ACTS AMENDMENT (FEDERAL COURTS AND TRIBUNALS) BILL 2001

Second Reading

Resumed from 27 June.

MRS EDWARDES (Kingsley) [11.09 am]: The Opposition supports this legislation. The legislation amends a number of state Acts to delete provisions that previously purported to confer state jurisdiction on federal courts. It also makes minor changes to the Corporations (Western Australia) Act 1990. Those changes are consequential upon changes made to the Corporations Law by legislation of the Commonwealth Parliament. A few weeks ago, we presented legislation to further update the Corporations Law. What I will refer to will be consequential on a case before the High Court called Re Wakim. That case essentially determined that state laws cannot invest federal courts with federal jurisdiction.

A number of important concerns were raised in that case. During a debate the other day, the Attorney General and I agreed that many more bombshells would arise because of that case. It is important to bring to the attention of the House what we talked about. Many pieces of legislation will require consequential changes because they have attempted to cross-vest jurisdiction into the federal system. It is important to consider where we have been, what we have done and where we are likely to go in the future. I emphasise that there are potential dangers for the State Parliament and the state jurisdiction.

In his decision of the Wakim case, the Chief Justice of the High Court, Justice Gleeson, referred to some of the history of the case. He did it so well that I will refer to his decision, which provides the historical background for the reasons for this Bill. He said that legislation that provided for cross-vesting of jurisdiction between the federal, state and territory courts was enacted to take effect in 1998. Justice Gleeson's decision states -

> The Commonwealth legislation is the *Jurisdiction of Courts (Cross-vesting) Act* 1987. After the Bill had passed through the Houses of Parliament, but before it had been assented to, the Advisory Committee on the Australian Judicial System, in its *Report to the Constitutional Commission* . . . expressed doubts as to the validity of the legislation and drafted a constitutional amendment to support the proposal for cross-vesting. In 1988, in its *Final Report* . . . the Constitutional Commission recommended that the Constitution be amended to permit cross-vesting. However, the legislation was enacted without the support of any constitutional amendment.

The ACTING SPEAKER (Mr Edwards): Order! It has already been said this morning that the level of conversation is at such a level that I cannot hear the member and I am sure that the Hansard reporter is also finding it difficult. If members must have conversations, they should have them outside the Chamber.

Mrs EDWARDES: Subsequent to the decision of Re Wakim, the Standing Committee of Attorneys General discussed how they should overcome the problems of Re Wakim, including whether to make a constitutional amendment. So far, the only support for a constitutional amendment was driven by the then Attorney General, Hon Peter Foss. At one stage, that position was supported by the Attorneys General from Victoria and South Australia. Cross-vesting is an effective tool that allows the federal court to deal with the jurisdiction of a State. Matters that are before the federal court may have to be dealt with in that way in the future. Chief Justice Gleeson also stated -

> Cognate legislation, providing specifically for cross-vesting of jurisdiction in relation to matters arising under the Corporations Law, was enacted in 1989 and 1990. In 1995 there came before the Full Court of the Federal Court proceedings which raised questions as to the validity of the legislation. The Full Court upheld the legislation.

That was in the case of BP Australia Ltd v Amann Aviation Pty Ltd. Chief Justice Gleeson further stated -

> An appeal in one proceeding came to this court.

That was the case of Gould v Brown. Chief Justice Gleeson continues -

> The six Justices who sat on the appeal were evenly divided.

Justices Brennan, Toohey and Kirby held that the legislation was valid, and Justices Gaudron, McHugh and Gummow held that it was invalid. Chief Justice Gleeson continues -

> The appeal was therefore dismissed, -

It was dismissed because a decision was not made, by virtue of section 23(2)(a) of the Judiciary Act 1903. Chief Justice Gleeson continues -

> . . . but the decision does not bind this Court in the present case.

Therefore, the High Court in Re Wakim could make a decision of its own because the appeal was dismissed because the judges were evenly divided. Chief Justice Gleeson continues -

> The Court now has before it further proceedings in which the validity of the legislation is again challenged.
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> The cross-vesting legislation has been commended as an example of the co-operation between the Parliaments of the Federation.

That has been the subject of many debates in this Parliament as to how we dealt with cross-vesting. It has proved to be an effective tool. Chief Justice Gleeson continues -

> Approval of the legislative policy is irrelevant to a judgment as to constitutional validity;

The support of the States, territories and the Commonwealth of the concept of cross-vesting does not necessarily determine the constitutional validity of such cross-vesting as it occurred in particular pieces of legislation. It was argued in the case that the legislation was unconstitutional and therefore invalid. The parliaments of the States and territories cannot, even by cooperation, amend the Constitution. Chief Justice Gleeson continues -

> The Constitution, in s 77(iii), provides that the Parliament of the Commonwealth may invest a court of a State with federal jurisdiction. What is presently the subject of challenge is the reverse process. Its convenience has been determined by the Parliaments.

That is, determined through legislation. Chief Justice Gleeson continues -

> The duty of the Court is to determine its legality . . . The question is whether the reverse process is effective without such an express grant of power.

