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**179 Notice of application**

The State must give written notice of the application for the pecuniary penalty order to the person named in the application.

**180 Right to appear**

A person named in the application for the pecuniary penalty order may appear at the hearing of the application.

**181 Amendment of application**

- (1) The court hearing the application for the pecuniary penalty order may amend the application at the request, or with the agreement, of the State.
- (2) If the State applies for an amendment of the application and the amendment would have the effect of including an additional benefit in the application, the State must give the person named in the application written notice of the application for the amendment.
- (3) The court may amend the application to include an additional benefit in the application only if the court is satisfied—
  - (a) the benefit was not reasonably capable of identification when the application was originally made; or
  - (b) necessary evidence became available only after the application was originally made.

**182 Procedure on application**

- (1) In deciding an application for a pecuniary penalty order, the court must have regard to the evidence given in any proceeding against the person for the relevant confiscation offence.
- (2) If—
  - (a) the application is made to the court before which the person is convicted; and



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- (b) when the application is made, the court has not passed sentence on the person for the confiscation offence;

the court may defer passing sentence until it has decided the application.

- (3) If a person is treated as if convicted under section 106 because the offence is taken into account in sentencing the person for another offence, the reference in subsection (1) to a proceeding against the person for the offence includes a reference to the proceeding for the other offence.

**183 Limitation on powers of Magistrates Courts**

- (1) A Magistrates Court may make a pecuniary penalty order because of a conviction for an offence only if it is satisfied the total amount payable under the pecuniary penalty order and all other undischarged pecuniary penalty orders made by the court because of the conviction is not more than the limit of a Magistrates Court's civil jurisdiction.

- (2) In this section—

*Magistrates Court*, other than in relation to the limit of the court's civil jurisdiction, includes the Childrens Court constituted by a magistrate.

**Division 2 Making of pecuniary penalty order**

**184 Pecuniary penalty orders**

- (1) On an application for a pecuniary penalty order against a person, the court may or, if the offence is a major drug offence, must—
  - (a) assess the value of the benefits derived by the person under division 3; and
  - (b) order the person to pay to the State a pecuniary penalty equal to the assessed value of the benefits less the amounts deducted under subsections (2) and (3).





- (2) The value, when the pecuniary penalty order is made, of any of the following property must be deducted—
  - (a) property for which a forfeiture order is made for the same conviction;
  - (b) property forfeited under a serious drug offender confiscation order.
- (3) The court may also deduct either of the following amounts, if the court considers it appropriate to take the amount into account—
  - (a) any amount payable for restitution or compensation for the same conviction;
  - (b) the value of any property forfeited under a forfeiture order under chapter 2 made in relation to a period including the day the offence to which the conviction relates was committed.
- (4) The amount payable by the person to the State under the pecuniary penalty order is a debt payable by the person to the State.
- (5) The order may be enforced as if it were a money order made by a court in a civil proceeding taken by the State against the person for the recovery of the amount payable under the pecuniary penalty order.

**185 Discharge of pecuniary penalty order to the extent of automatic forfeiture**

- (1) This section applies to a person who has been convicted of a serious criminal offence and against whom a pecuniary penalty order has been made because of the conviction.
- (2) If property of the person is also automatically forfeited to the State because of the conviction, the debt payable under the pecuniary penalty order is discharged to the extent of—
  - (a) if the property is sold—the value of the proceeds of the sale; or



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- (b) if the property is not sold—the amount the Attorney-General decides is the reasonable value of the property.

**186 Pecuniary penalty order increase if forfeiture order discharged**

- (1) This section applies if—
  - (a) a court makes a pecuniary penalty order; and
  - (b) in deciding the amount payable under the pecuniary penalty order, the court takes into account the value of property forfeited under a forfeiture order or under a serious drug offender confiscation order; and
  - (c) after the pecuniary penalty order is made—
    - (i) the forfeiture ends because of an appeal; or
    - (ii) an innocent interest exclusion order is made in relation to any property forfeited under the forfeiture order.
- (2) The State may apply to the court that made the pecuniary penalty order for a variation of the order to increase the amount payable under the order.
- (3) If the court considers an increase appropriate, it may vary the amount payable under the pecuniary penalty order.

