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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL CRIME AUTHORITY AMENDMENT BILL 2000

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Justice and Customs,  
Senator the Honourable  
Amanda Vanstone)

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# **NATIONAL CRIME AUTHORITY AMENDMENT BILL 2000**

## **OUTLINE**

This Bill amends the *National Crime Authority Act 1984* (the NCA Act) to clarify the powers, functions and duties of the National Crime Authority following the High Court's decision in *R v Hughes* (2000) 171 ALR 155.

The High Court's decision in *Hughes* raised questions about the capacity of a Commonwealth authority (such as the National Crime Authority) to perform functions or exercise powers under State laws when the function or power conferred on the Commonwealth authority is coupled with a duty, particularly a duty that has the potential to affect the rights of individuals. The Court decided that where both a power and a duty are conferred on the Commonwealth authority pursuant to a Commonwealth/State legislative scheme, an appropriate Commonwealth head of power must support the conferral of that power and duty.

The amendments will:

- confirm the power of the National Crime Authority to investigate offences under the NCA Act against a law of the Commonwealth, or a law of a Territory, or when the offence is an offence against a law of a State and that State offence has a federal aspect;
- clarify that when a function or power is conferred on the National Crime Authority by a law of a State in circumstances where the function or power is coupled with a duty, the Commonwealth's consent to the conferral will be limited to matters that have a federal aspect; and
- ensure that when the National Crime Authority is exercising a function or power under a law of a State where there is no federal aspect to that function or power, the National Crime Authority will not be under a duty or obligation under Commonwealth law to perform that function or exercise that power.

## **FINANCIAL IMPACT STATEMENT**

There are no direct financial impacts from this Bill.

## NOTES ON CLAUSES

### **Clause 1: Short title**

The short title of the Act is the *National Crime Authority Amendment Act 2000*.

### **Clause 2: Commencement**

The Act commences on the day on which it receives the Royal Assent.

### **Clause 3: Schedule(s)**

This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

## Schedule 1 – Amendment of the *National Crime Authority Act 1984*

### Item 1

This Item inserts a definition of the term *federal aspect* into subsection 4(1) and provides that, in relation to an offence against a law of a State, it will have the meaning given by proposed subsection 4A(2) (see Item 5).

### Item 2

This Item inserts a definition of the term *federally relevant criminal activity*. Relevant criminal activity (defined in subsection 4(1)) will be “federally relevant criminal activity” where the relevant offence (defined in subsection 4(1)) is an offence against a law of the Commonwealth, or of a Territory, or where the relevant offence is an offence against a law of a State and that State offence has a federal aspect (see Item 5). Relevant criminal activity will not be federally relevant criminal activity where the relevant offence is an offence against a law of a State and that State offence does not have a federal aspect.

### Item 3

This Item amends the definition of *original reference* so that it will apply to all references for which an additional office for a member of the National Crime Authority (the Authority) may be created under subsection 7(8AA).

### Item 4

This Item amends the definition of *related reference* so that it will apply to all references that are stated to be related to another reference.

### Item 5

This Item inserts a proposed section 4A to identify when a State offence will have a federal aspect.

Proposed subsection 4A(1) provides that the object of proposed section 4A is to identify State offences that will have a federal aspect because:

- the State offence could fall within Commonwealth legislative power because of the elements of the State offence;
- the State offence could fall within Commonwealth legislative power because of the circumstances in which the State offence was committed, regardless of whether or not those circumstances are expressed to be elements of the offence; or
- the investigation of a matter relating to a relevant criminal activity that relates to the State offence is incidental to the investigation of a matter relating to a Commonwealth or a Territory offence.

Proposed subsection 4A(2) provides that, for the purposes of the NCA Act, a State offence will have a federal aspect if and only if at least one of proposed paragraphs 4A(2)(a), (b), (c) or (d) is satisfied.

Proposed paragraphs 4A(2)(a) and (b) provide that a State offence will have a federal aspect if:

- the State offence is not an ancillary offence (as defined) and, assuming that the provision creating the State offence had been enacted by the Commonwealth Parliament instead of by the relevant State Parliament, the provision would have been a valid Commonwealth law; or
- the State offence is an ancillary offence that relates to a particular primary offence and, assuming that the provision creating the primary offence had been enacted by the Commonwealth Parliament instead of by the relevant State Parliament, the provision would have been a valid Commonwealth law.

These provisions will make it clear that, for the purposes of the powers of the Authority, a State offence will have a federal aspect when the subject of the State offence is a matter over which the Commonwealth could legislate. There is no requirement for the Commonwealth to have actually legislated in relation to that subject, provided that the Commonwealth has a head of power under which it could legislate on the matter.

Proposed paragraph 4A(2)(c) provides that, for the purposes of the NCA Act, a State offence will have a federal aspect if, assuming the Commonwealth Parliament had enacted a provision that created an offence penalising the specific acts or omissions involved in committing that State offence, that provision would have been a valid Commonwealth law.

This provision will make it clear that, for the purposes of the powers of the Authority, a State offence will have a federal aspect when the specific acts or omissions involved in committing the State offence are matters over which the Commonwealth could legislate, that is, when the circumstances of the particular State offence bring it within the Commonwealth's legislative power. For example, if the general offence of fraud is a State offence, then when fraud is committed by a constitutional corporation it is an offence that could have been enacted by the Commonwealth Parliament and therefore it will have a federal aspect. Furthermore, proposed subsection 4A(3) makes it clear that the specificity of the acts or omissions is to be determined having regard to the circumstances in which the offence was committed (whether or not those circumstances are expressed to be elements of the offence). Therefore, even if the general offence is expressed to be fraud, the fact that the offence was committed by a body over which the Commonwealth could legislate will be sufficient to give a federal aspect to the particular offence committed.

Proposed subsection 4A(4) provides examples of when a State offence will have a federal aspect for the purposes of proposed paragraph 4A(2)(c) (that is, because of the circumstances of the offence). Proposed subsection 4A(5) provides that the examples in proposed subsection 4A(4) are not, however, to limit the definition in proposed paragraph 4A(2)(c). A State offence will have a federal aspect if it:

- affects the interests of the Commonwealth, an authority of the Commonwealth or a constitutional corporation (as defined); or
- was committed by a constitutional corporation; or
- was committed in a Commonwealth place (as defined); or