

2000

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE RESERVE SERVICE  
(PROTECTION) BILL 2000**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Veterans' Affairs,  
the Hon. Bruce Scott MP)

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## Defence Reserve Service (Protection) Bill 2000

### OUTLINE

The Defence Service (Protection) Bill 2000 provides for the protection of the Reserves in their employment and education, to facilitate their return to civil life and for related purposes. The Bill will set out the entitlements and prohibitions that apply in relation to people who are rendering or have rendered defence service as members of the Reserves. In some cases, the entitlements extend to their dependants.

### FINANCIAL IMPACT

The Government has allocated \$20m in the Financial Year 2000-01 for the Reserves enhancement initiatives contained in the Bill which will fund initiatives such as:

- the Employer Support Payment which is expected to cost approximately \$8.9m in 2000-01. This assumes an initial full-year annual cost of approximately \$17.7m and a starting operation of 1 January 2001;
- Defence Support Reserve Committee enhancement is expected to cost \$0.681m;
- Communications and public awareness strategies are expected to cost approximately \$1.9m in 2000-01;
- Accreditation of reserve training in accordance with the Australina Training Authority is expected to cost approximately \$4.8m in 2000-01;
- A swipe card system for Reservists, to improve the efficiency of administration of the Reserve, would cost approximately \$1m;
- An independent study to develop proposals to maximise the period of service provided to Defence by individual Reservists is expected to cost approximately \$4.8m.

Defence Reserve Service  
(Protection) Bill 2000

**NOTES ON CLAUSES**

**Part 1** contains introductory matters:

1. Section 1 provides that the Act may be cited as the *Defence Reserve Service (Protection) Act 2000*.
2. Section 2 provides for the commencement of the Act on the 28<sup>th</sup> day after the day on which the Act receives Royal Assent.
3. Section 3 provides for an overview of the Act. The Act will provide for the following:
  - Entitlements and prohibitions that apply in relation to people who are rendering, or have rendered, defence service as members of the Reserves. In some cases, entitlements extend to their dependants;
  - The kinds of defence service rendered by the member may determine the scope of the entitlements and prohibitions available to him or her;
  - Part 4 contains prohibitions against the conduct that discriminates against members in their employment or other work. This Part applies to all types of defence service;
  - Part 5 sets out the consequences for member's employment if he or she was employed when he or she started to render defence service. This Part will apply to all kinds of defence service except for certain kinds of voluntary continuous full time service;
  - Part 6 protects members from having their partnerships dissolved while the members are absent on defence service;
  - Part 7 will allow a member to re-enrol in and resume a course that the member had to interrupt in order to undertake continuous full time defence service (except for certain kinds of voluntary continuous full time service);
  - Part 8 will postpone debts that a member (or his or her dependant) is liable to pay and would otherwise fall due after the member starts rendering defence service as a result of being called out. Interest however is payable by the member or dependant on the postponed debts. Part 7 also stays proceedings in respect of postponed debts;
  - Part 9 deals with bankruptcy of a member or his or dependant. It applies only if the member has rendered service after being called out;
  - Part 10 gives a member who has rendered defence service after being called out access to loans and guarantees to enable him or her to resume civilian life after returning from that service;
  - Part 11 deals with enforcement and remedies;
  - Part 12 deals with minor miscellaneous matters.
4. Section 4 provides that the act binds the Crown.

5. Subsection 4(1) provides that the Act binds the Crown in each of its capacities.
6. Subsection (2) provides that in particular, obligations that the Act imposes on employers or other persons are imposed on the Crown just as they are imposed on every one else.
7. Subsection (3) makes it clear that the Crown is not liable to be prosecuted for an offence under the Act.
8. Section 5 provides that the Criminal Code applies to all offences against this Act. Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.
9. Section 6 provides that the Act extends to every external Territory.

**Part 2** provides all the definitions for the purposes of the Act.

10. Section 7 is the **interpretation** section. It defines such matters as:
  - “ADI” means an authorised deposit taking institution that is a corporation that is an ADI for the purposes of the *Banking Act 1959*.
  - “call out day” in relation to a member means the day on which the member becomes liable to render continuous full time service as a result of an order under section 50D, 51A, 51B or 51C of the *Defence Act 1903*;
  - “defence service” means service (including training) in a part of the Reserves;
  - “employment” includes appointment or employment by the Commonwealth, a State or a Territory or by an authority of the Commonwealth, State or Territory, an apprenticeship, traineeship arrangement full time, part time or casual work, but does not include, work as a commission agent or work under a contract for services;
  - “land” includes buildings and improvements on land, legal and equitable estates or interests in land any company interest in land, right, power or privilege over or in relation to land;
  - “protected period” in relation to a member who is rendering or has rendered defence service to which Part 5 or Part 8 applies means the shorter of the following periods:
    1. the period that begins immediately after the day on which the member ceased to render the defence service and that is equal to the length of that service;
    2. the period of 12 months beginning immediately after the day on which the member ceased to render that service.
  - “service chief” means the Chief of Navy, Chief of Army or the Chief of Air Force;
  - “Reserves” has the same meaning as in the *Defence Act 1903*.
11. Section 8 also provides a definition of a member being “absent on defence service”. It is during:
  - any period which the member is travelling from his or her residence to the place at which he or she is required to report for defence service;

- any period while he or she is rendering defence service; and
- the period after he or she has ceased to render that service until he or she resumes work or is reinstated in employment under Part 4.