**Division 3 Assessment of benefits**

**187 Assessment of benefits**

- (1) When assessing the value of benefits derived by a person from the commission of a confiscation offence for the purposes of making a pecuniary penalty order against a person (**relevant person**), the court must have regard to the evidence before it about the following—
  - (a) the value of cash and other property that came into the possession or under the control of the relevant person or

someone else at the request, or by the direction, of the relevant person, because of the commission of the offence;

(b) the value of any benefit provided for the relevant person or someone else at the request, or by the direction, of the relevant person because of the commission of the offence;

(c) if the offence consisted of the doing of an act or thing in relation to a dangerous drug or controlled substance (the *illegal drug*)—

(i) the market value, when the offence was committed, of a dangerous drug or controlled substance similar, or substantially similar, to the illegal drug involved in the offence; and

(ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar, or substantially similar, act or thing;

(d) the value of the relevant person's property—

(i) if the application relates to a single offence—before, during and after the commission of the offence; or

(ii) if the application relates to 2 or more offences—before, during and after the offence period;

(e) the relevant person's income and expenditure—

(i) if the application relates to a single offence—before, during and after the commission of the offence; or

(ii) if the application relates to 2 or more offences—before, during and after the offence period.

(2) The court—

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- (a) may treat as the value of the benefit the value the benefit would have had if derived when the valuation is being made; and
- (b) without limiting paragraph (a), may have regard to any decline in the purchasing power of money between the time the benefit was derived and the time the valuation is being made.

(3) In this section—

*offence period*, for an application for a pecuniary penalty order made in relation to 2 or more offences, means the period starting when the earlier or earliest of the offences was committed and ending when the later or latest of the offences was committed.

**188 Procedure if application relating to 1 confiscation offence**

(1) This section applies if—

- (a) an application for a pecuniary penalty order relates to 1 confiscation offence; and
  - (b) at the hearing of the application, evidence is given that the value of the person's property after the commission of the confiscation offence was more than the value of the property before the commission of the offence.
- (2) The court must treat the difference as the benefits derived by the person from the commission of the offence, other than to the extent the court is satisfied the reason for the difference was not related to the commission of the offence.

**189 Procedure if application relating to more than 1 confiscation offence**

(1) This section applies if—

- (a) an application for a pecuniary penalty order relates to more than 1 confiscation offence; and
- (b) at the hearing of the application, evidence is given that the value of the person's property at any time during or





after the offence period was more than the value of the property before the start of the offence period.

- (2) The court must treat the difference as the benefits derived by the person from the commission of the offences, other than to the extent the court is satisfied the difference was not related to the commission of the offences.

#### **190 Property that may be taken into account for assessment**

- (1) For this division, the following property of a person is presumed, unless the contrary is proved, to be property that came into the possession or under the control of the person because of the commission of the offence or offences—
- (a) all property of the person when the application for the pecuniary penalty order is made; and
  - (b) all property of the person at any time within the shorter of the following periods—
    - (i) the period between the day the offence, or the earliest offence, was committed and the day the application is made;
    - (ii) the period of 5 years immediately before the day the application is made.
- (2) For subsection (1), property of a person that vests in the official trustee in bankruptcy because of the person's bankruptcy is taken to continue to be the property of the person.

#### **191 Property under effective control**

In assessing the value of benefits derived by a person from the commission of an offence, the court may treat as property of the person any property that, in the court's opinion, is under the person's effective control.

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**192 Particular benefits not to be taken into account**

The court must not take into account a benefit for the purposes of a pecuniary penalty order if a pecuniary penalty has already been imposed because of the benefit under this Act or a law of the Commonwealth or another State.

**193 Expenses and outgoings**

(1) For this division, any expenses or outgoings of the person in, or in connection with, the commission of the offence or offences must be disregarded.

(2) In this section—

*commit* an offence includes attempt, conspire, plan and prepare to commit the offence.

*expenses or outgoings*, of the person, includes all costs and expenses incurred by the person in, or in connection with, committing the offence or offences.

*Example of expenses or outgoings—*

the cost of acquiring or attempting to acquire something concerned in committing the offence

**194 Evidence**

(1) Despite any rule of law or practice about hearsay evidence, the court may, for this division, receive evidence of the opinion of a prescribed officer who is experienced in the investigation of illegal activities involving dangerous drugs about—

(a) the market value at a particular time of a particular kind of dangerous drug or controlled substance; or

(b) the amount, or range of amounts, ordinarily paid at a particular time for the doing of anything in relation to a particular kind of dangerous drug or controlled substance.

(2) In this section—



*prescribed officer* means—

- (a) a police officer; or
- (b) a member of the Australian Federal Police; or
- (c) an officer of customs within the meaning of the *Customs Act 1901* (Cwlth); or
- (d) an authorised commission officer.

