



Restraint action and enforcement of recovery orders under the Crimes (Superannuation Benefits Act) 1989 or Australian Federal Police Act 1979

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To simplify this National Legal Direction (NLD) all references are to the Crimes (Superannuation Benefits Act) 1989 but the NLD is equally applicable to actions under Divisions 2 and 3A of Part VA of the Australian Federal Police Act 1979.

The CDPP's responsibility for conducting Superannuation Order proceedings

- 1. The Crimes (Superannuation Benefits Act) 1989 (CSB Act) provides that the Commonwealth Director of Public Prosecutions (CDPP), upon being authorised by the Minister, must take action to seek an order for the recovery of the employer funded component superannuation contributions where an employee or the Commonwealth or Commonwealth agency has been convicted of a corruption offence.
2. It is the responsibility of the particular Practice Group that conducts the prosecution to consider and take CSB Act action.
3. Occasionally in some CSB Act matters it will be appropriate to consider obtaining a restraining order to preserve property to satisfy an order to recover from the convicted employee the employer funded component of the superannuation benefits.
4. The purpose of these instructions is to provide guidance on when restraint action will be appropriate and the CDPP's role in enforcement of recovery orders made under the CSB Act.

Conducting CSB Act Superannuation Order proceedings

5. A [Prosecutor's Guide](#) setting out the procedure for seeking Ministerial authorisations and conducting superannuation benefits is available.

Authorisations

6. The Director has issued Authorisations for recovering the proceeds of crime which includes action under the CSB Act. The Authorisations provide for approval to take restraint action under the CSB Act or to institute, carry on, coordinate or supervise civil recovery action. All applications for CSB Act restraining orders must be made pursuant to an appropriate approval.

Restraint action under the Crimes (Superannuation Benefits) Act 1989 (Cth)

7. The CSB Act provides a scheme for the forfeiture of a Commonwealth employee's employer component of their superannuation upon the employee's conviction for a corruption offence and imprisonment for longer than 12 months (an eligible sentence). Where the employee has been paid out the employer component of superannuation, the court may make a recovery order under subsection 19(3) or (4) for the employee to pay to the Commonwealth or Commonwealth authority (whichever the court considers appropriate) the amount of the employer component of superannuation. Section 21 of the CSB Act provides an order under subsection 19(3) or (4) against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth or the relevant Commonwealth authority against the person to recover a debt due by the person to the Commonwealth or the Commonwealth authority, and the debt arising from the order is to be taken to be a judgment debt.
8. There is provision in section 24 of the CSB Act for the CDPP to obtain a restraining order over property of the defendant or another person with a view to securing payment of any recovery order made:

Section 24 Application for restraining order

(1) Where a person (in this Part called the defendant):

(a) has been convicted of an offence; or

(b) has been, or is about to be, 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, or both.

9. The purpose of the restraining order is reflected in subsection 25(2) which states that the order must not be made over property to any extent greater than is necessary to ensure the recovery of an amount payable.
10. The practical effect of subsection 25(6) is that a court will usually require the CDPP to give an undertaking as to costs and damages before it will make a restraining order.
11. Unlike the *Proceeds of Crime Act 1987* (Cth) (POCA 87) and *Proceeds of Crime Act 2002* (Cth) (POCA 02) the CSB Act contains no information gathering tools that would enable law enforcement to identify property that could be the subject of restraint. The limited tools (essentially examination orders) only arise after restraint has occurred. These limitations make identifying property suitable for restraint difficult.
12. Unless property comes to the attention of the CDPP during the prosecution, or the investigating agency agrees to make enquiries, it is unlikely that the CDPP prosecutors will be in a position to make their own enquiries, and without investigation tools any enquiries that can be made are very limited. For example, although a property title search might reveal the defendant owns real estate, if the title reveals a mortgage, without bank records there may be no way of knowing if there is adequate equity to satisfy the recovery order or warrant restraint action.
13. Similarly, unlike the POCA 87 and POCA 02 the CSB Act contains no suitable mechanisms for:
- The restrained property to be managed and preserved by the Official Trustee; or

- For the property to be realised to satisfy the recovery order

Without provisions of the type found in the POCA 02 Act, the CDPP must rely on civil enforcement mechanisms.

- 14.** Restraining order action is best undertaken either before or at the time the recovery order is sought. This approach is not only intended to prevent dissipation of assets but also to encourage a defendant to consider prompt satisfaction of the recovery order while proceedings are on foot.

When will action be taken?

