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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (SUPERANNUATION BENEFITS) AMENDMENT BILL 1997

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice

Senator the Honourable Amanda Vanstone)



General Outline

This Bill amends the *Crimes (Superannuation Benefits) Act 1989* and the *Australian Federal Police Act 1979*. The amendments made by the Bill may be summarised as

- (i) allowing the tracing of amounts that have been paid to superannuation providers (eg amounts that have been rolled-over) and enabling them to be recovered under a superannuation order;
- (ii) enabling the Official Trustee to take custody and control of restrained property and to sell or otherwise dispose of it in satisfaction of a superannuation order;
- (iii) providing a mechanism by which persons charged with or convicted of corruption offences may have their employer-funded superannuation benefits temporarily suspended;
- (iv) facilitating the provision of information to the Commonwealth by superannuation entities concerning Commonwealth employees;
- (v) simplifying the way in which information is provided to a court that certifies the amount of a person's superannuation benefits in superannuation order proceedings.

Financial Impact

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

Abbreviations Used in the Explanatory Memorandum

ADF	Approved Deposit Fund
AFP Act	<i>Australian Federal Police Act 1979</i>
CRF	Consolidated Revenue Fund
CSB Act	<i>Crimes (Superannuation Benefits) Act 1989</i>
CSS	Commonwealth Superannuation Scheme
PSS	Public Sector Superannuation Scheme
DPP	Director of Public Prosecutions
OT	Official Trustee
para	paragraph
PoC Act	<i>Proceeds of Crime Act 1987</i>
RSA	Retirement Savings Account
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
ss	subsection
s	section
subpara	subparagraph

NOTES ON ITEMS

Item 1 Short Title

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

Item 2 Commencement

2. The Bill commences on the day that it receives the Royal Assent. The exception to that is Part 3 of Schedule 1 and Part 3 of Schedule 2 which commence on the day that the *Public Service Act 1997* commences if that occurs after the day on which this Act receives the Royal Assent.

Item 3 Schedules

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

SCHEDULE 1 AND SCHEDULE 2 - AMENDMENT OF THE CRIMES (SUPERANNUATION BENEFITS) ACT 1989 AND THE AUSTRALIAN FEDERAL POLICE ACT 1979

Introduction

4. The Bill deals with five subject matters as noted in the general outline. They are
- (i) tracing and recovery of superannuation benefits that have been rolled-over or transferred;
 - (ii) suspension or "freezing" of employer-funded superannuation benefits;
 - (iii) disposal of restrained property;
 - (iv) obtaining information from superannuation entities; and
 - (v) certification of information to a court when a superannuation order is applied for.

5. The Bill makes parallel amendments to Part VA of the *Australian Federal Police Act 1979* and the explanation of those amendments is dealt with concurrently with the explanation of the amendments to the CSB Act. That is, the explanation of the items of the Bill that follows is made by reference to specific provisions of the CSB Act for simplicity and ease of reading but the AFP Act amendments in Schedule 2 parallel those of the CSB Act. The exception to that is item 15 (new Part 2A) which deals with suspension of employer-funded superannuation benefits. The AFP Act already has a suspension or "freezing" mechanism in s 51 of the AFP Act and therefore the amendments made by new Part 2A (item 15, Schedule 1) are not made to the AFP Act.

PART 1 - AMENDMENTS

Item 1 Definition of Official Trustee

6. The Official Trustee referred to in this Act is the Official Trustee in Bankruptcy continued in existence under the *Bankruptcy Act 1966*. Parallel amendments to the AFP Act are made by item 1 of Schedule 2 to this Bill.

Item 2 Definition of roll-over holder

7. A roll-over holder is a person who is ordered to pay to the Commonwealth or Commonwealth Authority an amount under ss 19(7). Generally speaking, it is the person who has responsibility for the superannuation entity *eg* the trustee of a superannuation fund or approved deposit fund. Parallel amendments to the AFP Act are made by item 2 of Schedule 2 to this Bill.

Item 3 Subsections 18(3) and (4)

8. Subsections 18(3) and (4) are repealed and replaced by a new ss 18(3). The new subsection relaxes the evidentiary provisions relating to the certification to a court of the extent of a person's superannuation benefits. It removes the requirement for signed or sealed certificates from superannuation authorities. Instead, a response to a request for information under ss 39N(1) will be *prima facie* evidence of the information stated in it. It is expected that the response will normally take the form of a letter specifically addressing the questions raised in a request for information under ss 39N(1). Parallel amendments to the AFP Act are made by item 3 of Schedule 2 to this Bill.

Item 4 Repeal of subsection 18(6)

9. With the repeal of ss 18(3) and (4), ss 18(6) is repealed. Parallel amendments to the AFP Act are made by item 4 of Schedule 2 to this Bill.

Items 5, 6, 7 and 8 "The offender"

10. Subsections 19(1), (2), (3) and (4) are amended to substitute "offender" for person. The amendment is made to assist the readability of the section and does not alter the meaning of those subsections. Parallel amendments to the AFP Act are made by items 5, 6, 7 and 8 of Schedule 2 to this Bill.

