

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (SUPERANNUATION BENEFITS) BILL 1989

EXPLANATORY MEMORANDUM

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CRIMES (SUPERANNUATION BENEFITS) BILL 1989GENERAL OUTLINE

The purposes of the Bill are:

- . to prevent the payment of Commonwealth funded superannuation benefits where a Commonwealth employee has been convicted of a corruption offence; and
- . 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 Commonwealth employee; and
- . to restrain property of a Commonwealth employee 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.

The Commonwealth employee's own contribution to the superannuation fund and interest on that sum is not forfeitable and is to be refunded under the Bill. The Bill complements similar legislation which was passed during the Autumn Sittings 1989 which provides that corrupt members of the Australian Federal Police are to lose Commonwealth funded superannuation benefits.

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:-

- . ACT: Australian Capital Territory
- . AFP Act: Australian Federal Police Act 1979 (particularly as amended by the Australian Federal Police Legislation Amendment Act 1989 and subsequent amendments of the Act concerning superannuation benefits).
- . Commonwealth: the Commonwealth or a Commonwealth authority 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 subclause 19(3) of the Bill.

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

This clause contains the short title to the Bill.

Clause 2 - Definitions

2. This clause is definitional. Of particular interest is the definition of 'offence' which means a common law offence or an offence against the law of the Commonwealth or of a State or Territory punishable by imprisonment for life or for a term longer than 12 months. This has the effect of ensuring that the legislation does not apply to minor infringements and is consistent with the AFP amendment. The Queensland Act does not provide this limit but ameliorated it's effect by allowing the Courts to make orders which only provide for the partial forfeiture of superannuation having regard to the degree of corruption (and other factors). The scheme of this Bill is based on the principle that superannuation is a benefit to which only those who discharge their duties within the law are entitled. Consequently the Bill provides that those convicted of a corruption offence (other than a minor infringement) should not receive any Commonwealth funded superannuation.

3. Also of interest is the definition of 'corruption offence' which means an offence by a person committed while that person was a Commonwealth employee being an offence that involved an abuse by the person of his or her office as an employee or was committed for a purpose that involved corruption or was committed for the purpose of perverting or attempting to pervert the course of justice.

4. The definition of 'Commonwealth authority' 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 an 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 3 - Related offences

5. This clause defines related offences to be offences where the elements are substantially the same acts or omissions. This definition ties in with paragraph 37(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.

Clause 4 - Abscond

6. Clause 4 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. Subclause 19(2) provides that a superannuation order must not be made against an absconder unless the court is satisfied that the person has absconded and that the person has either been committed for trial or having regard to the evidence, a reasonable jury, properly instructed could lawfully find the person guilty of a corruption offence.

Clause 5 - Charge with offence

7. Clause 5 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.

Clause 6 - Conviction and quashing of conviction

8. This clause is definitional. Subclause (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.

9. Subclause (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.

10. Subclause (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.

11. Subclause (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.

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

Clause 7 - Employee

13. Subclause (1) provides that an employee means a person employed by the Commonwealth whether under contract, apprenticeship or under a law of the Commonwealth other than members of the AFP (who are covered by the AFP Act).

14. Subclause (2) provides, without limiting the previous subsection, certain persons or classes of person are to be taken for the purposes of the Act to be employed by the Commonwealth, such as Parliamentarians, Judges (including High Court and Federal Court) and Defence Force personnel.

15. Subclause (3) provides that members and directors of Commonwealth authorities are to be taken to be employees.

Clause 8 - Property of a person

16. Clause 8 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 either the day on which any restraining order is made or the day on which the person is charged, whichever occurs first. The purpose of the provision is to make that property available to satisfy any recovery order. The effect is similar to that achieved by section 120 of the Bankruptcy Act 1966.

17. Subclause (1) provides that property of the defendant is to include any property in which the defendant has the beneficial interest. Subclause (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 occurs first. It also covers property transferred to another for consideration (money, real estate or other property) whose value was less than the commercial value of the property at

the time the transfer was made. The subclause 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.

18. Subclause (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.

19. Subclause (4) provides that in the case of property of a person under subclause (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.

