Australian Federal Police Amendment Bill 1989

Date Introduced: 17 August 1989
House: House of Representatives
Portfolio: Attorney-General

Digest of Bill

Purpose
To provide for the recovery of employer superannuation contributions and property restraining orders in relation to members and former members of the Australian Federal Police (AFP) convicted of, or charged with, certain offences.

Background
The AFP was established in 1979 following the amalgamation of the Australian Capital Territory Police and the Commonwealth Police. Consequently, the AFP's main functions largely reflect the functions performed by these bodies, and include: the provision of policing services for the ACT, the protection of Commonwealth property and the enforcement of Commonwealth laws throughout Australia. As part of the latter function, the AFP performs such functions as the investigation of drug trafficking, organised crime and fraud against the Commonwealth. The AFP also protects airports and is part of an international policing force in Cyprus.

The average police staffing level for 1987-88 was 2672, compared with 2572 for the previous financial year. On 3 April 1989, the Minister for Justice announced a funding increase of $500 000 for the AFP. The additional funding arose after claims that, for many operations, the AFP was a 9am. to 5pm. police force as funds were not available for overtime. One of the causes of the funding shortfall was seen to be the amount spent on the investigation of the death of Assistant Commissioner Winchester. In the 1989–90 Budget, the AFP received $205.4 million, compared to $176.7 million received in 1988–89.¹

The question of whether government officers convicted for offences that are regarded as serious should still be eligible to receive the employer contributions to their superannuation scheme has recently received much publicity, particularly as a result of allegations before the Fitzgerald enquiry in Queensland. Governments have recently shown a marked interest in depriving criminals and corrupt officials of the proceeds of their activities. This has been exemplified by the Proceeds of Crime Act 1987, the Australian Federal Police Legislation Amendment Act 1989, and State legislation which aims to achieve the same ends. Part of the process of depriving people of benefits associated with illegal activity has involved the removal of the employer
contributions to their superannuation benefits. This usually results in a substantial loss to the person involved, who receives only their contributions and any interest on those contributions.

The Australian Federal Police Legislation Amendment Act 1989 deals with the loss of superannuation benefits by members and former members of the AFP who have committed a corruption offence. Where a person is convicted of a corruption offence, the Director of Public Prosecutions (DPP) may apply for a superannuation order. The effect of such an order is that the person ceases to be a member of the scheme and is not eligible to receive the employer's contributions to the scheme, and interest on these funds made in respect of them. Where a person ceases to be eligible to receive superannuation benefits, those benefits are payable to the Commonwealth. Currently, the Act only terminates superannuation benefits from the date a superannuation order is made. No provision exists for the recovery of superannuation benefits. However, the Attorney-General, during the debate on the Australian Federal Police Legislation Amendment Bill 1989, foreshadowed that the Government in the 1989–90 Budget session would introduce legislation providing for the recovery of superannuation benefits.2

Main Provisions

The Bill will operate, except for clause 21 (which will operate from the same day as the Crimes (Superannuation Benefits) Bill 1989), after the commencement of section 15 of the Australian Federal Police Legislation Amendment Act 1989 (which deals with the loss of superannuation benefits, but has yet to be proclaimed) (clause 2).

A new definition of 'offence' will be substituted into the Australian Federal Police Act 1976 (the Principal Act) by clause 4. 'Offence' will be defined as a common law offence, or an offence against a law of the Commonwealth, a State or Territory, that is punishable by a term of imprisonment for more than 12 months.

Clause 5 (proposed sections 42–42J) will substitute and insert certain definitions into the Principal Act. Proposed section 42A provides that, except in relation to proposed sub-section 46(2) (see below), a person will have 'absconded' if they have been charged with an offence; a warrant for their arrest has been issued; and one of the following happens: six months from the day the warrant is issued they can't be found, or for any other reason can't be brought to justice and, if they are outside Australia, extradition proceedings have not started; or after that same period, they can't be brought to justice because they are outside Australia, and extradition proceedings have commenced, but are subsequently unsuccessful.

Proposed section 42D provides that for the purpose of making a restraining order against the property of a person, the property is to include: any property in which the person has a beneficial interest; any gifts of property transferred two years prior to the day the restraining order is made, or the day the person
is charged; or property transferred within that two years period for an amount less than its commercial value. In the latter two cases, property will be available to satisfy a recovery order only if a restraining order has been made against the property.

Proposed section 42F provides that property may be subject to the effective control of a person whether or not they have an interest in it. A court, when determining whether or not property is under the effective control of a person, may look at interests in: a company that has an interest in the property; trusts that have a relationship to the property; and family, domestic and business relationships between persons having an interest in the property, or in companies and trusts with an interest in the property, and other persons.

Part VA of the Principal Act (which deals with the loss of superannuation benefits) will apply to offences for which a person is convicted after the commencement of this Part (proposed section 42H).