12. Section 9 defines in detail “dependant” of a member who is rendering continuous full time service as a result of an order under section 50D, 51A, 51B or 51C of the *Defence Act 1903*. In essence it means:

- if the member is a member of a couple – the member’s partner;
- a person who was wholly or partly dependant on the member for financial support immediately before the member’s call out day;
- a person who became or becomes wholly or partly financially supported by the member while the member was or rendering such service;
- a person who is wholly or partly financially supported by a pension payable under the *Veterans’ Entitlements Act 1986* because of the death or incapacity of a member;
- if the member died while rendering such service, the widow or widower of the member.

13. Subsection (2) provides that the expressions **member of a couple, partner, widow, widower**, have the same meaning in section 9 as in the *Veterans’ Entitlements Act 1986*.

14. Section 10 provides for the meaning of “**contract of employment**” in the context of the Act. It includes a contract of apprenticeship and an appointment or employment of a person under a law of the Commonwealth or a State or Territory.

**Part 3** outlines the **Kinds of Protection and benefits** that apply to different kinds of defence service.

15. Section 11 includes a table which sets out which Parts of the Act that apply in relation to which kinds of defence service.

16. In table form, this section provides that:

- Part 4 of the Act provides protection against discrimination in respect of all kinds of defence service;
- Part 5 provides employment protection in respect of all kinds of defence service except for certain kinds of voluntary continuous full time service;
- Part 6 provides partnership protection in respect of all kinds of defence service except for certain kinds of voluntary continuous full time service;
- Part 7 provides education protection in respect of all kinds of defence service except for certain kinds of voluntary continuous full time service;
- Part 8 provides financial liability protection in respect of continuous full time service following a call out;
- Part 9 provides bankruptcy protection in respect of continuous full time service following a call out;
- Part 10 provides for loans and guarantees in respect of continuous full time service following a call out;

- Part 11 provides for enforcement of remedies in respect of all kinds of defence service;
- Part 12 provides for other matters in respect of all kinds of defence service.

17. Section 12 provides for **Defence Service following a voluntary undertaking**. Parts 5, 6 and 7 do apply in relation to continuous full time service that the member voluntarily undertook to render under subsection 32A(4) of the *Naval Defence Act 1910*, subsection 50(3) of the *Defence Act 1903* or subsection 4J (3) of the *Air Force Act 1923*, unless a service chief has requested the member to give the undertaking on the basis that those Parts would apply to the service and the member gave the undertaking on that basis.

18. Subsection 12(2) provides that in deciding whether to request a member to give an undertaking on the basis outlined in subsection (1), the service chief must have regard to the following matters:

- The nature of the service to be rendered;
- The member's military and civil skills and capabilities;
- The current needs of the Defence Force for the member's skills and capabilities;
- The effect that rendering the service might have on the member's employment and education (including the effect that it might have on third parties such as employers);
- Any other relevant matter.

19. Section 13 provides for **Continuous full time service following a call out**. Parts 8, 9 and 10 apply only in relation to continuous full time service that a member is rendering or has rendered as a result of an order under section 50D, 51A, 51B or 51C of the *Defence Act 1903*.

20. **Part 4** of the Act outlines the **protection against discrimination because of defence service**.

21. Division 1 section 14, provides the overview of the Part. The Part applies in relation to all types of defence service. Essentially, the Part makes it unlawful to refuse to give work to a person on the ground that the person is rendering, has rendered or might in the future render defence service. A breach of the Part may be a criminal offence. Breaches can also be redressed by civil means.

22. Division 2 relates to **Discrimination in Employment**

Section 15 provides that an employer must not refuse or fail to employ another person because the person may volunteer for defence service or is rendering defence service or is or may become liable to render defence service or has previously rendered defence service. A person who contravenes subsection (1) of this section is guilty of

an offence. The maximum penalty is 30 units. (Section 4AA of the Crimes Act 1914 sets out the current value of a penalty unit).

23. Section 16 provides that an employer must not, for a prohibited reason, or for any reasons that includes a prohibited reason:

- change the terms and conditions of employment of an employee to his or her prejudice;
- discriminate against an employee in his or her terms and conditions of employment;
- dismiss an employee.

24. Subsection (2) outlines what a **“prohibited reason”** is in relation to conduct mentioned in subsection (1). Conduct mentioned in subsection (1) is for a prohibited reason if it is engaged in because the employee may volunteer to render defence service or is rendering defence service or is or may become liable to render defence service or has previously rendered defence service.

25. A person who contravenes subsection (1) is guilty of an offence attracting a maximum penalty of 30 units.

26. Section 17 provides that an employer must not hinder or prevent a person in the employer’s employment from volunteering to render defence service or rendering defence service.

27. Subsection (2) provides that a person who contravenes subsection (1) is guilty of an offence attracting a penalty of 30 penalty units.

Division 3 relates to **“Discrimination in Partnerships”**

28. Section 18 provides for refusing to offer a partnership to a person. Subsection (1) provides that a person who proposes to form a partnership must not refuse or fail to invite another person to become a partner in the partnership for a prohibited reason or for reasons that include a prohibited reason.

29. Subsection (2) provides that a person who is a partner in a partnership must not refuse or fail to invite another person to become a partner in the partnership for a prohibited reason or for reasons that include a prohibited reason. “Prohibited reason” has the same meaning as in relation to section 16.

30. A person who contravenes subsection (1) or (2) is guilty of an offence with a maximum penalty of 30 units.

31. Section 19 provides that a person who is a partner in a partnership must not hinder or prevent another partner in the partnership from volunteering to render defence service or rendering defence service. A person who contravenes subsection (1) or (2) is guilty of an offence attracting a maximum penalty of 30 penalty units.

