



FIRST SESSION OF THE THIRTY SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
CO-OPERATIVE SCHEMES
(ADMINISTRATIVE ACTIONS) BILL 2001
AND THE
AGRICULTURAL AND VETERINARY CHEMICALS
(WESTERN AUSTRALIA) AMENDMENT BILL 2001**

Presented by Hon Jon Ford MLC (Chairman)

Report 2

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

- 1.1 A *Legislation Committee* is established.
- 1.2 The Committee consists of 7 members.
- 1.3 The functions of the Committee are -
 - (a) to consider and report on any bill referred by the House;
 - (b) to review the form and content of the statute book;
 - (c) to inquire into and report on any proposal to reform an existing law;
 - (d) to consider and report on a bill referred under SO 230 (c).
- 1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3(a) at the second reading or any subsequent stage is excluded from the Committee's consideration.
- 1.5 The Committee of its own motion, or on a reference from a Minister, may inquire into and report to the House on any or all aspects, including policy, of a proposal for an agreement or arrangement that, to have effect, would necessitate the enactment of legislation of a type described in SO 230 (c).

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)	Hon Kate Doust MLC	Hon Paddy Embry MLC
Hon Peter Foss MLC	Hon W.N. Stretch MLC	Hon Giz Watson MLC
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ISBN: 0 7307 6445 1

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CHAPTER 1

EXECUTIVE SUMMARY

- 1.1 The Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 are products of a certain type of National Scheme, known as ‘cooperative scheme legislation’. Such legislation promotes uniformity across Australia on matters of national and regional importance.
- 1.2 The two Bills concentrate on one particular cooperative scheme, the National Registration Cooperative Scheme for Agricultural and Veterinary Chemicals (NRS), which has been constitutionally jeopardised as a result of *The Queen v Hughes*¹ (*Hughes*) and *Re: Wakim; Ex parte McNally*² (*Wakim*). However, other cooperative schemes are also at risk and as they become identified, they too will be brought under the protective umbrella of the Co-operative Schemes (Administrative Actions) Bill 2001, when that Bill becomes law. The Bills are designed to ensure the continuing effective operation of all cooperative schemes to which Western Australia is a party with the Commonwealth.
- 1.3 A cooperative scheme has its genesis in the Commonwealth enacting legislation to the extent of its own powers and then the States and Territories legislating to cover remaining matters. This co-mingling of legislative and administrative powers means participating jurisdictions can, by cooperation, achieve objects and perform functions, which separately would have been impossible.
- 1.4 A characteristic feature of a cooperative scheme is that it may confer functions and powers under State laws on Commonwealth authorities in a variety of situations. The *Hughes* decision has impacted on this particular feature, leaving an indelible legacy of uncertainty. *Hughes* essentially established that a conferral of power on Commonwealth authorities coupled with a duty by a State law, must be supported by a Commonwealth head of legislative power.
- 1.5 The Bills essentially relate to the administrative actions of Commonwealth authorities or officers who are performing State functions and exercising State powers. To overcome *Hughes*, the Bills firstly define the term “function” to now include the concept of a “duty”. This means that Commonwealth consent to the State’s conferral of powers and functions within a cooperative scheme to which the Bills apply, now

¹ (2000) 171 ALR 155.

² (1999) 163 CLR 511.

needs to cover duties as well as functions and powers. Secondly, the Bills validate any previous invalid administrative actions of those Commonwealth authorities or officers.

- 1.6 The Committee considers that validating the historical actions of Commonwealth authorities or officers is not, and does not reflect on any previous actions. Rather, the validation is to reinforce that those previous actions were legally sound.
- 1.7 Constitutionally, the validation must be by way of a declaratory clause and the basis for this is State Parliament's full, unlimited legislative power to declare certain rights and liabilities. Validation occurs through a deeming clause which retrospectively attaches to the administrative actions of Commonwealth authorities or officers, the same force and effects as would have ensued had the actions been taken by State authorities and officers.
- 1.8 The Committee had concerns with the retrospective nature of the clauses in the Bills but appreciates that there is no doubt as to the power of Parliament to pass such legislation. The validating clauses do no more than retrospectively validate anything done or omitted to be done before the commencement of the Bills, that were considered lawfully done prior to the *Hughes* case.
- 1.9 The Committee expresses concern that the scope of the definition of "relevant State Act" in the Co-operative Schemes (Administrative Actions) Bill 2001 is too wide and could include legislation that was never intended to be brought under the ambit of this Bill. Given time constraints the Committee was unable to pursue this matter.
- 1.10 The Co-operative Schemes (Administrative Actions) Bill 2001 provides a mechanism to protect schemes, other than the NRS, that may be affected by the *Hughes* decision. As schemes which may be 'potentially at risk' are identified, they too can be included under that Bill's protective umbrella by proclamation of the Governor.
- 1.11 Although it may be acceptable to use executive power to proclaim a particular State Act a "relevant State Act" to which the provisions of the Co-operative Schemes (Administrative Actions) Bill 2001 apply, the Committee believes that the exercise of executive power should be subject to parliamentary scrutiny. To do otherwise, means Parliament would not be given the opportunity to scrutinise these as yet unidentified cooperative schemes.
- 1.12 The Committee notes that the Commonwealth's alarm over the *Hughes* decision in relation to the National Corporations Law Cooperative Scheme has spread to other cooperative schemes and considers the Bills may be an over-reaction to *Hughes*. There have been no challenges since *Wakim* and *Hughes* to the constitutional framework of any other cooperative scheme and thus, there may be merit in adopting a 'wait and see' position.

- 1.13 The Committee has encountered great difficulty in obtaining information about the number and type of cooperative schemes existing between Western Australia and the Commonwealth. Although familiar with the Corporations Law National Cooperative Scheme, the NRS, as well as the Crimes at Sea Cooperative Scheme, the Committee has been unable to locate a register of all current and repealed cooperative schemes.
- 1.14 As stated in paragraph 1.2, the Bills concentrate on one particular cooperative scheme, the NRS. The Committee explored, with witnesses from Agriculture WA, whether the Bills impact on the day to day operation of that scheme and if the government can exercise any autonomy in relation to the regulation of agricultural and veterinary chemicals.
- 1.15 The witnesses confirmed that up to the point of retail sale, the State lacks autonomy, although there is latitude within the scheme for negotiation and consultation over disputed registrations of chemicals. However, the Committee reassures the Western Australian community that after the point of retail sale, the State retains total autonomy because it is able to fully control the use of chemicals.
- 1.16 The day to day operation of the NRS will continue unimpeded by the implications of the Bills. The Bills essentially ensure the constitutional backing for the existing legislation that establishes the Agricultural and Veterinary Chemicals Code and allows it to be applied and enforced in Western Australia.
- 1.17 The *Wakim* decision has also impacted on the Bills. It determined that State jurisdiction could not be conferred on federal courts because the Commonwealth Constitution forbids this practice. The effect of the decision is that the States can no longer cross vest jurisdiction in federal courts.
- 1.18 Cross vesting is an arrangement whereby one superior court exercises the jurisdiction of another superior court. It allows legal actions to be transferred between jurisdictions and consolidated so that one court can hear all the matters related to the one dispute.
- 1.19 The impact of *Wakim* has been so profound that Western Australia, in concert with other States, had to pass remedial legislation in the form of the *Federal Courts (State Jurisdiction) Act 1999*, to repair 13 years of ineffective judgments of the federal courts. Those judgments are now, by validation, treated as if they were judgments of the Supreme Court of Western Australia.
- 1.20 *Wakim* has directly affected Part 6 of the *Agricultural and Veterinary Chemicals (WA) Act 1995*. Part 6 contains clauses conferring jurisdiction on federal courts but the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 will repeal Part 6 and in doing so, restore constitutional certainty to the NRS.

RECOMMENDATIONS

Recommendation 1: The Committee recommends that a register of existing Western Australian cooperative schemes be compiled, gazetted and updated as required.

Recommendation 2: The Committee recommends that the Co-operative Schemes (Administrative Actions) Bill 2001:

- a) only apply to legislation enacted prior to the enactment of this legislation; and
- b) be amended in accordance with clause 4(2) in Appendix B.

Recommendation 3: The Committee recommends that clause 4 of the Co-operative Schemes (Administrative Actions) Bill 2001 be amended in accordance with Appendix B of this report which provides that:

- a) enactment (that a specified Act is a “relevant State Act” to which the provisions of the Bill apply) be by way of regulation not proclamation; and
- b) the operation of such regulation be postponed until after scrutiny by Parliament.

Recommendation 4: The Committee recommends that the Co-operative Schemes (Administrative Actions) Bill 2001 be passed subject to recommendations 2 and 3.

Recommendation 5: The Committee recommends that the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 be passed without amendment.

CHAPTER 2

INTRODUCTION

REFERENCE AND PROCEDURE

- 2.1 Following second reading, the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 were referred to the Standing Committee on Legislation (Committee) by the Legislative Council on May 29 2001 as part of a package of six Bills under Standing Order 230(c) for scrutiny. The first four Bills concerning the National Corporations Law Cooperative Scheme were scrutinised by the Committee in its first report to the Legislative Council, tabled on June 19 2001. These remaining two Bills stand referred to the Committee to report by June 28 2001.
- 2.2 Bills under Standing Order 230(c) are colloquially known as ‘30 day Bills’ in that the Committee has a very limited timeframe in which to scrutinise the many clauses of these so called ‘National Schemes of Legislation’ (National Schemes).
- 2.3 The 1996 Position Paper of the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia (Working Party)³ emphasised the critical need for effective parliamentary scrutiny of National Schemes because they evolve out of bodies like the Council of Australian Governments as well as various Ministerial Councils, and involve a method of lawmaking which the Working Party referred to as “*executive dominance vis a vis parliamentary scrutiny and assertiveness.*”⁴
- 2.4 National Schemes appear to challenge the sovereignty of the Western Australian Parliament itself and so the work of the Committee under Standing Order 230 is an attempt, in part, to preserve the role of Parliament as the legislature, and in doing so, maintain public confidence in the Western Australian Parliament. It is within this context that the Committee scrutinised the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001.

³ The Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996.

⁴ *Ibid.*, p. v.

- 2.5 The Committee notes that the Co-operative Schemes (Administrative Actions) Bill 2001, although similar to the Corporations (Administrative Actions) Bill 2001, was scrutinised separately because:

“... the Bill dealing only with corporations does not need to operate in the future. This is because corporations will be the subject of Commonwealth legislation while other cooperative schemes will continue to rely on State law.”⁵

- 2.6 This reliance on State law is an outcome of the fundamental nature of cooperative scheme legislation. That is, the Commonwealth first enacts legislation to the extent of its own powers and then the States and Territories legislate to cover remaining matters for which the Commonwealth has no power to legislate.⁶ Hence the continuing reliance of these cooperative schemes on State law.

INQUIRY PROCEDURE

- 2.7 The Committee resolved to form a Subcommittee to scrutinise the two Bills. The Subcommittee comprised Hon W.N. Stretch MLC (Convenor), Hon Giz Watson MLC and Hon Paddy Embry MLC. The Subcommittee met on 5 occasions. The Subcommittee thanks the staff of the Legislative Council Committee Office for their assistance in the preparation of this report.