Recovering Amounts That Have Been Rolled-Over or Transferred to Superannuation Entities

Item 9 Roll-overs are “paid” for ss 19(4) purposes

11. The Bill extends the operation of superannuation orders to benefits that have been rolled-over or transferred from the superannuation schemes to which the Commonwealth made contributions. That occurs by virtue of new ss 19(6). Parallel amendments to the AFP Act are made by item 9 of Schedule 2 to this Bill. The parallel provision to s 19 in the AFP Act is s 46. The explanation that follows is made by reference to specific provisions of the CSB Act but the AFP Act amendments parallel those of the CSB Act.

Why are certain benefits “deemed” to be paid to the offender ?

12. Under the existing scheme of the Act, there are basically three types or subsets of superannuation order. They are currently

- an order which cancels benefits that reside in the scheme to which the Commonwealth or Commonwealth Authority made contributions (ss 19(1));
- an order which orders repayment of benefits by the Fund under which the benefits are held where that scheme is one to which the Commonwealth or Commonwealth Authority has made contributions (ss 19(3)); and
- a recovery order made against the offender for recovery of benefits that have been paid to the offender by the scheme to which the Commonwealth or Commonwealth Authority made contributions (ss 19(4)).

13. Benefits which have been rolled-over from the scheme to which the Commonwealth or Commonwealth Authority made contributions fall outside the scope of superannuation orders. Those benefits are no longer residing in the relevant scheme and thus subsections 19(1) and (3) have no application. The benefits have not been “paid” to the person for the purposes of ss 19(4) because the person does not have an immediate, unfettered entitlement to the benefits given that the benefits usually would be required to be preserved in accordance with the preservation rules of the *Superannuation Industry (Supervision) Act 1993*.

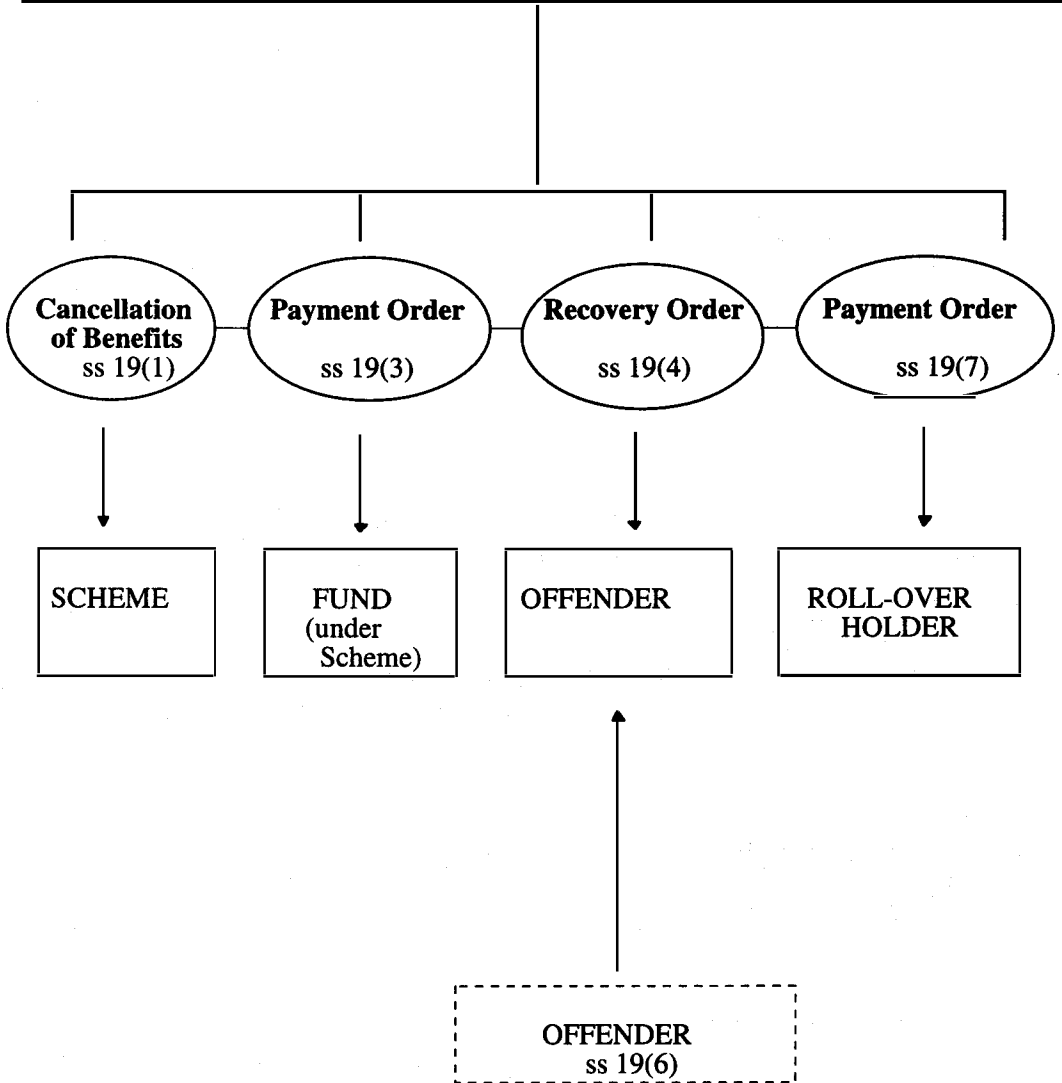
14. For that reason and because it is not uncommon for benefits to be rolled-over, it is appropriate to extend the operation of superannuation orders to benefits that have been rolled-over or transferred to another superannuation provider.