Again, as I indicated, a constitutional amendment may be needed. Chief Justice Gleeson continues -

> The primary issue turns upon the meaning and effect of Ch III of the Constitution, which relates to the judicature.

For the purposes before court -

> . . . the important provisions of Ch III are ss 71, 75, 76 and 77. Section 71 provides that the judicial power of the Commonwealth shall be vested in this Court, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The Federal Court of Australia is one such federal court created by the Parliament. Section 75 provides that this Court shall have original jurisdiction in certain kinds of matter. Section 76 empowers the Parliament to legislate to confer original jurisdiction on this Court in certain other kinds of matter.
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> The laws of the Parliament of the Commonwealth presently in question provide that the Federal Court may exercise jurisdiction conferred on that court by a law of a State. These are said to be laws by which the Parliament "consents" to a federal court being invested with State jurisdiction. They do not refer to any of the matters mentioned in ss 75 and 76.

That is the basis for a potential constitutional amendment. Chief Justice Gleeson continues -

> It is acknowledged that there is no provision in Ch III which either adverts to the possibility that a State Parliament may enact legislation conferring jurisdiction on this Court, or another federal court, or empowers the Parliament of the Commonwealth to consent to such a course. It is said, however, that Ch III is only concerned with the judicial power of the Commonwealth, and that what is here in question . . . The Parliament of a State . . . has power to vest jurisdiction to decide matters arising under its laws in courts other than courts of that State, including federal courts. An attempt to exercise such a power may, in the absence of Commonwealth agreement, be frustrated by the operation of s 109 of the Constitution. However, with Commonwealth agreement, there is nothing to prevent the effective vesting, by State legislation, of State judicial power in a federal court.
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> It may be doubted that, when the Federal Court exercises State jurisdiction conferred under the cross-vesting scheme, it is exercising power which is divorced from the judicial power of the Commonwealth.

These issues are discussed further in the case of Macks, to which I will refer later.

Chief Justice Gleeson continued -

> The power to enforce an order of the Federal Court, for example, comes from s 53 of the *Federal Court of Australia Act* 1976 (Cth). Furthermore, as Gummow J pointed out in *Gould v Brown*, when the legislative basis for appeals within the federal jurisdiction is considered, the assumption that a neat division between the judicial power of the Commonwealth and State judicial power can be maintained

> is questionable. However, the argument advanced in support of the legislation is challenged on more fundamental grounds.

Justice McHugh said -

> I do not think that it can be seriously doubted that, if Australia is to have a system of federal courts, the public interest requires that these courts should have jurisdiction to deal with all existing controversies between litigants in those courts.

Of course, the courts often deal with what has been referred to as "accrued jurisdiction", in an endeavour to pull together the respective matters between litigants in those courts. He went on to say -

> . . . the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest.

If there is a need for the Constitution to be amended, it must be taken before the people of Australia. He continued -

> The function of the judiciary, including the function of this Court, is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention.

Justice McHugh then said that the cross vesting legislation was invalid.

> My reasons for reaching the conclusion that the *Corporations Act* 1989 and the *Corporations (New South Wales) Act* 1990 are invalid in so far as they purport to give the Federal Court of Australia jurisdiction to exercise State judicial power . . .

He referred to his decision in Gould v Brown. The reasons he gave in Gould also lead to the conclusion that those cross vesting pieces of legislation -

> are also invalid in so far as they purport to give the Federal Court of Australia jurisdiction to exercise State judicial power.

He goes on to say that his reasons for this come from section 71 of chapter III of the Constitution, which -

> . . . gives the Parliament of the Commonwealth the power to create federal courts to exercise the judicial power of the Commonwealth. But as Dixon CJ, McTiernan and Kitto JJ pointed out in *Cockle v Isaksen*, "the jurisdiction which a federal court so created may exercise cannot come from s 71 alone. It must be conferred and defined by the exercise of further legislative power." Sections 75, 76 and 77 of Ch III of the Constitution give the Parliament that legislative power by empowering it to confer jurisdiction on federal courts in respect of the "matters" specified in ss 75 and 76.

It is very limited. He continued -

> State jurisdiction or State judicial power is not one of those "matters". If a federal court, or for that matter a State court, is invested with jurisdiction to determine a matter under ss 75 and 76, it is exercising federal jurisdiction even when State law must be applied in the proceedings. If State law is determinative in a legal proceeding but there is no "matter" within the meaning of ss 75 and 76, the court determining the rights and liabilities of the parties is exercising State judicial power and its authority to decide those rights and liabilities is an exercise of State jurisdiction.

Further down he said -

> Consequently, the Parliament of the Commonwealth can only invest federal courts with jurisdiction to decide the "matters" specified in ss 75 and 76 of Ch III of the Constitution.

He continued -

> That being so, it is clear that the Parliament of the Commonwealth cannot give a federal court jurisdiction to exercise State judicial power.

In their joint judgment, Justices Gummow and Hayne said -

> The decisions in this Court concerning what has been called the "accrued jurisdiction" of the Federal Court have arisen in cases where the claims have been made in the one proceeding.

