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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Honourable Lionel Bowen  
M.P. Deputy Prime Minister and Attorney-General)



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AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1989GENERAL OUTLINE

The purposes of the Bill are:

- . to allow the recovery of such payments where the person has already received Commonwealth funded superannuation benefits and has subsequently been convicted of a corruption offence which occurred when the person was a member of the Australian Federal Police;
- . to restrain the property of a member or former member of the Australian Federal Police convicted of a corruption offence or who may be convicted of a corruption offence where that person has been paid a Commonwealth funded superannuation benefit; and
- . to bring the provisions of the Australian Federal Police Act 1979 dealing with the loss of Commonwealth funded superannuation benefits into line with the Crimes (Superannuation Benefits) Bill 1989.

FINANCIAL IMPACT

It is not possible to estimate the number of cases likely to be brought under the legislation. There will clearly be costs associated with bringing any proceedings but the end result of successful proceedings will be that the Commonwealth will be relieved of an obligation to make certain superannuation payments. While it is not possible to estimate the amount the Commonwealth will save, savings are expected to be substantial. As a guide, the capital value of an early retirement pension is around 18 times the annual pension.

ABBREVIATIONS

The following abbreviations are used in this Explanatory Memorandum:-

- . AFP Act: Australian Federal Police Act 1979 (particularly as amended by the Australian Federal Police Legislation Amendment Act 1989).
- . Commonwealth: the Commonwealth or a Commonwealth organisation as defined in the Bill.
- . CRF: Consolidated Revenue Fund.
- . DPP: Director of Public Prosecutions
- . Proceeds Act: Proceeds of Crime Act 1987
- . Queensland Act: Public Officer's Superannuation Benefits Recovery Act 1988 (Queensland).
- . recovery order: a superannuation order containing an order of the kind mentioned in proposed section 46(4) at Clause 9 of the Bill.

NOTES ON CLAUSES**Clause 1 - Short Title**

This clause contains the short title to the Bill and defines 'Principal Act'.

**Clause 2 - Commencement**

The date of commencement of the Bill, except for proposed section 21, is immediately after the commencement of section 15 of the Australian Federal Police Legislation Amendment Act 1989.

Proposed section 21 commences on the same day as the Crimes (Superannuation Benefits) Bill 1989 commences.

**Clause 3 - Application and extension of Act and regulations**

Proposed subsection 5A(1) will apply the AFP Act and the regulations, when enacted, to inside and outside Australia.

Proposed subsection 5A(2) provides that the AFP Act and the regulations extend to the external Territories.

**Clause 4 - Definitions**

This clause contains definitions. The definition of 'Commonwealth organisation' includes a body corporate incorporated for a public purpose under the law of the Commonwealth or of a Territory. A body corporate in which the Commonwealth has a controlling interest or a subsidiary of such bodies is defined to mean an interest that derives from ownership of at least 50% of the voting rights in the body corporate. The definition covers those self-governing Territory bodies which employ people who are entitled to a Commonwealth funded superannuation benefit. The Territories do not have power to enact legislation which would provide for the forfeiture of Commonwealth funded superannuation.

**Clause 5 - Repeal of section 42 & substitution of new sections**

This clause repeals section 42 of the Principal Act and substitutes proposed sections 42A - 42J.

**Proposed section 42 - Related offences**

Proposed section 42 defines related offences to be offences where the elements are substantially the same acts or omissions. This definition ties in with proposed paragraph 49P(1)(a) which is designed to ensure that restraining orders do not cease to have effect as a result of re-charging the defendant for a related offence.

**Proposed section 42A - Abscond**

Proposed section 42A defines circumstances in which a person is to be taken to have absconded and is in substantially

similar terms to the definition in the Proceeds Act. It is designed to ensure that where proceedings have been initiated for a potential corruption offence and the accused has, by his or her own conduct, put himself or herself beyond the reach of the law, action can be taken to stop the payment of Commonwealth funded superannuation benefits and to secure the recovery of Commonwealth funded superannuation already paid.

#### **Proposed section 42B - Charge with offence**

Proposed section 42B provides that a reference to a person being charged with an offence is a reference to an information being laid against the person for the offence whether or not a summons has been issued or a warrant for the arrest of the person has been issued. There is a similar provision in the Proceeds Act.