15. That is achieved by a two-pronged approach of

- (i) treating or deeming benefits that have been rolled-over or transferred as “paid” to the person by the scheme for ss 19(4) purposes (new ss 19(6)); and
- (ii) making provision for tracing and recovery of the roll-over amount from the roll-over institution (new ss 19(7)).

16. That is illustrated by the diagram on the following page.

SUPERANNUATION ORDERS



What benefits are “deemed” to be paid to the offender ?

17. Subsection 19(6) treats certain benefits as being paid to the person. Essentially, they are superannuation benefits that are rolled-over or transferred to another superannuation entity.

18. Under ss 19(6), there are four things that characterise that type of payment. First, under para 19(6)(a), the benefits must be paid by the superannuation authority of the scheme or from the Consolidated Revenue Fund (CRF). Generally speaking, a superannuation authority is the person who has the administration of the relevant scheme *eg* the trustee of the scheme. However, under certain Commonwealth statutory schemes, employer-funded benefits are not paid by the superannuation authority as such but are paid by the Commonwealth from the CRF. That is the reason for para 19(6)(a) providing the two alternative ways of paying superannuation benefits.

19. Secondly, under para 19(6)(b), the payment must represent a benefit that would have been or become a benefit payable in respect of the offender under the scheme if it had not been paid to the payee and if a superannuation order had not been made. In other words, it must be a superannuation benefit.

20. Thirdly, under paragraph 19(6)(c), the benefits must have been paid to a payee for the purposes of the payee providing superannuation benefits to the offender. More simply, the payee must be a superannuation provider such as a superannuation fund, an ADF, an annuity provider or an RSA. Para 19(6)(c) also includes any other arrangement under which the offender is provided with superannuation benefits that falls outside the arrangements provided by those preceding entities. It includes superannuation providers that are not regulated by, or compliant with, the *Superannuation Industry (Supervision) Act 1993*.

21. Fourthly, under paragraph 19(6)(d), benefits that are moved to another Commonwealth superannuation authority of a scheme of the offender are outside the scope of new ss 19(6) “payments”. For example, benefits that have been transferred from one Commonwealth scheme to another such as a person transferring from the CSS to the PSS scheme. Superannuation orders extend to movements or transfers of that kind by virtue of ss 19(1) and (3).

22. The effect of ss 19(6) is that benefits which are moved out of the scheme to which the Commonwealth made contributions to another provider of superannuation/retirement benefits, are treated as if those benefits had been paid to the person by the scheme. In the main, that occurs when benefits have been rolled-over or transferred from the Commonwealth scheme to another superannuation provider. The terms “rolled-over” and “transferred” have technical meanings under the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Generally speaking, rolling a benefit over or transferring a benefit means that a superannuation benefit is moved from one superannuation provider (or product) to another without being paid to the beneficiary. That defers the taxation of the benefit. It also means the preservation rules of the superannuation law are complied with.

23. New ss 19(6) covers roll-overs and transfers within the meaning of the *Superannuation Industry (Supervision) Act 1993* but ss 19(6) has a wider application and extends to any benefits that were paid to the payee for the purpose of the provision of superannuation benefits to the offender. For example, a benefit that is paid to a non-regulated superannuation fund is caught by new ss 19(6), even though that payment is not “rolled-over” within the meaning of the SIS Act because it was not paid to a *regulated* superannuation fund.

24. Conversely, benefits which are paid to a third party who is not a superannuation provider *eg* a spouse of the offender, are not caught by ss 19(6). The intention of ss 19(6) is to treat benefits that have been moved from one superannuation provider to another, as being paid to the person.

The effect of treating certain payments as “paid” to the person

25. Subsection 19(6) brings certain payments within the ordinary operation of ss 19(4). In other words, a civil debt is created against the offender according to the ordinary operation of ss 21(2) and (3). However, that debt may be discharged if the superannuation institution that holds the benefits rolled-over or transferred, pays them back to the Commonwealth. That is explained below under recovery orders made under ss 19(7). If a person is taken to have been paid a benefit because of new ss 19(6), when the court makes a superannuation order, it must make a recovery order under ss 19(4) against the offender for the amount that was rolled-over.

26. However, the recovery order that is triggered by the operation of ss 19(6) also triggers the operation of recovery orders under ss 19(7). That means that although a recovery order is made against the offender, the court also makes an order against the superannuation institution which holds the benefit rolled-over or transferred, to recover the amount.

Recovery/Payment Orders Against Superannuation Entities

27. As noted above, the operation of ss 19(6) triggers ss 19(4) and creates a civil debt against the offender. Although the benefits are treated as if they were paid to the offender, they have in fact been paid to a superannuation institution by way of a roll-over, transfer or some other means. Therefore, ss 19(7) seeks to recover those benefits from the roll-over institution. That occurs by the court making a recovery order against the roll-over institution.

28. A recovery order under ss 19(7) enables money that has been rolled-over to be recovered from the roll over institution (the “roll-over holder”). The roll-over holder is ordered to pay to the Commonwealth or the Commonwealth Authority an amount which is equal to the amount of the roll-over minus the reasonable expenses of administration that it incurs in meeting the order. The roll-over holder is the institution that holds the benefits paid under ss 19(6) at the time of the making of the order. In the ordinary case, that will be the “payee” under para 19(6)(a). However, if there have been subsequent roll-overs, the roll-over holder will not be the payee referred to in para 19(6)(a).