Division 4 relates to **“Discrimination against commission agents”**.

32. Section 20 provides that a person must not refuse or fail to engage another person as a commission agent for the reason or reasons that include the reason that, the other person, or an officer or employee of the other person:

- may volunteer to render defence service ;
- is rendering defence service;
- is or may become liable to render defence service;
- has previously rendered defence service.

33. A person who contravenes subsection (1) is guilty of an offence with a maximum penalty of 30 units.

34. Section 21 provides that a person must not, for a prohibited reason, do or threaten to do either of the following:

- discriminate against a commission agent in relation to the terms and conditions of the contract for services that the person enters into with the agent;
- terminate the contract.

35. Again, “prohibited reason” has the same meaning as that discussed in relation to section 16 discussed above. A person who contravenes subsection (1) is guilty of an offence with a maximum penalty of 30 units.

Division 5 relates to “**Discrimination against contractors**”.

36. Section 22 provides that a person must not refuse or fail to engage another person as a contractor for the reason that or for reasons that include a reason, that the other person is volunteering for defence service or is rendering defence service or is or may become liable to render defence service or has previously rendered defence service.

37. A person who contravenes subsection (1) is guilty of an offence attracting a maximum penalty of 30 units.

38. Section 23 provides that a person must not, for a prohibited reason or for reasons that include a prohibited reason do or threaten to do either of the following:

- discriminate against a contractor in relation to the terms and conditions of the contract for services that the person has entered in with the contractor;
- terminate the contract for services.

A person who contravenes subsection (1) is guilty of an offence with a maximum penalty of 30 units

39. Conduct mentioned in subsection (1) as being for a “prohibited reason” has the same meaning as in relation to section 16.

Part 4 provides for **Employment Protection**.



40. Division 1, section 24, provides for an overview of the Part. This Part applies to all kinds of defence service except certain kinds of voluntary continuous full time service. The Part protects the status and entitlements, such as accrued leave, of members whose defence service conflicts with their employment obligations.

Division 2 relates to **Leave during Defence Service**.

41. Subsection 25(1) provides that the section applies if the member is employed under a contract of employment or other arrangement that allows the member any type of leave whether paid or unpaid.

42. Subsection (2) provides that an employer must not require the member to take the leave concurrently while the member is absent on defence service.

43. Subsection (3) goes onto provide that the section does not apply to the extent that the member agrees to take the leave concurrently with all or part of the absence.

Division 3 provides for the **effect of defence service on a contract of employment**.

44. Subsection 26(1) makes it clear that if a member was employed before starting to render defence service, the contract is not terminated because of the member's failure to perform his or her duties under the contract while absent on defence service. Subsection 26(2) provides that the contract is suspended while the member is on defence service, unless it is terminated earlier according to law.

45. Subsection 26(3) provides that a period during which a contract of employment is suspended is taken not to be a period of employment under the contract unless the Part provides otherwise.

46. Subsection (4) provides that a contract may be terminated if the member does not apply to resume the employment under the contract within 30 days after ceasing to render defence service.

47. Section 27 provides for the application by a member to **resume employment after defence service**. Subsection (1) provides that a member covered by section 26 may apply to the employer concerned to resume work under the contract. The application must be in writing (unless the employer waives that requirement).

48. Subsection 27(2) provides that if the contract was terminated in accordance with law while the member was absent on defence service but another employer is carrying on:

- the business or undertaking in which the member was employed under the contract; or
- another business or undertaking which includes that business or undertaking;

the member may apply in writing to the new employer for reinstatement.

49. Subsection 27(3) provides that the member must apply to the employer or new employer within 30 days after ceasing to render the service.

50. Subsection 27(4) provides that if an employee is reinstated in employment with a new employer, the employment contract under which the member was previously employed is novated to the new employer.

51. Section 28 requires an employer to re-employ a member. As soon as reasonably practicable after receiving an application under section 27, the employer must:

- allow the member to resume work, or reinstate the member in employment in the same capacity in which the member was employed immediately before the member started to render defence service; and
- ensure that the member's conditions of employment (including remuneration) are at least as favourable as those that would have applied to the member in that capacity but for the service.

52. Subsection 28(2) outlines the the circumstances in which subsection (1) does not apply. These are:

- he or she agreed to the resumption or reinstatement but the member did not make himself or herself available for work as agreed between them and did not have a reasonable excuse for doing so; or
- because of changed circumstances since the member was employed (except employing someone else to replace the member), it was not within the employer's power to allow the resumption or reinstatement, or the employer offered to employ the member in a capacity and under terms and conditions that were the most favourable that it was reasonably practicable to offer the member.

Division 4 relates to the **Effect of Defence Service on particular entitlements of members.**

53. Section 29 provides that the Division deals with determining the entitlements of a member or of someone else arising because of the entitlements of a member, under a contract of employment or otherwise after returning to work, in relation to the following:

- annual leave and leave loadings;
- personal/carer's leave or sick leave family leave and other forms of leave;
- long service leave or an amount in place of long service leave;
- superannuation or pension;
- parental leave, including maternity leave and adoption leave;
- a prescribed matter.

54. Section 30 provides for continuous full time defence service. The section applies if a member resumes work or is reinstated in employment under the Division after rendering continuous full time defence service to which this Part applies. Part 3 sets out which kind of defence service this Part applies to.

