

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

*CRIMES AND OTHER LEGISLATION AMENDMENT BILL 1996*

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General and Minister for Justice  
the Honourable Daryl Williams AM QC MP)



## **Crimes and Other Legislation Amendment Bill 1996**

### **General Outline**

This Bill amends a number of Acts dealing with Commonwealth criminal law and law enforcement matters. The amendments made by the Bill may be summarised as

aggregate and cumulative sentences imposed for corruption offences by Commonwealth employees and AFP members and staff members are brought within the scope of sentences which trigger the cancellation of employer-funded superannuation benefits;

- sentences imposed as an alternative to full time imprisonment will not trigger the cancellation of employer-funded superannuation benefits;
- the value of a penalty unit in all Commonwealth statutes is increased from \$100 to \$110;
- the Commonwealth is to be able to recovery the costs it incurs in relation to the storage and maintenance of confiscated goods such as vehicles and vessels used in drug trafficking;

the restrictions on fresh applications for bail by persons who have been remanded in custody under the Extradition Act pending their extradition hearing are modified to remove an unintended consequence;

a requirement that a person who has been arrested having escaped from custody under the Extradition Act, is to be taken before a magistrate who may issue a warrant authorising return of the person to custody;

making provision for extensions of time to be granted for the making of an application in relation to property restrained under the Proceeds of Crime Act;

making provision for a defence of reasonable corporate precaution for offences committed by bodies corporate under the Proceeds of Crime Act;

minor technical corrections to the Proceeds of Crime Act and the Witness Protection Act;

- the requirement to obtain Ministerial consent to institute prosecutions under various Commonwealth statutes is removed.

### **Financial Impact**

The amendments are expected to have a minor and unquantifiable financial impact on Government revenue.

### **Abbreviations Used in the Explanatory Memorandum**

AFP      Australian Federal Police

AFP Act   *Australian Federal Police Act 1979*

CSB Act   *Crimes (Superannuation Benefits) Act 1989*

## NOTES ON ITEMS

### Item 1 Short Title

This is a formal item which provides for the citation of the Bill.

### Item 2 Commencement

The Bill commences on the day that it receives Royal Assent. The exceptions to this are items 22, 23, 24 and 28 of Schedule 1 to the Bill, which are taken to have commenced immediately after the commencement of the Schedule to the *International War Crimes Tribunals (Consequential Amendment) Act 1995* (that schedule commenced on 28 August 1995).

### Item 3 Schedules

This item explains that the items set out in the Schedules to this Bill amend the Acts specified.

## SCHEDULE 1 - AMENDMENT OF ACTS

### *Australian Federal Police Act 1979*

#### Item 1 Definition of sentence

Part VA of the *Australian Federal Police Act 1979* (the AFP Act) makes provision for the making of superannuation orders which disentitle AFP members and staff members who have been convicted of corruption offences and sentenced to imprisonment for terms exceeding 12 months to government-funded benefits.

The definition of sentence in the AFP Act is amended to exclude a sentence passed or order made under ss 20AB(1) of the *Crimes Act 1914*. The effect of the amendment is that a superannuation order may not be made against person who is convicted of a corruption offence and receives a sentence under s 20AB, even if the sentence is for a term longer than 12 months. Sentences under ss 20AB(1) are an alternative to full time incarceration.

#### Item 2 Applications for superannuation orders

Subsection 45(1) is repealed and replaced with a new subsection. The circumstances in which the DPP may make an application for a superannuation order is separated into two new subsections, applications where the person has absconded in connection with the offence (new ss 45(1)) and applications where the person has not absconded (ss 45(1A)).

New subsection 45(1) concerns the application for a superannuation order where a person is taken to have been convicted of an offence because of paragraph 42C(1)(b) *ie* where the person has absconded in connection with the offence.

New subsection 45(1A) recasts the former ss 45(1) to bring cumulative and aggregate sentences exceeding 12 months within the scope of sentences that trigger the operation of Part VA of the AFP Act. Where a person has committed multiple corruption offences, the court may impose sentences that are cumulative, partly cumulative or concurrent. For example, a person could be convicted of two counts of defrauding the Commonwealth under section 29D of the *Crimes Act 1914* and be sentenced to 12 months imprisonment on each count, with three months of the sentence on the second count to be cumulative to the sentence on the first count. This means the head sentence is 15 months.

Alternatively, a court might impose a *single* sentence which exceeds twelve months in respect of multiple offences, instead of imposing a sentence for each offence, any of which do not exceed twelve months *eg* a *single* sentence of 15 months for both offences.