29. As with ss 19(4) orders, the order against the roll-over holder is a civil debt and is enforceable against the roll-over institution.

How is the amount of the recovery order against the roll-over holder calculated ?

30. There are two calculations that must be made. First, under the combined effect of para 19(8)(a) and ss 19(9), the amount that was originally rolled-over (including the interest that may be attributed to it) is indexed to reflect any decline in the purchasing power of money (para 19(9)(b)). That indexation mirrors that of ss 19(5). It is normally expected that the court would apply the relevant Consumer Price Index to the roll-over amount and arrive at a amount that reflects the real value of the roll-over at the time of making the order. Then, by virtue of para 19(9)(c), from that amount is subtracted the unrecouped reasonable expenses of the roll-over holder for administering that amount and the amount that would be incurred in making the payment to the Commonwealth ("reasonable expenses" in that context is discussed below).

31. The second calculation is described by para 19(8)(b). It is the amount that the roll-over holder actually has in respect of the person, less the amount of unrecouped reasonable expenses of the roll-over holder for administering that amount and that would be incurred in making the payment to the Commonwealth.

32. The amount of the order is the lesser of the two amounts calculated under paras 19(8)(a) and (b). Both amounts ensure that the Commonwealth is not recovering more than the real value of the roll-over benefit less the expenses of the roll-over holder. If the amount of the roll-over has grown substantially, the recovery is still only for the historical amount of the employer-funded component of the roll-over indexed by CPI, less trustee's administrative expenses. The balance in the roll-over institution remains for the benefit of the person.

33. Both calculations also ensure that the roll-over institution is not financially disadvantaged as a result of complying with the recovery order, by allowing it to recover its costs in both administering the benefit (if not already deducted) and the amount of expenses it incurs in making the payment.

Example 1

Employer contributions of \$30,000 plus interest of \$6,000 were rolled-over from the PSS to Super Fund Ltd. Sometime later, a superannuation order is made against the offender. The offender does not hold any other funds with Super Fund Ltd and thus the balance of the offender's account (assume current balance is \$43,000) is the benefit previously rolled-over. Assume that the decline in purchasing power has been calculated by reference to CPI as \$3,000. Assume the trustee's unrecouped reasonable expenses in total are \$1,000. The two calculations are performed under paras 19(8)(a) and 19(8)(b) as follows:

(i) Calculation under 19(8)(a)

Amount rolled-over plus interest (19(9)(a))	\$ 36,000
Add decline in purchasing power amount (19(9)(b))	+ \$ 3,000
Subtract trustee's reasonable expenses (19(9)(c))	- \$ 1,000
Amount under 19(8)(a)	= <u>\$ 38,000</u>

(ii) Calculation under 19(8)(b)

Amount held by roll-over holder	\$ 43,000
Subtract trustee's reasonable administration expenses -	<u>\$ 1,000</u>
Amount under 19(8)(b)	= <u>\$ 42,000</u>

The lesser of the two amounts is (i) and thus the order is made under ss 19(8) for **\$38,000**. The balance of the offender's account is \$4,000 and remains in the fund for the benefit of the offender.

Example 2

Same facts as in *Example 1* above except that the current account balance of the offender with the Super Fund Ltd is \$ 38,000.

(i) Calculation under 19(8)(a)

Amount rolled-over plus interest (19(9)(a))	\$ 36,000
Add decline in purchasing power amount (19(9)(b)) +	\$ 3,000
Subtract trustee's reasonable expenses (19(9)(c)) -	<u>\$ 1,000</u>
Amount under 19(8)(a)	= <u>\$ 38,000</u>

(ii) Calculation under 19(8)(b)

Amount held by roll-over holder	\$ 38,000
Subtract trustee's reasonable administration expenses -	<u>\$ 1,000</u>
Amount under 19(8)(b)	= <u>\$ 37,000</u>

The lesser of the two amounts is (ii) and thus the order is made under ss 19(8) for **\$37,000**.

What are reasonable expenses of administration etc ?

34. There are two components to the reasonable expenses. Superannuation entities charge various fees for the management of the member's funds. Those costs and charges are normally deducted from the person's capital benefit. Those costs will normally be specified in a trust deed or in the governing rules of the fund. Those costs, to the extent that they have not been recouped at the time of the making of the order, are the reasonable costs of administering the amount referred to in subparas 19(8)(b)(i) and 19(9)(c)(i).

35. In addition to those costs and charges, there may be costs incurred in making the payment under the court order. It is anticipated that those costs would normally be similar to the costs that are charged in otherwise releasing those benefits (commonly called "exit fees"). The costs should represent a small proportion of the overall value of the benefit (unless the benefit is very small, where the costs may be proportionately higher). They are the costs referred to in subparas 19(8)(b)(ii) and 19(9)(c)(ii). If the roll-over holder incurs costs in the litigation in which a roll-over recovery order is made, those costs are not costs incurred in making the payment as described under subparas 19(8)(b)(ii) and 19(9)(c)(ii).

What happens if there is more than one roll-over holder ?

36. Subsection 19(10) ensures that even in circumstances where there is more than one recovery order, the total amounts that may be recovered do not exceed the amount that is ordered against the offender under para 19(4)(a).

