Principal Act enables the NCA to investigate 'relevant criminal activity'⁷—an expression linked to the concept of a 'relevant offence' against Commonwealth, State or Territory law.⁸ The term, 'relevant offence' is defined as an offence involving two or more persons in substantial planning and organisation using sophisticated techniques. Further, it must involve an offence such as theft, fraud, tax evasion or illegal drug dealing which is punishable by imprisonment for at least three years.⁹ This definition attempts to confine the NCA to the investigation of organised criminal activity.

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According to the NCA's 1998-99 Annual Report, the most commonly investigated offences include drug importation, cultivation, manufacture and trafficking, money laundering, theft, fraud, tax evasion, bribery, extortion and violence.¹⁰

Under the Principal Act, the NCA has two types of functions. General functions are set out in subsection 11(1). General functions can be exercised on the NCA's own initiative. They include collecting, analysing and disseminating criminal information and intelligence, investigating matters of its own choosing, making arrangements for the establishment of task forces and co-ordinating their work. The NCA's coercive powers cannot be exercised in relation to its general functions.

Subsection 11(2) confers special functions on the NCA enabling it to investigate matters referred to it either by the Commonwealth Minister or the relevant State or Territory Minister or Ministers. Before referring a matter to the NCA the Commonwealth Minister must consult with the Inter-Governmental Committee.¹¹ The Inter-Governmental Committee consists of the Commonwealth Minister and a Minister from each of the participating States and Territories. A State or Territory Minister must obtain the approval of the Inter-Governmental Committee before referring a matter to the NCA.¹² Once a matter has been referred to the NCA either by the Commonwealth Minister or a State Minister the NCA can investigate that matter using its special coercive powers. These powers include 'hearings, including compulsory appearances and production of documents, imposition of penalties and warrants for search and seizure, for arrest and for interception of communications'.¹³ If a person is summonsed to attend an NCA hearing it is an offence not to attend or answer questions without reasonable excuse.¹⁴ Further, the NCA may obtain a warrant for the arrest of a person who fails to attend an NCA hearing after being summonsed.¹⁵

Apart from the Principal Act, other Commonwealth statutes are relevant to the operations of the NCA. For example, the *Telecommunications (Interception) Act 1979* (Cwlth) empowers an NCA member or a police officer attached to the NCA to apply to an eligible judge for a telecommunications interception warrant.¹⁶ Under the *Customs Act 1901* (Cwlth), an NCA member or a police officer attached to the NCA may apply to a nominated judge for a listening device warrant. Applications may also be made under State and Territory listening device laws.

Following the passage of the Principal Act and the *National Crime Authority (Consequential Amendments) Act 1984*, the States and Territories passed mirror legislation enabling the NCA to investigate offences against State and Territory laws.¹⁷ In addition to allowing the NCA to operate in jurisdictions apart from that of the Commonwealth, underpinning State laws regulate the NCA's exercise of its functions once a matter has been referred to it by a State. They also require the NCA to co-operate with State law enforcement agencies when exercising its special functions and contain a double jeopardy clause providing that a person cannot be punished twice for an offence under Commonwealth and State laws.

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Finally, the NCA operates not only under a range of Commonwealth, State and Territory laws but with a staffing complement that crosses jurisdictions. At 30 June 1999, its staff included 265 Commonwealth Public Service Act officers, 124 seconded police officers, 13 secondees from the Australian Taxation Office and 5 secondees from the Australian Customs Service. Seconded police officers included 43 from the Australian Federal Police, 18 from NSWPol, 30 from VicPol, 16 from the Queensland Police Service, 5 from SAPol, 7 from the Western Australian Police Service, and 5 Tasmanian police officers.¹⁸

High Court decision in *R v. Hughes*

R v. Hughes concerned a decision by the Commonwealth Director of Public Prosecutions (Commonwealth DPP) to prosecute Craig Allan Hughes and Noel Andrew Bell under the *Corporations Law*. Among other things, Mr Hughes contested the validity of State and Commonwealth laws that provided for the prosecution of offences under the national scheme for corporate regulation. As part of that scheme, the *Corporations (Western Australia) Act 1990* (WA) conferred on the Commonwealth DPP the function of prosecuting offences under the Corporations Law of Western Australia and withdrew the power to prosecute from Western Australian authorities. For this reason, the joint judgment in *Hughes* concluded that the powers and functions conferred on the Commonwealth DPP were obligations, not mere permissions.¹⁹ Various Commonwealth laws (including the *Director of Public Prosecutions Act 1983*, the Commonwealth Corporations Act and regulations made under it) enabled and obliged the Commonwealth DPP to perform those functions. Additionally, Commonwealth and State corporations laws treated offences under State corporations law as Commonwealth offences.