#### **Proposed section 42C - Conviction and quashing of conviction**

This proposed section is definitional. Subsection (1) provides an extended definition of 'convicted of an offence' which includes where the person has been convicted of the offence whether summarily or on indictment or the person has absconded in relation to the offence.

Subsection (2) provides that a person is to be taken to have been convicted of an offence in a particular State or Territory if the person was actually convicted of the offence in a court in the State or Territory or, where the person has absconded, the information relating to the offence was laid in that State or Territory.

Subsection (3) provides that where a person has absconded in respect of an offence, and the information relating to the offence was laid in a particular State or Territory, the person is to be taken to have been convicted before the Supreme Court of that State or Territory.

Subsection (4) provides that a person's conviction of an offence is to be taken to be quashed where the conviction is quashed or set aside or, where the person has been convicted by virtue of absconding, he or she is brought before the Court and is discharged in respect of the offence or is convicted and that conviction is quashed or set aside.

Subsection (5) provides that a reference to a person's conviction includes a reference to the alleged commission of an offence by an absconder.

#### **Proposed section 42D - Property of a person**

Proposed section 42D provides that, for the purpose of making a restraining order against the property of a person accused of a corruption offence, the property is to include any property in which the person has the beneficial interest and any gifts made to another person within 2 years immediately prior to the day on which any restraining order is made or the day on which the person is charged, whichever happens first. The purpose of the provision is to void gifts made in the 2 years prior to the granting of a restraining order or to the



person being charged and make that property available to satisfy any recovery order. The effect is similar to that achieved by section 120 of the Bankruptcy Act 1966.

Subsection (1) provides that property of the defendant is to include any property in which the defendant has the beneficial interest. Subsection (2) provides that it is to include gifts transferred to another person within 2 years immediately before the day on which the restraining order is made, or the day on which the person is charged, whichever happens first. It also covers property transferred to another for consideration (money, real estate or other property) the value of which was less than the commercial value of the property at the time the transfer was made. The subsection provides that the value of the property to the defendant is to be worked out in proportion to the amount the defendant provided for the purchase or acquisition. This is done to address any increase in the value of the property. For example, if a defendant made a gift of \$100,000 towards the purchase of a house and the donee contributed \$50,000 then the defendant's interest in the house is two-thirds of the market value of the property.

Subsection (3) provides that property that is to be taken to be property of a person under subclause (1) is available to satisfy a recovery order regardless of whether a restraining order has been made against the property.

Subsection (4) provides that in the case of property of a person under subsection (2) it is available to satisfy a recovery order only if a restraining order has been made against the property. The purpose of this provision is to ensure that a donee has notice that the property may be used to satisfy a recovery order.

#### **Proposed section 42E - Dealing with property**

Proposed section 42E provides an inclusive definition of dealing with property for the purposes of the legislation. As with the Proceeds Act, which has a comparable provision (section 9), the purpose of this provision is to preserve restrained property and prevent steps being taken to diminish the value of the property, to remove it from Australia or give it to another person.

#### **Proposed section 42F - Effective control of property**

Proposed section 42F provides a definition of property subject to the effective control of a person. The provision will enable a court to pierce the corporate veil and is based on a similar provision in the Proceeds Act (section 9A).

### **Proposed section 42G - Sufficient consideration**

Proposed section 42G defines the term 'sufficient consideration' which focusses solely on the commercial value of the property. The purpose of this definition is to exclude unquantifiable consideration that may be sufficient in the law of contract (for example, 'long and faithful service' or 'filial devotion').

### **Proposed section 42H - Application of Part to convictions and offences**

Proposed section 42H provides that Part VA of the AFP Act applies to an offence whenever committed but only in respect of convictions after the legislation comes into force.

### **Proposed section 42J - Act binds the Crown**

This proposed section provides that Part VA of the AFP Act is to bind the Crown in right of the Commonwealth in each of the States, the ACT, the Northern Territory and of Norfolk Island, but nothing renders the Crown liable to be prosecuted for an offence.

### **Clause 6 - Authority to apply for superannuation order**

Clause 16 amends section 44 of the Principal Act by omitting 'appropriate authority in relation to the offence' and substituting "DPP". It will be the DPP who applies to a court for a superannuation order under the AFP Act.

### **Clause 7 - Application for superannuation order**

Clause 7 amends section 45 of the AFP Act. Paragraph (a) provides that only the DPP may be authorised to bring an application for a superannuation order.