Of course, one of the dangers I referred to earlier is that the Federal Court might expand the notion of federal jurisdiction. Therefore, by adding to what is now regarded as accrued jurisdiction, it could exclude state jurisdiction. As such, it would totally exclude state law. That is a potential danger arising from this case - that the Federal Court may expand what it has used in the past as accrued jurisdiction. It makes a lot of sense. One reason cross vesting was considered in the first place was because it was seen as an effective tool for matters that

covered both federal and state jurisdictions or Acts as it would allow one court to determine the matter. That often occurs under contract law, which is covered by the Trade Practices Act 1974. Contract law is covered by common law and comes under state jurisdiction; however, the Trade Practices Act is a federal Act. Therefore, it is convenient for those matters to be heard in one proceeding, rather than going through two courts. Justices Gummow and Hayne said -

> What is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships". There is but a single matter if different claims arise out of "common transactions and facts" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide". So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination.

They continued -

> Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter.

As such, there are good, solid reasons for one court to exercise joint jurisdiction. On accrued jurisdiction, Justices Gummow and Hayne said that in the case of Phillip Morris, Chief Justice Barwick found -

> . . . that the exercise of the "accrued" jurisdiction "is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter". In *Stack*, Mason, Brennan and Deane JJ refer to this proposition with approval but say that the idea is similar to the process of identification of a related matter mentioned in *Fencott* as being "a matter of impression and of practical judgment". There may be some difficulty in analysing the question as one of "discretion". It is not clear what principles or criteria would inform the exercise of a discretion of this kind. It may be that the better view is that the references to "discretion" are not intended to convey more than that difficult questions of fact and degree will arise in such issues - questions about which reasonable minds may well differ.

Again, that is where there is a potential for the Federal Court, with subsequent support from the High Court in terms of accrued jurisdiction, to expand its powers and to perhaps, in a way, get around Wakim. The danger is that it will make it exclusive of state jurisdiction, so rather than this State Parliament determining which powers it will vest in a federal jurisdiction, the court itself would start to decide, albeit on reasonable and practical grounds. Following the case of Wakim, in which it was held that the cross vesting legislation was invalid, the case of Re Peter Ivan Macks & Ors attempted to declare that legislation invalid. In the 1990s, the States enacted legislation that would give them retrospective legislation to cover matters that might have been declared invalid under Wakim. Macks attempted to determine that that legislation would be regarded as invalid. It was basically remedial legislation and it was put to the test. Fortunately, it was held to be valid legislation under that case. The case of Macks relates to how the Federal Court determines its jurisdiction and how the remedial legislation should be interpreted. Macks relates to events during 1995 and 1996. The Federal Court had made orders for a number of companies of a particular group to be wound up and for Peter Ivan Macks to be appointed as liquidator. Those companies were incorporated in both South Australia and Queensland. The basis of the case was that -

> One feature of the scheme of legislation of which cross-vesting was a part, was that it contemplated that, although a company may be wound up by, for example, the Federal Court, orders varying the winding up order, or other orders in the winding up, might be made by, for example, the Supreme Court of South Australia.

Having regard for the history of doubts about the validity of certain aspects of cross-vesting, the States understandably moved after 17 June 1999 to enact the remedial legislation. The validity of that part of remedial legislation was considered and upheld. The judgment continues -

> One ground upon which the argument of invalidity is based is that the State Jurisdiction Acts are inconsistent with the *Federal Court of Australia Act* 1976 . . . Thus, it is said, s 109 of the Constitution applies.

That would mean that the federal legislation took precedence over state jurisdiction. The Chief Justice points out -

> . . . the identification of the legal effect of those provisions, referred to earlier -

Those are in the remedial legislation -

> becomes critical. The State Jurisdiction Acts operate to confer, impose and affect rights and liabilities of persons. They do that by reference to ineffective judgments of the Federal Court, as defined. They do not purport to affect those judgments.

That is the critical point of this decision -

> They do not purport to validate ineffective judgments of the Federal Court, or to deem such judgments to be judgments of the relevant State Supreme Court. The hypothesis upon which the judgments are defined as ineffective is that they were made without jurisdiction because the State Act purporting to confer jurisdiction was invalid . . . The rights and liabilities declared by s 6 are the same as if an ineffective judgment had been a valid judgment of a State court. They are rights and liabilities of a kind which State Parliaments have legislative power to impose.
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> There is no direct inconsistency involved in a State law declaring the existence of a right or liability which is the same as that arising, directly or indirectly, under a Commonwealth law. The question is whether the Commonwealth law evinces an intention "to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed." . . .
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> The Federal Court Act does not evince an intention to cover a field which includes the rights and liabilities of persons affected by orders, valid or infirm, of the Federal Court. . .
>
> It is unnecessary to decide whether there is inconsistency between the appeal rights purportedly given by the State Jurisdiction Acts and the Federal Court Act. If there were such inconsistency the State Acts could, and should, be read down.