The High Court²⁰ held, in relation to the specific offences, that the laws were valid and that the Commonwealth DPP was empowered to prosecute the offences against the Corporations Law of Western Australia with which Hughes was charged.²¹

While the decision in *R v. Hughes* may not have resolved all the questions that might arise in relation to Commonwealth-State cooperative schemes, the decision does identify some of the tests that should be applied to such schemes and some of the principles that underpin those tests. The questions that might be asked include:

- does the State law confer functions or powers on Commonwealth authorities or agencies?
- has the Commonwealth Parliament enacted legislation which permits Commonwealth officers or authorities to perform the functions and exercise the powers conferred by State laws?
- does the Commonwealth law impose duties on a Commonwealth officer or instrumentality to perform functions or exercise powers created and conferred by State law? If so, is the Commonwealth law supported by a constitutional head of power?

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- does the Commonwealth law empower a Commonwealth officer to prosecute an offence created under State law? If so, could the Commonwealth have legislated independently to create the offence or proscribe the conduct or circumstances in a particular case?

The joint judgment in *Hughes* concluded that a State law cannot unilaterally invest functions or powers in a Commonwealth officer or authority. However, the majority said that the Commonwealth can pass legislation relying on the incidental power to permit Commonwealth officers to perform functions and accept appointments additional to their Commonwealth functions and appointments.²² The joint judgment also stressed that State laws cannot invest a Commonwealth officer or authority with wider powers or authority than the Commonwealth law which provides consent to the conferral.²³ Further, the majority said that a federal law imposing duties under State law on a Commonwealth officer—especially when the performance of those duties has the potential to affect the rights of individuals—must be grounded in a constitutional head of power. Whether a Commonwealth law is so grounded can be determined by looking not only at the words of the State law but the particular circumstances in which they are applied. Their Honours also invoked section 15A of the *Acts Interpretation Act 1901* (Cwlth) to find that a provision expressed to apply in general terms can be read down in order to limit its application to functions and powers within Commonwealth legislative power.²⁴

Kirby J also found the impugned provisions valid—although he reached his conclusions via a somewhat different path. His Honour did not consider whether Western Australian law merely authorised the Commonwealth DPP to perform functions and exercise powers under State law or imposed an obligation on him to do so. What was more significant in Kirby J's view was that 'criminal liability and punishment, when provided in a federal law, must be supported by demonstrable constitutional authority.'²⁵ And while he did not find it fatal to the Commonwealth's case he remarked:

Obviously, the search for a constitutional source is not helped by the absence of any relevant expression by the Federal Parliament of the propounded constitutional bases of its enactment.²⁶

Kirby J also stressed that Commonwealth-State cooperative schemes are subject to express and implied constitutional prohibitions and that State laws cannot impose on Commonwealth officers and agencies, powers and functions that are inconsistent with those imposed by federal legislation.

As stated above, the NCA is an investigative agency not a prosecutorial authority. The evidence it collects is provided to the relevant Commonwealth, State or Territory prosecutorial authority for a decision on whether or not to prosecute. However, the NCA does exercise functions and powers under both Commonwealth and State laws. When exercising its special functions it has significant coercive powers.

In response to the decision in *Hughes* the Bill:

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- describes, in the language of Commonwealth constitutional power, the offences which the NCA is empowered to investigate under the Principal Act. In brief, these are Commonwealth and Territory offences and offences against State laws which have a ‘federal aspect’.
- enumerates at least some of the heads of constitutional power which might give a State offence a ‘federal aspect’.
- enables a State law to impose a duty on the NCA—but only in relation to matters which have a federal aspect.
- gives consent to and authorises the exercise of powers and functions under State laws lacking a federal aspect by the NCA, NCA members and federal judges—subject to certain caveats. For example, no constitutionally impermissible power or function can be conferred.
- limits the duties, powers and functions that can be conferred on the NCA by State law to those consistent with duties, powers and functions conferred by the Principal Act and other Commonwealth laws.
- enables the NCA to exercise a choice, where appropriate, about whether it conducts investigations under Commonwealth or State laws.