Paragraph (b) provides that where the member or former member is not an absconder an application is not to be made unless the member or former member is also sentenced to imprisonment for life or for a term longer than 12 months.

Paragraph (c) effectively provides that only the DPP may apply to a court for a superannuation order.

Paragraph (d) adds proposed subsections 45(2) and 45(3).

Proposed section 45(2) ensures that the DPP only makes an application for a superannuation order in the circumstances outlined in subsection 45(1).

Proposed subsection 45(3) provides that the DPP must take reasonable steps to give written notice of the application to the person in respect of whom the superannuation order is sought.

### **Clause 8 - Application for superannuation order: evidence**

This clause inserts proposed section 45A. Subsection (1) provides that the appropriate court may have regard to the

transcript of any proceedings against the person for the offence to which the application relates.

Subsection (2) provides that any finding of fact made by a court in any proceedings for the offence to which the application relates is prima facie evidence of that fact and the finding may be proved by the production of documents under the seal of the court in which the finding appears.

Subsection (3) provides that a certificate signed or sealed by a person's superannuation body stating that employer contributions or benefits made or payable by the Commonwealth or a specified Commonwealth organisation in respect of the person are held in a specified fund under the relevant superannuation scheme and stating that the specified amount that equals the sum of those contributions or benefits plus interest on that sum is prima facie evidence of those matters.

Subsection (4) provides that a certificate signed or sealed by a person's superannuation authority stating the amount of benefits paid or attributable to employee contributions plus interest is prima facie evidence of those matters.

Subsection (5) provides that a document purporting to be sealed with the seal of a court should be taken to have been lawfully sealed with the seal of a court unless the contrary is proved.

Subsection (6) provides that a document purporting to be signed or sealed by a person's superannuation authority is to be taken to have been signed or sealed by that superannuation authority unless the contrary is proved.

#### **Clause 9 - Superannuation orders**

This clause amends section 46 of the AFP Act which deals with the making of superannuation orders. Paragraph 9(a) amends subsection 46(1) of the AFP Act by omitting "Where" and substituting "Subject to subsection (2) where".

Paragraph 9(b) amends subsection 46(1) of the AFP Act to provide for the recovery of Commonwealth funded employer contributions.

Paragraph 9(c) omits subsections 46(2), (3), (4), (5) and (6) dealing with evidentiary matters and revocation of a superannuation order, as they are dealt with elsewhere in the Bill.

Subsection (2) provides that where a person who is an absconder is because of paragraph 42(1)(b), taken to have been convicted of an offence, a Court must not make a superannuation order unless the Court is also satisfied, on the balance of probabilities, that the person has absconded and the person has been committed for trial for the offence or the Court is satisfied that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

Proposed subsection (3) provides that where any employer contributions or benefits payable by the Commonwealth have been paid into a fund (but has not yet been paid to the beneficiary) then the court must quantify that sum plus the interest and include in the superannuation order an order that the amount be paid to the Commonwealth. This provision is designed to ensure that any employer contributions are returned to the Commonwealth or Commonwealth organisation that paid the contribution.

Proposed subsection (4) provides for recovery orders (see definition in clause 2). The subclause provides for a formula by reference to which the court must calculate any amount to be specified in the order and also provides that the court must include in the order an order that the person pay the specified amount to the Commonwealth. The formula is designed to distinguish between the Commonwealth funded benefit and the employees contributions (with interest). The former is forfeitable whereas the latter property is the property of the employee.

Subsection (5) provides that the court may take into account the value of those amounts when the calculation is made having regard to any decline in the purchasing power of money between the day on which the benefits were paid to the person and the day on which the calculation was made. There is a similar provision in the Proceeds Act.

Subsection (6) provides that the DPP must give written notice of any superannuation order to the relevant superannuation authority.

#### **Clause 10 - When does a superannuation order take effect?**

This clause inserts proposed section 46A. Subsection 46A(1) provides that a superannuation order made in relation to a person who has absconded takes effect on the day on which it is made.

Subsection (2) provides that a superannuation order other than in respect of an absconder does not take effect until the end of any appeal period or, where an appeal is lodged, the time any proceedings resulting from it are finally determined. This ensures that the person is not adversely affected by an order where the appeal is successful and the order is revoked.