55. Subsection 30(2) provides that the entitlements in relation to the member's employment in respect of the period of service must be no less beneficial than they would have been if the member had been absent on leave without pay from the employment during that period.

56. Subsection 30(3) provides that the continuity of a member's employment is taken not to have been broken by his or her absence on defence service.

57. Section 31 outlines **other defence service**. This section applies if a member resumes work, or is reinstated in employment under the Part after rendering defence service other than continuous full time service.

58. Subsection 31(2) provides that if a member resumes work, the period of absence is taken to have been paid service in the employment and the continuity of the member's employment is taken not to have been broken by his or her absence on defence service.

59. Subsection 31(3) provides that if the member is **reinstated in employment** with a new employer:

- the period of employment under the suspended contract of employment is taken to have been served under the contract of employment entered into on the reinstatement; and
- the period of absence is taken to have been paid service in the new employment; and
- the continuity of the period of employment under the suspended contract of employment with the period of employment that commenced on the reinstatement is taken not to have been broken by the member's absence on defence service.

Division 5 relates to the **Termination of employment after resumption of employment**.

60. Section 32 applies to an employer who has permitted a member to resume work or has reinstated a member in employment after the member's absence on defence service. Subsection (2) provides that during the period that begins immediately after the member resumes work or is reinstated in employment, and that is equal to the length of the member's absence on defence service, the employer must not:

- terminate the member's employment; or
- vary the member's employment by employing the member in a capacity or under other conditions less favourable to the member than the capacity in which, or the conditions under which, the member was employed on resuming work or being reinstated in employment.

61. Subsection 32(3) provides a defence for an employer. If an employer has terminated the member's employment, it is a defence to that employer that, due to the changed circumstances since the member resumed work or was reinstated, it was not within the employer's power to retain the member in employment

62. Subsection 32(4) provides another defence for an employer. Subsection (2) does not apply if the termination or variation of the member's employment was because of the misconduct by the member that was serious enough to justify the termination or variation.

63. Subsection 32(5) makes it clear that the member's absence on defence service is not misconduct for the purposes of subsection (4).

New Division 6 is headed "**No additional obligations on employees**".

64. Section 33 makes it clear that the Act does not oblige an employer of a member who is or has been absent on defence service to do any of the following in respect of the period of service:

- pay the member's remuneration in respect of the employment;
- grant the member's entitlements in respect of the employment;
- meet the employer's obligations under workers' compensation law to pay premiums, contributions or similar payments in relation to the member;
- meet the employer's obligations under the *Superannuation Guarantee (Administration) Act 1992* in relation to the member.

65. Subsection (2) provides that the above does not apply to the extent that the member would have been entitled to the benefit of the things mentioned anyway if the member's absence had been for a purpose other than the purpose of rendering defence service. An example is provided:

66. An employer would still have to pay the wages of a member who rendered defence service while on paid annual leave, since the member's absence on this form of leave would not relieve the employer from having to pay wages. Once the member ran out of paid leave, the employer would not have to pay the member any longer until the member returned from rendering defence service.

67. Subsection 33(3) goes onto to define "**workers' compensation law**" to mean a law that provides for compensation or other benefits for work related trauma suffered by employees without requiring proof of any breach by employers or their associates.

Part 6 relates to **Partnership Protection**.

68. Section 34 provides an overview of the Part. The Part applies to all kinds of defence service except for certain kinds of voluntary continuous full time service. The Part protects members from having their partnerships dissolved while the member is absent on defence service.

69. Section 35 provides **for dissolving partnerships involving a serving member**. Subsection (1) provides that a person must not take or continue proceedings or other action against a member who is a partner in a partnership to:

- dissolve the partnership;
- expel the member from the partnership;

- require the member to forfeit his or her share in the partnership;
- subject the member to any other detriment concerning the partnership.

while the member is rendering defence service.

70. Subsection (2) provides that it does not matter whether the proceedings are taken or continued under a partnership agreement or otherwise.

71. Subsection (3) provides that subsection (1) does not apply if all the partners consented to taking or continuing the proceedings or other action.

72. Section 36 mirrors section 35 except it relates to **former members**. A person must not take or continue proceedings or other action against a partner in a partnership who has rendered defence service to:

- dissolve the partnership; or
- expel the partner from the partnership; or
- require the partner to forfeit his or her share in the partnership; or
- subject the partner to any other detriment concerning the partnership;

before the end of the protected period.

73. Subsection 36(2) provides that it does not matter whether the proceedings are taken or continued under a partnership agreement or otherwise.

74. Subsection 36(3) provides that subsection (1) does not apply if the person proves that all the partners consented to taking or continuing the proceedings or other action.

Part 7 is the Part that provides for **Education Protections**.

75. Section 37 provides an outline of the Part. The Part applies in relation all continuous full time defence service except for certain kinds of voluntary continuous full time service. The Part allows a member to re-enrol in and resume a course that the member had to interrupt because he or she was required to render defence service or voluntarily undertook defence service.

76. Section 38 applies the Part to a member who:

- is enrolled in a course at an Australian education institution during all or any period he or she is rendering defence service;
- does not complete the course before ceasing to render the service;
- applies to re-enrol (if necessary) and to resume the course within 30 days after ceasing to render the service.

77. Section 39 provides for the obligations of the body administering the institution. Subsection (1) provides that the body administering the Australian education institution must not exclude a member from the course or subject the member to any

other disadvantage because he or she did not complete a requirement of the course or any assessment for the course, while rendering the defence service or otherwise because of having rendered the defence service.