Main Provisions

Definitions—‘federally relevant criminal activity’ & ‘State offences with a federal aspect’

These definitional changes are intended to define what federally relevant criminal activity can be investigated by the NCA under the Principal Act. In brief, they provide that the NCA can investigate certain offences against Commonwealth or Territory laws. It will also be able to investigate State offences which have a ‘federal aspect’.

Items 1-5 insert new definitions into the *National Crime Authority Act 1984* (the Principal Act).

Item 2 inserts a definition of ‘federally relevant criminal activity’. This means criminal activity involving an offence against Commonwealth or Territory law, or criminal activity involving a State offence which has a ‘federal aspect’. The expression ‘federal aspect’ is defined in **new section 4A**.

Item 5 inserts new section 4A which provides that a State offence has a ‘federal aspect’:

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- if it could, potentially, be the subject of a valid Commonwealth law [**new paragraph 4A(2)(a)** dealing with primary offences & **new paragraph 4A(2)(b)** dealing with ancillary offences]
- if the circumstances of the offence could, potentially, be the subject of a valid Commonwealth law [**new paragraph 4A(2)(c)** & **subsection 4A(3)**]. State offences will fall within new paragraph 4A(2)(c) if they:
 - affect Commonwealth interests, the interests of a Commonwealth authority or a constitutional corporation (see below)
 - are committed by a constitutional corporation or in a Commonwealth place
 - involve postal services, electronic communications, trade or commerce, banking, insurance, or
 - relate to matters outside Australia [**new subsection 4A(4)**].

New subsection 4A(4) draws on a number of heads of Commonwealth constitutional power. For example, **new paragraph 4A(4)(f)** defines a State offence involving trade and commerce with reference to interstate or overseas trade and commerce, commerce within a Territory, commerce between a State and a Territory and commerce between two Territories. This definition draws on Commonwealth powers under sections 51(i) and 122 of the Constitution.

New subsection 4A(5) clarifies that the matters listed in new subsection 4A(4) are not an exhaustive list. Other heads of Commonwealth constitutional power may be relevant in particular circumstances.

A State offence will also have a ‘federal aspect’ if the NCA is investigating criminal activity relating to a Commonwealth or Territory offence and its investigation of a State offence is incidental to that investigation [**new paragraph 4A(2)(d)**].

New subsection 4A(6) defines expressions found in new section 4A. Thus, an ‘ancillary offence’ is defined as conspiracy, aiding, abetting, or attempting to commit the primary offence. A ‘constitutional corporation’ is defined as a corporation to which paragraph 51(xx) of the Constitution applies. A ‘State offence’ is defined as an offence against a State law.

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Functions of the Inter-Governmental Committee

Items 7-13 amend section 9 of the Principal Act. Section 9 sets out the functions of the Inter-Governmental Committee. The Inter-Governmental Committee consists of representatives of the Commonwealth, the States and Territories. Its functions include:

- consulting with the Commonwealth Minister when that Minister proposes to refer a matter relating to ‘relevant criminal activity’ to the NCA for investigation under section 13 [paragraph 9(1)(b)]
- considering whether to approve the referral of a matter relating to a relevant criminal activity by a State Minister or Ministers to the NCA under section 14 [paragraph 9(1)(c)].

Items 8 and 10 insert the word ‘federally’ before the expression ‘relevant criminal activity’ in paragraphs 9(1)(b) and 9(1)(c) of the Principal Act.

Items 7, 9, 11 and 13 are minor drafting amendments which insert the word ‘and’ between four of the paragraphs in subsection 9(1).

Item 12 inserts **new paragraph 9(1)(ca)** into the Principal Act. This new paragraph empowers the Inter-Governmental Committee to approve the referral by a State Minister of a non-federally relevant criminal activity to the NCA under State law. The NCA, an NCA member or a Federal Court judge will not be obliged to perform a duty or function or exercise a power in such a case (**item 36** inserting **new section 55C**).

Requests by the NCA for approval of references

Section 10 of the Principal Act enables the NCA to ask for a matter relating to a ‘relevant criminal activity’ to be referred to it for investigation.

Item 14 amends subsection 10(4A) of the Principal Act. Section 10(4A) enables the NCA to request the Commonwealth Minister make a section 13 referral of a matter relating to a ‘relevant criminal activity’. The amendment makes this a ‘federally relevant criminal activity’.