#### **Clause 11 - Effect of superannuation orders**

Paragraph 11(a) amends section 47 by omitting subsection (1) and substituting proposed subsections (1), (1A) and (1B). Subsection (1) provides that the consequences of a superannuation order are that:

- (a) all rights of and benefits payable to the person, or a dependant of the person, being rights or benefits arising out of the person's membership of any superannuation scheme cease, or cease to be payable, on the day on which the order takes effect and the person ceases to be a member of the scheme on that day;

- (b) any amount of the kind mentioned in subsection 46(3) (money paid into a fund by the Commonwealth in respect of the person) that is vested in the person ceases to be so vested on that day; and
- (c) the Commonwealth or a Commonwealth organisation is not liable to pay any employer contribution or benefit under the scheme in respect of the person on or after that day.

Subsection (1A) provides that an amount payable by a person to the Commonwealth or a Commonwealth organisation under a superannuation order is a debt due by the person to the Commonwealth or the Commonwealth organisation. This is the same effect as that given to a pecuniary penalty order under subsection 26(8) of the Proceeds Act.

Subsection (1B) provides that any order under proposed subsections 46(3) or (4) against a person may be enforced as if it was an order made in civil proceedings instituted by the Commonwealth or relevant Commonwealth organisation against the person to recover a debt due by the person to the Commonwealth or the Commonwealth organisation and the debt arising from the order is to be taken to be a judgment debt.

Paragraphs 11 (b) and (c) are technical amendments. The amendment in paragraph 11(d) makes provision for the recovery of Commonwealth funded employer contributions.

#### **Clause 12 - Superannuation orders: variation and revocation**

This clause inserts new sections 47A and 47B.

##### **Proposed section 47A - Superannuation orders: variation**

Proposed subsection 47A(1) provides for the situation where a superannuation order is made and it specifies an amount pursuant to proposed subsections 46(3) or (4) and takes effect on the day that is later than the day on which the order is made (as a result of proposed section 46A). The DPP may apply to the court to vary the order by substituting for the specified amount an increased amount having regard to any employer contributions or benefits paid by the Commonwealth in respect of that person during the prescribed period (that is, from the day the order is made until the day it is varied, as defined in proposed subsection (3)).

Subsection (2) provides that where the DPP makes such an application the court must vary the superannuation order accordingly and provides for a method of calculation of the increased amount.

##### **Proposed section 47B - Superannuation orders: revocation**

Proposed section 47B provides the circumstances in which a superannuation order is to be taken to have been revoked. Subsection (1) provides that revocation occurs if the person's conviction is quashed; the person's sentence is reduced or otherwise changed so that the person is not sentenced to imprisonment or is sentenced to imprisonment for a term of 12 months or less; or, when the person is an absconder, the

person is brought before a court in respect of the offence concerned and having been convicted of that offence is not sentenced to imprisonment or is sentenced to imprisonment for a term of 12 months or less.

Subsection (2) provides that where a superannuation order is revoked the DPP must give written notice to the person and the person's superannuation authority.

Subsection (3) provides that where an absconder's superannuation order is revoked the person is entitled to compensation having regard to amounts paid to the person, amounts recovered, losses they have sustained and other matters the Minister considers relevant. Proposed subsection 47B(3) is designed to re-instate the person to their former position. While this is possible where the sentence has been quashed or reduced on appeal (as orders do not have effect until appeals are heard - proposed section 47B) the same is not the case with absconders. It is, in practice, not possible to put an absconder who was the subject of a superannuation order which has been revoked under subsection (1) back in the same position given the effluxion of time. (By definition a person must have been absent for at least 6 months to be an absconder). Rather, the provision recognises the practical difficulty created by such a situation and gives an affected person a right to seek compensation from the Minister for Finance.

#### **Clause 13 - Members found guilty of relevant disciplinary offences**

Section 49 of the AFP Act is amended by omitting subsection 2 and substituting proposed subsections 49 (2), (3) and (4).

Subsection (2) addresses the rights of a contributor's dependants, liability of the employer to pay contributions and the entitlement of a member found guilty of a disciplinary offence.

Subsection (3) makes provision for the amounts held or paid in to a fund and withheld from a person under proposed subsection (2) to be paid back to the Commonwealth or a Commonwealth organisation, whichever is appropriate.