However, as the Chief Justice goes on to decide, the case for the applicants substantially failed. The States' jurisdiction legislation was held to be valid. Justice Gaudron, in judgment, provides a succinct summary of where we are at -

> Since the decision in *Re Wakim,* each State has enacted legislation, the short title of which is the *Federal Courts (State Jurisdictions) Act* 1999 . . . The State Jurisdiction Acts are, in substance, identical. In general terms, the Acts are designed to ensure that, where certain orders have been made by a federal court in purported exercise of jurisdiction conferred by a State law, including orders under a State Corporations Act, the rights and obligations of the parties are the same as those specified in those orders. It is that legislation which is in issue in these proceedings . . .
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> Once it is appreciated that the State Jurisdiction Acts do not interfere with the jurisdiction of this or other federal courts, the argument that they are, on that account or to that extent, repugnant to Ch III of the Constitution must be rejected . . .
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> The State Jurisdiction Acts are valid save to the extent that they purport to allow for the modification of rights and liabilities embodied in a federal court order that has not been set aside.

That is a background to the legislation before us. As I said, the Bill seeks to amend a number of state Acts by deleting the provisions that purport to confer state judgment. The Federal Courts (State Jurisdictions) Act is retrospective so that actions in any matter prior to Re Wakim - or in the process or on foot - are valid. The latest judgment means that all State and Territories must go through legislation that seeks to confer state jurisdiction on the Federal Court and endeavour to claw back that legislation or, in some instances, refer the power. That is another potential danger. The States must decide whether to refer more state powers to federal jurisdiction. That can be a big trap. Corporations Law is a big issue as companies operate across borders. It would be difficult for them to operate in two jurisdictions, particularly as cross-vesting is no longer held to be valid. As such, those powers needed to be referred. The Federal Court, in its wisdom, is making judgments of accrued jurisdiction with respect to commonwealth power. The issue is whether the Commonwealth Parliament can make that accrued jurisdiction exclusive of state jurisdiction. If the Commonwealth amended federal laws dealing with those areas of accrued jurisdiction, would they totally exclude state law? That is one of the other dangers we face. It may be that the only satisfactory solution is to amend chapter III of the Constitution. I do not know the Attorney General's view on that.

Mr McGinty: I would favour a referendum to do that.

Mrs EDWARDES: I think it would be the only satisfactory solution to this problem. As we said the other day, although we have already had a couple of bombs as a result of the Re Wakim decision, a few more will probably arise. We spoke last year about censorship legislation as a result of Re Wakim and Hughes. I am sure that that is still on the agenda of the Standing Committee of Attorneys General. The issue for us in Western Australia

arose when the federal Government enacted legislation that overrode our legislation dealing with Internet laws. The Internet now comes under the jurisdiction of telecommunications. The federal Government does not like including penalties, particularly those involving imprisonment, in its telecommunications legislation. The federal Government overrode our legislation making pornography on the Internet an offence, and our imprisonment penalties are no longer valid. Despite the arguments I had with the federal Government over that, it persisted with its view of the world. One of the dangers of referring state powers and jurisdictions is that the States' view of the world does not necessarily reflect decisions originating from Canberra.

We in Western Australia are innovative. I do not know whether it is because of our isolation - sometimes the tyranny of distance can have a positive effect. We do things our own way, and we often do them first. Some of the changes we have made in the area of censorship have been picked up by the federal Government. However, the federal Government, as a matter of policy, does not believe in imprisonment for breaches of telecommunications laws, and the Internet comes under that legislation.

I think the federal Government is wrong. I will continue to argue that the Western Australian legislation for sentencing people who have breached the Act has been successful; in particular in dealing with child pornographers and paedophiles who operate on the Internet. The penalty imposed should not be inconsistent because such material is contained in books and other written material compared with the Internet, which has a wider market. I will argue vehemently on that. That is another piece of legislation that will come under scrutiny because of the decision of Re Wakim.

In summary, the Opposition supports the Bill, which came about from the Re Wakim case that I have been through in some detail in this House. I have done that, because this will not be the only occasion on which we will discuss the Wakim decision. We will talk about Re Wakim and subsequent cases for a long time to come as we find that legislation dealing with cross-vesting causes problems in the enforcement of orders. Under the Corporations Law, States conferred those powers on the federal jurisdiction.

The other problem I identified is accrued jurisdiction in federal courts. That is not to say it is not an appropriate way to determine matters; accrued jurisdiction is often a convenient tool for courts to determine matters, particularly if they are likely to get a decision in one jurisdiction that may be inconsistent with that of another jurisdiction and it is on the same matter. Accrued jurisdiction is an important tool, but it may create an opportunity for a jurisdiction to be expanded and therefore create a notional federal jurisdiction excluding the state jurisdiction. That is a potential problem, because the State Parliament will have no power over the extension of that power that has been given by the Federal Court. Obviously there will be limitations on the Federal Court and if at any time it overextends the definition of accrued jurisdiction, that will be the subject of an appeal to the High Court. We have heard that the High Court will deal with the decision on the facts and the merits of the case. The High Court cannot change the Constitution; it must determine the validity of those pieces of legislation according to the Constitution. That is a real problem when state jurisdiction is conferred on federal courts. As I have said previously and on this occasion, perhaps the only way out of this - which is a position put strongly by the former Attorney General and agreed to by the current Attorney General - is an amendment to the Constitution to allow cross-vesting of state matters to the federal jurisdiction. I support the Bill.