COMMITTEE HEARINGS

- 2.8 The Subcommittee conducted a joint hearing with the Committee on June 11 2001. The Committee thanks Dr Jim Thomson, Legal Officer, Crown Solicitor’s Office, Mr Greg Calcutt Parliamentary Counsel, Ministry of Justice and Mr Peter Richards, Acting Commissioner for Corporate Affairs for their valuable assistance.
- 2.9 The Subcommittee conducted a hearing on June 20 2001. The Committee thanks Ms Katy Ashforth, Acting Manager, Legislation and Mr Peter Rutherford, Chemicals

⁵ Hon Nick Griffiths MLC, Minister for Racing and Gaming representing the Attorney General in the Legislative Council, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 29 2001, p. 562.

⁶ For example, the Commonwealth has little power to make laws with respect to public health under any of its specific heads of power, so the role of law maker therefore falls to the States and Territories, which may each take a different approach to law making. Jurisdictions have often sought uniformity in areas of public health legislation and laws affecting public health through cooperative arrangements. Examples of recent cooperative efforts include: the current work by the Australian and New Zealand Food Authority on nationally uniform food legislation; and therapeutic goods legislation passed by the Commonwealth, Victoria and New South Wales.

Coordinator, both from Agriculture WA for their valuable assistance. A copy of the transcript of evidence from this hearing is attached at Appendix C.

CHAPTER 3

THE CO-OPERATIVE SCHEMES (ADMINISTRATIVE ACTIONS)

BILL 2001

CONSTITUTIONAL BACKGROUND

3.1 For many years, the States have, with Commonwealth consent, conferred a variety of non-judicial powers and functions on Commonwealth officers and authorities under so called ‘cooperative schemes’. Challenges to such schemes had been made but the law confirming their validity had been settled back in 1983 by the High Court of Australia (High Court) in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*⁷ (*Duncan*). That case held that there was no constitutional difficulty with Commonwealth officers, like the Commonwealth Director of Public Prosecutions (Commonwealth DPP), performing functions under State laws so long as it could be demonstrated that:

- a State law conferred this function on the Commonwealth officer; and
- a Commonwealth law authorised the officer to perform that State function.⁸

What has happened to change this situation?

3.2 As Hon Nick Griffiths MLC, the Minister representing the Attorney-General in the Legislative Council, explained in the second reading speech, two High Court cases from June 1999 and May 2000 cast doubt on the constitutional underpinnings of a specific cooperative scheme known as the National Corporations Law Cooperative

⁷ (1983) 158 CLR 535. That case held that a scheme of cooperative legislation was The Coal Industry Tribunal which dealt with disputes in the coal industry. The Parliaments of the Commonwealth and NSW constituted this Tribunal. Powers were conferred and the intention was that the Tribunal exercise the totality of powers so conferred and thus be able to more effectively discharge its functions. It was argued, unsuccessfully, that the Commonwealth could not create an authority jointly with a State. Of this, Gibbs CJ said that the Commonwealth Constitution nowhere forbids the Commonwealth and State from exercising their respective powers in such a way that each is complementary to the other. Deane J said that cooperation between the States is in no way antithetic to the provisions of the Commonwealth Constitution, to the contrary it is a positive objective of the Commonwealth Constitution. The case shows that federalism and cooperation are not inconsistent.

⁸ Graeme Hill, ‘R v Hughes and the Future of Cooperative Legislative Schemes’, *Melbourne University Law Review*, Volume 24, No 2, August 2000, p. 3.

Scheme.⁹ These two cases were *The Queen v Hughes*¹⁰ (*Hughes*) and *Re Wakim; Ex parte McNally*¹¹ (*Wakim*).

- 3.3 However, after *Wakim* and before *Hughes*, two other cases further challenged the (former) National Corporations Law Cooperative Scheme. These were *Byrnes v The Queen*¹² and *Bond v The Queen*.¹³ In those cases, the High Court held that the Commonwealth DPP could not bring appeals against sentence in relation to offences against the former National Corporations Law Cooperative Scheme because the relevant Commonwealth and State provisions did not confer that power.¹⁴ The defendant in *Hughes* was clearly inspired by these constitutional defeats and some feared the worst when the challenge finally came before the High Court.¹⁵
- 3.4 The Commonwealth considered that the *Hughes* decision clearly jeopardised the operation of the National Corporations Law Cooperative Scheme and if the reasoning in *Hughes* was generally applied to other, less well known cooperative schemes, then their constitutional framework would also be in question. In relation to the National Corporations Law Cooperative Scheme, *Hughes* has given rise to great uncertainty as to the Commonwealth DPP's powers to prosecute for other kinds of offences and also as to the exercise of powers and functions by the Australian Securities and Investment Commission (ASIC).¹⁶
- 3.5 In relation to other cooperative schemes, the uncertainties are similar, that is a general uncertainty over the exercise of State powers and functions by Commonwealth officers or authorities. For this reason, the Western Australian Government considers that the Co-operative Schemes (Administrative Actions) Bill 2001 (Bill) is vital to

⁹ The Committee scrutinised the legislation supporting the constitutional framework of the Corporations Law Cooperative Scheme in its first report to the Legislative Council.

¹⁰ (2000) 171 ALR 155.

¹¹ (1999) 198 CLR 511.

¹² (1999) 164 ALR 164.

¹³ (2000) 169 ALR 607.

¹⁴ Graeme Hill, 'R v Hughes and the Future of Cooperative Legislative Schemes', *Melbourne University Law Review*, Volume 24, No 2, August 2000, p. 1.

¹⁵ Graeme Hill, 'R v Hughes and the Future of Cooperative Legislative Schemes', *Melbourne University Law Review*, Volume 24, No 2, August 2000, cites an example. He refers to *The Age* publishing an article titled 'High Court May Drive Nail into Corporations Law Coffin', *The Age* (Melbourne), 20 March 2000.

¹⁶ Dennis Rose, 'The Implications of the The Queen v Hughes for cooperative Commonwealth-State schemes', *Butterworths Corporation Law Bulletin*, 2000, No 10, p. 8.

restore certainty to the effective operation of various cooperative schemes to which Western Australia is a party.¹⁷

What are cooperative scheme laws?

- 3.6 Cooperative scheme legislation is one of five types of legislative structures which promote uniformity across Australia concerning matters of national and regional importance.¹⁸
- 3.7 Cooperative scheme laws are enacted, by agreement, in each participating State's Parliament so as to create a so called 'national legislative scheme' and the concept is born when the Commonwealth enacts legislation to the extent of its powers and then the States and Territories legislate to cover remaining matters. This co-mingling of legislative and administrative powers has meant participating jurisdictions can, by cooperation, achieve objects and perform functions which separately would have been impossible.

What are the characteristics of cooperative schemes?

- 3.8 A cooperative scheme has been described as an "*elastic [legislative] structure*"¹⁹ because variations can be made to accommodate requirements determined during the negotiation process. Other characteristics include:
- (by definition) the participation of the States and Territories;
 - one jurisdiction acting as host and enacting the legislation in the form agreed to by the executive branches of the other participating jurisdictions. The other participating jurisdictions then enact legislation which applies the legislation of the host jurisdiction;
 - an intergovernmental agreement underpins the whole concept and provides that participating jurisdictions must refrain from introducing separate legislation on any matter within the scope of the agreed legislation, and they must undertake repeal, amendment or modification of existing inconsistent legislation;

¹⁷ Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 29 2001, p. 562.

¹⁸ These five types were identified by the Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, Legislative Assembly, *Structures – A consideration of the different structures available for uniformity in legislation*, Report No 2, 1994, p. 1.

¹⁹ Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, Legislative Assembly, *Structures – A consideration of the different structures available for uniformity in legislation*, Report No 2, 1994, p. 9.

- participating jurisdictions have an ability to automatically adopt future amendments to the legislation by the host jurisdiction;²⁰
- conferring State laws on Commonwealth authorities in a variety of situations;²¹ and
- a central body or authority which ensures uniformity in the administration of the cooperative scheme.²²

Western Australian cooperative schemes

3.9 The Committee has encountered great difficulty in obtaining information about the number and type of current cooperative schemes between Western Australia and the Commonwealth. The Committee is familiar with the National Corporations Law Cooperative Scheme, the National Registration Cooperative Scheme for Agricultural and Veterinary Chemicals (NRS), as well as the Crimes at Sea Cooperative Scheme. However, the Committee has at this stage been unable, for various reasons, to locate a register of all cooperative schemes. The Committee notes that the Commonwealth has no up-to-date register and, since *Hughes*, is actively seeking information from its own agencies so as to compile a list.

3.10 Given the emphasis in the second reading speech on these High Court decisions, the Committee considers that a brief outline of *Hughes* and *Wakim* is of assistance to understanding the impact of the cases. The *Hughes* case is of direct relevance to this Bill whereas both *Hughes* and *Wakim* are relevant to the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 which is discussed in Chapter 4. For convenience, the outline of *Wakim* is provided at Appendix A.

²⁰ Western Australia did this for example in 1999 when Parliament passed amendments to the *Agricultural and Veterinary Chemicals Act 1995* affecting the NRS. The amendments dealt with animal foodstuffs that were exempt from the control of the Commonwealth Act.

²¹ Justice Kirby in *Hughes* at pp. 185-6 listed 19 Commonwealth Acts containing conferral provisions. For example, the *Therapeutic Goods Act 1989*, the *Aboriginal and Torres Strait Islander Commission Act 1989* and the *Australian Sports Drug Agency Act 1990*. However, not all cooperative scheme laws confer State powers on the Commonwealth. See for example, Western Australia's *Crimes at Sea Act 2000* cooperative scheme which was agreed to by the Commonwealth and the States in 2000 and applies the criminal law of the States extraterritorially in the areas adjacent to the coast of Australia. Where there is no conferral, the *Co-operative Schemes (Administrative Actions) Bill 2001* has no relevance.

²² Tasks range from administration to the setting of standards.

What happened in the Hughes case?

3.11 In 1992, Mr Hughes and Mr Bell²³ (Hughes and Bell) arranged for a group of investors in Australia to place \$300,000 offshore. Mr Bell raised the money and Mr Hughes completed the transaction by arranging for a USA securities house to clear the money. The idea was that the money, with profit, would be returned to investors in Australia through Mr Bell's company.²⁴ The Commonwealth DPP successfully prosecuted Hughes and Bell for three offences against section 1064 (1) of the Corporations Law (Cth), which provides that:

“... a person, other than a public corporation, must not make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest ...”

3.12 A prescribed interest included *“... a participation interest, meaning any right to participate in any profits, assets or realisation of any financial or business undertaking or scheme whether in Australia or elsewhere.”*²⁵

3.13 Mr Hughes appealed and the issues canvassed by the High Court were: could the *Corporations Act 1990 (WA)* confer on the Commonwealth DPP the function or power of instituting and conducting the prosecution of Hughes? Hughes challenged the power of the Commonwealth DPP to prosecute him in the District Court of Western Australia and wanted to quash the indictment for the offences under the National Corporations Law Cooperative Scheme. Hughes argued that:

- there was a lack of legislative authority under Commonwealth and State law for the Commonwealth DPP to prosecute him. That is, there was no link between the subject matter of the offences with which he was charged and Commonwealth heads of power;²⁶
- Western Australia's Corporations Law, in effect, renders offences against Western Australia's Corporations Law to be offences against the Commonwealth's Corporations Law; and

²³ Mr Bell was a finance broker.