Proposed subsection (4) provides that, when the calculation is made, the value of those amounts may be taken into account having regard to any decline in the purchasing power of money between the day on which the benefits were paid to the person and the day on which the calculation was made. There is a similar provision in the Proceeds Act.

#### **Clause 14 - Proposed Division 3A: Restraining Orders**

##### **Proposed section 49A - Application for restraining order**

Subsection (1) provides that where a person has been convicted of an offence, or is about to be charged with an offence, or has been charged with an offence, the DPP may apply to the appropriate court for a restraining order against specified property of the defendant or of another person. This is

designed to secure property of the defendant where he or she has received Commonwealth funded superannuation benefits and he or she may be the subject of a superannuation order. Again this provision is modelled on provisions of the Proceeds Act.

Subsection (2) provides that the court may require the DPP in any such application to give undertakings as to damages or costs.

#### **Proposed section 49B - Making of restraining orders**

While based on provisions of the Proceeds Act the provisions in proposed section 49B are more limited than those of the Proceeds Act (section 44 refers). Subsection (1) provides that where a superannuation order may be made the court may order that such property as is specified in the order is not to be disposed of or otherwise dealt with by any person except in the manner and circumstances (if any) as are specified in the order.

Subsection (2) provides the restraining order must not be made against a person's property to any extent greater than that necessary to ensure the recovery from the defendant of any amount payable or reasonably likely to be payable by the defendant under a recovery order.

Subsection (3) provides that the previous subsection does not prevent the court from making a restraining order against a person's property where the value of that property is more than the amount payable or reasonably likely to be payable if there is no other property of sufficient value in respect of which the court can make a restraining order.

Subsection (4) provides a court may make a restraining order against property whether or not there is any risk of the property being disposed of, or otherwise dealt with, in a manner that would defeat the operation of the legislation.

Subsection (5) provides that where the application is made in reliance on the proposed charging of the defendant of an offence the court must not make a restraining order unless it is satisfied that the defendant will be charged with the offence, or with a related corruption offence, within 48 hours.

Subsection (6) provides that a court may refuse to make a restraining order if the Commonwealth refuses or fails to give the court such undertakings as the court considers appropriate with respect to the payment of damages, or costs, or both arising out of the order.

#### **Proposed section 49C - Restraining order may be subject to conditions**

This provision is similar to the approach taken at subsection 43(3) of the Proceeds Act. Proposed section 49C provides that the court making the restraining order can impose conditions concerning restrained property. This is necessary to tailor the order for individual circumstances.

Subsection (1) specifically indicates that these conditions may extend to providing for the payment of reasonable living and business expenses, taxed legal expenses in defending a criminal charge and special debts incurred in good faith out of the property.

Subsection (2) ensures that the conditions relating to payments out of the property are not made unless the court is satisfied the person cannot meet the payment out of property not subject to a restraining order.

**Proposed section 49D - Affidavit of police officer needed in certain cases**

Proposed section 49D limits the circumstances where a restraining order may be made to ensure that the property rights of the defendant and other persons are not unduly affected. Subsection (1) provides that where application is made for a restraining order and the defendant has not been convicted of the offence upon which the application is based, the court must not make the order unless it is supported by an affidavit of a police officer stating that the officer believes the defendant committed the offence. The court must also be satisfied, having regard to the affidavit, that there are reasonable grounds for the officer's beliefs concerning the offence.

Subsection (2) deals with applications for restraining orders that relate to the property of someone other than the defendant. It provides that the court cannot make the order unless it is supported by an affidavit of a police officer stating that the officer believes that the property is subject to the effective control of the defendant. Effective control of property is defined at proposed section 42F and takes into account the corporate veil and family relationships. As with subsection (1) the Court must also be satisfied, having regard to the affidavit, that there are reasonable grounds for the officer's beliefs concerning the defendant's effective control of the property. The only other property which could be categorised as another person's property affected by restraining orders is property which has been given to that person by the defendant within 2 years immediately prior to the date of the restraining order. Proposed section 42D provides that such property is to be property of the defendant to the extent that the other person has not paid for it.

Subsection (3) requires the police officer to detail the grounds of his or her beliefs contained in affidavits made under this section.

Subsection (4) provides that a court may require the DPP to provide notice of the application for a restraining order to any persons it considers appropriate, (although the DPP is required to comply with specified notice requirements such as proposed section 49E).