MS QUIRK (Girrawheen) [11.45 am]: I am pleased to support the Bill that clarifies a range of commonwealth-state cooperative schemes that confer jurisdiction on federal courts and tribunals following the High Court's decision in Re Wakim. The consequences of this decision, and others such as the Hughes case, have been widely canvassed in legal circles and also comprehensively by the member for Kingsley, so I do not intend to reiterate those matters today. However, as the Bill amends the National Crime Authority (State Provisions) Act 1985, it is apposite to make some general observations about the utility of that legislation and the role of the authority within law enforcement in Western Australia. Members should be under no illusion that the proposed amendments to the National Crime Authority (State Provisions) Act will enable the authority to function fully in this State.

As has been raised in this place for a number of years, the Act in its present form contains provisions which, frankly, hamper comprehensive investigation of organised crime. This was most graphically raised in the context of the investigation of the outlaw motorcycle gangs in this State. The operation known as Operation Panzer was referred to the NCA in Perth by the then police minister Kevin Prince, so that the so-called coercive powers of the NCA could crack the notorious code of silence under which the OMCGs tend to conduct their affairs. In hindsight that referral was either naive or politically expedient, because anyone with a passing knowledge of the Act would know that while privilege against self-incrimination was enshrined in the Act, no gang member or associate could ever be forced to give inculpatory evidence. Similarly, the minister would have known that those who did not cooperate to the extent of claiming that privilege but, instead, refused point blank to assist in the investigation, could do so with impunity. Under the existing Act, refusal to answer carries a

maximum penalty of $2 000 or six months imprisonment. The tariff for such matters that has been set in recent years tends to be a fine of between $500 and $750.

In a case in which an OMCG member had a prior conviction for such an offence, he received a suspended sentence of two months. What is most unsatisfactory about these sanctions is that these matters were only finally determined by the courts a number of years after the offence and the refusal to respond to questions had been committed. At that stage, the momentum in the investigation had been lost; and when the information sought was finally secured from the witness, it was no longer current or of any utility. I am pleased to note that at a federal level, some steps have been taken to remedy this defect in the federal National Crime Authority Act 1984, which will limit the circumstances under which the privilege against self-incrimination can be invoked. However, I also understand that the proposal to enshrine a contempt provision has been eschewed by my federal colleagues and by the Australian Democrats. That is a matter of some regret to me. This leaves open the option of the witness choosing strategic silence, the consequences of which I have already outlined.

The other matter of some regret is that these amendments to the federal Act have taken many years to implement. Although the federal Minister for Justice and Customs is the person responsible for the NCA at commonwealth level, the federal Attorney General must take some responsibility for the glacial speed in which his department has been prepared to facilitate enactment of these changes. This is relevant at the state level because under this cooperative scheme, the usual practice is for amendments to NCA legislation to be made firstly at the commonwealth level, and thereafter by the respective States. It is hoped that once the federal legislation is passed, that complementary state Act can be enacted with more expedition. I am assured by both the Attorney General and Minister for Police that they intend to act promptly in this regard.

These concerns are not just academic. Recent tragic events surrounding the murder of Don Hancock, who was shortly to give evidence before the coroner, graphically illustrate that powers need to be conferred for such contingencies. There is very little utility in jumping into action once an event has occurred. By the time the additional powers sought have been enacted, the evidentiary power is well and truly cold. This event also illustrates that it is imperative to demonstrate to would-be criminals that the community will not countenance such sickening behaviour and that authorities will be meticulous in taking timely measures that will not only facilitate apprehension of the perpetrators but also deter them in the first instance.

In the past in similar matters, the NCA has been asked to assist the WA Police Service when a joint task force has been formed. Under this arrangement, the NCA has assisted by using its so-called coercive powers to summon witnesses before it.

However, for the reasons I have already stated, this is becoming a diminishing utility, especially so long as the outlaw motorcycle gangs maintain the privilege against self-incrimination and so long as the penalties for refusing to answer or to be sworn are so ludicrously inadequate. As I said earlier, I have been assured by both the Attorney General and the Minister for Police that to facilitate Operation Zircon, this matter is being handled with all expedition.