²⁴ The investors were told they would double their money in 90 days. However, two years later only the principal had been returned.

²⁵ Section 9 of the Corporations Law (Cth).

²⁶ Commonwealth heads of power are those 39 matters listed in section 51 of the Commonwealth Constitution, for which the Commonwealth can make laws. They include, for example, trade & commerce, corporations, aliens, marriage, external affairs and quarantine.

- the Corporations Law (Cth) is supposedly enacted as a law of Western Australia, but the Western Australian provisions authorising the Commonwealth DPP to prosecute him for offences against the Corporations Law (Cth) are invalid because such a ‘transmutation’ is beyond the legislative competence of the Western Australian Parliament and contrary to the Commonwealth Constitution.
- 3.14 Justice Kirby, in a concurring but separate judgment to the majority, recognised the highly significant nature of Hughes’ arguments. He said:
- “...[the argument] presented a challenge to the scheme adopted for the regulation of corporations in Australia, of which the Corporations Law (Cth) is the centrepiece.*
- Unless the offences in the Corporations Law were valid and allowed to be the subject of prosecution in Western Australia by the Commonwealth DPP, the legislative and administrative scheme for the regulation of corporations in Australia would collapse.”²⁷*
- 3.15 Fortunately, the legislative and administrative scheme did not collapse because a majority of the High Court were able to identify both a provision under the Corporations Law (Cth) as well as a regulation²⁸ which operated to provide the authority that was needed under Commonwealth law to support the prosecution by the Commonwealth DPP for the offences Hughes committed. That is, the High Court found a legislative head of power. The importance of *Hughes*, in this respect, cannot be overstated. It established that a conferral of power on Commonwealth authorities or officers coupled with a duty by a State law, must be able to be referred to a Commonwealth head of power.
- 3.16 The High Court made a number of other observations including:
- A State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth.
 - A State law which supposedly grants a wider power/authority to the Commonwealth than that prescribed by the Commonwealth Constitution would be inconsistent and invalid under section 109 of the Commonwealth Constitution.

²⁷ (2000) 171 ALR 155 at 50.

²⁸ Section 47(1) of the Corporations Law and Regulation 3(1)(d) of the Corporations Law Regulations.

- The relevant Commonwealth provisions in the Corporations Law (Cth) imposed a duty on the Commonwealth DPP to perform the function of prosecuting State Corporations Law offences and to this extent required independent support under a head of Commonwealth legislative power.
- Even though the High Court found a legislative head of power in this particular case, argument and written submissions raised discussion of the validity of the operation of these laws of the Commonwealth with respect to the indictment and prosecution of future offenders.

What is the effect of Hughes on other cooperative schemes?

3.17 The Committee notes that *Hughes* has produced uncertainties in two areas. Firstly, uncertainties which stem from the suggestion that there might be a constitutional imperative for the Commonwealth to impose duties on the Commonwealth DPP to exercise State conferred powers and functions.²⁹ Secondly, uncertainties stemming from the statement that the Commonwealth might lack power to impose such duties in relation to the full range of State powers and functions conferred on Commonwealth authorities.

The effect of the Hughes judgment on the Bill

3.18 As stated in paragraph 3.1, the general principles described in *Duncan* in 1983 were accepted by the High Court in the *Hughes* case. However, *Hughes* considered a point not addressed in *Duncan*. This was whether the State functions that the Commonwealth may authorise its officers and authorities to perform are limited to functions that are connected with heads of Commonwealth legislative power. Mr Hughes argued that the Commonwealth provisions claiming to authorise the Commonwealth DPP to prosecute him under State Corporations Law offences are invalid when they are not supported by a Commonwealth head of legislative power.

3.19 The Committee considers this to be the central issue of the Bill. Do its clauses in fact, permit a Commonwealth officer or authority to validly perform a function, (now defined as including a ‘duty’ in clause 3) under State law and hence overcome the difficulty identified in *Hughes*?

PURPOSE OF THE BILL

3.20 The explanatory memorandum to the Bill establishes that the purpose of the Bill is to actively respond to doubts cast by the decision in *Hughes* on the “ability of

²⁹ (2000) 171 ALR 155, p. 34.

*Commonwealth authorities or officers to exercise powers and perform functions under State laws*³⁰ dealing with cooperative schemes.

3.21 The second reading speech refers to a number of objects in the Bill. These are:

“... first, the Bill will validate actions undertaken by Commonwealth officers before this Bill commences to operate by reason of that scheme ...

secondly, the Bill protects future actions undertaken by those Commonwealth officers by ensuring that they are under no duty to perform functions under the scheme. ...

*The Co-operative Schemes (Administrative Actions) Bill 2001 will continue to give certainty to the effective operation of various co-operative schemes to which Western Australia is a party.”*³¹

3.22 The third objective is a direct recognition that the cast of *Hughes* (in particular) is far wider than anticipated. Other schemes may well be in jeopardy because of *Hughes* and *Wakim*.

Administrative actions

3.23 The *Hughes* case said that it was questionable whether Commonwealth authorities/officers could exercise powers and perform actions of an administrative or legislative nature under State laws. The Bill aims to rectify this as its long title explains. Commonwealth authorities/officers are now permitted to exercise powers and perform actions of an administrative or legislative nature with impunity under State laws.

3.24 The Bill targets the administrative actions of Commonwealth authorities/officers who operate under:

- specifically, the cooperative scheme for agricultural and veterinary chemicals; and
- more generally, any other cooperative scheme to which the Bill is applied by proclamation of the Governor.

³⁰ Explanatory Memorandum of the *Co-operative Schemes (Administrative Actions) Bill 2001*, p. 1.

³¹ Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 29 2001, p. 562.

- 3.25 The long title makes it clear that the Bill relates to “administrative actions” by Commonwealth authorities or officers. An “administrative action” is defined in clause 3 as “*an act or omission of an administrative or legislative nature.*”
- 3.26 The Bill also validates any previous invalid administrative actions of those Commonwealth authorities or officers. This means that anything ineffectually done in the past by them is now “*good for the future and is taken to have always been as good, as it would have been if it had been done by a state authority.*”³²
- 3.27 The Committee considers that validating the historical actions of Commonwealth authorities or officers is not, and does not reflect on any previous actions. Rather, the validation is to reinforce that those previous actions were legally sound. Ms Katy Ashforth, Acting Manager, Legislation, Agriculture WA said:

*“The basic point is that the commonwealth officers exercise the functions and powers under the legislation, and these amendments will ensure that they are validly able to. They have always had the powers, functions and duties – to the extent that they were duties. They have always been there. ... it is still the same officer who will be performing all those things, but the effect of this quite complex legislation is to attempt by every means possible to give the Legislatures the necessary power to confer the duties ...”*³³

Validation of previous invalid administrative actions

- 3.28 Validation is achieved through clause 9 which is essentially a ‘declaratory clause’. Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, described this clause as being “*central to the Bill.*”³⁴ According to Mr Calcutt, any validation must be declaratory:

*“...[such a clause] declares that people’s rights and liabilities are the same as they would have been if something which may not have been the case was the case.”*³⁵

³² Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 23.

³³ Ms Katy Ashforth, Transcript of Evidence, June 20 2001, p. 3.

³⁴ Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 27.

³⁵ Ibid., p. 27.

What is the constitutional basis for validation?

- 3.29 Western Australia's State Parliament has always had a constitutional power to declare rights and liabilities and this ability flows from the fact that it possesses full, unlimited legislative power.³⁶

*"It is plainly within state power to [declare rights and liabilities] and it is the reason [the clause] is in that form, as opposed to trying to fix it any other way with any other form of words."*³⁷

- 3.30 The High Court case of *The Queen v Humby, Ex parte Rooney*³⁸ further supports this constitutional position.

How does validation occur?

- 3.31 Clause 8 of the Bill (a deeming clause which complements clause 9), retrospectively attaches to the administrative actions of Commonwealth authorities or officers the same force and effect as would have ensued had the actions been taken by State authorities and officers.³⁹

- 3.32 Dr Jim Thomson, Legal Officer, Crown Solicitor's Office, commented that the retrospective validating clauses are targeted at a "*fairly specific constitutional difficulty that is said to arise under Hughes*."⁴⁰ Dr Thomson doubts that the scope of the *Hughes* decision is as broad as feared and believes that the legislation "*has been born out of the abundance of caution*."⁴¹

Conferral of a duty

- 3.33 The long title of the Bill states that its clauses are enacted for "other purposes". One such purpose is to clarify that a State Act does not claim to confer a duty on a Commonwealth authority or officer to perform a function or exercise a power if that conferral of the duty is beyond the legislative competence of Western Australia.

³⁶ Full legislative power is legally known as "plenary" power.

³⁷ Hon Peter Foss, QC, MLC, Transcript of Evidence, June 11 2001, p. 27.

³⁸ (1973) 129 CLR 231. The Solicitor General for South Australia argued that it is the function of the State Parliament to pass laws which extinguish or create rights and liabilities. The High Court agreed with this argument.

³⁹ Explanatory Memorandum of the *Co-operative Schemes (Administrative Actions) Bill 2001*, p. 3.

⁴⁰ Dr Jim Thomson, Transcript of Evidence, June 11 2001, p. 24.

⁴¹ *Ibid.*, p. 24.

- 3.34 The inclusion of the terms “confer” and “function” in clause 5 of the Bill is a drafting device to overcome any doubt that the word “function” includes a duty. A reference to the conferral of a duty is to be interpreted to include the concept of the imposition of a duty. This need has arisen from the High Court’s willingness to imply the existence of a duty in *Hughes* despite the absence of language to that effect. This puts the Commonwealth on notice that duties may be found to exist in other cooperative legislative schemes which also refrain from using the term ‘duty’. Thus consent to conferral now needs to cover duties as well as functions and powers.⁴²
- 3.35 Clause 5 of the Bill may then be read as not conferring a duty on those Commonwealth authorities or officers if it is beyond the legislative power of the State to so confer and is a direct response to the problem identified in *Hughes*. This clause protects the future actions of those Commonwealth authorities or officers.

Statutory immunity: are there any constitutional limitations?

- 3.36 Under clause 4 of the Bill the Governor will proclaim that the *Agricultural and Veterinary Chemicals (WA) Act 1995* (with its new amendments passed as a result of the *Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*) is a “relevant State Act”. Contemporaneously, any actions and omissions of Commonwealth authorities or officers will be clothed with a statutory immunity against liability under clause 13. This protective device will ensure that the State of Western Australia is not accountable for any action, claim or demands arising from the Bill.
- 3.37 The Bill also provides a mechanism to protect other cooperative schemes that may be affected by the *Hughes* case. As those ‘potentially at risk’ cooperative schemes become identified, they too can be included under the Bill by proclamation of the Governor and published in the Government Gazette as a “relevant State Act.”
- 3.38 The Committee considered whether there were any constitutional limitations to clause 13 of the Bill. Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, explained that the purpose of the clause is to ensure that a person does not have a remedy against the State for compensation for some right that they may have lost because of the operation of this validating Bill. This clause is aimed at making sure the person cannot sue the State by removing defences to the action.
- 3.39 Mr Calcutt commented that clause 13 is the kind of provision that is not generally necessary in Western Australia or even something normally drafted in a piece of

⁴² Sean Brennan, *Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001*, Law and Bills Digest Group, Department of the Parliamentary Library, Bills Digest No 133 2000-01, May 23 2001.

legislation. However, clause 13 has been included for the sake of uniformity. Current case law does not indicate that such a clause is necessary and it is suggested that the clause is anticipatory. It is included on the basis that it might be required in the event of future litigation rather than on the basis of current case law.