78. Subsection 39(2) provides that the body administering the Australian education institution must:

- allow the member to re-enrol (if necessary) in the course;
- allow the member to resume the course at a point that the body considers appropriate;
- ensure that the conditions on the re-enrolment and resumption are at least as favourable as those that would have applied to a person who is not a member.

79. Subsection 39(3) provide that subsection (2) does not apply however, because of a change in the nature of the courses offered by the institution since the member was previously enrolled:

- it was not reasonable or practicable to allow the member to re-enrol or resume the course in which he or she was previously enrolled;
- the body administering the institution offered to enrol the member in another course that most closely corresponded to the course in which he or she was previously enrolled;
- the conditions on the re-enrolment and resumption were the most favourable that it was reasonable or practicable to offer the member.

Part 8 deals with **Financial Liability Protection**.

80. Subsection 40(1) provides an overview of the Part. The Part will only apply to continuous full time service rendered as a result of a call out (see Part 3).

81. Subsection 40(2) provides for the postponement of many debts that a member or his or her dependant would be liable to pay after the member starts rendering defence service. The debts contemplated in this Part are, for example, principal or interest under a loan or the purchase price of something that the member or dependant agreed to buy. The liability must have arisen before the member's call out day.

82. Subsection 40(3) provides for the period for which debts are postponed. They are the shorter of the following:

- the period that begins immediately after the member ceased to render defence service and that is equal to the length of that service;
- 12 months beginning immediately after he or she ceased to render that service.

83. Subsection 40(4) provides that interest accrues on the postponed payments. This is so regardless of whether the member or the dependant had to pay interest on the original liability.

84. Subsection 40(5) provides that the Part also stays proceedings in respect of the postponed debts.

Division 2 provides for the **Financial Liabilities** to which the Part applies.

85. Section 41 sets out the financial liabilities that arise before a call out day. Subsection 41(1) provides that the Part applies to a liability of a member or his or her dependant that arose before the member's call out day to make a payment under one or more of the following:

- a secured or unsecured loan;
- an agreement to buy something (including land)
- an agreement to lease something (including land)
- a guarantee;
- a hire purchase agreement;

In the Part all the above are referred to as "agreements".

86. Subsection 41(2) provides that the section is subject to the exceptions in sections 44, 45 and 46.

87. Section 42 provides that the Part also applies to a liability of a member or dependant to make a payment under an **agreement** if:

- the member or dependant had an option to buy or lease something (including land) that was granted before the member's call out day; and
- on exercising the option under the agreement on or after that day, the member or dependant became liable to make the payment.

88. Subsection 42(2) provides that the section is subject to the exceptions in sections 44, 45 and 46.

89. Subsection 43(1) applies the Part to the liability of a member or dependant to pay **rates or other taxes in respect of land** if the liability arose before the member's call out day or where section 42 applies, the liability arose on or after the day on which the option to buy or lease the land was exercised.

90. Subsection 43(2) provides that the goods and services tax does not apply to the liability outlined in subsection (1) relating to rates on land. Subsection 43(3) provides that the section is subject to section 46 which relates to a members liabilities as a trustee or in a representative capacity.

91. Section 44 provides that the Part does not apply to a liability of a member or dependant to make a payment under an agreement if, before the member's call out day, a court orders that a party to the agreement may exercise all or any of its remedies to enforce the security under the agreement (including land if the security is on the land).

92. Subsection 45(1) provides that the Part does not apply to a liability of a member or dependant to make a payment under an agreement if, while liable to make the payment, the member or dependant:

- becomes bankrupt;
- applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
- compounds with his or her creditors;
- makes an assignment of his or her remuneration for the benefit of his or her creditors;
- dies and his or her estate is being administered in bankruptcy or insolvency.

93. Subsection 45(2) provides that for the purposes of subsection (1), it does not matter whether the bankruptcy, insolvency, assignment or death happened before or after the commencement of the Act.

94. Section 46 provides for the a **member's liability** in a trustee or representative capacity. Subsection (1) provides that the Part does not apply in relation to a liability of a member to make a payment as a trustee or in a representative capacity except to the extent that in incurring the liability, the member is acting for the benefit of, or on behalf of persons who are or who include, the member one or more dependants of the member.

95. Subsection (2) provides for the **dependant's liability** in a trustee or representative capacity. The Part does not apply in relation to a liability of a member's dependant to make a payment as a trustee or in a representative capacity unless in incurring the liability the dependant is acting for the benefit of or on behalf of persons who are or who include the member or one or more other dependants of the member.

96. Section 47 defines "liable to make a payment" for the purposes of the Part. A person is liable to make a payment if he or she is obliged to make a payment even if the due date for the payment has not arrived.

97. Section 48 makes it clear that a liability to which the Part applies may arise before or after the commencement of the Act.

Division 3 provides for the **postponement of payments** and the **staying of proceedings**.

98. Subsection 49(1) provides that the time for **making a payment** under an agreement to which the Part applies is by force of the section postponed in accordance with the Division. Subsection (2) mirrors subsection (1) however it applies to the **postponement of rates** to which the Part applies.

99. Subsection (3) provides that the time is postponed by the section even if the time had already passed when the member began to render the relevant service.

100. Subsection (4) provides that the section does not prevent a person from making a payment before the time to which a payment is postponed.



101. Section 50 relates to **Rescheduling Payments**. Under subsection (1), if the payments are to be made by the member or dependant by instalment and the first instalment falls due before the end of the member's protected period, then:

- the time for paying the first unpaid instalment is postponed so that the payment falls due at the end of the member's protected period;
- the time for paying each later instalment is postponed for a period of the same length as the member's protected period.

