

CO-OPERATIVE SCHEMES (ADMINISTRATIVE ACTIONS) BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

OBJECTIVES OF THE LEGISLATION

The object of this Bill is to deal with doubts cast by the decision in *the Queen v Hughes* (2000) 171 ALR 155 (“*Hughes*”) on the ability of Commonwealth authorities or officers to exercise powers and perform functions under State laws in relation to the following inter-governmental legislative schemes--

- (a) the co-operative scheme for agricultural and veterinary chemicals;
- (b) the co-operative scheme for the operation of the National Crime Authority, and
- (c) any other co-operative scheme to which the proposed Act is applied by regulation.

The Bill ensures that functions or powers are not imposed on Commonwealth authorities and officers in connection with administrative actions under the schemes if their imposition would exceed the legislative powers of the State, and validates any such previous invalid administrative action.

REASONS FOR THE OBJECTIVES AND HOW THEY WILL BE ACHIEVED

This Bill is part of a legislative response to the *Hughes* decision.

Before the High Court decision in *Hughes*, the Commonwealth acted on the assumption that a Commonwealth law allowing Commonwealth officials and authorities to perform functions or exercise powers under State laws was not purporting to impose a duty on the Commonwealth official or authority to perform the functions and powers.

In *Hughes*, the High Court held that Commonwealth legislation purported to impose a duty on the Commonwealth Director of Public Prosecutions (DPP) to exercise State powers and the imposition of that duty needed to be firmly supported by a head of Commonwealth constitutional power.

The *Hughes* decision related to the powers of the DPP within the corporations Law co-operative scheme but is also relevant to the Agvet National Registration Scheme (NRS) and the National Crime Authority scheme (NCA). Within the NRS and the NCA, there are a range of Commonwealth officials and authorities that perform functions and powers conferred under the State legislation.

This Bill validates any previous invalid administrative action under the NRS and NCA schemes. In addition, the validating effect of the Bill can be applied to any other State legislation if later found to be at risk from the *Hughes* decision.

The Explanatory Memorandum to *the Agricultural and Veterinary Chemicals (Queensland) Amendment Bill* sets out further background in respect of the matter.

ADMINISTRATIVE COST TO GOVERNMENT OF IMPLEMENTATION

There is no administrative cost to government on implementation.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

The Bill is generally consistent with the fundamental legislative principles outlined in section 4 of the *Legislative Standards Act 1992*. Some potential breaches are set out below-

- Clause 4(2) and (3) provide that a regulation may declare a commencement time for a relevant State Act retrospectively. This is a potential breach of the fundamental legislative principle of not affecting rights and imposing obligations retrospectively. The potential breach is justified. It is contemplated that the Bill may need to be reinvoked for relevant State Acts at a later time to maintain its curative effect to ensure that State-Commonwealth schemes have a secure constitutional footing. This involves a retrospective regulation.

- Clause 13 provides the Act does not give rise to liability against the State. This is a potential breach of the fundamental legislative principle of conferring immunity from proceedings without adequate justification. The immunity is justified, as the entire point of the legislation is to prevent further litigation on the constitutional validity of State-Commonwealth co-operative schemes.
- The transitional regulation making power under clause 14 allows a regulation to contain provisions of a savings or transitional nature. This may mean that a regulation may modify the effect of the Act. This is a potential breach of the fundamental legislative principle that legislation have sufficient regard to the institution of Parliament. This potential breach is justified, as it is an essential component of the model uniform legislation. Clause 4(2) and (3) provide for the power to reinvoke the validating effect of the proposed Act. Some transitional or savings provisions may be required in this process. The regulation making power cannot be terminated after one year as the reinvoking power may be required at any time in the future.
- Part 2 of the Bill validates past invalid administrative actions taken under a relevant State Act. This is a potential breach of the fundamental legislative principle of not adversely affecting the rights and liberties of individuals retrospectively. This retrospective validation is the curative purpose of the Bill and is essential to remove uncertainty. The national NRS and NCA co-operative schemes have been operating for over several years on the assumption that the schemes have sound constitutional footing. The Bill is necessary to overcome the serious consequences that would otherwise flow from a potential determination that the administrative actions of Commonwealth authorities and officers under the schemes were invalid. Further clause 8 provides that the Bill has no effect on the rights or liabilities of parties to proceedings that have been heard and determined.

CONSULTATION

There has been consultation within the Queensland Government, the Commonwealth Government and other States. Consultation within the Queensland Government was undertaken with-

- Department of Primary Industries
- Department of Tourism, Racing and Fair Trading
- Queensland Police Service
- Department of Industrial Relations
- Office of Queensland Parliamentary Counsel
- Department of Premier and Cabinet

Consultation with the Commonwealth Government and other States occurred through the

- Standing Committee of Attorney-Generals,
- Standing Committee on Agriculture and Resource Management, and
- Agriculture and Resource Management Council of Australia and New Zealand.