- 15.** The CDPP must not commence restraint action unless satisfied that there are reasonable prospects of success in obtaining payment of the recovery order and that, in all the circumstances of the case, the public interest would be served by taking the action.
- 16.** Where property of value is identified to the CDPP that could be the subject of restraint, the CSB Act makes it clear that only the CDPP is empowered to seek restraint. Accordingly the CDPP should consider whether it is appropriate to take restraint action over property that could be used to secure payment of a recovery order on a case by case basis.
- 17.** In deciding whether to commence confiscation action prosecutors must have regard to all relevant factors including:
- *(If a recovery order has not been made at the time restraint is sought)* the prospects of a recovery order being made (this includes the likelihood of conviction resulting in an eligible sentence);
 - the value of the potential recovery order;
 - the adequacy of the information regarding the assets that could be restrained and the nature of any further investigation that may be required;
 - the total value of the assets potentially subject to restraint action;
 - the nature of the assets;
 - the interests of third parties;
 - the views of the investigative agency;
 - whether there is any conflict with an on-going POCA action being conducted by the AFP (see paragraph 14 of the Prosecutor's Guide)
 - how any recovery order might be enforced against restrained property, including ancillary orders to a restraining order which might assist with recovery;
 - the prospects of the defendant agreeing to pay the recovery order;
 - the potential cost of the litigation should the matter be disputed or civil litigation be required to enforce the recovery order; and
 - whether other avenues for enforcement of the recovery order are available to other agencies.

Value of the potential recovery order

- 18.** If a defendant is being paid a pension at the time of proceedings, there is no mechanism to suspend future superannuation payments so the value of the potential order can increase until such time as the final recovery order is made.

Nature and value of assets

- 19.** Some property will be easier to take enforcement action against, such as accessible superannuation funds in the name of the defendant (where the superannuation fund is likely to assist with recovery) as opposed to real estate where the property is owned in several names. Where the property to be

restrained is of a minimal value it may not be an efficient use of resources to pursue it. The CDPP should anticipate being required by the court to give the usual undertakings as to costs and/or damages. There is no mechanism in the CSB Act, for the management of restrained property that might preserve its value as there is in the POCA 02. Generally, restraint of any high risk property (e.g. boats) should be approached with particular caution.

Limited information gathering tools

20. There are limited information gathering tools to identify property and there are no powers given to the Official Trustee to realise restrained property to satisfy the debt to the Commonwealth. The information gathering tools are only available once a restraining order has been obtained and are limited in nature to examinations before a court or registrar. There are no powers to gather information from banks or conduct search warrants or even compel the superannuation authority to produce information in advance of the proceedings. While it might be possible to identify real estate in the defendant's name, there are no tools in the CSB Act to obtain bank records which might reveal the defendant's equity in the property.

Enforcement of the recovery order

21. Previous CSB Act matters have shown that where a defendant does not consent or cooperate to realise the restrained property or otherwise satisfy the recovery order out of other property, enforcement of the recovery order can be challenging, time consuming and expensive. The CDPP does not retain expertise in the area of debt enforcement and, for the reasons set out below, considers that the responsibility for enforcement action is properly the responsibility of the Commonwealth employer and/or the relevant superannuation authority.

Responsibility for the conduct of civil recovery action

22. In matters where no restraining order action is to be taken, the CDPP is of the view that the Rules made for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) in relation to recovery of debts owing to the Commonwealth apply to agencies affected by CSB Act action; ie the Rules apply to Commonwealth departments or agencies which employed the convicted employee as well as the Crimes Superannuation Corporation (CSC) in the same way as those rules apply to a non-corporate Commonwealth entity (within the meaning of the PGPA Act) or corporate entities incorporated for a public purpose such as the CSC.

23. Pursuant to the PGPA the Department of Finance issued the *Public Governance, Performance and Accountability Rule* (PGPA Rule) including the PGPA Rule (Recovery of debts) to guide non-corporate entities on the recovery of debts. The *Accountable Authority Instructions*, (AAI's) provide:

For additional clarity section 11 of the PGPA Rule (Recovery of debts) prescribes requirements for the recovery of debts by the accountable authority of a non-corporate Commonwealth authority. It requires the accountable authority to pursue recovery of all debts for which they are responsible, unless the debt has been written off as authorised by an Act, or they consider that the debt is not legally recoverable, or that recovery is not economical to pursue. An accountable authority is responsible for debts owing to the Commonwealth in relation to the operations of their authority.

24. While the CDPP might be authorised by the Minister to conduct proceedings under the CSB Act it does not do so to remove monies paid to the defendant in respect of the CDPP's operations.

25. In CSB Act matters this would be the Commonwealth employer for whom the defendant worked given that the debt could be said to align more closely with the operation of the Commonwealth employer that contributed the employer contribution to the superannuation fund. Or, in the alternative, the superannuation authority which has duties in relation to management of superannuation contributions.

26. The CDPP is not currently resourced to institute, carry on, co-ordinate or supervise enforcement action nor does it retain the appropriate expertise to do so. During CSB Act proceedings and/or following the

making of a recovery order the CDPP should advise the superannuation authority and/or the Commonwealth employer:

- that should the CDPP be provided with adequate information regarding property that could be restrained to secure payment a recovery order, the CDPP will consider whether such action is appropriate;
- the CDPP is not resourced to institute, carry on, co-ordinate or supervise enforcement of the debt created by the recovery order; and
- it is open to the Commonwealth authority (the superannuation authority and/or the Commonwealth employer) to pursue enforcement of the debt at any time it remains unsatisfied.