102. Subsection (2) provides that if only a single payment is to be made by the member or dependant, and the payment falls due before the end of the member's protected period, the time for making the payment is postponed so that it falls due at the end of the member's protected period.

103. Subsection (3) provides that this section is subject to section 51 which outlines the situation where a payment falls due when a member dies while rendering defence service.

104. Section 51 deals with the scenario of a member dying whilst rendering defence service and payments fall due. Subsection (1) provides that if a member dies while rendering defence service, the time for making the payment is postponed so that the payment falls due on the first anniversary of the member's death.

105. Subsection (2) provides that if the person liable to make the payment is a dependant of the member and the dependant dies while the member is rendering defence service, the time for making the payment is postponed so that the payment falls due on the first anniversary of the dependant's death.

106. Subsection 51(3) provides that if subsections (1) and (2) apply to a payment, then the time for making the payment is postponed to the later of the two applicable times.

107. Section 52(1) provides that if an agreement to which the Part applies allows interest to be paid or accepted at a reduced or lower rate if it is paid before the due date, interest remains payable at the reduced or lowered rate even if it is not paid before the due date. Subsection (2) provides that no interest is payable under any other law on the late payment of rates on land if the payments were postponed under the Division.

108. Section 53 provides for the **interest payable on postponed payments** (except on rates on land). Subsection (1) provides that interest is payable by the member or dependant on a payment under an agreement that is postponed under the Division at the rate determined under subsection (3), until the payment is made. Subsection (2) provides that the interest is payable to the person to whom the postponed payments are required to be made.

109. Subsection (3) outlines the rate of interest. It is:

- the rate or rates specified in the agreement concerned before the interest falls due;

- if no rate of interest is specified in the agreement, the rate worked out in accordance with the regulations as in force at the start of the member's call out day.

110. Subsection (4) provides that the interest is payable after the start of the postponement at the times specified in the agreement for paying the interest or, if no times are specified, at the end of 3 months after the start of the postponement and at the end of each successive period of 3 months.

111. Section 54 relates to the **interest payable on payment of postponed rates of land**. Subsection (1) provides that interest is payable by the member or dependant on payment postponed under section 43 until the payment is made.

112. Subsection (2) provides that the interest is payable to the person to whom the payments of the rates are required to be made and subsection (3) provides that the interest is payable at the end of each quarter that ends after the postponement.

113. Subsection (3) provides that the rate of interest is worked out in accordance with regulations as in force at the start of the member's call out day.

114. Subsection (4) provides that the interest is payable at the end of each quarter that ends after the start of the postponement.

Subdivision B relates to **Proceedings stayed**.

115. Subsection 55 (1) provides that while one or more payments are postponed, all proceedings against a member or dependant that were instituted before the commencement of the Act either to enforce payments or in respect of or because of non-payment. Subsection (2) provides that it does not matter how or in what forum the proceedings were instituted.

116. Subsection (3) provides that while one or more payments are postponed, all remedies against the member or dependant to recover the payments are stayed. Subsection (4) provides that the Division does not prejudice or affect any stayed proceeding or remedy or affect the rights or obligations of anyone. Subsection (5) provides that as soon as the postponement ceases, all stayed proceedings may be continued and all stayed remedies may be pursued.

117. Subdivision C allows a Court to order that all or part of the Division does not apply.

118. Section 56 provides that a Court may order that all or a specified part of this Division does not apply to a particular payment if it is satisfied that the operation of those provisions would cause hardship or unreasonable loss to someone other than the member or dependant.

119. Subsection (2) provides that in considering an application for an order, the Court may make any interlocutory or final order (including as to costs) that the Court considers just, having regard to:

- if the liability arose under an agreement – the terms and conditions of the agreement;
- the circumstances of the member or dependant; and
- the circumstances of the other person.

Division 4 relates to **General Matters**.

120. Section 57 provides that the **Powers of a security holder are not to be affected**. The Part will not affect the power of a security holder under an agreement to which the Part applies to enforce the holder's rights against the member or dependant if:

- the security holder was or is in possession of the security at the member's call out day; or
- if the security is land - the security holder has appointed or appoints a receiver who, at the member's call out day was or is in possession of the land or is receiving the rents and the profits of the land.

121. Section 58 provides that the Part does not prevent or alter the effect of any instrument concerning an agreement to which the Part applies that is made on or after the call out day of the member concerned or anything done under the instrument.

122. Section 59 relates to **Joint Liability**. If a member or his or her dependant is liable jointly with one or more others to make a payment under an agreement, the Part applies to the member's or dependant's liability in the same way it would apply if the member or dependant were solely liable. The Part does not apply to the liability of the other parties who are jointly liable (but who are not member's or dependants to whose defence service this Part applies in their own right).

123. Section 60 relates to the operation of the **Statute of Limitations**. In working out a deadline imposed by a statute of limitations or other Commonwealth, State or Territory law for bringing actions or pursuing other remedies in respect of a liability to which the Part applies, the following periods are not to be taken into account:

- the period while the time for making payments is postponed under the Part;
- the period while proceedings or proposed proceedings are stayed under the Part.

124. Section 61 outlines the **preservation of a member's or dependant's rights**. Subsection 61(1) provides that the right of a member or his or her dependant to commence a proceeding, or to enforce a right, exercise a power or pursue a remedy, in relation to a liability to which the Part applies, is not barred during the preservation period:

- by the end of a period of limitation fixed by a Commonwealth, State or a Territory law; or
- by an instrument with respect to the right.