RESULTS OF CONSULTATION

All Ministers considered issues arising out of the High Court's decision in *Hughes*. All Ministers agreed this Bill should be passed to apply to the NRS and NCA schemes. All other bodies consulted support the preparation and introduction of the legislation.

NOTES ON PROVISIONS

Clause 1 sets out the short title of the Act.

Clause 2 sets out the main purpose of the Act.

Clause 3 provides that a dictionary in the schedule defines some words used in the Act.

Clause 4 defines the relevant State Acts to which the proposed Act applies, namely, the *Agricultural and Veterinary Chemicals (Queensland) Act 1994* and the *National Crime Authority (State Provisions) Act 1985*. The clause also enables another Act to be declared by an Act to be a relevant State Act. Clause 4(2) enables the commencement time for the

validation under the relevant State Act to be declared by regulation and the commencement of the regulation may be retrospective. This allows a relevant State Act to be validated again. This is an essential component of the uniform legislation passed or intended to be passed by all States.

Clause 5 provides that the Act binds all persons, the State, and to the extent possible, the Commonwealth and other States.

Clause 6 ensures that a relevant State Act is construed as not conferring a duty on a Commonwealth authority or officer to perform a function or exercise a power if the conferral of the duty would be beyond the legislative power of the Parliament of the State. In the case of the co-operative scheme for agricultural and veterinary chemicals, the clause complements the *Commonwealth Agricultural and Veterinary Chemicals Legislation Amendment Act 2001* (which seeks to authorise the conferral of duties on Commonwealth authorities and officers by State law to the fullest extent that is constitutionally possible). The clause further provides that the section does not limit section 9 of the *Acts Interpretation Act 1954* (ie an Act is to be interpreted as not exceeding Parliament's legislative power.)

PART 2—VALIDATION OF INVALID ADMINISTRATIVE ACTIONS

Clause 7 provides that Part 2 applies to previous invalid administrative actions, namely any such actions taken or purportedly taken under a relevant State Act before the commencement time in relation to that Act (the relevant commencement time). This clause gives retrospective effect to Part 2 so that any past invalidities of Commonwealth officers or authorities can be cured.

Clause 8 deals with the operation of the proposed Part. Clause 8(1) provides that the proposed Part extends to affect rights and liabilities that are or have been the subject of legal proceedings. Clause 8(2) provides that the proposed Part does not affect rights and liabilities arising between parties to legal proceedings heard and finally determined before the relevant commencement time to the extent to which they arise from, or are affected by, an invalid administrative action. Clause 8(3) ensures that the proposed Part extends to certain previous administrative actions that are to be validated by the *Agricultural and Veterinary Chemicals (Queensland) Amendment Bill 2001*.

Clause 9 provides that every invalid administrative action to which the proposed Part applies has (and is deemed always to have had) the same force and effect as it would have had if it had been taken by a duly authorised State authority or officer of the State. The clause does not validate administrative actions taken by Commonwealth authorities and officers, but rather attaches to the actions retrospectively the same force and effect as would have ensued had the actions been taken by State authorities and officers (a similar distinction was drawn in *The Queen v Humby, Ex parte Rooney* (1973) 129 CLR 231).

Clause 10 complements clause 9 and does not affect the generality of clause 9. The clause declares that the rights and liabilities of all persons are (and always have been) for all purposes the same as if every invalid administrative action to which the proposed Part applies had been taken by a duly authorised State authority or officer of the State.

Clause 11 ensures that the proposed Part does not reinstate administrative actions that, since the action was taken, have been affected by another action or process. For example, if a decision has been altered on review, the proposed Part does not reinstate the decision in its original form. The proposed Part applies to the decision as it is affected by later actions from time to time.

PART 3—MISCELLANEOUS PROVISIONS

Clause 12 provides that it is immaterial for the purposes of the proposed Act that a Commonwealth authority or officer does not have a counterpart in the State, or that the powers and functions of State authorities or officers do not correspond to the powers and functions of Commonwealth authorities or officers.

Clause 13 provides that the proposed Act does not give rise to any liability against the State.

Clause 14 empowers the making of regulations for the purposes of the proposed Act.

The Schedule of the Act contains a dictionary for some words used in the Act. The phrase "invalid administrative action" is defined as an administrative action taken by a Commonwealth authority or officer pursuant to a function or power conferred under a co-operative scheme

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established by a relevant State Act to which the proposed Act applies, and that is invalid because its conferral on the Commonwealth authority or officer is not supported by a head of power in the Commonwealth Constitution.