- 3.40 Dr Jim Thomson, Legal Officer, Crown Solicitor's Office warned the Committee that no-one can predict what the High Court will do in this area and that although "*there are no constitutional limitations ... on the State at this point, it is difficult to be definitive about what might happen in the future.*"⁴³

CONTENTS OF THE BILL

- 3.41 The Bill contains 14 clauses in three Parts:

- Part 1- Preliminary
- Part 2- Validation of invalid administrative actions
- Part 3- Miscellaneous

SELECTED CLAUSES OF THE BILL

Clause 2

- 3.42 The Committee notes that the Bill commences by proclamation rather than by royal assent. By virtue of this clause, the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 will also commence by proclamation. The Committee notes that the commencement of the Bill is dependent on the passage of complementary Commonwealth legislation.

Clause 3

- 3.43 This clause contains 11 definitions. One is considered below.

"confer and impose"

- 3.44 The Committee notes that these terms are also inserted as amendments in the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001. Where used in both Bills, the terms include situations where a duty is imposed. The High Court found in *Hughes* that a duty was imposed on the Commonwealth DPP by

⁴³ Dr Jim Thomson, Transcript of Evidence, June 11 2001, p. 4. Dr Thomson then mentioned *Durham Holdings Pty Ltd v The State of New South Wales*, [2001] HCA 7 as a possible challenge to this principle. In that case, an (unsuccessful) argument was raised that the States were bound by a just compensation right. Justice Kirby went on to add that there may be pieces of legislation that he would not characterise as legislation, and he would strike them down and award compensation.

implication rather than in express terms. This amendment gives statutory recognition to that possibility.

Clause 4

- 3.45 This clause defines the “relevant State Acts” to which the Bill applies, namely the *Agricultural and Veterinary Chemicals (WA) Act 1995* and any other State Act declared by a proclamation. The relevant commencement time for the validation of invalid administrative actions under a “relevant State Act” will be declared by proclamation.
- 3.46 The Committee expresses concern that the scope of the definition of “relevant State Act” is too wide and could include legislation that was never intended to be brought under the ambit of the Bill. For example, the definition is so broad that it could potentially import the law of another State because under section 5 of the *Interpretation Act WA 1984*, “State” means a “State of the Commonwealth”.
- 3.47 However, the Committee notes that when interpreting general words in a statute, there is a presumption that Parliament does not intend to exceed its own jurisdiction. At first glance, the general words are restricted in their operation within territorial limits.⁴⁴ The Committee would like to have explored the definition of “State Act” further, but given time constraints, was unable to pursue this matter.
- 3.48 A cooperative scheme first needs to be identified in order to come within the ambit of the Bill. The Committee notes the lack of a central register of existing cooperative schemes to aid the identification process. The Committee considers that a comprehensive register would be useful and is concerned that to date no agency or body has produced such a register.
- 3.49 The Committee notes that the Bill appears to be able to be applied not only to existing cooperative schemes before *Hughes*, but also to future cooperative schemes. The Committee sees no reason why future cooperative schemes should not be appropriately drafted in order to avoid the *Hughes* scenario. The Committee further notes, that the Bill also allows multiple proclamations, which would permit a faulty cooperative scheme to continue unamended and be ‘topped up’ from time to time with a validating proclamation under clause 4(4).

What is a proclamation?

- 3.50 The term ‘proclamation’ is reserved for announcements made by or under the authority of the Crown. In Western Australia, the Governor issues proclamations and

⁴⁴ *Jumbanna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 363.

they have the full force of law. Proclamations are regarded as strictly executive orders rather than legislation.⁴⁵

- 3.51 The Committee notes that clause 4 will allow the Bill to apply to “relevant State Acts” and that the definition of “relevant State Acts” includes any Act specified in a proclamation. This means the Bill will effectively validate previous acts and omissions via proclamation and at the same time, under clause 13, cloak those acts and omissions with a statutory immunity.

Henry VIII clause

- 3.52 The Committee questioned whether clause 4 of the Bill is a ‘Henry VIII clause’. Such a clause is defined as “*the inclusion in an Act of a power to amend that Act or other Acts by regulation.*”⁴⁶ Essentially, it is the power to make substantial changes in the future to Acts not only by regulations but also by “... *proclamations, orders or other instruments used by the Governor, the Executive Council or the Minister without coming back to the Parliament.*”⁴⁷ The Committee’s concern with this is that by executive action, this Bill will apply to validate the effects of past administrative actions and change legal rights of persons by way of declaration. Such a power is usually only exercised by Parliament and not by the Executive.
- 3.53 The Committee explored this issue because the Working Party’s Position Paper on National Schemes of Legislation alerts all Australian scrutiny committees to be wary of Henry VIII type clauses.⁴⁸ Although the Working Party does not oppose national schemes of legislation, it seeks to ensure that the legislation is subject to effective parliamentary scrutiny and has serious reservations over the use of Henry VIII type clauses in national schemes.⁴⁹ The Working Party concluded that the use of Henry VIII type clauses should be curtailed as they inappropriately and notoriously delegate legislative power.
- 3.54 Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, confirmed that clause 4 is a Henry VIII clause in that it permits legislative acts to occur by means of subordinate legislation, in this case, the Governor making a proclamation that an Act is a “relevant State Act” and thereby validating actions of Commonwealth officers or

⁴⁵ Francis Bennion, former UK Parliamentary Counsel, Barrister, Research Associate University of Oxford, *Statutory Interpretation, A Code*, 3rd edition, 1997.

⁴⁶ D.C. Pearce, *Delegated Legislation in Australia and New Zealand*, 1977, p. 7.

⁴⁷ Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 7.

⁴⁸ The Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996.

⁴⁹ *Ibid.*, p. 24.

authorities under that specific Act, as well as making savings and transitional regulations.

3.55 The Committee then considered whether the power given to the Governor is an inappropriate delegation when it is desirable that any changes to primary legislation should be subject to parliamentary scrutiny. Proclamations are not subject to scrutiny as they are executive orders, lacking legislative character and not disallowable.⁵⁰

3.56 The Committee believes that it is acceptable to use executive powers in this particular case. The Committee notes the comments of Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, that:

*“... the only inappropriate delegations per se are in relation to offences. Any delegation of power to create serious offences is inappropriate and I regard as inappropriate any delegation of power to alter a penalty for an offence created by statute. There may be other powers beyond those which the Parliament considers inappropriate; however, that is strictly a matter for the Parliament ...”*⁵¹

3.57 Although it may be acceptable to use executive power to proclaim a particular State Act a “relevant State Act” to which the provisions of the Bill apply, the Committee believes that the exercise of executive power should be subject to parliamentary scrutiny. To do otherwise, means Parliament would not be given the opportunity to scrutinise these as yet unidentified cooperative schemes.

3.58 The Committee considered three mechanisms for effective scrutiny:

- enactment by regulation;
- enactment by regulation which does not come into effect until the opportunity for disallowance has passed; and
- enactment by proclamation and an affirmative resolution of both Houses of Parliament.

3.59 For various reasons, the Committee decided that enactment by regulation which does not come into effect until the opportunity for disallowance has passed, would better achieve the object of effective parliamentary scrutiny of future identified cooperative

⁵⁰ However, the Committee acknowledges that savings and transitional regulations would be subject to parliamentary scrutiny by the Joint Standing Committee on Delegated Legislation.

⁵¹ Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 26.

schemes. The form of parliamentary approval that the Committee recommends appears in Appendix B in draft form.

What is an enactment by regulation after the time for disallowance has passed?

- 3.60 After a regulation has been gazetted, there is a requirement under the *Interpretation Act 1984* that the regulation be tabled within six parliamentary sitting days. The objective of tabling is to bring to Parliament's attention the fact that a law has been made. This procedure allows members of Parliament an opportunity to seek disallowance of that regulation under section 42 of the *Interpretation Act 1984*. This opportunity is lost unless a notice of motion for disallowance of the regulation is given within 14 sitting days of tabling.
- 3.61 Under the usual procedure for disallowance, the regulation is operative as from the date of gazettal or such other date as is notified in the *Gazette* or as required by the enabling statute.
- 3.62 Under the procedure recommended by the Committee, the regulation that a specified Act is a "relevant State Act" to which the provisions of the Bill apply, is not operative until such time as either the regulation ceases to be capable of disallowance under the *Interpretation Act 1984* or at a later time specified in the regulation. In effect, this means that the operation of the regulation is postponed until after scrutiny by Parliament.

Clause 5

- 3.63 The Committee notes that the only "relevant State Act" currently identified that will be proclaimed is the *Agricultural and Veterinary Chemicals (WA) Act 1995*, with all its amendments in place. Clause 5 ensures that a Commonwealth officer/authority does not have a duty conferred on that officer/authority if the duty conferred is beyond the legislative competence of the Western Australian Parliament.
- 3.64 This clause addresses the second objective of the Bill listed in the second reading speech and so protects those officers and authorities. It addresses the problem identified in the *Hughes* case that Western Australia, by its laws, cannot unilaterally invest functions under that law in officers of the Commonwealth and alleviates the problem identified in the *Hughes* case, which is, that conferral of power on Commonwealth authorities/officers coupled with a duty by a State law must be able to be referred to a Commonwealth head of power.

Clauses 6 to 10

- 3.65 Clauses 6 to 10 in Part 2 of the Bill generally address the issue of what to do with those Commonwealth officers/authorities who performed administrative actions in the

past that were invalid under a “relevant State Act”. Under these clauses, those previous actions will now be retrospectively validated.

Retrospectivity

- 3.66 Legally, an Act of Parliament is presumed not to have retrospective application.⁵² This common law rule evolved out of a consideration that a statute changing the law ought not to be understood as applying to facts or events that have already occurred in such a way as to affect rights or liabilities which the law had defined by reference to the past events. However, this presumption can be easily displaced by some clear statement to the contrary, such as the clauses in proposed Part 2.
- 3.67 The Committee appreciates that there is no doubt as to the power of Parliament to pass retrospective legislation. Proposed Part 2 contains validating clauses which do no more than retrospectively validate anything done or omitted to be done before the commencement of this Bill, that were considered lawfully done prior to the *Hughes* case.

Clause 8

- 3.68 The Committee notes that clause 8 of the Bill is a deeming clause with retrospective application. It does not explicitly validate administrative actions taken by Commonwealth authorities/officers, but rather, retrospectively, attaches to those actions the same force and effect as would have occurred had the actions been taken by State authorities/officers.