Functions of the NCA

Items 15-18 amend section 11 of the Principal Act. Section 11 stipulates the general and special functions of the NCA (see Background section).

Under existing paragraph 11(1)(b) one of the NCA’s general functions is to investigate, on its own initiative, matters relating to ‘relevant criminal activities’—excluding matters referred by Commonwealth or State Ministers under sections 13 or 14 of the Principal Act.

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Item 15 amends paragraph 11(1)(b) stipulate that the NCA's general functions do not extend to investigating offences under State law which lack a 'federal aspect'.

Items 16-18 amend subsection 11(2) of the Principal Act which deals with the NCA's special functions. The NCA's special functions are to investigate matters relating to relevant criminal activity following referrals made by the Commonwealth Minister under section 13 or by a State Minister with Inter-Governmental Committee approval under section 14. It is only when exercising its special functions that the NCA can use its special coercive powers. In the case of a section 13 reference, the amendment clarifies that an NCA investigation will relate to 'federally relevant criminal activity'. In the case of a section 14 reference, the amendment specifies that the NCA's investigation will relate to 'federally relevant criminal activity' where the relevant offence is a State offence which has a federal aspect.

Performance of NCA functions

Items 19 & 20 amend subsections 12(1) & (1A) of the Principal Act which provide that if the NCA obtains evidence admissible in a prosecution for a Commonwealth, State or Territory offence during the course of an investigation it must pass this on to the relevant law officer or law enforcement agency. The amendments re-word the subsections so that the duty to pass on admissible evidence is imposed only if an investigation relates to a 'federally relevant criminal offence'.

References by the Commonwealth to the NCA

Items 21-24 amend section 13 of the Principal Act. Subsection 13(1) empowers the Commonwealth Minister, after consulting with the Inter-Governmental Committee, to refer a matter relating to a 'relevant criminal activity' to the NCA for investigation where the offences include offences against Commonwealth or Territory law. The amendments ensure that these referrals relate to 'federally' relevant criminal activity (**item 21**). Other consequential changes are also made (**items 22-24**).

References by State Ministers to the NCA

Items 25-27 amend section 14 of the Principal Act. Existing section 14 empowers the NCA to investigate matters relating to a 'relevant criminal activity' which are referred by a State Minister with the approval of the Inter-Governmental Committee and which involve offences under State law. The amendments change all references to 'relevant criminal activity' in section 14 to 'federally relevant criminal activity'.

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The NCA's powers to obtain information from Commonwealth agencies

Items 29 & 30 amend section 19A of the Principal Act. Section 19A enables the NCA to request Commonwealth agencies to provide it with information which is relevant to a prescribed investigation. A 'prescribed investigation' is defined in section 4 of the Principal Act as an investigation conducted or coordinated by the NCA in the performance of functions under paragraphs 11(1)(b) and (d)²⁷ or subsection 11(2).²⁸ The amendments confine such investigations to 'federally relevant criminal activity'.

Items 31 & 32 amend section 20 of the Principal Act. Section 20 enables the NCA in specified circumstances to require Commonwealth agencies to provide it with information that is relevant to a 'prescribed investigation'. The amendments ensure that such investigations are 'in relation to a federally relevant criminal activity'.

Search warrants

Items 33 & 34 amend section 22 of the Principal Act. Section 22 deals with the issuing of search warrants when the NCA is conducting a special investigation into a matter relating to 'relevant criminal activity'. Item 33 ensures that a search warrant can only be applied for under section 22 if the relevant criminal activity is 'federally relevant criminal activity'. As the Explanatory Memorandum points out, the power to apply for a search warrant in relation to a State offence that does not have a federal aspect will continue to be exercised under a State NCA Act.²⁹ In the latter case, neither the NCA, an NCA member or a Federal Court judge is obliged to perform a function or duty or exercise a power (**item 36** inserting **new section 55C**).