In both those examples, the *individual* terms of imprisonment do not exceed twelve months, and therefore a superannuation order may not be made against the person. The proposed amendments are intended to align Part VA of the AFP Act with current sentencing practice. The effect of the amendments is that a superannuation order may be made if the single sentence in respect of multiple corruption offences or the aggregate sentence in respect of multiple corruption offences, exceeds twelve months (new subparagraph 45(1A)(b)(ii)).

### **Item 3 Subsection 45(2)**

Subsection 45(2) provides that the DPP must not make an application for a superannuation order otherwise than under subsection (1). The amendment removes the reference to subsection (1) and replaces it with 'this section' (*ie* s 45) because new subsections 45(1) and 45(1A) both describe the circumstances in which the DPP may make an application for a superannuation order.

### **Items 4 and 5 Paragraph 47B(1)(b) and 47B(1)(c)**

Section 47B is amended as a consequence of the insertion of new ss 45(1A). A superannuation order may be revoked if a person's sentence is reduced or changed to a term of imprisonment not exceeding 12 months for corruption *offences*. Existing paragraph 47B(1)(b) is deleted and a replacement paragraph inserted. New paragraph 47B(1)(b) refers to subsection 45(1A) to describe a sentence which, if reduced or changed, will result in a superannuation order being taken to have been revoked. Similarly, paragraph 47B(1)(c) is amended to take account of the insertion of new ss 45(1A). A superannuation order may be revoked where a person who has absconded is brought before a court and convicted of the offence concerned, but is not sentenced to a term of imprisonment exceeding 12 months for a corruption offence *or offences* (that is, the sentence would not support the making of an application for a superannuation order under proposed subsection 45(1A)).

### **Item 6 Paragraph 49B(1)(b)**

The amendment will align paragraph 49B(1)(b) with the other amendments to the Act by providing that a restraining order may be made if the court is satisfied, amongst other things, that the person has been sentenced to imprisonment for a term exceeding 12 months for a corruption offence or *offences* (that is, the sentence would support the making of an application for a superannuation order under proposed subsection 45(1A)).

### **Item 7 Paragraph 49P(1)(b)**

Subsection 49P(1) is amended to take account of the insertion of new 45(1A). In order to provide that a restraining order ceases to have effect if the defendant is convicted of the offence but does not receive a term of imprisonment exceeding 12 months for a corruption offence or *offences*, paragraph 49P(1)(b) is deleted and a new paragraph inserted. Paragraph 49P(1)(b) refers to subsection 45(1A) to describe a sentence which causes a restraining order to cease to have effect.

### **Item 8 Paragraph 51(3)(b)(ii)**

Section 51 is amended as a consequence of the insertion of new ss 45(1A). In order to provide that a person can receive benefits from a superannuation scheme if the person is convicted of an offence but is not sentenced to imprisonment for a term exceeding 12 months for corruption *offences*, subparagraph 51(3)(b)(ii) is deleted and replaced by a new subparagraph.

## ***Crimes Act 1914***

### **Item 9 Increase in penalty unit to \$110**

Section 4AA of the *Crimes Act 1914* is amended to increase the value of a penalty unit from \$100 to \$110.

Section 4AA was included in the Crimes Act in 1992 following a recommendation by the *Gibbs Committee* in its *Fifth Interim Report* dated June 1991. The effect of the provision was that the value of all pecuniary penalty provisions in Commonwealth legislation which were expressed in penalty units could be adjusted from time to time by amendment of the value of the penalty unit.

The penalty unit approach allows the real level of fines to be maintained on a uniform basis. The legislation was designed in such terms that, by amendment of section 4AA the value of the penalty units applicable to an offence under any Commonwealth Act or regulation could be varied to reflect current money value.

Since the enactment of the provision, inflation has had the effect of deflating the value of penalties. According to figures provided by the Australian Bureau of Statistics, the change in the Consumer Price Index numbers between June 1992 and September 1995 is calculated at approximately 9.6 %. It follows that a penalty unit should now be \$110.

Section 4F of the Crimes Act will operate to ensure that the increased penalty will apply only in respect of those offences committed after the commencement of the new provision.

### ***Crimes (Superannuation Benefits) Act 1989***

The amendments to the *Crimes (Superannuation Benefits) Act 1989* effected by items 10 - 17 mirror those amendments to the *Australian Federal Police Act 1979*, made by items 1 to 8 of Schedule 1 to this Bill.