OBSERVATIONS

- 3.69 The Committee considers that the Bill achieves the purposes outlined in the second reading speech.
- 3.70 In terms of the third objective, which is to ensure that the Bill gives certainty to other cooperative schemes, the Committee notes the Commonwealth’s alarm over the *Hughes* decision in relation to the National Corporations Law Cooperative Scheme and considers the Bill may be an over-reaction to the *Hughes* scenario. In fact, there have been no challenges since *Wakim* and *Hughes* to the constitutional framework of any other cooperative scheme and, thus, there may be merit in adopting a ‘wait and see’ position.
- 3.71 The Committee has reservations about the use of proclamations, to identify a specified State Act as a “relevant State Act” to which the provisions of the Bill would then

⁵² *Maxwell v Murphy* (1957) 96 CLR 261.

apply. The Committee considers that a regulation is the preferred method of identification, but that such a regulation should only become operative after parliamentary scrutiny.

3.72 However, in view of the Commonwealth's stance on *Hughes*, the Committee considers it is prudent to proceed with this legislation, subject to the Committees recommendations 2 and 3 below.

RECOMMENDATIONS

Recommendation 1: The Committee recommends that a register of existing Western Australian cooperative schemes be compiled, gazetted and updated as required.

Recommendation 2: The Committee recommends that the Co-operative Schemes (Administrative Actions) Bill 2001:

- a) only apply to legislation enacted prior to the enactment of this legislation; and
- b) be amended in accordance with clause 4(2) in Appendix B.

Recommendation 3: The Committee recommends that clause 4 of the Co-operative Schemes (Administrative Actions) Bill 2001 be amended in accordance with Appendix B of this report which provides that:

- a) enactment (that a specified Act is a "relevant State Act" to which the provisions of the Bill apply) be by way of regulation not proclamation; and
- b) the operation of such regulation be postponed until after scrutiny by Parliament.

Recommendation 4: The Committee recommends that the Co-operative Schemes (Administrative Actions) Bill 2001 be passed subject to recommendations 2 and 3.

CHAPTER 4

THE AGRICULTURAL AND VETERINARY CHEMICALS (WESTERN AUSTRALIA) AMENDMENT BILL 2001

REFERENCE AND PROCEDURE

- 4.1 Following second reading, the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 (Bill) was referred to the Committee by the Legislative Council on May 29 2001 under Standing Order 230(c) for scrutiny.

BACKGROUND TO THE BILL

- 4.2 As was stated in Chapter 3, *Hughes* challenged the constitutional foundation of the National Corporations Law Cooperative Scheme. However, because of *Hughes* and *Wakim*, other cooperative schemes remain in a constitutional wilderness. This Bill continues the theme of Chapter 3, that is, it is a further legislative response to the outcomes of those two cases. However, the Co-operative Schemes (Administrative Actions) Bill 2001 was essentially a validating Bill, whereas this is an amending Bill.
- 4.3 As an amending Bill, it will have a direct impact on the National Registration Authority for Agricultural and Veterinary Chemicals (NRA).⁵³ At the same time the Bill will complement the proposed Commonwealth Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001 (Cth) which was introduced into the Senate in April 2001. The Commonwealth's Bill is an attempt to shore up one of the many cooperative schemes currently in existence.

What is the NRA?

- 4.4 The NRA is an independent statutory authority, which undertakes the Commonwealth's responsibilities under the National Registration Cooperative Scheme for Agricultural and Veterinary Chemicals (NRS). If a person imports and/or manufactures chemicals or chemical products, there is a requirement to comply with federal legislation governing the assessment and registration of chemicals. There are four National Chemicals Assessment and Registration Schemes which cover food, industrial chemicals, pharmaceuticals and agricultural and veterinary chemicals. The schemes operate in a complementary manner to ensure there is no duplication or any unnecessary regulatory burden on industry. The scope of each of the four chemicals assessment and/or registration schemes is defined by legislation. Legislation also

⁵³ The NRA was established by the *Agricultural and Veterinary Chemicals (Administration) Act 1992*.

specifies what chemical/chemical products are to be covered by each of the schemes as well as the requirements for anyone involved in chemicals manufacture and/or importation.

- 4.5 The NRS, which commenced in March 1995, is a cooperative partnership between the Commonwealth, the States and Territories. It places under one national umbrella (that is the Commonwealth) the evaluation, registration and review of agricultural and veterinary chemicals, as well as their control up to the point of retail sale (previously undertaken independently by the Commonwealth and each of the States and Territories). The States and Territories retain responsibility for control-of-use activities, such as licensing of pest control operators and aerial spraying. For these control-of-use purposes, there is a separate legislative regime administered by the States and Territories.⁵⁴ Mr Peter Rutherford, Chemicals Coordinator, Agriculture WA explained:

“The registration, the import of chemicals and the registration and production of the label that appears on the container is done under the commonwealth legislation, which is enacted into Western Australia. From then on, once it is sold or in the hands of the user, the commonwealth legislation has no role to play. The control and use of the product is entirely up to state law. ... the State controls the use of chemicals...”⁵⁵

- 4.6 Legislation supporting the NRS consists of seven Acts: three dealing with registration activities and four relating to registration fees and charges. Central to this package of legislation is the Agricultural and Veterinary Chemicals Code (AgVet Code), scheduled to the *Agricultural and Veterinary Chemicals Code Act 1994 (Cth)* which contains the detailed operational provisions for registering chemical products and provides the NRA with its full range of powers, including:

- the evaluation, registration and review of agricultural and veterinary chemical products (including active constituents and product labels);
- the issuing of permits;
- the control of the manufacture of chemical products;
- controls regulating the supply of chemical products; and

⁵⁴ National Registration Authority, *Background to NRA Legislation*, <http://www.nra.gov.au/nra/legislat.html>

⁵⁵ Mr Peter Rutherford, Transcript of Evidence, June 20 2001, p. 2.

- provisions ensuring compliance with, and for the enforcement of, the Code.⁵⁶
- 4.7 The AgVet Code was initially a law of the Commonwealth that only applied in the Australian Capital Territory. To enable the AgVet Code to have national coverage, each of the States and the Northern Territory enacted complementary legislation that had the effect that the AgVet Code of the Australian Capital Territory is applied as a law of each State and the Northern Territory with each one in turn conferring powers and functions on Commonwealth authorities such as the NRA. Taken together they are referred to as the AgVet Codes.
- 4.8 While the AgVet Codes apply in the States and the Northern Territory as the law of those jurisdictions, the applied laws are partly ‘federalised’ – that is, for most practical purposes they have the general characteristics of Commonwealth rather than State laws. In particular, this ‘federalisation’ allows the Commonwealth’s *Acts Interpretation Act 1901* to apply for the purposes of interpreting the AgVet Codes so that there is a uniform interpretative regime. Also, the Commonwealth’s administrative law package applies. This allows exclusive rights of review of NRA decisions taken under the AgVet Codes as though the decisions were made under Commonwealth laws.
- 4.9 Additionally, the Commonwealth DPP is empowered to prosecute offences under the AgVet Code even though such offences are offences against the laws of the States or Territories concerned. As has been earlier stated, *Hughes* called this practice into question.

Why is the NRS in doubt?

- 4.10 The NRS is in jeopardy because the Commonwealth modelled it on the Corporations Law Cooperative Scheme, which is constitutionally questioned as a result of *Hughes*.
- 4.11 The *Hughes* case raises the spectre that when analysts and inspectors of the NRA (as well as officers of the Commonwealth DPP and the Administrative Appeals Tribunal (AAT)) exercise powers, their activities might be invalid. The Bill is an attempt to provide constitutional certainty to the exercise of their powers.
- 4.12 As discussed in Chapter 3 in relation to the Cooperative Schemes (Administrative Actions) Bill 2001, *Hughes* highlighted the need for the Commonwealth to authorise the conferral of duties, powers and functions by the State on Commonwealth officers/authorities.

⁵⁶ The last four Acts in the package contain the cost recovery mechanisms — in particular, the imposition, assessment and collection of a levy on sales of chemical products — which establish the NRA as an independent, self-funding regulatory body.

- 4.13 As the High Court decisions are central to this Bill the Committee considers that a brief outline of *Hughes* and *Wakim* is useful. A summary of *Hughes* is contained in Chapter 3, paragraphs 3.11 to 3.16. *Wakim* is briefly summarised below and a fuller description included at Appendix A.

What happened in *Wakim*?

- 4.14 *Wakim* essentially called into question the cross vesting arrangements between the Commonwealth and the States.

What is cross vesting?

- 4.15 Cross vesting is an arrangement whereby one superior court exercises the jurisdiction of another superior court. It allows legal actions to be transferred between jurisdictions and consolidated so that one court can hear all the matters related to the one dispute.
- 4.16 Cross vesting of jurisdiction was introduced by Commonwealth legislation in May 1987. Then, reciprocally, throughout 1987 the six States and the Northern Territory passed their cross vesting legislation and each was proclaimed in July 1988.⁵⁷
- 4.17 *Wakim* determined that State jurisdiction could not be conferred on federal courts because the Commonwealth Constitution forbids this practice. The effect of the decision is that the States can no longer cross vest jurisdiction in federal courts but the Commonwealth still retains its ability to vest federal jurisdiction in State Courts.⁵⁸
- 4.18 Historically, cross vesting legislation was lauded as an example of cooperation between the Australian parliaments. However, as the law is now invalid, no amount of parliamentary cooperation can fix the essential problem which is, that there is no power to cross vest. Only the Commonwealth can invest a State court with federal jurisdiction.⁵⁹

PURPOSE OF THE BILL

- 4.19 The second reading speech refers to two principal objects of the Bill:

⁵⁷ PH Lane, *Lane's Commentary on the Australian Constitution*, 2nd edition, 1997, p. 518.

⁵⁸ In order to address the implications of *Wakim*, all States have passed remedial legislation in the form of the *Federal Courts (State Jurisdiction) Act 1999* which provides that parties to ineffective judgments of federal courts have the same rights as if those judgments were judgments of the State Supreme Court. This legislation has itself been challenged but upheld by the High Court in *Re Macks: Ex parte Saint* [2000] HCA 62.

⁵⁹ As per section 77(iii) of the Commonwealth Constitution.

“... First, the Bill again confers powers on Commonwealth authorities and officers to carry out functions under the scheme ...