Notice must be given by the DPP

37. Under ss 19(11), the DPP must give written notice of the superannuation order to the superannuation authority of the offender's superannuation scheme and to the roll-over holder(s) subject to orders under ss 19(7).

Item 10 Note added to foot of ss 21(2)

38. A note is added to the foot of ss 21(2) which refers to the way debts arising from recovery orders under ss 19(4) and 19(7) may be discharged. Parallel amendments to the AFP Act are made by item 10 of Schedule 2 to this Bill.

Item 11 Amendments to ss 21(3)

39. Subsection 21(3) is amended by making reference to new ss 19(7). The effect of that amendment is that recovery orders made against the person by virtue of new ss 19(6) and recovery orders made against the roll-over holder under ss 19(7), both may be enforced as if they were civil judgement debts. Parallel amendments to the AFP Act are made by item 11 of Schedule 2 to this Bill.

Item 12 Discharging Recovery Order Debts

40. As already noted, if an amount is treated as paid to the person by virtue of new ss 19(6), there are two debts created. One is created against the offender as a debt under ss 19(4). The other is a debt created against the roll-over holder under ss 19(7).

41. The satisfaction of a debt by one discharges the debt of the other. In other words, if the offender discharges the debt under ss 19(4), the debt against the roll-over holder is also discharged by virtue of ss 21A(1). Similarly, if the roll-over holder discharges a debt created under ss 19(7), that discharges the offender's debt under ss 19(4) to the extent of the roll-over and the reasonable administration expenses, by virtue of new ss 21A(4). Parallel amendments to the AFP Act are made by item 12 of Schedule 2 to this Bill.

Roll-Over Holder Discharged From Obligations to Pay Offender

42. Once the roll-over holder pays the amount of a recovery order under new ss 19(7), the roll-over holder is released from its obligation to pay to the offender (or other beneficiary) an amount equal to the recovery order by virtue of new s 21B. That provision overrides any obligation arising under any rule of law or equity. It releases the roll-over holder only from an obligation to pay an amount equal to the recovery order which ensures that if the roll-over holder holds other benefits for the person, the obligation to the offender or beneficiary connected to the offender in respect of those other benefits is unaffected.

Item 13 Varying a superannuation order

43. Section 22 is amended by the addition of new ss (4) which allows the DPP to apply to a court to vary an order made under ss 19(7) by substituting for an amount specified under 19(7) a larger amount that reflects any increase in the amount held by the roll-over holder in respect of the offender since the order was made. The court recalculates the amount under ss 19(8) by virtue of ss 22(5). Parallel amendments to the AFP Act are made by item 13 of Schedule 2 to this Bill.

Item 14 Revocation of superannuation order

44. Subsection 23(2) is amended by the addition of paragraph (c). The DPP must also notify a roll-over holder (if applicable) if the superannuation order has been revoked. Parallel amendments to the AFP Act are made by item 14 of Schedule 2 to this Bill.

Item 15 Temporary Suspension of Employer-Funded Superannuation Contributions and Benefits

45. If benefits remain in the scheme to which the Commonwealth made contributions, a superannuation order is made under ss 19(1) which has the effect described in ss 21(1). If benefits are held in a fund under a scheme, the benefits are ordered to be paid back to the Commonwealth (ss 19(3)). If benefits have been paid to the person by the scheme to which the Commonwealth made contributions, a recovery order is made against the defendant under ss 19(4). If benefits are rolled-over those benefits may now be traced and recovered by way of a recovery order against the roll-over institution (ss 19(7)).

46. Although those mechanisms facilitate the recovery of amounts that have been paid to the person, rolled-over or transferred to another superannuation entity, there are advantages and efficiencies in temporarily freezing employer-funded benefits in the scheme until the corruption offence proceedings are finalised. That way, if a superannuation order is made against the person, the benefits are simply cancelled in the scheme. That obviates the need to obtain either a recovery order under ss19(4) or a recovery order under ss 19(7) as relevant and prevents them from being dissipated and thus more difficult to recover.

47. New Part 2A permits the Minister to make a direction that suspends the employer-funded contributions of a person in the scheme to which they were paid. New s 23A provides an outline of those directions. New Part 2A is modelled on s 51 of the AFP Act where the benefits of AFP members or staff members may be suspended.

48. The Minister may only make a direction that a person's employer-funded contributions be suspended if the person has been charged with or convicted of an offence which the Minister believes is a corruption offence. The freezing or suspension of benefits preserves the benefits in the scheme. That order ends 12 months after it was made but may be extended by the Minister.

49. There may be cases where benefits have been moved out of the scheme before a freezing order takes effect. In those cases, recovery orders under ss 19(4) or 19(7) will enable the benefits to be recovered.

When can the Minister direct a superannuation authority to freeze employer-funded contributions ?

50. New s 23B sets down the circumstances under which the Minister may give a signed direction to freeze/suspend the person's employer-funded benefits in the scheme. The preconditions to the giving of a direction are

- the member has been charged with or convicted of an offence that the Minister is of the opinion is a corruption offence (paras 23B(1)(a) and (b)); and
- where the person has been convicted and the person has been sentenced in respect of the offence, the sentence is for more than 12 months (para 23B(1)(c)).

51. Under ss 23B(2), the direction comes into force seven days after it was signed. This provides sufficient time for the direction to be given to the superannuation authority and for the superannuation authority to act on it before it is taken to come into operation. Under ss 23B(3), the Minister must advise the person of the making of a direction under ss 23B(1), although a failure by the Minister to give such notification to the member does not prevent the direction from coming into force.