#### **Item 10 Definition of sentence**

The definition of sentence in the CSB Act is amended to exclude a sentence passed or order made under ss 20AB(1) of the *Crimes Act 1914*. The effect of the amendment is that a superannuation order may not be made against person who is convicted of a corruption offence and receives a sentence under s 20AB, even if the sentence is for a term longer than 12 months. Sentences under ss 20AB(1) are an alternative to full time incarceration.

#### **Item 11 Applications for superannuation orders**

Subsection 17(1) is repealed and replaced with a new subsection. The circumstances in which the DPP may make an application for a superannuation order is separated into two new subsections, applications where the person has absconded in connection with the offence (new ss 17(1)) and applications where the person has not absconded (ss 17(1A)).

New subsection 17(1) concerns the application for a superannuation order where a person is taken to have been convicted of an offence because of paragraph 6(1)(b) *ie* where the person has absconded in connection with the offence.

New subsection 17(1A) recasts the former ss 17(1) to bring cumulative and aggregate sentences exceeding 12 months within the scope of sentences that trigger the operation of the CSB Act. Where a person has committed multiple corruption offences, the court may impose sentences that are cumulative, partly cumulative or concurrent. For example, a person could be convicted of two counts of defrauding the Commonwealth under section 29D of the *Crimes Act 1914* and be sentenced to 12 months imprisonment on each count, with three months of the sentence on the second count to be cumulative to the sentence on the first count. This means the head sentence is 15 months.

Alternatively, a court might impose a *single* sentence which exceeds twelve months in respect of multiple offences, instead of imposing a sentence for each offence, any of which do not exceed twelve months *eg* a *single* sentence of 15 months for both offences.

In both those examples, the *individual* terms of imprisonment do not exceed twelve months, and therefore a superannuation order may not be made against the person. The proposed amendments are intended to align the CSB Act with current sentencing practice. The effect of the amendments is that a superannuation order may be made if the single sentence in respect of multiple corruption offences or the aggregate sentence in respect of multiple corruption offences, exceeds twelve months (new subparagraph 17(1A)(b)(ii)).

## **Item 12 Subsection 17(2)**

Subsection 17(2) provides that the DPP must not make an application for a superannuation order otherwise than under subsection (1). The amendment removes the reference to subsection (1) and replaces it with 'this section' (*ie s 17*) because new subsections 17(1) and 17(1A) both describe the circumstances in which the DPP may make an application for a superannuation order.

## **Items 13 and 14 Paragraph 23(1)(b) and paragraph 23(1)(c)**

Section 23 is amended as a consequence of the insertion of new ss 17(1A). A superannuation order may be revoked if a person's sentence is reduced or changed to a term of imprisonment not exceeding 12 months for corruption *offences*. Existing paragraph 23(1)(b) is deleted and a replacement paragraph inserted. New paragraph 23(1)(b) refers to subsection 17(1A) to describe a sentence which, if reduced or changed, will result in a superannuation order being taken to have been revoked. Similarly, paragraph 23(1)(c) is amended to take account of the insertion of new ss 17(1A). A superannuation order may be revoked where a person who has absconded, is brought before a court and convicted of the offence concerned, but is not sentenced to a term of imprisonment exceeding 12 months for a corruption offence *or offences* (that is, the sentence would not support the making of an application for a superannuation order under proposed subsection 17(1A)).

## **Item 15 Paragraph 25(1)(b)**

The amendment will align paragraph 25(1)(b) with the other amendments to the Act by providing that a restraining order may be made if the court is satisfied, amongst other things, that the person has been sentenced to imprisonment for a term exceeding 12 months for a corruption offence *or offences* (that is, the sentence would support the making of an application for a superannuation order under proposed subsection 17(1A)).

## **Item 16 Paragraph 37(1)(b)**

Subsection 37(1) is amended to take account of the insertion of new 17(1A). In order to provide that a restraining order ceases to have effect if the defendant is convicted of the offence but does not receive a term of imprisonment exceeding 12 months for a corruption offence *or offences*, paragraph 37(1)(b) is deleted and a new paragraph inserted. Paragraph 37(1)(b) refers to subsection 17(1A) to describe a sentence which causes a restraining order to cease to have effect.

## ***Customs Act 1901***

## **Item 17 New subparagraph 208DA(3)(b)(ii)**

Subparagraph 208DA(3)(b)(ii) is repealed and replaced by a new subparagraph which requires the Official Trustee to apply the proceeds of the sale or disposition of narcotic-related goods (other than narcotic goods) in accordance with new ss (3A). Generally, narcotic-related goods are vehicles and vessels used in drug trafficking.