Subsection (5) defines 'police officer' for the purposes of proposed section 49D.



**Proposed section 49E - Notice of application for restraining order**

Subsection (1) provides that generally the DPP must give written notice of an application for a restraining order against property to the owner of the property and any other person believed to have an interest in the property.

Subsection (2) provides that where a notice under subsection (1) has not been given the court must consider the DPP application if asked but, except in the circumstances outlined in subsection (3), the order may only be made for a maximum of 14 days.

Subsection (3) allows an extension of the limit on the length of the order by the court if it is satisfied there are circumstances justifying the extension.

Subsection (4) provides that where an extension is sought under subsection (3) the DPP must notify those interested in the property which is the subject of the order.

Proposed section 49E places an obligation on the DPP to give those who have an interest in the property proper notice but recognises that there are some circumstances of urgency which require the order to be made immediately or that it would be contrary to the interests of justice to give any notice. One circumstance in which it may be necessary to seek a restraining order without notice is where it would prejudice the effectiveness of a related criminal investigation. Proposed sections 49D and 49E mirror section 45 of the Proceeds Act.

**Proposed section 49F - Persons who may appear and adduce evidence**

Proposed section 49F permits a person who claims an interest in property to appear and adduce evidence at the hearing of an application for a restraining order or for the extension of a restraining order, other than applications made without notice referred to at proposed subsection 49E(2). This provision mirrors section 46 of the Proceeds Act.

**Proposed section 49G - Witnesses not required to answer questions**

This provides that where the DPP has applied to a court for a restraining order, a witness shall not be required to answer a question or produce a document if a court is satisfied that to so answer or produce may prejudice the investigation of, or prosecution of a person for, an offence. This provision mirrors subsection 48(8) of the Proceeds Act.

**Proposed section 49H - Notice of restraining orders**

Subsection (1) requires the DPP to give written notice of the making of a restraining order to any person who has an interest in property the subject of that order. However subsection (2) enables the court to order that the giving of notice in accordance with subsection (1) be delayed for a

specified period if the court is satisfied that it would be in the interests of justice to do so. This is in furtherance of provisions for the making of application for restraining orders without notice (subsection 49D(2)) to enable other law enforcement action to be taken before notice is given. This provision mirrors section 47 of the Proceeds Act.

#### **Proposed section 49J - Ancillary orders**

Subsection (1) enables a court to make ancillary orders in relation to property the subject of the restraining order at the time it makes the restraining order or at any later time. The court may vary the restraining order by excluding property from, or bringing additional property within, the ambit of the order. The court may vary any condition attaching to the restraining order or may order the examination on oath of any person, either before the court or its registrar, concerning the affairs of the owner of the property. The Court may also make an order for the carrying out of any undertaking with respect to damages or costs given by the Commonwealth.

Subsection (2) provides that the DPP, the respondent to the restraining order, or any other person with the leave of the court, may lodge an application for an ancillary order.

Subsection (3) enables a person other than the defendant to make an application to vary the order by excluding that person's interest in the property. The court is required to grant the application for variation if it is satisfied the applicant's interest in the property is not subject to the effective control of the defendant as defined at clause 10.

Subsection (4) provides that where a person is examined following an order under subsection (1) the person is not excused from answering a question on the grounds that the answer might tend to incriminate the person or make the person liable to penalty. However, pursuant to subsection (5) a statement or disclosure made by the person in answer to a question during the course of such an examination and any information, document or thing which is obtained as a direct or indirect consequence of the making of a statement or disclosure is not admissible against the person in criminal proceedings for giving false testimony during the course of that examination. These provisions mirror subsections 48(5) and (6) of the Proceeds Act.

Subsection (6) ensures that statements made during the course of an examination are admissible in proceedings relating to superannuation or restraining orders.

Subsection (7) provides that on the hearing of an application for an ancillary order under subclause (1) a witness is not required to answer a question or produce a document if the court is satisfied that to answer or produce may prejudice the investigation of, or prosecution of a person for, an offence. This also mirrors section 48 of the Proceeds Act.

**Proposed section 49K - Charge on property subject to restraining order**

Proposed section 49K creates a charge over property which is the subject of both a restraining order and a recovery order and is based on section 50 of the Proceeds Act. Subsection (1) creates a charge over the property.