What is the effect of a direction to freeze employer contributions ?

52. Under s 23C, all of the benefits that are treated as employer contributions in the scheme and the interest accrued thereon, are suspended for the life of the order. That will be 12 months unless it is extended, or less if it is revoked. The scheme must not pay a benefit to the person that is attributable to employer contributions or interest accrued on those employer benefits.

53. The scheme may pay to the person the person's employee contributions plus the interest attributable to the employee's contributions if the rules of the scheme permit that and if the *Superannuation Industry (Supervision) Act 1993* permit it (ss 23C(4)). In other words, the freezing of benefits does not affect the employee's rights to his or her employee contributions. A withdrawal of employee contributions has the same consequences it would have had had the direction to freeze benefits not been made. If, for example, the withdrawal of employee benefits causes the employee to forfeit rights to certain employer benefits, that effect is unaffected by the freezing. In other words, the freezing merely prevents the fund from paying employer benefits, but does not prevent those benefits from being forfeited, or prevent other rights from being affected by the actions of the employee or any one else.

When does a direction freezing employer contributions cease to be in force ?

54. Section 23D explains when a direction to freeze employer contributions ceases to be in force. Those circumstances are

- the person is acquitted of the corruption offence or the charges are withdrawn or otherwise disposed of (ss 23D(2)); or
- the person is convicted of the corruption offence but does not receive a sentence in excess of 12 months and the DPP has not appealed the sentence (ss 23D(3)); or
- the Minister refuses to authorise the DPP to apply for a superannuation order or revokes an authorisation to apply for a superannuation order (ss 23D(4)); or

- the court refuses to make a superannuation order (ss 23D(5)); or
- 12 months has elapsed since the direction to freeze the benefits took effect and the direction has not been extended (ss 23D(6)).

55. The Minister must inform the member's superannuation authority if the direction ceases to be in force under ss 23D(7). However, it should be noted that the freezing ceases upon the happening of any of the events in ss 23D(2) to 23D(6) and is not dependent upon the Minister's notification under ss 23D(7).

Extending the direction to freeze employer contributions

56. Section 23E makes provision for directions to freeze employer contributions. Given that a direction is made to avoid dissipation of superannuation when superannuation order proceedings are either envisaged or on foot, an extension would normally be made because those proceedings have not been finalised or in some cases, may still only be envisaged, because the corruption offence proceedings have not been finalised. Section 23E enables the Minister to extend the direction for an additional twelve months. The Minister may extend the direction at any time within the 12 month period of freezing (ss 23E(2)) but it takes effect only from the time that the freezing direction would otherwise have expired. The Minister may make more than one extension in relation to a person.

Item 16 The Official Trustee to Take Custody and Control of Restrained Property

57. New ss 25(1A) enables the court to order the Official Trustee (OT) to take custody and control of restrained property. That marks a new way of dealing with restrained property which is modelled on and consistent with the way the OT takes custody and control of restrained property under the *Proceeds of Crime Act 1987*. That is explained further below. Subsection 25(1A) is modelled on para 43(2)(b) of the PoC Act. Parallel amendments to the AFP Act are made by item 15 of Schedule 2 to this Bill.

Item 17 When a charge on restrained property ceases to have effect

58. Subsection 33(2) is amended by the insertion of new para (f) which is made as a consequence of the insertion of new Part 3A which empowers the OT to take custody and control of restrained property. Under new para 33(2)(f), where the OT has been directed by a restraining order to take custody control of property, a charge on restrained property ceases to have effect when the owner disposes of it with the consent of the OT or when the OT disposes of the property in accordance with Division 2 of Part 3A. That provision is modelled on para 50(2)(e) of the PoC Act. Parallel amendments to the AFP Act are made by item 16 of Schedule 2 to this Bill.

Item 18 New Part 3A-Fulfilling superannuation orders from property subject to restraining orders

59. Part 3 of the CSB Act currently makes provision for the making of restraining orders. The concept of restraining orders and those provisions of Part 3 are modelled on the restraining orders of the PoC Act.

60. Restraining orders under the CSB Act are designed to secure property of a defendant to serve as reserve from which payment may be sought when a recovery order is obtained under ss 19(4). If a person has been paid superannuation benefits under a scheme, and there is property of equal value to that of the benefits paid, it may be restrained. The object of the restraining of the property is that that property can be sold or otherwise disposed of to satisfy an order made under ss 19(4).

61. New Part 3A introduces a mechanism for the sale and disposition of restrained property for the purposes of satisfying a recovery order, authorising the court to direct the OT to take custody and control of restrained property and to sell or otherwise dispose of it to satisfy an order made under ss 19(4). That is modelled on the way the OT takes custody and control of restrained property under the PoC Act and disposes of it in satisfaction of a pecuniary penalty order.

62. New s 39A is modelled on subsections 43(6), (6A) and (6B) of the PoC Act. It enables the OT to preserve property that is the subject of the restraining order by the doing of any of the things covered by ss 39A(2), (3), (4) or (5). Parallel amendments to the AFP Act are made by item 17 of Schedule 2 to this Bill.