## **Item 18 Recovery of Storage and Maintenance Costs**

The amendment allows the Commonwealth to recover the costs it incurs in relation to the transportation and storage of narcotic-related goods that are condemned and placed in commercial storage facilities, prior to the goods being transferred to the Official Trustee for disposal. It will allow the Commonwealth to recover its costs just as the Official Trustee recovers similar costs, under the former subparagraph 208DA(3)(b)(ii) (now paragraph 208DA(3A)(b)).

The amendment does not extend to full cost recovery for the Commonwealth. The Commonwealth will not be entitled to recover expenses of staff remuneration such as salary expenses nor is it entitled to recover expenses that are an ordinary incident of its operation. Ordinary everyday running costs such as office expenses (telephone, facsimile expenses *etc*) are not recoverable. Rather, it is the extraordinary costs such as the costs of transportation of narcotic-related goods to a place of storage and the actual storage charges, that are recoverable.

### ***Extradition Act 1988***

## **Item 19 Applications for bail**

This amendment corrects a deficiency in the previous provision. Subsection 15(3) previously provided that where a magistrate remands a person in custody after the person has made an application for bail, the person is not entitled to apply to any other magistrate for release on bail during that remand. The purpose of the provision is to restrict 'magistrate shopping', but the provision could have had a more far-reaching application than was originally intended, for instance, in cases where a magistrate dies, resigns or retires. The amendment avoids that possible effect by making it clear that if a person makes an application for bail and fails, the person is not able to make a further application unless there is evidence of a change in circumstances that might justify bail being granted.

## **Item 20 Escaped persons to be taken before magistrate**

These amendments specify the appropriate procedure following the arrest of persons who are believed to have escaped from custody. Section 49 previously provided for a person who had been arrested by a police officer without warrant, when the officer had reasonable grounds to believe that the person had escaped from custody authorised by the Act, to be returned to custody. The amendments make it clear that the appropriate action following arrest is to take the person before a magistrate for testing of the arresting police officer's belief that the person has escaped from custody. The magistrate is required to be satisfied that the person has escaped from custody authorised by the Act before issuing a warrant authorising return to custody.

### ***Proceeds of Crime Act 1987***

## **Item 21 - 23 Technical Corrections**

Items 21-23 are technical amendments to correct a misdescribed amendment to the *Proceeds of Crime Act 1987*. In each case, s 46 of the *International War Crimes Tribunals Act 1995* was referred to whereas the correct reference is s 45.

## **Extension Of Time To Make An Application In Relation To Restrained Property**

The Proceeds of Crime Act allows a court to restrain property of defendants charged with serious offences. Under ss 30(1) of the Proceeds of Crime Act, the property that remains restrained six months after conviction, is automatically forfeited to the Commonwealth.

A person may apply to the court to have the restraining order varied to release any or all of the property from the restraining order, but that application must be listed, heard and decided before the expiration of six months post conviction. Many defendants await the outcome of the trial before applying for a variation of restraining orders. That results in applications needing to be heard and determined within six months, and that places considerable pressure on court lists.

The amendments effected by items 25 to 27 inclusive are designed to alleviate that pressure on court lists. The amendments will stay the forfeiture of restrained property until an application for a variation of a restraining order has been judicially determined.

### **Item 24 Paragraph 30(1)(d)**

Paragraph 30(1)(d) is repealed and replaced with a new paragraph as a consequence of the insertion of new ss 30A.

### **Item 25 Subsection 30(1)**

Subsection 30(1) is amended as a consequence of the insertion of new ss 30A.

### **Item 26 Extension of the waiting period**

New s 30A provides a mechanism by which a person seeking to make a section 48 application (defined by new ss 48(8) to mean an application under ss 48(2), (3) or (4)), may stay temporarily the forfeiture of property (new ss 30A(1)). A person may apply to a court for an extension of the period under ss 30(1) governing the forfeiture of property, for any time up to a maximum of nine months commencing at the expiration of six months from the date of conviction. That six month period is termed the "waiting period" by new ss 30A(8).

An application for an extension of the waiting period must be made before the end of the waiting period concerned (new ss 30A(3)). The application would have to be decided also before the end of the waiting period as once the property is forfeited under ss 30(1), an order extending the waiting period cannot be made.

A court has a discretion to grant an application for an extension of the waiting period (for a maximum of nine months) but, without limiting the discretion of the court, it may only grant the application if the applicant has diligently prosecuted the s 48 application without undue delay (new ss 30A(5)). That is designed to prevent abuse of the extension provision. If a court were to extend the waiting period for a maximum of nine months, then in the absence of a successful s 48 application, property would be forfeited 15 months from the date of conviction. Whereas a court may extend the waiting period more than once in relation to the property, the aggregate of extensions cannot exceed nine months from the date of conviction. The extension period always runs from the end of the six month waiting period.