Subsection (2) provides that the charge created by virtue of subsection (1) ceases to have effect in respect of property once the recovery order ceases to have effect (for example, where the order is revoked pursuant to proposed section 47B because the conviction is quashed on appeal); upon payment of the amount specified in the order; upon the person becoming bankrupt; on sale or other disposition of the property by the owner with consent of the court; or upon sale of the property to a purchaser in good faith for sufficient consideration who has no notice of the charge.

Under subsection (3) a charge is deemed to be subject to every encumbrance that has come into existence before the charge and that would have priority by virtue of other legislation. The charge has priority over all other encumbrances and, subject to subsection (2), is not affected by a change of ownership.

Subsection (4) enables the DPP to register a charge over property in accordance with the laws of the Commonwealth or a State or Territory, and where a charge is so registered a person seeking to deal with an interest in the property shall be deemed to have notice of the charge at the time of the dealing.

**Proposed section 49L - Registration of restraining orders**

This proposed section permits the DPP to request that details of a restraining order be registered pursuant to a law of the Commonwealth or a State or Territory, and where the restraining order is registered any person who subsequently deals with the property shall be deemed to have notice of the restraining order for the purpose of an offence under proposed section 49M. This proposed section mirrors section 51 of the Proceeds Act.

**Proposed section 49M - Contravention of restraining orders**

Subsection (1) creates an offence of knowingly dealing with property in contravention of a restraining order and is similar to section 52 of the Proceeds Act.

Subsection (2) enables a court to set aside a disposition of or dealing with the property which is the subject of the restraining order, in contravention of that order, if the disposition or dealing is not for sufficient consideration or not in favour of a person who acted in good faith. 'Sufficient consideration' is defined at proposed section 42G. Under subsection (3) the court may set the dealing or disposition aside either as from the date of the dealing or disposition or from the date of the order. If the court makes the latter order, the court must declare the respective rights

of persons who acquired an interest in the property during or after that dealing.

**Proposed section 49N - Restraining orders: revocation**

This proposed section deals with the revocation of restraining orders and empowers the court, on the application of any person whose property is the subject of the restraining order, to revoke the order if the person gives security to the satisfaction of the court for the payment of the recovery order which may be imposed or gives undertakings satisfactory to the court concerning the person's property. This proposed section mirrors section 56 of the Proceeds Act.

**Proposed section 49P - When do restraining orders cease to have effect**

Subsection (1) lists the circumstances where a restraining order ceases to have effect. This occurs if the defendant is acquitted of the offence, the charge is withdrawn or otherwise disposed of without conviction and the defendant has not been charged with a related corruption offence before the acquittal, withdrawal or disposal occurs. The order also ceases to have effect if the defendant is convicted of the offence but is not sentenced to life imprisonment or for a term of more than 12 months imprisonment; the Minister refuses to authorise the DPP to apply for a superannuation order; the court refuses to make a recovery order; the superannuation order has been made but is since satisfied or taken to have been revoked; or where the restraining order was made in reliance of a proposed charge, the defendant is not charged with the offence (or a related corruption offence) within 48 hours of the order. In other cases, subsection (2) provides that the restraining order ceases to have effect at the end of the relevant period in relation to the order. The 'relevant period' is defined at proposed section (4).

Subsection (3) provides that if, within the relevant period, an application is made to extend a restraining order under proposed section 49Q and it is refused by the court after the end of the relevant period, then the order will cease to have effect when the refusal occurs. Subsection (4) provides that when the application to extend the order is granted the order has effect for the period specified in the order under proposed section 49Q or on the occurrence of a specified event.

**Proposed section 49Q - Extension of period of effect of restraining orders**

This provision permits the DPP to apply for an extension of the period of effect of a restraining order. Subsection (1) provides that the application must be made before the restraining order expires.

Subsection (2) provides that a court may extend the period of effect of a restraining order or other appropriate orders where it is satisfied that a recovery order has been or may still be made in respect of the same person or where the property is that of another person, an order under proposed subsection 53A(1) has been or may still be made. Subsection

53A(1) enables the court to order that property which is the subject of the effective control of a person may be made available to satisfy a recovery order made against that person.

Subsection (3) provides that the DPP must give notice of such applications to those whose property is affected.

**Proposed section 49R - Notice of applications**

This deals with other notice requirements. Subsection (1) obliges those who make an application for an ancillary order (proposed section 49F) to provide the DPP, the owner of property the subject of the restraining order or any other person who has been given leave to make an ancillary order with written notice of the application.