Orders for the delivery of witness passports to the NCA

Item 35 amends paragraph 24(1)(a) of the Principal Act—dealing with a court order for a person to deliver their passport to the NCA. Once again, the amendment ensures that such an order under the Principal Act relates to an investigation into a matter relating to federally relevant criminal activity. If an offence is a State offence which does not have a federal aspect, the power to order delivery of a passport will continue to be exercised under a State NCA Act.³⁰ In the latter case, neither the NCA, an NCA member or a Federal Court judge is obliged to perform a function or duty or exercise a power (**item 36** inserting **new section 55C**). plus authorisation

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The exercise of powers under State laws by the NCA, NCA members and Federal Court judges

The Bill contains provisions designed to give Commonwealth consent to and authorisation of the exercise of certain powers, functions and duties under State laws by the NCA, its members and federal judges. These provisions also contain limitations. For example, they provide that the NCA, its members and federal judges are not under any duty to perform non-federal activities or activities that are constitutionally impermissible. The *National Crime Authority (State Provisions) Act 1985* (Qld) (the Queensland Act) can be used to illustrate some of the roles conferred under State laws. Thus, under sections 12 and 13 of the Queensland Act, an NCA member can apply for a search warrant from a judge of a ‘prescribed court’. This term is defined as a judge of the Federal Court or the Supreme Court.³¹

Item 36 repeals and replaces section 55A of the Principal Act. Existing section 55A declares that, in addition to the Commonwealth powers, functions and duties conferred or imposed by the Principal Act and other Commonwealth laws, State powers, functions and duties can be conferred and imposed on the NCA and Federal Court judges.

The purpose of **new section 55A** is to give Commonwealth legislative consent to the NCA, an NCA member or a Federal Court judge exercising duties, powers and functions under State laws [**new subsection 55A(1)**]—subject to conditions designed to take into account the decision in *Hughes*.

New subsections 55A(2) & (3) relate to conferrals by State law on the NCA. **New paragraph 55A(2)(a)** enables a State law to confer on the NCA the function of investigating a matter relating to relevant criminal activity which includes an offence against State law—irrespective of whether that offence has a ‘federal aspect’. **New paragraph 55A(2)(b)** enables a State law to confer investigative duties, powers and functions on the NCA—as long as those powers, duties or functions are the same kind as those conferred by Commonwealth law. Before the NCA can investigate relevant criminal activity under State law, the State Minister must refer the matter to the NCA in writing, the reference must be approved by the Inter-Governmental Committee and the Commonwealth Minister must consent to the NCA investigating that matter [**new subsection 55A(3)**].

New subsection 55A(4) enables a State law to confer on an NCA member a duty, function or power that relates to the investigation of a matter relating to a relevant criminal activity involving an offence against State law. The duty, function or power must be associated with a function conferred on the NCA and must be the same kind of duty, function or power as conferred on an NCA member by a Commonwealth law.

New subsection 55A(5) contains similar provisions in relation to a ‘Judge of the Federal Court’—an expression defined in **new subsection 55A(13)** as a judge in his or her personal capacity.³²

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New subsection 55A(6) enables the Commonwealth to limit the duties, powers and functions conferred by State law on the NCA, an NCA member or Federal Court judge by way of regulation.

New subsection 55A(7) provides that State laws cannot confer on a Commonwealth authority, a member of Commonwealth authority or ‘judges of a court created by the Parliament’ a duty that is constitutionally impermissible.

New subsection 55A(9) provides that the NCA can exercise either State or Commonwealth powers where a particular investigation is being conducted under Commonwealth or State references.

New section 55B provides that where the NCA is conducting an investigation relating to federally relevant criminal activity and has a choice of acting under Commonwealth or State laws it can choose either (despite anything contained in subsection 11(2) or sections 13 or 14 of the Principal Act).

New subsection 55C(1) provides that neither the NCA nor an NCA member has an obligation to perform duties that are unrelated to the investigation of a ‘federally relevant criminal activity’ or contravene any constitutional doctrine. **New subsection 55C(2)** provides that a Judge of the Federal Court is not obliged to perform a duty or function or exercise a power relating to an NCA investigation if the relevant criminal activity is not ‘federally relevant criminal activity’ or the imposition of the obligation is constitutionally impermissible.

Items 38 & 39 are transitional provisions relating to notices in force under subsections 13(1) and 14(1) of the Principal Act. **Item 38** provides that the amendments in the Schedule do not affect the validity of notices under subsection 13(1) which were in force before the commencement of the *National Crime Authority Amendment Act 2000*—that is, notices given by the Commonwealth Minister referring a matter to the NCA for investigation. **Item 39** provides that the amendments in the Schedule do not affect the validity of notices issued under subsection 14(1) of the Principal Act before the commencement of the *National Crime Authority Amendment Act 2000*—except as those notices relate to offences lacking a federal aspect.