125. Subsection (2) provides that the action, suit or other proceeding may be commenced and the right enforced, powers exercised or remedy pursued at any time before the end of the preservation period.

126. Subsection (3) says that it does not matter whether the right arose before or after the commencement of the Act. Subsection (4) provides that the section also applies in relation to a person who became or becomes a member or dependant of a member after the right arose.

127. Subsection (5) defines “**preservation period**” for the purposes of the section. It means the combined consecutive periods of the member’s absence on defence service and the member’s protected period.

Part 9 is the Part that provides for **Bankruptcy Protection**.

128. Section 62 provides that the Part applies to continuous full time service rendered as a result of a call out. The Part protects members from bankruptcy proceedings while the member is rendering defence service following a call out.

129. Section 63 provides that bankruptcy proceedings against a member or dependants are not allowed. Subsection (1) provides that during a member’s protected period, a bankruptcy notice must not be issued and a creditor’s petition must not be presented in relation to the member or a dependant of the member if the notice or petition relates to a debt that arose before the member’s call out day for the relevant defence service.

130. Subsection (2) provides that subsection (1) does not apply to a person who has leave of a Court with jurisdiction in bankruptcy or insolvency to issue the notice or present the petition. Subsection (3) goes onto provide that the Court must not grant leave unless it is satisfied that, having regard to all the circumstances of the case, including the conduct and the financial situation of the member or dependant and of the applicant, it would be inequitable to refuse to grant leave.

131. Section 64 outlines the orders that the Court may make in relation to the bankruptcy of a member. If:

- a creditor presents a bankruptcy petition to a court against a member or his or her dependant;
- and the member or dependant satisfies the Court that he or she was unable to pay the relevant debts, because of the circumstances (directly or indirectly) attributable to the member’s defence service,

the Court may stay the proceedings under the petition for such time and subject to such conditions as the Court thinks fit.

132. Subsection 64(2) provides that if:

- a Court has on the petition of a creditor, made a sequestration order against a person who is a member or dependant of a member; and
- on application the Court is satisfied that if the sequestration is annulled,

the business of that person will continue to be carried on by the person on his or her behalf and the business will be carried on successfully, the Court may make an order annulling the sequestration order.

133. Subsection (3) provides that an order under subsection (2) annulling a sequestration order has the same effect as an annulment of the sequestration order under the *Bankruptcy Act 1966*.

134. Subsection (4) provides that an order made under subsection (2) may be made on such conditions as the Court thinks fit. This includes the reimbursement of the costs incurred by the petitioning creditor in the bankruptcy.

Part 10 relates to **Loans and Guarantees to former members on return from call out**.

135. Section 65 provides an **Overview** of the Part. The Part applies in relation to continuous full time service rendered as a result of a call out. This Part allows for a member who has rendered defence service after being called out, to get access to loans and guarantees to enable him or her to resume civilian life after returning from that service.

136. Section 66 provides a prescribed authority to make loans and give guarantees. To enable a member to resume civilian life after he or she stops rendering defence service, a prescribed authority may make a loan to the member or guarantee the repayment of a loan to a member and the interest on the loan.

137. Section 67 relates to the **amount of the loan or the guarantee**. The amount of the loan or the guarantee must not be more than the prescribed amount. Subsection (2) goes on to provide that if one or more loan is made or guarantee given to a member, the sum of them must not be more than the prescribed amount.

138. Section 68 provides that a loan is made or a guarantee given on the security and terms and conditions that the prescribed authority determines in writing.

139. Section 69 provides that interest is payable on a loan under the Part at the rate and under the conditions prescribed by the Regulations that were in force when the loan was made.

140. Section 70 outlines **the pre-conditions for a loan or guarantee**. Subsection (1) prohibits a prescribed authority from making a guarantee or loan unless the requirements and matters under the section are met and taken into account. These are:

- the member must apply in the prescribed form for the loan or guarantee within the prescribed period (subsection (2));
- the prescribed authority must approve the particular purpose for which the loan is made or guarantee given (subsection (3));
- the prescribed authority must be satisfied that the applicant is likely to repay the amount of the loan made or guaranteed within a reasonable period (subsection (4));

- in determining whether to make a loan or give a guarantee, the prescribed authority must take into account the effect of the applicant's defence service on his or her capacity and opportunities to establish or re-establish himself or herself in civilian life without assistance under the Part (subsection 5));

141. Section 71 provides that an application may be made to the Administrative Review Tribunal for review of a decision to refuse to make a loan or give a guarantee.

142. Section 72 provides for **agreements between prescribed authorities and States and Territories**. Subsection (1) provides that a prescribed authority may enter into an agreement with a State or Territory, a State or Territory authority or an ADI (the delegate) for the delegate to perform those functions of the prescribed authority under the Part that are specified in the agreement.

143. Subsection (2) provides that if under an agreement the delegate makes or guarantees a loan to a member, the delegate may take any security for the loan or guarantee the loan in its own name.

144. Subsection (3) goes on to say that for the purposes of the Part, a prescribed authority may make loans or give guarantees to a State or Territory authority or an ADI that is itself making loans or giving guarantees under an agreement.

145. Subsection (4) provides that the prescribed authority must have the Finance Minister's consent to enter into an agreement mentioned in subsection (1) and to make a loan or give a guarantee mentioned in subsection (3).