Second, the Bill also confers powers on and validates previous actions of Commonwealth inspectors and analysts where those actions were carried out without the requisite statutory power ...”⁶⁰

- 4.20 The third objective is to provide continuing certainty to the effective operation of the NRS, which is in doubt because of *Hughes* and *Wakim*.
- 4.21 With respect to the first principal object, the Committee scrutinised the equivalent clauses in the Co-operative Schemes (Administrative Actions) Bill 2001 and so it is unnecessary to repeat that material here. The Committee reiterates that conferring powers on Commonwealth authorities and officers to carry out functions under the NRS is necessary because the previous conferral by State legislation was not expressly authorised by Commonwealth legislation. The clauses of the Bill overcome this difficulty which was first identified in *Hughes*.
- 4.22 The Committee also notes that the amendments proposed by the Bill will have an impact not only on the NRA, but also on the Commonwealth DPP and on the Commonwealth AAT. The reason for this is because offences under the NRA can be prosecuted by the DPP and are appealable under the AAT. The amendments address the problem identified in *Hughes* which is that although the Commonwealth DPP had power to prosecute *Hughes*, the general issue of whether the Commonwealth DPP had power to prosecute all State Corporations Law offences was left unresolved.
- 4.23 With respect to the second principal object, the actions of NRS officers before the passage of these amendments may not be legal. Even though *Hughes* upheld the validity of the Commonwealth DPP’s functions in the case of Mr *Hughes*, it did so on the narrowest of grounds, thereby consigning many cases with just slightly different facts to the category of ‘constitutionally suspect’.⁶¹ For example, a litigant might want to prosecute an NRS officer over a past action. That NRS officer’s administrative actions may not be authorised. The clauses respond to that scenario.
- 4.24 Ms Katy Ashforth, Acting Manager Legislation, Agriculture WA, explained to the Committee that to her knowledge, there has not been any action taken against any officers performing functions under the NRS:

⁶⁰ Hon Kim Chance MLC, Minister for Agriculture, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, May 29 2001, p. 562.

⁶¹ Sean Brennan, *Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001*, Law and Bills Digest Group, Department of the Parliamentary Library, Bills Digest No 133 2000-01, May 23 2001.

“Ms Ashforth: ... the potential problem of all officers ... being covered ... has been recognised for a little while. I do not think it has been involved in any challenges.

The Chairman: To your knowledge, this is purely precautionary, and is not related directly to any problems?

Ms Ashforth: It is a problem in so far as the legislation that has existed, but not in practical terms of jobs not being able to be done or people being aggrieved. It has not arisen as far as we know.”⁶²

4.25 Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, explained to the Committee that the Bill contains other validations which are not specifically related to either the *Hughes* or *Wakim* cases. He said that:

“In the course of researching the AgVet scheme, the commonwealth officers identified some other unrelated problems with the legislation, first the Commonwealth had not properly accepted the functions that were given to its officers and secondly we had not adequately conferred those powers in our AgVet legislation.”⁶³

4.26 The Bill solves these anomalies retrospectively in proposed Part 5. It repeals and then re enacts Part 5 of the *Agricultural and Veterinary Chemicals (WA) Act 1995* which contains the provisions that apply certain Commonwealth administrative laws as laws of the State. These laws are:

- *The Administrative Appeals Tribunal Act 1975;*
- *The Freedom of Information Act 1982;*
- *The Ombudsman Act 1976;*
- *The Privacy Act 1988;* and
- regulations in force under those Acts.⁶⁴

4.27 Clause Note 5 in the explanatory memorandum explains that, the overall effect is to re-apply those laws and to re-confer functions and powers on Commonwealth

⁶² Ms Katy Ashforth, Transcript of Evidence, June 20 2001, p. 4.

⁶³ Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 24.

⁶⁴ *Agricultural and Veterinary Chemicals 1995 Act*, section 3.

authorities and officers.⁶⁵ Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice explained that the mechanism of repealing and then immediately reapplying proposed Part 5 is unusual but was requested by Commonwealth legal officers as part of the uniform approach to this legislation. It has been done this way in order to shore up certainty in the consent and conferral process because of the doubt cast by *Hughes* on past conferral of powers and functions. Normally it would be sufficient to say that the current provisions in Part 5 have effect. However, it appears that repealing and then re-enacting proposed Part 5 has been done out of an abundance of caution.

How does Wakim impact on the Bill?

4.28 *Wakim*⁶⁶ questioned the jurisdictional arrangements of the Federal Court, including cross vesting. The Bill responds to those queries by making amendments to the *Agricultural and Veterinary Chemicals (WA) Act 1995*. In doing so, the amendments seek to achieve the third objective of the Bill which is to provide continuing certainty to the effective operation of the NRS. This has been achieved in two ways:

4.28.1 Firstly, the *Agricultural and Veterinary Chemicals (WA) Act 1995* currently contains two provisions in Part 6 in which the State of Western Australia confers jurisdiction on the Federal Court. The Bill seeks to repeal the whole of Part 6 in line with the decision in *Wakim*.

4.28.2 Secondly, clause 4 describes how section 3(a)(ii) of the *Agricultural and Veterinary Chemicals (WA) Act 1995* is to be deleted. Section 3(a)(ii) contains a reference to the *Administrative Decisions (Judicial Review Act) 1977* which is now deleted as a Commonwealth Act because of *Wakim*. According to Mr Greg Calcutt, Parliamentary Counsel, Ministry of Justice, the *Administrative Decisions (Judicial Review) Act 1977* conferred jurisdiction on federal courts to review administrative decisions. In implementing the NRA scheme:

*“... each State applied that Act as part of the commonwealth law as it applied to State law in relation to the AgVet Code. That produced an Australia wide system of administrative review of decisions about agricultural and veterinary chemicals administration.”*⁶⁷

⁶⁵ Explanatory Memorandum of the *Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, p. 3.

⁶⁶ See Appendix A for further information.

⁶⁷ Mr Greg Calcutt, Transcript of Evidence, June 11 2001, p. 27.

- 4.29 *Wakim* said it was not appropriate for a State to apply a Commonwealth Act in that way because if it did so the State would be conferring jurisdiction on federal courts. Hence amendments contained in the Bill.

CONTENTS OF THE BILL

- 4.30 The Bill contains eight clauses affecting section 3, Part 5 and Part 6 of the *Agricultural and Veterinary Chemicals (WA) Act 1995* and inserting proposed sections 28A, 28B and 33A of that Act.

SELECTED CLAUSES OF THE BILL

Clause 5

- 4.31 When the NRS scheme was being investigated for constitutional certainty following *Hughes*, it was realised that the Commonwealth had not properly accepted the functions that were given to its officers in the NRS legislation.
- 4.32 Clause 5 first repeals the current Part 5 of the *Agricultural and Veterinary Chemicals (WA) Act 1995*, then deletes the reference to section 13 of the *Administrative Decisions (Judicial Review) Act 1977*. It then immediately re-applies the provisions in the Part and re-confers functions and powers on Commonwealth authorities and officers.
- 4.33 As the explanatory memorandum notes, this has been done to overcome doubts that the current conferral arrangements are adequate. To date, the Commonwealth has not expressly authorised the conferral. The re-enactment of proposed Part 5 complements provisions in the Commonwealth legislation which specifically authorise the conferral of certain powers on Commonwealth officers and authorities.
- 4.34 The Committee notes the overall importance of proposed Part 5 to the NRS. The actions and decisions of Commonwealth officers and authorities is integral to the effective work of the NRS. Proposed Part 5 will prevent the real threat of legal challenge to actions and decisions of those Commonwealth personnel by bestowing equal status on State and Commonwealth officers.

Clause 7

- 4.35 Clause 7 inserts proposed sections 28A and 28B into the *Agricultural and Veterinary Chemicals (WA) Act 1995* and comes after current section 28 of the *Agricultural and Veterinary Chemicals (WA) Act 1995* which confers powers on State officers.
- 4.36 Clause Note 7 in the explanatory memorandum states that proposed section 28A confers functions and powers on “Commonwealth inspectors and analysts”. The

Committee notes that the conferral is strictly on “officers” and officers are described in proposed section 28A(1) as being either inspectors or analysts. This is a recognition that any person with appropriate qualifications can either be appointed an inspector⁶⁸ or approved as an analyst.⁶⁹ These inspectors and analysts are not necessarily State or Commonwealth officers, they may for example be independent consultants who test and clear chemicals. The Committee notes that the *Agricultural and Veterinary Chemicals (WA) Act 1995* confers powers on State officers and the Bill confers functions and powers on both Commonwealth and non Commonwealth inspectors and analysts. However, for non Commonwealth inspectors and analysts, *Hughes* has no relevance.

- 4.37 In summary, proposed section 28A confers functions and powers on analysts and inspectors, thereby closing a gap identified when the NRA scheme was being investigated for constitutional certainty following *Hughes*. The *Hughes* case raised the concern that when Commonwealth analysts and inspectors of the NRA, as well as officers of the Commonwealth DPP and AAT exercise powers, their activities might be invalid. Clause 7 confers powers on those authorities and officers, whereas the current *Agricultural and Veterinary Chemicals (WA) Act 1995* is silent. Ms Katy Ashforth, Acting Manager, Legislation, Agriculture WA, confirmed that:

“... Previously, the legislation referred to commonwealth officers. Inspectors and analysts may not have come within the definition of commonwealth officers and would not have been covered. They will now be covered.”⁷⁰

The retrospective validating provision in clause 7

- 4.38 The Committee also notes the retrospective validating provision in clause 7 that applies to analysts and inspectors. The Committee accepts that the clause does no more than validate anything done or omitted to be done prior to commencement of provisions in the Bill and that were considered lawfully done prior to *Hughes*.

OBSERVATIONS

- 4.39 The Committee considers that the Bill achieves the principal objects outlined in the second reading speech.

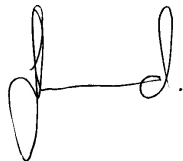
⁶⁸ Under section 69F(1) of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*.

⁶⁹ Under section 69G of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*.

⁷⁰ Ms Katy Ashforth, Transcript of Evidence, June 20 2001, p. 3.

RECOMMENDATIONS

Recommendation 5: The Committee recommends that the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001 be passed without amendment.



Hon Jon Ford MLC

Chairman

Date: June 27 2001

APPENDIX A

RE: WAKIM; EX PARTE McNALLY (WAKIM)

RE: WAKIM; EX PARTE McNALLY (WAKIM)

1 WHAT HAPPENED IN WAKIM?

- 1.1 This case essentially decided that State jurisdiction could not be conferred on federal courts.
- 1.2 Of four proceedings in *Wakim*, only two are relevant.⁷¹ These are: *Re Wakim; Ex parte McNally* and *Re Wakim; Ex parte Darval*. They were applications for prohibition directed to the Federal Court, arising out of bankruptcy proceedings. However, the four proceedings had one thing in common - the jurisdiction of the Federal Court was being challenged. In each of the four proceedings, the question for the High Court was whether jurisdiction had been validly conferred on the Federal Court, a court created by the Commonwealth Parliament.
- 1.3 In *Re Wakim; Ex parte McNally* and *Re Wakim; Ex parte Darval* a creditor of a bankrupt commenced proceedings (breach of statutory duty against the trustee and negligence against the lawyers) in the Federal Court against the trustee in bankruptcy, the trustees' solicitors and counsel retained by the solicitors on the trustee's behalf. The trustees' solicitors and counsel alleged the Federal Court did not have jurisdiction and that the Commonwealth's *Cross Vesting Act (1987)* was invalid.

What is cross vesting?

- 1.4 Cross vesting is an arrangement whereby one superior court exercises the jurisdiction of another superior court. It allows legal actions to be transferred between jurisdictions and consolidated so that one court can hear all the matters related to the one dispute.
- 1.5 Cross vesting of jurisdiction was introduced by Commonwealth legislation in May 1987. Then, reciprocally, throughout 1987, the six States and the Northern Territory passed their cross vesting legislation and each was proclaimed in July 1988.⁷²
- 1.6 A major part of the Federal Court's first ten years' reports deal with jurisdictional disputes. By 1995, *BP Australia Ltd v Amann Aviation Pty Ltd*⁷³ was again raising questions of the validity of the Commonwealth's cross vesting legislation. An appeal

⁷¹ The third was *Re Brown, Ex parte Amman*, which was an application for certiorari to quash certain orders of the Federal Court and for prohibition directed to the Federal Court. The fourth was *Spinks v Prentice*, an application for special leave to appeal from an order of the full court of the Federal Court regarding a summons and attendance for examination.