Fulfilling Recovery Orders From Restrained Property - New Division 2

Court may direct OT to make payment to meet recovery order

63. Subsection 39B(1) is modelled on ss 49(1), (2) and (2A) of the PoC Act. It enables a court to direct the OT to pay to the Commonwealth or Commonwealth Authority an amount out of the restrained property to satisfy a recovery order.

64. The amount that is ordered to be paid under ss 39B(1) is the amount of the recovery order under paragraph 19(4)(a) (refer ss 39B(2)). That must be paid to the Commonwealth or Commonwealth Authority as relevant (ss 39B(3)). That direction may be included in other orders made by a court under the CSB Act and does not have to be a separate order (ss 39B(4)).

65. New ss 39C is modelled on ss 49(8) of the PoC Act. The offender's liability is reduced to the extent of the payment by the OT from a direction under ss 39B(1). The offender's debt under ss 19(4) may be discharged if the payment by the OT equals the debt.

66. In order to enable the OT to make a payment under ss 39B, the court may direct the OT to sell or dispose of specified restrained property and may appoint any person to execute instruments in the name of a person who has an interest in the property to do any act or thing necessary to make the instrument effective (new s 39D). That is modelled on ss 49(3) of PoC Act.

67. A direction or appointment may be included in the order under s 39B and does not need to be a special or separate order. An instrument executed by the person appointed under para 39D(1)(b) has the same force and validity as if the deed were executed by the person(s) with the interest in the property. Subsection 39D(3) is modelled on ss 49(4) of the PoC Act.

How must the OT carrying out the direction ?

68. New s 39E is modelled on ss 49(6) of the PoC Act. Essentially, the OT is entitled first to recover its costs, charges and expenses and its remuneration before the balance is paid to offset the defendant's liability under a recovery order.

69. If there is any money left after making those payments (including a payment under s 39B), it is paid to the person whose property was originally restrained (ss 39E(3)). That is consistent with the terms of para 49(7)(b) of the PoC Act.

When must the OT carry out the direction ?

70. Under new ss 39F(1), the OT must carry out a direction under s 39B or s 39D as soon as practicable but not until the relevant the appeal period has expired. That is, the OT must await the end of the period for appealing the conviction for the offence, the end of the proceedings arising out of an appeal against the conviction, the end of the period for appealing the making of a recovery order, or the end of the proceedings arising out of the making of a recovery order.

71. New subsections 39F(2) and (3) are modelled on ss 53(1) and (2) of the PoC Act and deal with the situation where the OT has been directed to pay an amount under ss 39B(1) and the OT subsequently receives notice of the presentation of a creditor's petition against the person whose property is restrained or the referral of a debtor's petition against the property of the person whose property was restrained. In those circumstances, the OT must take no further action to sell or otherwise dispose of the property until the respective petitions have been dealt with by the Federal Court or until the petitions have been withdrawn or have lapsed.

OT Protected From Liability - New Division 3

OT may only be sued if negligent

72. New s 39G is modelled on ss 54(1) and (2) of the PoC Act. It ensures that where the OT has taken custody and control of property under a restraining order without notice that anyone claims an interest in the property, the OT is not liable for any loss or damage sustained by a person claiming an interest in the property or the cost of proceedings to establish an interest in the property, unless the OT is negligent in taking custody and control of the property.

OT not personally liable for certain taxes and charges

73. New s 39H is modelled on ss 54(3) of the PoC Act and limits the OT's personal liability for rates, taxes and other statutory charges.

OT not personally liable for leave payments

74. New s 39J is modelled on ss 54(4) of the PoC Act and ensures the OT is not personally liable for long service or extended leave payments that relate to employees of a business of which the OT has taken custody and control.

Miscellaneous Aspects - New Division 4

Money in OT's custody and control not to be paid into Common Investment Fund

75. New s 39K is modelled on ss 43(5) of the PoC Act. The OT must not pay money that has been restrained to the Common Investment Fund under s 20B of the *Bankruptcy Act 1966*.

Bankruptcy of person whose property is controlled by OT under a restraining order

76. New s 39L is modelled on ss 53(3) of the PoC Act. Where the OT has custody and control of a person's property and the person subsequently becomes bankrupt, the OT holds the property as the trustee of an estate in bankruptcy from that time.

OT's remuneration to be paid to CRF

77. New s 39M is modelled on ss 55(2) of the PoC Act. It ensures that any remuneration of the OT is paid to the CRF.

Item 19 Obtaining Information From Superannuation Authorities

78. New s 39N enables information to be obtained from superannuation entities to enable applications for superannuation orders to be made or to enable the Minister to take account of relevant facts in deciding whether an authorisation to the DPP to apply for a superannuation order should be given.

79. Under new ss 39N(1), an authorised officer may ask the following for information

- the superannuation authority of the accused's superannuation scheme (para 39N(1)(a));
- a superannuation fund (para 39N(1)(b));
- an ADF (para 39N(1)(c));
- the Commissioner of Taxation as recipient of unclaimed money under s 225 of the SIS Act (para 39N(1)(d));
- a State or Territory as recipient of unclaimed money as referred to in ss 225(9) of the SIS Act (para 39N(1)(e));
- the person administering an exempt public sector superannuation scheme (para 39N(1)(f));
- annuity providers (paras 39N(1)(g), (h) and (i));
- an RSA provider (para 39N(1)(j));
- the Commissioner of Taxation as recipient of unclaimed money under ss 83(1) of the RSA Act (para 39N(1)(k));

- a State or Territory as recipient of unclaimed money as referred to in ss 83(1) of the RSA Act (para 39N(1)(l));
- any other person who provides superannuation/retirement benefits (para 39N(1)(m)).