It is also timely in the context of looking at the National Crime Authority in this State to ask what is the utility of having a body such as the NCA. It is always a vexed question to ask how to judge the effectiveness or otherwise of a law enforcement body. To use numbers of arrests alone ignores qualitative measures and the complexity of the investigation. Similarly, it ignores the identity of the target and the impact and disruptive effect that a key arrest can have on a particular criminal syndicate. Recent outcomes in arrests for the NCA have not been impressive. However, it is also argued that the role of the NCA is broader than just arrests. It was created as a result of the Costigan royal commission, which found that there was little capacity for state law enforcement agencies to pursue investigations with multi-jurisdictional aspects. In the 15 years or so since Costigan, however, law enforcement in this country has changed markedly. There is the Australian Bureau of Criminal Intelligence, which disseminates criminal intelligence throughout the country. All police forces work together closely on common targets. An electronic surveillance capacity granted by warrant in one State can often be readily extended in other jurisdictions with a relative facility. Generally, communication and information technology has improved markedly to enable better dialogue between operational officers in different agencies in different jurisdictions. Also, the methodologies employed by the NCA are no longer unique or novel. Most law enforcement agencies have some multidisciplinary component, employing unsworn civilian staff such as intelligence analysts, accountants and lawyers. However, I would be pleased to see additional forensic accountants at the Western Australia Police Service.

Moreover, in recent years, the NCA has undertaken work which, frankly, should more properly be done by other agencies. It has done so; however, because the federal Government has made funding contingent on its undertaking that work. For example, Operation Swordfish dealt with a number of tax avoidance schemes, many of which impacted on the member for Kalgoorlie's constituents. In that case recurrent funding was contingent upon tax assessment revenues being secured. Normally, one would have anticipated that the Australian Taxation

Office would have conduct of such matters; however, it appeared to be fully occupied in implementing the goods and services tax. Most of the schemes were not complex and did not require the kind of specialist investigative expertise that the NCA could offer. One can only speculate on the quantum of revenue lost while the ATO took its eyes off the ball. I have also been informed that the Australian Taxation Office has refused to look at outlaw motorcycle gangs that have significant assets and unexplained wealth, on the basis that it believes it can leave it up to law enforcement agencies. I am aware of one case in which a tax assessment of over $1 million has been forgone by the Australian Taxation Office because it says that it is too fully occupied in enforcing the GST.

At a time when the NCA is struggling to define an ongoing role for itself, one must also ask why other agencies such as the Australian Federal Police appear to be achieving some impressive results. Most recently in Western Australia over a tonne of cocaine was seized, the largest haul of the drug in Australia. It appears, however, that the NCA in this State had no role whatsoever in the investigation. One possible answer is that the NCA is currently engaged in a navel-gazing exercise about its place in Australian law enforcement. While it is doing that, it has lost focus, leaving other law enforcement agencies to fill the vacuum. From my observations while at the NCA and subsequently, the current management of the NCA is not up to the task, morale is low and most staff now see the merger with the AFP as inevitable. I do not necessarily think that the merger is a bad thing; however, to do so by stealth is not the ideal way to achieve that outcome.

In March of this year, the Community and Public Sector Union - the union with coverage for all unsworn personnel at the NCA - issued a staff bulletin. In it the CPSU chronicled a range of management problems, which it contended required immediate remedial action if the NCA were to remain at the forefront of the fight against organised crime. The problems included poor human resource management practices; lack of transparency and fairness in staff selection processes; lack of appropriate delegation of decision making; confusion as to what constitutes complex national organised crime; lack of transparency in management decision making; creation of an environment of management by fear; excessive use of non-ongoing employment contracts; introduction of cliques within some workplaces, resulting in uneven and arbitrary treatment of staff; and restructuring being undertaken on the run, with no consultation with staff. Accordingly, a motion of no confidence in the chairman was passed. I understand that at least two state police services have threatened to withdraw their seconded staff as they have seen a continuing reduction in the service being provided by the NCA to those States in recent times.

Despite assertions of serious budgetary constraints, there has been a highly profligate and irresponsible financial decision-making regime at a management level, leaving few resources for operational work. It is little wonder that results have tapered off significantly. The concerning aspect of these trends is that a tension is being created between notions of risk taking and flexibility and those more traditional values of ethical practice and adherence to process. Similarly, in this climate, acting as the conscience of an organisation or offering advice fearlessly and independent of personal consequences is viewed as "career-limiting behaviour". In this context, recently quite a few staff of the NCA have fallen foul of the chairman or management by providing advice without fear or favour which management did not want to hear.

In this climate, it is hardly surprising that when the Chairman of the NCA recently made a throwaway line about the medical provision of heroin to addicts, he received little support. Despite the fact that this observation was taken out of context, it is interesting to note that his minister, Senator Ellison, the Prime Minister and the head of the Australian Federal Police all publicly and vehemently disagreed with the proposition. This speaks volumes about the extent to which the NCA currently has the respect of its law enforcement partners. In the report of these comments which appeared in *The Age* of 9 August this year is a Ron Tanberg cartoon. It depicts the Prime Minister being interviewed by reporters who say, "The NCA says law enforcement can't stop the drug trade" to which the Prime Minister responds, "What on earth would they know about it?" Unless the NCA demonstrates its relevance and that it can make a significant contribution to law enforcement in this country, such observations no longer will be the domain of cartoonists, but will also be the sentiment held by public policy makers more generally. The management team and Chairman of the NCA would be well advised to ensure that it has the legislative tools required to do its job, rather than focusing on an ideological witch-hunt which will not deliver outcomes, will demoralise and demean hardworking and committed staff, and will diminish corporate knowledge and expertise. This will place the NCA in competition with its law enforcement partners rather than its assuming a cooperative and coordination role.