Subsection (2) requires those who apply under proposed section 49N for revocation of a restraining order to give the DPP written notice of the application.

**Clause 15 - Repeal of section 50**

This amendment is of a technical nature and repeals section 50 of the AFP Act, as a similar provision is contained in proposed subsection 49(3).

**Clause 16 - Resignation or retirement: members charged with corruption offences**

This clause contains minor amendments to section 51 of the AFP Act. The amendments are necessitated by the provisions in this Bill providing for the recovery of Commonwealth funded employer contributions.

**Clause 17 - Resignation or retirement: members charged with relevant disciplinary offences**

This clause amends section 52 of the AFP Act by inserting a new subsection (4). It provides that where a member has been taken to be suspended without pay under subsection 52(1) of the AFP Act and proceedings in respect of a relevant disciplinary offence are determined in favour of the member, discontinued, or upon the final determination of the proceedings the member is found guilty of a relevant disciplinary offence but is not dismissed, that member shall be taken to have resigned or retired on the day on which the relevant event mentioned in paragraph 52(3)(a) or (b) happened for the purposes of his or her entitlement to interest under a superannuation scheme.

**Clause 18 - End of fixed-term senior executive appointments: members charged with relevant disciplinary offences**

This clause amends section 53 of the AFP Act by adding a new subsection (4). This amendment applies provisions which are similar to those in proposed subsection 52(4) to fixed-term senior executive members.

# **Clause 19 - Court may lift corporate veil, etc**

This clause inserts proposed section 53A into the AFP Act. Subsection (1) enables a Court to treat as property of a person any property it considers to be subject to his or her effective control as defined by proposed section 42F. It provides that the court may make an order that the whole or a specified part of that property is available to satisfy the recovery order. The provision is designed to combat sham transactions conceived as a method of avoiding the consequences of the legislation. A similar provision is contained in section 28 of the Proceeds Act.

Subsection (2) provides that where an order is made making the property available to satisfy a recovery order then enforcement and restraint of the property may occur as if the property is the property of the person against whom the recovery or restraining order is directed.

Subsection (3) contains the notification requirements. The DPP is required to notify all those who have an interest in the property. This subsection also gives those who have an interest in the property a right to participate in the hearing of applications under subclause (1).

## **Proposed section 54 - Amounts payable under section 46, 47, 47B, 49 or 51**

Proposed section 54 provides for the necessary appropriations and financial arrangements to enable the Commonwealth to adjust superannuation funds appropriately where a person's superannuation benefits have been stopped or recovered.

Subsection (1) provides that where an amount is payable as a result of an order under proposed subsection 46(3) the person responsible for the fund has authority and is required to pay that money out of the fund in accordance with the order.

Subsection (2) provides a special regime relating to employer contributions that have been paid into CRF. The Minister for Finance is authorised to make arrangements other than an actual payment in satisfaction of an order under proposed section 46(3).

Subsection (3) provides that where employee contributions are to be paid to a person, (pursuant to subsections 47(2) and (3) of the AFP Act) and the superannuation scheme is established by an Act, it is payable by the Commonwealth (since in those cases the employee contributions are paid to the Commonwealth). Under other schemes the money is to be paid by the fund established under the relevant superannuation scheme.

Subsection (4) deals with the situation mentioned in subsection (3) where the Commonwealth is required to refund employee contributions. It provides authority to make the payment from the CRF where, as a result of the relevant Act, the employee contributions are paid into the CRF. Similarly it also authorises the payment of money from a fund established under an Act where the employee contributions are paid into the fund rather than the CRF.

Subsection (5) provides authority to pay from the CRF any amount determined by the Minister for Finance under proposed subsection 47B(3). Subsection (6) contains the CRF appropriation mechanism.

**Clause 21**

This clause inserts after section 54 of the AFP Act proposed section 54A.

**Proposed section 54A - Multiple payments in respect of same employee contributions not allowed**

Subsections (1) and (2) prevent any unwarranted double payments in respect of the same employee contributions and interest.

**Clause 22 - Constitution of appropriate courts**

This clause amends section 56A of the AFP Act to enable the court which dealt with the corruption offence to also exercise power in relation to restraining orders (as well as superannuation orders).