80. The information may only be requested on the grounds that the person who is the subject of the request has been charged with or convicted of a corruption offence and the information is relevant to the making of an application for a superannuation order or for the making of a decision (by the Minister) as to whether the Director of Public Prosecutions should be authorised to apply for a superannuation order (new ss 39N(2)).

81. A person who does not comply with a request made under ss (1) commits an offence (ss 39N(3)). It is also an offence to provide a response to a request made under ss (1) that is false or misleading in a material particular and to do so recklessly (ss 39N(4)).

82. The request made under ss (1) must be made by an authorised officer. Under ss 39N(4), an authorised officer is the DPP or a member of the staff of the DPP, or a person holding a Senior Executive Service position with the Attorney-General's Department. Parallel amendments to the AFP Act are made by item 18 of Schedule 2 to this Bill.

Item 20 Payment of recovery orders by the ISC or ATO

83. In the event that the Insurance and Superannuation Commissioner or the Commissioner of Taxation is required to make a payment under a recovery order under ss 19(7), the Minister for Finance must make arrangements for the payment of the money from the CRF. A payment from CRF in those circumstances is taken to have been made by the relevant Commissioner and to have satisfied a recovery order. Parallel amendments to the AFP Act are made by item 19 of Schedule 2 to this Bill.

Item 21 Constitution of court hearing proceedings under the Act

84. Section 44 is repealed and replaced with a new section. The new section is needed to take account of the new role of the Official Trustee and the mechanisms to realise restrained property to satisfy a recovery order (refer paras (44(2)(c), (d) and (e)). Parallel amendments to the AFP Act are made by item 20 of Schedule 2 to this Bill.

Item 22 OT's costs, charges and remuneration

85. New ss 45(2) is modelled on ss 55(1) of the PoC Act and enables Regulations to be made concerning the costs, charges, expenses and remuneration of the OT in connection with the performance by the OT of functions or duties or the exercise of powers under the Act. Parallel amendments to the AFP Act are made by item 21 of Schedule 2 to this Bill.

PART 2 APPLICATION PROVISIONS

Item 23 Application of amendments to s 18 of the CSB Act

86. The admissibility in evidence of a certificate signed or sealed by a person's superannuation authority before the commencement of new ss 18(3) of the CSB Act is not affected by the amendments made by this Bill. Parallel amendments to the AFP Act are made by item 22 of Schedule 2 to this Bill.

Item 24 Application of amendments made to s 19 of the CSB Act

87. The amendments to s 19 of the CSB Act apply only to superannuation orders that relate to convictions that occurred on or after the day on which this Act receives the Royal Assent. Parallel amendments to the AFP Act are made by item 23 of Schedule 2 to this Bill.

Item 25 Application of freezing order provisions

88. The amendments that deal with the freezing of employer contributions (new Part 2A) apply to a member of a scheme who is charged with or convicted of a corruption offence on or after the day on which this Act receives the Royal Assent. It also applies to a member who was charged with a corruption offence that occurs before the Royal Assent of this Bill provided the charge was not either withdrawn or disposed of by acquittal or conviction.

PART 3 AMENDMENT CONSEQUENTIAL ON NEW PUBLIC SERVICE ACT

Item 26 SES Employee

89. The reference to a person holding a position in the "Senior Executive Service" (SES) in para 39N(5)(d) will be amended by the Public Service Act 1997 (when it commences). SES will be replaced by "an SES employee or acting SES employee". Parallel amendments to the AFP Act are made by item 24 of Schedule 2 to this Bill.

SCHEDULE 3 - CONSEQUENTIAL AMENDMENT TO THE INCOME TAX ASSESSMENT ACT 1936 - DEFINITION OF ETP

90. The amendment to the definition of "eligible termination payment" (ETP) made by items 1 and 2 by the insertion of new paragraphs (s) and (t) to ss 27A(1) of the *Income Tax Assessment Act 1936* (ITAA) is made from an abundance of caution. The amendment ensures that a payment under ss 19(7) is not an ETP.

91. The definition of ETP under the ITAA (refer for example to paras 27A(1)(b) and (c)) includes a payment by a superannuation entity which, under subpara 27A(3)(a)(i), is made for the benefit of the taxpayer. Under new ss 21A(3) of the CSB Act, where a roll-over holder (such as a superannuation entity) discharges a recovery order made under ss 19(7), that also discharges the debt against the offender under ss 19(4).

92. Arguably, that payment by the roll-over holder is made for the benefit of the offender who is "the taxpayer" for the purposes of the definition of ETP, bringing the payment within the ETP definition. If the payment is an ETP, there are certain taxation implications, for example, the roll-over holder may be required to deduct taxation instalments from the ETP and remit them to the Australian Taxation Office. There may also be concomitant reporting obligations, for example, a requirement to provide a "Statement of Termination Payment" form.

93. The payment by the roll-over vehicle under a recovery order ensures that the person who is the subject of the superannuation order does not receive the Commonwealth funded superannuation benefits. Whilst the payment may technically satisfy the definition of an ETP, it is a more appropriate outcome to exclude it especially as it is not received as income by the offender. The payment by the superannuation entity is made to the Commonwealth or Commonwealth Authority as relevant.

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