MR PENDAL (South Perth) [11.58 am]: I will make a brief contribution to the Bill and express a number of concerns about not only the methodology but also the substance of the Bill. In one respect it is very difficult to give anything like a comprehensive response in 20 minutes as a private member, given that we are dealing with amendments to a number of important statues; that is, the Competition Policy Reform (Western Australia) Act 1996, the Corporations (Western Australia) Act 1990, the Federal Courts (State Jurisdiction) Act 1999, the Gas Pipelines Access (Western Australia) Act 1998, the Jurisdiction of Courts (Cross-vesting) Act 1987, the National

Crime Authority (State Provisions) Act 1985 and one or two others. Therein partly lies the difficulty in that we are dealing with a very comprehensive issue and members are being asked to address any concerns they have in the space of 20 minutes. One could argue that there is a better way of handling a Bill of this kind.

The second complaint I have, and I ask that the minister take it into account in the future, is that the second reading speech involved the minister speaking for in the order of six minutes. The second reading speech is deficient - hopefully this will not be repeated in the future - because it does not state the intention of the Bill, which is normally dealt with at that stage. An example is the area in which I am most interested and which I will address in a moment. The minister said in his second reading speech -

> This Bill therefore amends . . . the National Crime Authority (State Provisions) Act 1985.

That is all he said. I admit that clause notes were provided in the explanatory memorandum. I have been through the explanatory memorandum, but it is not really an explanatory memorandum at all. In the most cursory way, it gives a minute insight into what the amending clauses are intended to do. For example, at page 4 of the clause notes it is stated that clause 20 - I think it deals with the National Crime Authority - repeals section 52 which refers the application of the federal Court. With the greatest respect, that is not an explanation at all. I do not think that is adequate, particularly because these matters are not highly charged politically, at least in a party-political sense.

With that as background information, I move on to why I think the whole thing is pretty inadequate anyway. I have taken an interest in the National Crime Authority over the years, and have always wondered why there is one. I keep answering that question with another question mark on each occasion that another amending Bill comes to the Parliament. Again, after a lack of explanation in the second reading speech and in the clause notes, my understanding is that we are about to do the following with regard to the National Crime Authority. We will confer on the NCA, by Western Australian statute, the capacity to forestall a criminal's recourse to what the Americans might call taking the fifth amendment. We are heading off at the pass, our lack of capacity in Western Australian law by those amendments to the National Crime Authority (State Provisions) Act. I do not have any sympathy for the criminals involved of course; however, this begs the question - for me at least - that if we want to limit the right of suspects or citizens to remain silent, and if by extinction we want to force them into a position in which they have to answer questions, why are we not doing it under our Western Australian statute?

It seems to me that that reflects something of a malaise that we have allowed to develop in our Western Australian statutes in law enforcement over the past five or 10 years. For example, we have been consistently promised by Government after Government that we will get a modern Police Act. The Police Act in this State is one of the most disgraceful, archaic and probably eighteenth century statutes imaginable. If I recall correctly, it was written or passed by this Parliament in 1892 or thereabouts. That means it probably reflected the values and the practices within police forces anywhere up to 40, 50 or 60 years prior to that. We should be updating not only the Criminal Code in Western Australia, but also the Police Act. However, that is not happening.

I do not know where we are with the Police Act now, but I recall making a complaint when the member for Darling Range was the Minister for Police, and that was back in 1997. One of my complaints was that he was falling into the same trap as all other Ministers for Police, who said that they could not give any advice, guidance or direction to police commissioners. That was the biggest misunderstanding of successive police ministers, who had been snowed by commissioners for generation after generation. It was simply not true, but everyone had been led to believe that it was. If I remember correctly, it relied on section 8 of the Police Act that had nothing to do with what the ministers thought it had everything to do with. Therefore, members were told to be a little patient because there would be a new Police Act. That was at least five years ago, and the Police Act is now 109-years-old. Is it no wonder that bikies and people of criminal intent are always a mile in front of the police and other law enforcement agencies in Western Australia, when we have tied the hands of police behind their backs for decades and generations by an Act that is totally inappropriate for the year 2001.

This brings me back to the Bill before the House. I have some difficulties with limiting people's right to remain silent -notwithstanding the appalling activities in America in the past 48 hours - because we still live under a system, which we ought to cherish, that it is up to the State, the authorities and other people to demonstrate that person A or person B is guilty. It is not up to person A or person B to demonstrate that he or she should not be the subject of an inquiry. Even against the background of those awful events of the past 48 hours, I have some difficulty saying that we should remove those sort of limitations. However, I have a particular problem with removing them in the space of a Bill that does not explain itself, that has an explanatory memorandum that is not explanatory, and that finally will export to a commonwealth agency the powers that this Parliament is not prepared to put into a Western Australian statute. In Australian law, the day-to-day responsibility for investigating and enforcing the laws is with the police forces, and, by extension, that generally means the state

police forces. Yet little effort has been made, certainly in the time that I have been a member in the two Houses of this Parliament, to update the statutes for those state investigators.