⁷² PH Lane, *Lane's Commentary on the Australian Constitution*, 2nd edition, 1997, p. 518.

⁷³ (1996) 62 FCR 451.

from that case later came to the High Court where six Judges were evenly divided on the issue of validity.⁷⁴ An even division produces a curious legal result. The decision appealed from is affirmed but the case cannot establish any legal principle or binding precedent.⁷⁵ *Wakim* therefore essentially represented the next phase of a challenge to the cross vesting legislation and its outcome turned on how the Judges interpreted Chapter 3 of the Commonwealth Constitution.

- 1.7 A majority (6 to 1) found a ‘negative implication’ in Chapter 3 of the Commonwealth Constitution.⁷⁶ They said by granting power to the Commonwealth to create federal courts and by expressly stating the matters about which Parliament may confer jurisdiction on those courts, Chapter 3 impliedly forbids the conferring of any other jurisdiction on those courts by the Commonwealth or States. No other system of government, other than the Commonwealth, could confer such jurisdiction.
- 1.8 The Judges went on to say that the Commonwealth’s *Cross Vesting Act (1987)* tried to confer jurisdiction on State courts but it could not be captured from the relevant sections in Chapter 3 of the Commonwealth Constitution. Therefore, it was invalid.⁷⁷
- 1.9 Historically, cross vesting legislation was lauded as an example of cooperation between the Australian parliaments. However, as the law is invalid, no amount of parliamentary cooperation can fix the essential problem which is, that there is no power to cross vest. Only the Commonwealth can invest a State court with federal jurisdiction.⁷⁸
- 1.10 From the litigant’s point of view, cross vesting is a far more convenient, less expensive and time consuming process if the federal courts can deal with all the issues, irrespective of whether those issues have any connection with federal law. For the litigant, this is beneficial, but from a constitutional perspective, it is irrelevant. The Commonwealth Constitution, which the judiciary cannot alter, prohibits the States

⁷⁴ This case was *Gould v Brown* (1998) CLR 346.

⁷⁵ The decision is affirmed under section 23(2)(a) of the *Judiciary Act 1903*. The authority that the case cannot establish any legal principle or binding precedent is from *Tasmania v Victoria* (1935) 52 CLR 157 at p. 183 per Dixon J.

⁷⁶ The Judges applied a common law rule of statutory interpretation - the *expressio unius* rule, which in plain English means an express reference to one matter indicates that other matters are excluded.

⁷⁷ The Cross Vesting scheme to the extent that it confers State jurisdiction on the federal court has been struck down by *Wakim* and only a Constitutional amendment can re-instate that part of it.

⁷⁸ As per section 77(iii) of the Commonwealth Constitution.

from vesting State jurisdiction in federal courts and prohibits the Commonwealth consenting to the vesting of State jurisdiction in those courts.⁷⁹

- 1.11 The argument in *Wakim* in favour of validity of the cross vesting scheme focused on whether the Commonwealth could give “consent” to cross vesting. The language was described as an expression of ‘cooperative federalism’, but the use of such language cannot obscure what it is the legislation actually provides or does not provide in this case.
- 1.12 The cross vesting legislation’s effect is that the provisions sought to confer jurisdiction on the Federal Court, not to give permission for other systems of government in the federation to do that. No amount of cooperation can supply power where none exists. If it were so, then by ‘cooperative legislation’, the Commonwealth and States could effectively amend the Commonwealth Constitution by giving the Commonwealth power that the Constitution does not itself give.

⁷⁹ McHugh J said at p. 557 that section 77(iii) expressly empowers the Commonwealth Parliament to invest “any court of a State with federal jurisdiction. Take that express provision and the absence of any express power in the States to invest State Jurisdiction in federal courts is itself enough to indicate that the States lack the power to do so.”

APPENDIX B

**CO-OPERATIVE SCHEMES (ADMINISTRATIVE ACTIONS) BILL 2001 SHOWING
AMENDMENTS BY THE STANDING COMMITTEE ON LEGISLATION**

As reported from Legislation Committee 28/06/2001 with recommended
amendments

Words deleted are shown with line through text;

Words inserted are shown underlined.

Western Australia

**Co-operative Schemes (Administrative Actions)
Bill 2001**

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Western Australia

LEGISLATIVE COUNCIL

**Co-operative Schemes (Administrative Actions)
Bill 2001**

A Bill for

An Act relating to administrative actions by Commonwealth authorities or officers of the Commonwealth under the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* and other State co-operative scheme laws, and for other purposes.

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Co-operative Schemes (Administrative Actions) Act 2001*.

5 2. Commencement

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

3. Definitions

10 In this Act —

“**administrative action**” means an act or omission of an administrative or legislative nature, and includes any act or omission of an administrative nature that is done or omitted in the course of or ancillary to or preliminary to or subsequent to judicial proceedings (civil or criminal);

15

“**commencement time**” means (except as provided by section 4(4)) —

20

(a) in relation to the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* — the time when section 4(1) comes into operation; or

(b) in relation to any other relevant State Act — the time when it becomes a relevant State Act for the purposes of this Act by a proclamation regulation made under section 4(2);

25

“**Commonwealth authority**” means an authority or body (whether incorporated or not) that is established or continued in existence by or under an Act of the Commonwealth, but does not include the Federal Court of Australia, the Family Court of Australia or the Federal Magistrates Court;

30

“confer” includes impose;

“function” includes a duty;

“invalid administrative action” means an administrative action of a Commonwealth authority or an officer of the Commonwealth taken, or purportedly taken —

(a) pursuant to a function or power conferred, or purportedly conferred, by or under a relevant State Act (the “relevant function or power”); and

(b) in circumstances where the relevant function or power could not have been conferred on the authority or officer by a law of the Commonwealth the operation of which in the relevant respect was based on the legislative powers of the Parliament of the Commonwealth (including, for example, circumstances where the authority or officer was, or purportedly was, under an express or implied duty to perform the function or exercise the power),

that was invalid because of the circumstances referred to in paragraphs (a) and (b), whether or not it was also invalid on any other ground;

“liability” includes a duty or obligation;

“officer of the Commonwealth” has the same meaning as in section 75(v) of the Constitution of the Commonwealth;

“relevant function or power” means a function or power referred to in paragraph (a) of the definition of “invalid administrative action”;

“relevant State Act” is defined in section 4;

“right” includes an interest or status.

4. Co-operative schemes to which this Act applies — relevant State Acts

(1) For the purposes of this Act —

“relevant State Act” means —

-
- (a) the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*; and
- (b) any other Act specified in a proclamationregulation under subsection (2),
- 5 and includes any law applying as a law of the State by force of any such Act.
- (2) A proclamationregulation may declare that a specified Act enacted prior to coming into operation of this Act, is a relevant State Act for the purposes of this Act.
- 10 (3) A proclamationregulation under subsection (2) comes into operation —
- (a) on the day following that on which the regulation ceases to be capable of disallowance under section 42(2) of the Interpretation Act 1984 at the beginning of the day on
15 which it is published in the Gazette; or
- (b) subject to paragraph (a), at a later time, being a specified time of a day specified in the proclamationregulation.
- (4) A proclamationregulation may declare that the commencement time in relation to a relevant State Act is the specified time of a day specified in the proclamationregulation. This Act has effect
20 in respect of the commencement time so declared whether or not it has already had effect with respect of an earlier commencement time.
- 25 (5) Where proceedings under section 42(2) of the Interpretation Act 1984 are unresolved when Parliament is prorogued, a regulation to which those proceedings relate is disallowed.

**5. Administrative functions and powers conferred on
Commonwealth authorities and officers**

- 5 (1) A relevant State Act does not purport to confer any duty on a
Commonwealth authority or an officer of the Commonwealth to
perform a function, or to exercise a power, in relation to a
matter arising under the relevant State Act if the conferral of the
duty would be beyond the legislative power of the Parliament of
the State.
- 10 (2) This section does not limit the operation of section 7 of the
Interpretation Act 1984.

Part 2 — Validation of invalid administrative actions

6. Invalid administrative actions to which Part applies

5 This Part applies to invalid administrative actions that have been taken, or have purportedly been taken, under a relevant State Act at or before the commencement time in relation to that Act.

7. Operation of Part

10 (1) Subject to subsection (2), this Part extends to rights or liabilities arising between parties to proceedings initiated at or before the commencement time in relation to a relevant State Act where an allegedly invalid administrative action is or was the subject of or relevant to the proceedings.

15 (2) This Part does not affect rights or liabilities arising between parties to proceedings heard and finally determined at or before the commencement time in relation to a relevant State Act to the extent to which those rights or liabilities arise from, or are affected by, an invalid administrative action.

(3) This Part extends to administrative actions as affected by the operation of section 28B of the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*.

20 8. Legal effect of invalid administrative actions

Every invalid administrative action has, and is deemed always to have had, the same force and effect for all purposes as it would have had if —

- 25 (a) it had been taken, or purportedly taken, by a State authority or officer of the State; and
- (b) the relevant function or power had been duly conferred on that authority or officer.

9. Rights and liabilities declared in certain cases

- (1) Without affecting the generality of section 8, the rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, for all purposes the same as if —
- 5 (a) every invalid administrative action had been taken, or purportedly taken, by a State authority or officer of the State; and
- (b) the relevant function or power had been duly conferred on that authority or officer.
- 10 (2) A right or liability conferred or affected by subsection (1) —
- (a) is exercisable or enforceable; and
- (b) is to be regarded as always having been exercisable or enforceable,
- as if it were a right or liability conferred or affected by (or arising from) an administrative action of a State authority or officer of the State on which or whom the relevant function or power had been duly conferred.
- 15
- (3) Any act or thing done or omitted to be done at or before the commencement time in relation to a relevant State Act under or in relation to a right or liability conferred or affected by subsection (1) —
- 20 (a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and
- 25 (b) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law,
- as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, an administrative action of a State authority or officer of the State on which or whom the relevant function or power had been duly conferred.
- 30

10. This Part to apply to administrative actions as purportedly in force from time to time

- 5 (1) The purpose of this section is to ensure that this Part operates to give to an invalid administrative action that has subsequently been affected by another action or process no greater effect than it would have had if the administrative action, or any other relevant administrative action, had not been invalid on constitutional grounds (arising from the circumstances referred to in paragraphs (a) and (b) of the definition of “invalid administrative action” in section 3).
- 10 (2) If administrative action taken by a Commonwealth authority or an officer of the Commonwealth was affected (whether by way of revocation, modification or otherwise) at or before the commencement time in relation to a relevant State Act by any later administrative action or by any judicial process or by any administrative review process, this Part applies to the administrative action as so affected from time to time.
- 15 (3) In this section, a reference to administrative action taken includes a reference to administrative action purportedly taken, and a reference to administrative action affected in any way includes a reference to administrative action purportedly affected in that way.
- 20

Part 3 — Miscellaneous

11. Act binds Crown

5 This Act binds the Crown in right of Western Australia and, in so far as the legislative power of the Parliament of Western Australia permits, in all its other capacities.