Clause 9 - Dealing with property

20. Clause 9 provides the 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.

Clause 10 - Effective control of property

21. Clause 10 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).

Clause 11 - Sufficient consideration

22. Clause 11 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').

Clause 12 - Application

23. Clause 12 provides that the Act applies to an offence whenever committed but only in respect of convictions after the legislation comes into force.

Clause 13 - Act binds the Crown

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

Clause 14 - Act applies inside and outside Australia

25. Clause 14 provides that the Act applies throughout the whole of Australia, outside Australia and extends to the external Territories.

PART 2 - SUPERANNUATION ORDERS

Clause 15 - Notice of charge etc

26. Subclause (1) provides that the relevant police authority (which includes State, Territory and Federal Police) may notify the Minister in writing where an employee is charged with an offence and the police authority thinks that the offence is or may be a corruption offence.

27. Subclause (2) provides that the notice must contain particulars of the charge and set out the reasons why the police officer thinks the offence is, or may be, a corruption offence.

28. Subclause (3) provides that where a police authority notifies the Minister the authority must further notify the Minister in writing if the person is acquitted or convicted of the offence, or the charge is withdrawn or otherwise disposed of without conviction. This procedure is similar to the approach taken in section 43 of the AFP Act.

Clause 16 - Authority to apply for superannuation order

29. Clause 16 provides that where a person who is, or was, an employee at the relevant time, and the person is convicted of an offence, and the Minister is of the opinion that the offence is a 'corruption offence' the Minister may by notice in writing authorize the DPP to apply to a court for a superannuation order in respect of the person.

Clause 17 - Application for superannuation order

30. Subclause (1) provides the circumstances where the DPP is required to make an application for a superannuation order. Application must be made if the DPP is authorised by the Minister to apply for a superannuation order under the preceding provision. Where the person is not an absconder the application is not to be made unless the person is also sentenced to imprisonment for life or for a term longer than 12 months. This provision is designed to ensure that Commonwealth funded superannuation benefits are not forfeited as a result of a minor infringements. In the case of absconders, the DPP is able to seek a superannuation order 6 months after the person first failed to appear. If the absconder subsequently comes before the Court and receives a sentence of 12 months imprisonment or less after the superannuation order is made, that order is revoked under clause 23. This provision is similar to the approach taken under the Proceeds Act.

31. Subclause (2) ensures that the DPP only makes an application for a superannuation order in the circumstances outlined in subclause (1).

32. Subclause (3) provides 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. While the DPP would be expected to serve notice on a person in respect of whom an order is sought it may be that, due to the person's own actions, it is not possible to actually serve an absconder.

Clause 18 - Application for superannuation order: evidence

33. Subclause (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.

34. Subclause (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.

35. Subclause (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 in respect of the person are held in a specified fund under the relevant superannuation scheme and stating that the specified amount equals the sum of those contributions or benefits plus interest on that sum is prima facie evidence of those matters.

36. Subclause (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.

37. Subclause (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.

38. Subclause (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 19 - Superannuation orders: making

39. This clause details a regime relating to the making of superannuation orders. Subclause (1) provides that subject to subclause (2) where an application is made for a superannuation order and the court is satisfied that the person was convicted of a corruption offence, it must declare that the person was so convicted and that the provisions relating to superannuation orders apply in relation to any rights or benefits payable to or in respect of the person under any superannuation scheme.

40. Subclause (2) provides that where a person is taken to be convicted because he or she is an absconder a court must not make a superannuation order unless it is satisfied, on the balance of probabilities, that the person has absconded and either the person has been committed for trial or, having regard to the evidence, a reasonable jury, properly instructed, could lawfully find the person guilty of the offence. (This mirrors section 17 of the Proceeds Act).

41. Subclause (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 employer that paid the contribution.

42. Subclause (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 properly is the property of the employee.

43. Subclause (5) provides that the court may take into account the value of those amounts when it is worked out 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 as at which their value must be worked out. There is a similar provision in the Proceeds Act.

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

Clause 20 - When does a superannuation order take effect?