If the court extends the waiting period, the waiting period ends on the earliest of the time taken to determine the application or at the expiration of the waiting period (ss 30A(6)). Once a person has successfully applied for an extension of the waiting period, the six months period under ss 30(1) which applies to the forfeiture of property is stayed until the application is heard or the waiting period expires.

Where a court grants an extension of the waiting period and the application under s 48 is determined before the waiting period expires, the order extending the waiting period terminates also at that time (new ss 30A(7)).

#### **Item 27 Technical correction**

As with items 21-23, this item is a technical amendment to correct a misdescribed amendment to the *Proceeds of Crime Act 1987*. Section 46 of the *International War Crimes Tribunals Act 1995* was referred to whereas the correct reference is s 45.

#### **Item 28 Defence of reasonable corporate precaution**

This item makes provision for a defence of “reasonable corporate precaution” for a body corporate to protect it from prosecution for offences committed by its directors, servants or agents, under the *Proceeds of Crime Act*.

Under the *Proceeds of Crime Act*, a body corporate is vicariously liable for the criminal conduct of its directors, servants or agents. Other Commonwealth legislation establishes liability similarly, but at the same time, provides a defence of reasonable corporate precaution, for example, ss 65(2) of the *Ozone Protection Act 1989*, a provision which is used as a model for this proposed amendment of the *Proceeds of Crime Act*.

The proposed amendment prevents the criminal conduct of directors, servants or agents from being imputed to a body corporate where the body corporate can demonstrate that it took reasonable precautions and exercised due diligence to avoid the conduct of its directors servants and agents.

#### ***Witness Protection Act 1994***

#### **Item 29 Disclosure of information relating to witness protection**

The item amends subsection 22(2) of the *Witness Protection Act 1994* and will enable a Commonwealth participant or former participant or a person assessed for placement on the National Witness Protection Program to make disclosures for the purposes of making a complaint or providing information to the Ombudsman under the *Ombudsman Act 1976* or the *Complaints (Australian Federal Police) Act 1981*.

### **SCHEDULE 2 - AMENDMENTS TO REMOVE REQUIREMENT FOR CONSENT TO PROCEEDINGS FOR OFFENCES**

Schedule 2 of the Bill amends various Commonwealth Acts to remove the requirement to obtain Ministerial consent to institute proceedings for the prosecution of offences under those Acts.

Consent to prosecute requirements are inserted in some legislation for various reasons. One purpose is to ensure that prosecutions are not brought in inappropriate circumstances (for example, trivial, frivolous or vexatious private prosecutions), particularly in relation to offences which Parliament has intended to be selectively enforced such as those which relate to national security or obligations under international treaties. Many of the consent to prosecute provisions which are currently on the statute book were inserted before the establishment of the independent Commonwealth Director of Public Prosecutions. The establishment of the Commonwealth Director of Public Prosecutions has reduced the need for a consent to prosecute provision for two reasons. First, there is now a systematic and publicly available policy to guide decision making on instituting a prosecution. Secondly, the decision to prosecute is amenable to judicial review, either under the *Administrative Decisions (Judicial Review) Act 1977* or by way of prerogative writ.

Accordingly, some of the current consent provisions have proved to be unnecessary on a number of grounds. First, there is the policy question of whether it is appropriate, in substantial areas of Commonwealth law, for the decision to prosecute to lie with a Minister or delegate rather than the Director of Public Prosecutions, an independent office holder. Secondly, there is the risk that a formal defect in the consent documents, or in the authority of the person who signs them may render proceedings invalid. Thirdly, the *Director of Public Prosecutions Act 1983* permits the Director of Public Prosecutions to take over and discontinue a private prosecution brought in relation to an offence under Commonwealth law, thus diminishing an important justification for the existence of most of the consent provisions. And finally, the provisions impose an administrative burden on the DPP and administering agencies.

The proposed amendments will make it clear that consent from the relevant Minister will not be required before the institution of proceedings in relation to Commonwealth offences. Pursuant to paragraphs 6(1)(c) and (d) of the *Director of Public Prosecutions Act 1983*, it will be the function of the Director of Public Prosecutions to institute proceedings in relation to the Acts affected, for the commitment of persons for trial in respect of indictable Commonwealth offences, or for summary conviction relating to Commonwealth offences.

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