## Division 4 Other provisions

### 195 Discharge of pecuniary penalty order

- (1) A pecuniary penalty order is discharged if—
  - (a) the conviction because of which the order was made is quashed; or
  - (b) it is discharged on appeal.
- (2) If the pecuniary penalty order is registered under the *Service and Execution of Process Act 1992* (Cwlth), notice of the order's discharge must be given to the persons, in the way and within the time the court that quashed the conviction or upheld the appeal considers appropriate.

### 196 Charge on restrained property under restraining order if pecuniary penalty order made

- (1) This section applies if—
  - (a) a pecuniary penalty order is, or has been, made against a person convicted of a confiscation offence (the *prescribed respondent*); and
  - (b) a restraining order is, or has been, made against the property of a person, whether the prescribed respondent or someone else, based on—
    - (i) the prescribed respondent's conviction of the confiscation offence; or



- (ii) the charging, or proposed charging, of the prescribed respondent with the confiscation offence or a related indictable offence.
- (2) A charge on the property that secures the payment to the State of the amount payable under the pecuniary penalty order comes into existence on the making of whichever is the later of the pecuniary penalty order or the restraining order.
- (2A) The charge is declared to be a statutory interest to which section 73(2) of the *Personal Property Securities Act 2009* (Cwlth) applies.
- (3) The charge ceases to have effect if—
  - (a) the pecuniary penalty order is discharged; or
  - (b) the pecuniary penalty is paid; or
  - (c) the property is disposed of under an order under section 219; or
  - (d) the property is disposed of with the approval of—
    - (i) the Supreme Court; or
    - (ii) if the public trustee has been directed to take control of the property—the public trustee; or
  - (e) the property is sold to a buyer in good faith for sufficient consideration and without notice of the charge.
- (4) The charge is subject to every encumbrance over the property that was in existence immediately before the pecuniary penalty order was made but has priority over all other encumbrances.
- (5) Subject to subsection (3), the charge remains on the property despite any disposal of the property.
- (6) The charge may be registered under a law that provides for the registration of charges on property of the type affected by the charge.
- (7) If the charge is registered under subsection (6), a person who buys the property after the registration of the charge is, for the

purposes of subsection (3)(e), taken to have had notice of the charge.

- (8) Subsection (7) does not apply to a charge over personal property mentioned on the register kept under the *Personal Property Securities Act 2009* (Cwlth).

#### 197 Pecuniary penalty order to be registered

- (1) This section applies if a pecuniary penalty order has been made against a person.
- (2) The registrar of titles and any other person responsible for keeping registers relating to property must, on request and on production to the person of sufficient evidence of the order, record in the appropriate register a statement that the pecuniary penalty order has been made.
- (3) This section is to be given effect even though a relevant document of title is not produced to a registrar or any other person.
- (4) This section applies despite any other Act.

#### 198 Application of property under effective control for satisfying pecuniary penalty order

- (1) The State may apply to a court for an order declaring that particular property is under the effective control of a person against whom the court has made a pecuniary penalty order (the *controlling person*).
- (2) The State must give written notice of the application to—
- (a) the controlling person; and
  - (b) anyone else the appropriate officer making the application for the State considers may have an interest in the property.
- (3) The controlling person, and anyone else who claims an interest in the property, may appear at the hearing of the application.

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- (4) If the court is satisfied that the property is under the effective control of the controlling person, the court may make an order declaring that the property is available to satisfy the pecuniary penalty order to the extent to which property of the controlling person is not readily available for the purpose.
- (5) The pecuniary penalty order may be enforced against the property, to the extent stated in the declaration, as if the property were the controlling person's property.
- (6) The court may also make a restraining order in relation to the property as if the property were the controlling person's property.
- (7) The absence of a person required to be given notice of the application does not prevent a court from making the order.

#### 199 Rehearing

- (1) This section applies if a pecuniary penalty order has been made against a person who was charged with a confiscation offence on the ground that the person is unamenable to justice.
- (2) The person or the State may apply to the court that made the order to have the order set aside.
- (3) If the applicant is the person against whom the order was made, the applicant must give notice of the application to the Attorney-General.
- (4) The Attorney-General may appear to oppose the grant of the application.
- (5) The court may set aside the order on the terms and conditions about costs or otherwise the court considers appropriate.
- (6) If the court sets aside the order, the court may rehear the application for the order immediately or at a later time fixed by the court.