45. Subclause (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.

46. Subclause (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 21 - Effect of superannuation orders

47. Subclause (1) provides that the consequences of a superannuation order are that

- (a) all rights of and benefits payable to, or in respect of, 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 subclause 19(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 is not liable to pay any employer contribution or benefit under the scheme in respect of the person on or after that day.

48. Subclause (2) provides that an amount payable by a person to the Commonwealth under a superannuation order is a debt due by the person to the Commonwealth. This is the same effect as that given to a pecuniary penalty order under subsection 26(8) of the Proceeds Act.

49. Subclause (3) provides that any order under subclauses 19(3) or (4) against a person may be enforced as if it was an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth and the debt arising from the order is to be taken to be a judgment debt.

50. Subclause (4) provides that, where a superannuation order has been made in respect of a person, the person is entitled, on the day on which the order takes effect to be paid of an amount equal to that which he or she would have otherwise been entitled (that is, employee contributions paid by the person

plus any interest on those contributions). The purpose of the legislation is that a person should only be disentitled to the Commonwealth funded aspect of the superannuation. The subclause is designed to facilitate payment of outstanding monies which are not attributable to Commonwealth funding. This is necessary because existing superannuation laws and agreements do not provide for payments in these circumstances.

51. Subclause (5) provides that where a person in respect of whom a superannuation order has been made and the person has ceased to be an employee before being charged with the offence the person is entitled to an amount in accordance with a formula which takes into account the worth of employee contributions (plus interest) and money already received.

Clause 22 - Superannuation orders: variation

52. Subclause (1) provides for the situation where a superannuation order is made and it specifies an amount pursuant to subclauses 19(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 clause 20). 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 at subclause (3)).

53. Subclause (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.

Clause 23 - Superannuation orders: revocation

54. The clause provides the circumstances in which a superannuation order is to be taken to have been revoked. Subclause (1) provides that revocation occurs if the person's

conviction is quashed (which includes, where the person is an absconder, the person is acquitted or the charge is dismissed; or the person is convicted and that conviction is quashed or set aside); 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 bought 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.

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

56. Subclause (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. Clause 23 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 - clause 20) 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 subclause (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 recognised the practical difficulty created by such a situation and gives an affected person a right to seek compensation from the Minister for Finance.

PART 3 - RESTRAINING ORDERS**Clause 24 - Application for restraining order**

57. Subclause (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 of Crime Act.

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

Clause 25 - Making of restraining orders

59. While based on provisions of the Proceeds Act the provisions in clause 25 are more limited than those of the Proceeds Act (section 44 refers). Subclause (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.

60. Subclause (2) provides the restraining order must not be made against a person's property to any extent greater than is 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.

61. Subclause (3) provides that the previous subclause 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.

62. Subclause (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 on the legislation.

63. Subclause (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.

64. Subclause (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.

Clause 26 - Restraining order may be subject to conditions

65. This provision is similar to the approach taken at subsection 43(3) of the Proceeds Act.

66. This clause provides that the court making the restraining order can impose conditions concerning restrained property. This is necessary to tailor the order for individual circumstances. Subclause (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.

67. Subclause (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.

Clause 27 - Affidavit of police officer needed in certain cases

68. This clause 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. Subclause (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.

69. Subclause (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 clause 10 and takes into account the corporate veil and family relationships. As with subclause (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. Clause 8 provides that such property is to be property of the defendant to the extent that the other person has not paid for it.

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

71. Subclause (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, (though the DPP is required to comply with specified notice requirements such as clause 28).

Clause 28 - Notice of application for restraining order

72. Subclause (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.

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

74. Subclause (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.

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

76. This clause 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. Subclauses 27(4) and clause 28 mirror section 45 of the Proceeds Act.

Clause 29 - Persons who may appear and adduce evidence

77. This clause 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 subclause 28(2). This provision mirrors section 46 of the Proceeds Act.

Clause 30 - Witnesses not required to answer questions

78. 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.

Clause 31 - Notice of restraining orders

79. Subclause (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 subclause (2) enables the court to order that the giving of notice in accordance with subclause (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 (subclause 28(2)) to enable other law enforcement action to be taken before notice is given. This provision mirrors section 47 of the Proceeds Act.