Similar transitional provisions are found in **items 40-45** which relate to the validity of requests for information³³, notices requiring information³⁴, warrants³⁵, orders for the delivery of passports³⁶, summons³⁷ or notices requiring the production of documents³⁸—so long as the relevant NCA investigation relates to a federally relevant criminal activity.

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Concluding Comments

The implications of the decision in *Hughes* have yet to be fully explored, so too the extent to which Commonwealth-State cooperative legislative schemes can and must be amended as a result of the decision. The Bill attempts to draw on the principles so far elucidated by the Court in order to provide a secure constitutional underpinning for NCA activities under State law. However, the uncertainties that remain after *Hughes* may result in the provisions of Commonwealth-State cooperative schemes being challenged on a case-by-case basis. As Kirby J remarked in *Hughes*:

If a gap in the legislation is found—either because of the omission to provide a critical power or because of the enactment of crucial provisions beyond constitutional power—this court must say so, leaving it to legislators and officials to sort out the consequences.³⁹

Endnotes

- 1 (2000) 171 ALR 155.
- 2 See *R v. Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 per Gibbs CJ at 552.
- 3 *R v. Hughes* (2000) 171 ALR 155 at 174–5.
- 4 *ibid* at 185–6.
- 5 *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, p. 3.
- 6 *Parliamentary Debates (Hansard)*, Senate, 10 November 1983, p. 2492.
- 7 Section 4.
- 8 Section 4.
- 9 Section 4.
- 10 National Crime Authority, *1998-99 Annual Report*, p. 3.
- 11 Section 13.
- 12 Section 14.
- 13 A Leaver, *Investigating Crime. A Guide to the Powers of Agencies involved in the Investigation of Crime*, LBC Information Services, Sydney, 1997, p. 350.
- 14 Section 30.
- 15 Section 31.
- 16 Such warrants are executed by the Australian Federal Police.
- 17 *National Crime Authority (Territory Provisions) Act 1991* (ACT); *National Crime Authority (Territory Provisions) Act 1985* (NT); *National Crime Authority (State Provisions) Act 1984*

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- (NSW); *National Crime Authority (State Provisions) Act 1984* (Vic); *National Crime Authority (State Provisions) Act 1985* (Qld); *National Crime Authority (State Provisions) Act 1984* (SA); *National Crime Authority (State Provisions) Act 1984* (Tas); *National Crime Authority (State Provisions) Act 1985* (WA).
- 18 National Crime Authority, *op.cit.*, p. 94.
- 19 (2000) 171 ALR 155 at 161.
- 20 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ in a joint judgment; Kirby J in a single judgment.
- 21 Because the prosecution was of alleged offences involving overseas activities (bringing the external affairs power and the overseas trade and commerce power into play).
- 22 (2000) 171 ALR 155 at 163.
- 23 This would be inconsistent with Commonwealth law and thus invalid under section 109 of the Constitution.
- 24 (2000) 171 ALR 155 at 167.
- 25 (2000) 171 ALR 155 at 189.
- 26 (2000) 171 ALR 155 at 189.
- 27 Paragraph 11(1)(b) enables the NCA to investigate certain matters relating to relevant criminal activity on its own initiative. Paragraph 11(1)(d) empowers the NCA to coordinate investigations by Commonwealth, State or Commonwealth-State task forces.
- 28 Subsection 11(2) sets out the special functions of the NCA which are exercised following a reference from the Commonwealth Minister under section 13 or a State Minister under section 14.
- 29 Explanatory Memorandum, page 10.
- 30 *ibid.*
- 31 Subsection 12(11).
- 32 As a result of the constitutional separation of federal judicial power from legislative and executive power, a Chapter III judge cannot exercise non-judicial power except in certain limited circumstances. One of these is that a federal judge can consent to carrying out non-judicial functions in his or her personal capacity (the *persona designata* rule).
- 33 Under section 19A of the Principal Act.
- 34 Under section 20 of the Principal Act.
- 35 Under section 22 of the Principal Act.
- 36 Under section 24 of the Principal Act.
- 37 Under section 28 of the Principal Act.
- 38 Under section 29 of the Principal Act.
- 39 (2000) 171 ALR 155 at 170.

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