12. Corresponding authorities or officers

10 It is immaterial, for the purposes of this Act, that a Commonwealth authority or an officer of the Commonwealth does not have a counterpart in the State, or that the functions and powers of a counterpart State authority or a counterpart officer of the State do not correspond exactly or substantially with those of the Commonwealth authority or the officer of the Commonwealth.

13. Act not to give rise to liability against the State

15 (1) The State is not liable to any action, liability, claim or demand arising from the enactment, commencement or operation of this Act or the making, publication or operation of a proclamationregulation under section 4.

20 (2) Without limiting subsection (1), no proceedings lie against the State in respect of an administrative action affected by this Act, except to the extent that the proceedings would lie had this Act not been enacted or a proclamationregulation under section 4 not been made.

25 (3) In this section —
“**proceedings**” includes proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief;

“**the State**” includes any State authority or officer of the State, and also includes —

30 (a) the Crown in right of the State; and

- (b) the Government of the State; and
- (c) a Minister of the Crown in right of the State; and
- (d) a statutory corporation, or other body, representing the Crown in right of the State.

5 **14. Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- 10 (2) In particular, the regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or the making of a proclamation regulation under section 4.

=====

APPENDIX C

TRANSCRIPT OF EVIDENCE

OF SUBCOMMITTEE HEARING HELD ON JUNE 20 2001

**STANDING COMMITTEE ON LEGISLATION
SUBCOMMITTEE**

**CO-OPERATIVE SCHEMES (ADMINISTRATIVE ACTIONS) BILL 2001 AND
THE AGRICULTURAL AND VETERINARY CHEMICALS (WESTERN
AUSTRALIA) AMENDMENT BILL 2001**

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH,
WEDNESDAY, 20 JUNE 2001**

Members

**Hon W.N. Stretch (Convenor)
Hon Giz Watson**

Committee met at 9.45 am

RUTHERFORD, MR PETER,
Chemicals Coordinator,
Agriculture Western Australia,
3 Baron-Hay Court,
South Perth, examined:

ASHFORTH, MS KATY,
Acting Manager, Legislation,
Agriculture Western Australia,
Locked Bag 4,
Bentley Delivery Centre 6983, examined:

The CHAIRMAN: I shall start with a formal statement that I have to read. On behalf of the committee I welcome you to the meeting. Have you signed a document titled "Information for witnesses" and have you read it and do you understand that document?

Mr Rutherford: Yes.

Ms Ashforth: Yes.

The CHAIRMAN: Hansard is recording proceedings. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document that you refer to during this hearing. Please be aware of the microphones and try to talk into them, ensure that you do not cover them with papers or make noise near them and please try to speak in turn. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings you should request that the evidence be taken in closed session. If the committee agrees to your request, any public or media in attendance will be excluded from the hearing. Please note that until such time that the transcript can be finalised it should not be made public. I advise that premature disclosure of public evidence may constitute contempt of Parliament and may mean the material published or disclosed is not subject to parliamentary privilege. Would you care to make an opening statement to the committee?

Mr Rutherford: To be honest, I am not certain what sort of opening statement you would like.

The CHAIRMAN: It is probably easier if I make a statement of where the committee is coming from. Our brief is to study in some detail the Bills referred to it. A couple of queries arose in general discussion, mainly from me as a farmer and from Hon Giz Watson as a scientist on behalf of the Greens (WA). Also, apologies were received from Hon Paddy Embry. The committee's concern is whether this legislation will impinge on the practical side of the horticulture and agriculture industries, and the general use of chemicals within the community that might come under the ambit of your departments. We outlined some questions for you when we invited you to come. I thank you for appearing. We have those questions and a couple of others. If you would like to comment on those questions that were sent to you, please do so.

Ms Ashforth: The short answer is that these Bills do not impact at all on the practical operation of the scheme as far as it relates to chemicals, and have virtually nothing to do with chemicals as such. This is all to do with attempting to ensure the constitutional validity of the whole scheme.

Mr Rutherford: I would agree with those comments. I could perhaps move on and touch on the first question, which is the all-embracing question about how the scheme operates. I will describe the concept of the scheme. It is the life cycle of a chemical from where it is either imported or manufactured in Australia right through the processes of registration, wholesale and retail sale, and then use by, in most cases, the farmer and then to oblivion - when it is applied to the crop. The national registration scheme, which is the ministerial agreement that underpins the commonwealth Agricultural and Veterinary Chemicals Code Act 1994, is enacted into Western Australia through the Agricultural and Western Australian Veterinary Chemicals (Western Australia) Act 1995 to cover the import and manufacture up to the retail sale of the chemical. The registration, the import of chemicals and the registration and production of the label that appears on the container is done under the commonwealth legislation, which is enacted into Western Australia. From then on, once it is sold or in the hands of the user, the commonwealth legislation has no role to play. The control and use of the product is entirely up to state law. There are small variations between States, but, by and large, there is uniformity. The answer to the first question whether the WA Government can exercise any autonomy in relation to regulation is that up to the point of retail sale, the main element is the registration process and the State cannot exercise much autonomy at all because it has signed on as a State to the national registration scheme. We can tinker at the edges in the sense that we can make specific comments about a chemical that is coming up for registration or a chemical that is under a review process by the national registration authority and we can agree, disagree or whatever to its use in Western Australia. Therefore, to that extent we have some latitude. However, by and large, we are signed into the national agreement and up to the point of retail sale we do not have a lot of autonomy. From then on we have total autonomy, because the State controls the use of chemicals, and all States do likewise, so our degree of autonomy is total.

Ms Ashforth: The control of the use of chemicals is not touched upon by this legislation that you are considering. It is completely separate.

Hon GIZ WATSON: Would it be useful to give an example that the committee discussed, although it might not be impacted on by this Bill? For example, the use of 1080, which is obviously a useful chemical in Western Australia, can be problematic in other States. If the decision at the national level was not to allow the use of 1080, what would happen if WA were to say that it is a useful chemical and did want it put on the national register? Perhaps it is outside the ambit of the Bill, but I am interested to know.

Mr Rutherford: It is a reasonable question. We would have a say, because the mechanism by which the national registration authority would be approaching that hypothetical decision to ban the use of 1080 in Australia would be through the existing chemical review process. It takes about three years to run the full gamut of the ECRP. The state stakeholders and signatories to the national registration scheme have lots of opportunities to comment on whatever the proposal is. In the case of 1080, obviously if one of the other States said "Let's ban 1080" we would jump up and down say what a silly idea that is because we need it. Our view would almost certainly be upheld, because we have strong grounds to retain the use of 1080 - using that example. To the extent that the national registration scheme is binding on all the state signatories, it does not preclude the States from putting in their two-bob's worth or having input into specific decisions that may be made along the road.

The CHAIRMAN: Thank you; that is very clear. You have answered pretty well the second question, "Who is responsible for the various functions". The third question relates to the operation of the agricultural and veterinary chemicals code. The Agvet Code does not seem to be terribly well understood. The committee is concerned that there may be some impact on the way that could operate, or has been operating under the legislation.

Ms Ashforth: The answer is no; it does not affect the way it operates at the moment or is intended to continue operating. It will ensure the constitutional backing for the legislation that sets up the

code and allows it to be applied in Western Australia and enforced will not at some time fall over because of litigation brought after *Hughes*, but otherwise the system will keep operating.

The CHAIRMAN: So any difficulties with the Agvet Code will be dealt with under the same procedure that Mr Rutherford outlined; that is, negotiation between the States and the various parties?

Mr Rutherford: In fact, the ministerial agreement that was signed by all parties in 1994 or thereabouts when it was created, provides for a consultative and cooling off period mechanism - if I can put it that way. If any State has particular difficulties with the national registration scheme, they can, through the minister, make that concern known and there are periods - I cannot remember the exact period - whereby nothing changes. Ultimately, the States have the power to withdraw from the agreement giving 12 months or thereabouts notice. I cannot see any situation in which that is likely to happen.

The CHAIRMAN: Has that worked satisfactorily since 1994?

Mr Rutherford: Absolutely.

The CHAIRMAN: The other questions we prepared relate to the impact of the Agvet Code. We have covered the second question. The last questions are: Will the Bills alter the relationship between the state and commonwealth officers, given that the Bills place an obligation or duty on the part of commonwealth officers and authorities to perform functions? What happens if there is a disagreement over the performance of functions and the exercising of powers between the state and commonwealth officers, and do the actions of commonwealth officers override their state counterparts?

Ms Ashforth: The basic point is that the commonwealth officers exercise the functions and powers under the legislation, and these amendments will ensure that they are validly able to. They have always had the powers, functions and duties - to the extent that they were duties. They have always been there. These High Court cases raised the question: Can the States confer duties, as such, as well as powers and functions that involve the performance of a duty on commonwealth officers? If they cannot, and the duty has to be conferred by the Commonwealth, where does the power to do that come from under the Commonwealth Constitution? Again it is still the same officer who will be performing all those things, but the effect of this quite complex legislation is to attempt by every possible means to give the Legislatures the necessary power to confer the duties and to make it clear that the Parliament's intention is that the States be able to do this, if at all possible, and, if not, the Commonwealth is relying on every power it possibly has to do it, if the High Court finds that it has to be the Commonwealth that does it.

Ms Turner: Could I ask you about non-commonwealth and non-state officers under proposed sections 28A and B which refer to inspectors and analysts. Is there protection in that section for non-commonwealth officers and non-state officers; for example, an independent consultant who might analyse a chemical?

Ms Ashford: Yes. As long as they are appointed under these provisions, they will be an officer within this section.

Ms Turner: They are not strictly commonwealth officers.

Ms Ashforth: That is why the need arose for the amendments. Previously, the legislation referred to commonwealth officers. Inspectors and analysts may not have come within the definition of commonwealth officers and would not have been covered. They will now be covered.

The CHAIRMAN: When compiling our report, we got the impression that we were ratifying past actions. The immediate question is, what are we covering up? Have there been problems with this in the past? The usual reaction of oversuspicious people is, whom are we letting off the hook? Has there been any problem in the past or are state officers under threat or vice versa?

Ms Ashforth: No. As far as I am aware, there have not been any problems, but the potential problem of all officers, including inspectors and analysts, being covered even though they do not come within the definition of commonwealth officers has been recognised for a little while. I do not think it has been involved in any challenges.

The CHAIRMAN: To your knowledge, this is purely precautionary, and is not related directly to any problems?

Ms Ashforth: It is a problem in so far as the legislation that has existed, but not in practical terms of jobs not being able to be done or people being aggrieved. It has not arisen as far as we know.

The CHAIRMAN: That clears up the major problem the committee has come across in the legislation. Thank you very much for giving up your time. It has taken you more time to get up here than to give evidence, but I thank you for your trouble. You will be sent a transcript of these proceedings. If you have any corrections, please get them back to us as quickly as you can. We must report by 28 June, so we are on a fairly short time frame.

Committee adjourned at 10.00 am