Here we are back again, plugging another hole in the leaky ship of investigative work, by using the powers of a federal agency to give to our police a power which is said to limit their capacity to fight crime. I find that a really circuitous route, and it makes me ask the question: Why do we not solve more of the serious crime in this State than we do? The answer, it seems to me, is that we do everything imaginable to put impediments in the way of those people whose task it is to solve crime.

The Bill will pass, because that is the nature of these things, but I have stated my concerns. I do not even begin to address, at this stage, the question of further limiting the rights of people to remain silent. Members must keep reminding themselves that it is all very well to be talking unsympathetically about bikies, terrorists and other people for whom none of us has any sympathy, when, within the context of that, we are limiting the rights of everyone. Innocent people may well eventually pay very serious penalties, because the fear of bikies and terrorists has been allowed to limit the way in which ordinary citizens can go about their business, and the way in which those ordinary citizens can refuse to answer questions. I have a grab bag of concerns about this legislation.

The Attorney General seems to be in a bit of a reforming mode at the moment. I support some of his reforms, and oppose some, while I do not know what to do about others. I would like him to assure me that, if the Government is taking the path of reform, the concerns I have raised will not be discounted. If it is good enough for Western Australia to import into its legislation from the National Crime Authority the limitation of certain rights, then why is the Government not importing those rights directly into its own legislation? Whatever the Attorney General may say to that, it does not give me any great level of comfort to think that the Government may be doing that in the state jurisdiction, because of the concerns I have already expressed.

I am not unmindful of the fact that our police have a horrific job. Our prosecutorial personnel have a very difficult row to hoe against all sorts of other influences which seem to militate against the guilty being brought to justice. It is always really difficult to know whether or not we fall a percentage point on either side of that very fine line. It really concerns me, in any event, that such important legislation, dealing with important powers, should be dealt with in such a perfunctory way, with a second reading speech lasting six minutes, and the concerns I have raised dealt with in less that one line. I hope that will not be repeated, because it may well put members in a position of voting against the legislation as a matter of principle because of its lack of definition and explanation. With those very serious concerns, I signify my support for the Bill, but hope the Government will take into account the matters I have raised.

MR McGINTY (Fremantle - Attorney General) [12.15 pm]: I apologise to the member for South Perth, and I hope I can allay the concerns he has raised. I begin with an apology, because, in the brief discussion between the member for South Perth and me before he took the floor, it may have been that I inadvertently led the member to certain conclusions about the Bill. This Bill seeks to repeal redundant provisions from several pieces of legislation. The provisions are redundant because the decisions of the High Court of Australia in Re Wakim and others meant that it is not constitutionally possible for the State to confer jurisdiction on federal courts. This Bill goes no further than seeking to repeal those provisions that no longer have any operative effect. That is the reason the explanatory memorandum is brief. I accept the point of the member for South Perth that the memorandum is not clear enough.

A Bill is currently before the federal Parliament that seeks to abridge the right of a person to rely on the privilege against self-incrimination. That Bill has not yet passed the federal Parliament, but if it does, it will be necessary for the Government to introduce further legislation to reflect that at a state level. At this stage, that legislation is only prospective. Similarly, in response to the murder of Don Hancock, consideration of appropriate policing powers is being given priority at a state level, and further announcements will be made on that matter in the future. At present, this legislation only goes to the extent of repealing redundant provisions. The others are matters of hot contention in the federal Parliament, and will no doubt be the same in the State Parliament, most probably as the next step in this process.

Mr Pendal: Is the Attorney General saying that these provisions have been made redundant because of a High Court decision?

Mr McGINTY: Yes.

Mr Pendal: If the High Court has struck down these provisions, why does this Parliament need to go to the trouble of repealing them?

Mr McGINTY: The point made by the member for South Perth is perfectly valid.

Mr Pendal: Why can the provisions not be left there?

Mr McGINTY: That could be done, and it would have exactly the same legal effect. This is a tidying up exercise. The points raised by the member for South Perth are still matters of hot contention, in any event. The explanation given should not present a barrier to the member supporting this legislation. I thank the member for Kingsley for her erudite description of the law as it stands, and similarly the member for Girrawheen, for addressing the problems in the NCA, of which she has some first-hand knowledge. The valid point she raises is that, notwithstanding the reference to the NCA in respect to the death of Don Hancock, it will still be suffering under the two problems of inadequate penalties, when someone refuses to testify, and the presence of privilege against self-incrimination. That reference to the NCA is not perfect.

Mrs Edwardes: Will the Attorney General be consulting with his federal counterpart on the subject of the contempt provisions, as raised by the member for Girrawheen?

Mr McGINTY: That will happen, but as the member for Kingsley can appreciate, the current environment is a rather difficult one in which to communicate sensibly with our federal colleagues, on both sides, I suspect. With those comments I commend the Bill to the House.

Question put and passed.

Bill read a second time, proceeded through remaining stages without debate, and transmitted to the Council.