Part 11 is the Part that provides for **Enforcement and Remedies**. Division 1 deals with **Civil Enforcement**.

146. Section 73 provides for **action for loss or damage**. Subsection (1) provides that a person who suffers loss or damage because another person contravenes or was involved in contravening a provision of the Act may bring an action in a Court of competent jurisdiction to recover the amount of the loss or damage from the other person. This is so even if the other person did not commit an offence (if the contravention is also an offence).

147. Subsection (2) goes on to say that an action mentioned in subsection (1) may be brought by a prescribed person on behalf of the person who suffers the loss or damage.

148. Subsection (3) provides that an action under subsection (1) may only be begun within 3 years after the day on which the cause of action arose.

149. Subsection (4) says that the section does not affect any right or liability that a person has under any other law.

150. Subsection (5) provides that for the purposes of the section, a person is involved in a contravention if and only if the person has

- Aided or abetted, counselled or procured the contravention;
- Induced whether by threats or promises or otherwise, the contravention;
- In any way by act or omission directly or indirectly, been knowingly concerned in or party to the contravention; or
- Conspired with others to effect the contravention.

151. Section 74 provides that if a person is convicted of an offence against the Act in relation to another person, the Court may (whether or not it imposes a penalty) order the convicted person to pay the other person such compensation as the Court thinks reasonable. An order under subsection (1) may be enforced as if it were a judgement of the Court.

152. Section 75 provides for **injunctions for contraventions of the Act**.

153. Subsection (1) relates to applications for injunctions. It provides that if a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention under the Act the following persons may apply for an injunction to a Court of competent jurisdiction under subsection (2) or (3):

- an interested person;
- a prescribed person acting on behalf of an interested person.

154. Subsection (2) relates to **prohibitory injunctions**. It provides that if a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of the Act, the Court may grant an injunction restraining the person from engaging in the conduct. The Court may grant the injunction:

- whether or not it appears to the Court that the person intends to engage again or continue to engage in conduct of that kind; and
- whether or not the person has previously engaged in conduct of that kind.

155. Subsection (3) relates to **mandatory injunctions**. If a person has refused or failed or is refusing or failing, or is proposing to refuse or fail to do an act and the refusal or failure did, does or would constitute an offence under the Act, the Court may grant an injunction requiring the person to do the act. The Court may grant the injunction:

- whether or not it appears to the Court that the person intends to refuse or fail again or to continue to refuse or fail, to do the act; and
- whether or not the person has previously refused or failed to do the act.

156. Subsection (4) relates to **interim injunctions**. Before deciding an application for an injunction under the section, the Court may grant an interim injunction restraining a person from engaging in conduct or requiring a person to do an act.

157. Subsection (5) provides that the Court may, on application, discharge or vary an injunction.

158. Subsection (6) provides that a prescribed person cannot be required, as a condition of granting an interim injunction, to give an undertaking as to damages.

159. Subsection (7) says that the powers conferred on a Court by the section are in addition to and do not limit any other powers of the Court.

160. Section 76 provides that a Court may make other orders if transactions or proceedings are in contravention of the Act. Subsection (1) says that a Court of competent jurisdiction may make any other order (including a declaratory order) it thinks fit if a person enters a transaction or brings a proceeding in contravention of the Act. Subsection (2) goes on to specify that only an interested person or a prescribed person acting on behalf of an interested person may apply to the Court under the section.

161. Subsection (3) provides that an order under subsection (1) may be enforced as if it were a judgement of the Court.

162. Subsection (4) provides that the section does not affect a person's liability to a penalty for a contravention of the Act.

Part 12 deals with **Other Matters**.

163. Section 77 relates to the **Jurisdiction of Courts**. It specifies the Courts that may hear and determine matters under the Act. They are:

- all State and Territory courts (including courts of summary jurisdiction), insofar as their jurisdiction extends to those matters;
- The Federal Court of Australia;

164. The Act does not however confer on these Courts criminal jurisdiction (subsection (2)).

165. To make it clear, subsection (3) provides that nothing in the Act limits the jurisdiction of a Court or other body under any other law of the Commonwealth, a State or Territory in relation to matters covered under the Act.

166. Section 78 provides that the Act applies to an unincorporated body or association ("the body") as if it were a person other than an individual, but it applies subject to the following:

- Obligations that would be imposed on the body are imposed instead on – if the body is a partnership – each partner;
- or in any other case – each member of the committee of management of the body. The obligations may be discharged by any of the partners or any of the members;

167. Section 79 provides for **Delegation**. A service chief may, by signed writing, delegate all or any of his or her powers and functions under the Act to an officer (within the meaning of the *Defence Act 1903*) in that service.

Section 80 provides for **Severability**



168. Subsection (1) provides that the without limiting its effect apart from this section, the Act has effect as provided for under the section.

169. Subsection (2) provides that the Act also has the effect that it would have had if its operation were expressly confined to acts or omissions of corporations to which paragraph 51(xx) of the Constitution applies.

170. Subsection (3) provides that the Act also has the effect that it would have if its operation were expressly confined to acts or omissions taking place in the course of or in relation to trade or commerce:

- Between Australia and places outside Australia;
- Among the States;
- Within a Territory, between a State and a Territory or between 2 Territories.

171. Subsection (4) provides that the Act also has the effect that it would have if its operation were expressly confined to acts or omissions taking place in a Territory.

172. Section 81 is the **Regulation making section**. The Governor-General may make Regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, the Regulations may prescribe penalties not exceeding a fine of 10 penalty units for offences against the Regulations.