Clause 9 will amend section 46 of the Principal Act which deals with the making of superannuation orders. Basically, where a court is satisfied that a person was convicted of a corruption offence and that Part VA of the Principal Act applies in relation to superannuation benefits paid or payable to them under a superannuation scheme, a superannuation order is to be made. Where a person has absconded and is taken to have committed an offence, a court is not to make a superannuation order against them unless it is also satisfied, on a balance of probabilities, that they have absconded and have been committed for trial for the offence, or are satisfied a jury would find the person guilty of the offence (proposed sub – section 46(2)). Where employer contributions have been made or are payable into a scheme, but have yet to be paid, the court will calculate the amount of those contributions plus interest, and direct that they be paid to the Commonwealth. Where any superannuation benefits have been paid, the court will calculate the amount of employer contributions plus interest paid, and direct that they be paid to the Commonwealth. Employee contributions and related interest will not be forfeitable.

The effect of a superannuation order will be that the person will cease to be a member of their superannuation scheme; will not be eligible to receive the employer’s contributions to the scheme; and the Commonwealth will not be liable to pay any employer contributions in respect of them (clause 11).

A superannuation order will be revoked if the person’s conviction is quashed; the person’s sentence is changed so that they are no longer sentenced to a term of imprisonment of more than 12 months; or where the person is an absconder, they are brought before a court, convicted, but not sentenced to a term of imprisonment of more than 12 months. Where an absconder’s superannuation order is revoked they will be entitled to certain compensation, determined by the Minister for Finance, including; for any financial loss suffered as a result of the superannuation order and any amount recovered from them under a recovery order (proposed section 47B) (clause 12).
Where a person is convicted of a relevant disciplinary offence (i.e. an offence under the AFP (Discipline) Regulations) they will cease to be a member of their superannuation scheme, will not be eligible to receive the employer’s contributions to the scheme, and the Commonwealth will not be liable to pay any employer contributions in respect of them. Where employer contributions have been made, or are payable into a scheme, but have yet to be paid, those contributions will be paid to the Commonwealth. Employee contributions plus interest on those contributions will remain payable (clause 13).

A new Division 3A (proposed sections 49A–49R) will be inserted into Part VA of the Principal Act by clause 14 that will deal with restraining orders. Where a person (the defendant) has been convicted of an offence, or has been, or is about to be charged with an offence, the DPP may apply to the court for a restraining order against specified property of the defendant, another person, or both (proposed section 49A). Where a superannuation order has been made, the court may order that the property is not to be disposed of, or dealt with, by any person except in a way specified in the order. A restraining order is not to be greater than is necessary to ensure recovery of any amount likely to be payable by the defendant under a recovery order. Where an application for a restraining order is made in reliance on a proposed charging of the defendant, the court is not to make a restraining order unless satisfied that the defendant will be charged within 48 hours. A court may refuse to make a restraining order if the Commonwealth refuses or fails to give the court undertakings it considers appropriate with respect to the payment of damages, costs, or both, in relation to the making and operation of the order (proposed section 49B).

Proposed section 49C provides that a court making a restraining order may impose any conditions it thinks fit, including: for meeting out of the property the person’s taxed legal expenses in defending a criminal charge, and the person’s reasonable living and business expenses. The court is not to attach conditions to a restraining order unless satisfied the person cannot meet those expenses or debts out of property that is not subject to a restraining order.

Generally, the DPP is to give notice of an application for a restraining order against a person’s property, to the owner of the property and any other person they believe may have an interest in it. Where no notice has been given, the court is still, if the DPP ask’s it to, to consider an application. However, any restraining order it makes will only have effect for 14 days. A court may, on application from the DPP, extend a 14 day order. If this occurs, the DPP is to give notice to the owner of the property and any other person they believe may have an interest in it (proposed section 49E). Proposed section 49H provides that, generally, where a restraining order is made against a person’s property, the DPP is to give them notice of the order. However, the court may delay the giving of notice where it is satisfied it would be in the public interest to do so.
A person who knowingly contravenes a restraining order by disposing or dealing with the property will be guilty of an offence. The maximum penalty for breach of this provision will be imprisonment for five years (proposed section 49M).

Proposed section 49P provides that restraining orders will cease to have effect in certain circumstances, including: that the defendant is acquitted of the offence; the Minister refuses to authorise the DPP to apply for a superannuation order in respect of the defendant; or, generally, six months from the day the order was made.

Clause 19 will allow a court making a recovery order against a person, if it thinks that particular property is subject to their effective control, to make an order declaring the whole, or a specified part of that property as available to meet the recovery order.

A new section 54A, which will be inserted into the Principal Act by clause 21, will prevent a person getting multiple payments in respect of the same employee superannuation contributions.

References

For further information, if required, contact the Law and Government Group.

23 August 1989

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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