Clause 32 - Ancillary orders

80. Subclause (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.

81. Subclause (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

82. Subclause (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.

83. Subclause (4) provides that where a person is examined following an order under subclause (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 subclause (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.

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

85. Subclause (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.

Clause 33 - Charge on property subject to restraining order

86. This clause 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. Subclause (1) creates a charge over the property.

87. Subclause (2) provides that the charge created by virtue of subclause (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 clause 23 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.

88. Under subclause (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 subclause (2) is not affected by a change of ownership.

89. Subclause (4) enables the DPP to register a charge over property in accordance 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.

Clause 34 - Registration of restraining orders

90. This clause 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 so registered any person who subsequently deals with the property shall be deemed to have notice of the restraining order for the purposes of an offence of dealing with property under clause 35.

Clause 35 - Contravention of restraining orders

91. This clause creates an offence of knowingly dealing with property in contravention of a restraining order and is similar to section 52 of the Proceeds Act.

92. Subclause (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 clause 11. Under subclause (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.

Clause 36 - Restraining orders : revocation

93. This clause 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 clause mirrors section 56 of the Proceeds Act.

Clause 37 - When do restraining orders cease to have effect

94. Subclause (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 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 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, subclause (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 clause 2.

95. Subclause (3) provides that if, within the relevant period, an application is made to extend a restraining order under clause 38 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. Subclause (4) provides that when the application to extend the order is granted the order has effect for the period specified in the order under clause 38 or on the occurrence of a specified event.

Clause 38 - Extension of period of effect of restraining orders

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

97. Subclause (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 subclause 40(1) has been or may still be made. Subclause 40(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.

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

Clause 39 - Notice of applications

99. This deals with other notice requirements. Subclause (1) obliges those who make an application for an ancillary order (clause 32) to provide the DPP, the owner of property the subject to the restraining order or any other person who has been given leave to make an ancillary order with written notice of the application.

100. Subclause (2) requires those who apply under clause 36 for revocation of a restraining order to give the DPP written notice of the application.

PART 4 - MISCELLANEOUS

Clause 40 - Court may lift corporate veil, etc

101. Subclause (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 clause 10. 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.

102. Subclause (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.

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

Clause 41 - Amendments payable under section 19, 21 or 23

104. This clause 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.

105. Subclause (1) provides that where an amount is payable as a result of an order under subclause 19(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.

106. Subclause (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 clause 19(3).

107. Subclause (3) provides that where employee contributions are to be paid to a person, (pursuant to subclauses 21(4) and (5)) and the superannuation scheme is established by an Act, it is payable by the Commonwealth. Under other schemes the money is to be paid by the fund established under the relevant superannuation scheme.

108. Subclause (4) deals with the situation mentioned in subclause (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.

109. Subclause (5) provides authority to pay from the CRF any amount determined by the Minister for Finance under subclause 23(3). Subclause (6) contains the CRF appropriation mechanism.

Clause 42 - Multiple payments in respect of same employee contributions not allowed

110. Subclauses (1) and (2) prevent double payments in respect of the same employee contributions and interest.

Clause 43 - Possible superannuation order not to be taken into account in sentencing

111. Clause 43 directs a court not to take into account the possibility that a superannuation order may be made in relation to a person at the time of sentencing. The principle behind the legislation is that Commonwealth funded superannuation benefits should only be paid to persons who discharge their duties in a non-corrupt way. Thus, corruption should be viewed as a failure to fulfil a condition of Commonwealth employment and it is that failure which leads to the disentanglement to superannuation benefits. The legislation therefore does not seek to create an additional penalty for the conduct constituting the offence and the courts are precluded from taking the legislation into account when imposing a penalty or sentence for that offence.

Clause 44 - Constitution of appropriate courts

112. This clause enables the court which dealt with the corruption offence to also deal with the application for a superannuation order. It provides that the court may do this regardless of whether it is constituted in the same way as it was when the person was convicted of the offence.

Clause 45 - Regulations

113. This clause contains the regulation making power.



