

Role of financial investigation – relationship with criminal investigation

In its Financial Investigations Division ('FID'), the Commission employs several expert forensic accountants and financial analysts who specialise in tracing the proceeds of crime and identifying assets held by, or on behalf of, those suspected of criminal misconduct, including proceeds and assets that have been subjected to money laundering and other efforts to hide them.

The primary purpose of these financial investigations is to support the discharge of the Commission's functions under the *Criminal Assets Recovery Act 1990* ('the CAR Act'). However, financial investigations are an invaluable aid to criminal investigations. Financial investigations are sometimes deployed as the leading investigative strategy, for much of the activities of organised criminal groups are motivated by money. The FID's Criminal Investigation Support Team is co-located with the Criminal Investigation Division ('CID') and provides forensic accounting contributions to the CID's work. On the other hand, the CID is a source of intelligence and evidence for the FID to use in confiscation action, and it is important that staff in the CID be alert to confiscation potential and opportunity.

The Commission has protocols to ensure a proper separation of the two roles. In particular, the Commission does not trade information and intelligence for leniency in confiscation: that is, the Commission does not pursue confiscation action less vigorously or to a lesser extent because of a person's co-operation with the CID, nor seeks information, intelligence or other co-operation when negotiating confiscation matters.

The confiscation process

The confiscation process begins when the FID receives a referral from another part of the Commission (generally the CID) or from a partner agency (generally the NSW Police). The FID then assesses the referral to determine whether or not the Commission should commence confiscation proceedings in the matter. In the event that the Commission determines that there are sufficient grounds to start confiscation proceedings, the Commission will prepare the necessary court papers, including, in most cases, an affidavit in support of an application for a restraining order. Thereafter proceedings are commenced and, in most cases, the Commission makes an application for a restraining order. A summons starts proceedings and will seek one or more confiscation orders.

The Commission makes all relevant applications through the Supreme Court of NSW ('the Court').

Confiscation proceedings are civil proceedings. As such they are governed by the Court and statutory rules in respect of civil proceedings. This means that the Commission must attempt to settle each matter by negotiation rather than proceeding directly to a contested hearing. The majority of the Commission's confiscation proceedings are settled following negotiations with the defendant.

In some cases, the Commission will, either as a result of agreement reached during negotiations or for other reason, amend the summons to seek a different or additional confiscation order.

If the proceedings are settled, the Commission prepares and presents orders (known as ‘consent orders’) to the Court. The orders will sometimes involve dismissal of the proceedings without the making of a confiscation order and will sometimes involve the making of a confiscation order. These orders include a certification that the Commission has complied with the Commission’s Management Committee’s guidelines about negotiating the terms of settlements. These guidelines are also available on the Commission’s website.

The Commission settles most proceedings for a number of reasons. These include:

- there are inherent difficulties involved in producing an entirely comprehensive financial analysis and, as confiscations are civil proceedings, the Commission has a legal and ethical obligation to reach a negotiated settlement;
- if the Commission fails to establish a relevant offence or suspicion (and, absent a relevant conviction, there is never complete certainty of success) then no confiscation order can be made.
- the Commission must calculate the risk of being subject to an adverse costs order if it does not accept an offered settlement. For instance, if the Commission fails to accept a settlement offer in high risk litigation, then the defendant may ultimately secure a better result than if the Commission had settled; and
- the Commission tends to settle proceedings in cases where the confiscation order is likely to be for an amount larger than the defendant can pay after contested litigation.

In short, the Commission settles matters because this is the best way to maximise the overall monetary return to the State and, commensurately, the best way to maximise the overall deterrent effect of the confiscation regime.

If the Commission is unable to reach agreement with the defendant, the matter proceeds to a contested hearing based on the evidence available at the time. The result of the hearing is an order, or orders, of the Court disposing of the proceedings either in favour of or against the Commission.

Once the Court has made orders in the matter, the Commission takes the actions necessary to give effect to the orders. In the case of assets forfeiture orders, the NSW Trustee and Guardian sells the assets and remits the proceeds to the NSW Treasury. In the case of proceeds assessment orders (‘PAO’) and unexplained wealth orders (‘UWO’), the Commission has a role in obtaining payment. In most cases, the debt due to the Crown is secured by real estate or other collateral and interest accrues.

Factors considered when assessing a referral

The Commission’s careful analysis of all relevant factors in each matter is basis for the steps it takes during the proceedings. This analysis underpins the decision to commence proceedings, settlement negotiations, preparation for hearings and so on. The most notable factors considered by the Commission include:

1. the Commission’s prospects of proving a relevant offence to the civil standard;
2. the total assets available to satisfy any order against the defendant;
3. the likely costs of litigation;

4. the extent to which those litigation costs would be met out of restrained funds that would otherwise be confiscated;
5. the evidence that particular interests in property were lawfully or unlawfully acquired;
6. the evidence available to demonstrate that the proceeds have been derived from illegal activity and to prove the amounts so derived; and
7. the prospects of the defendant or someone else securing relief from confiscation on the grounds of hardship or other possible grounds.

Throughout the process, but subject to the requirements of the particular cases, the Commission makes use of various statutory provisions under the CAR Act and the *Crime Commission Act 2012* that enable it to obtain relevant evidence, information and material.

Referrals

Referrals to the Commission (in particular, its FID) for consideration of confiscation action come from a variety of sources, including the NSW Police (the dominant source), joint investigations between the Commission and the NSW Police, and joint investigations between the Commission, NSW Police and Commonwealth agencies such as the AFP, the ACC, and the ACBPS. All referrals are assessed but only some are determined to be suitable for confiscation action.

The Commission estimates that approximately one in six referrals results in confiscation proceedings. There are two main situations in which the Commission does not commence confiscation proceedings:

- the value of the potential defendant's assets is not high enough to make proceedings worthwhile; or
- the assessment process indicates that it is unlikely that the potential defendant has derived sufficient proceeds of crime to make the proceedings viable.

The Commission's analysis of referrals indicates the Commission receives the majority of confiscation referrals from NSW Police LACs following the arrest and charging of a person with a relevant offence. These arrests are often the result of short-term investigations focused on a particular criminal activity with little reference to the potential recovery of proceeds of crime. These referrals form the bulk assessed by the FID, but are the least likely to result in the start of confiscation proceedings.

In contrast, the matters that are most likely to result in significant confiscation outcomes are those in which the Commission's CID has been involved in the investigation. This is partly because the Commission is able to make an assessment of the person's financial position early in the investigation and work to uncover hidden assets throughout the inquiry, but also because of the serious and high-level nature of the investigations in which the Commission participates. The Commission is assisted in this endeavour by some of the most experienced police investigators in NSW.

Confiscation and restraining orders

Although in most cases a restraining order will be sought at the time the proceedings are commenced, there are cases in which it is appropriate for the Commission to make an application for a confiscation order without applying for a restraining order. There are two main circumstances when the Commission will seek a confiscation order without an associated restraining order:

- where the defendant is not in a position to deal with the interest or interests in property that would otherwise be the subject of the restraining order application. Most commonly this is where the interest is in an item of property, generally cash, which NSW Police have seized. NSW Police hold the property pursuant to non-CAR Act legislation; and
- where the Commission has obtained a restraining order for a defendant's jointly owned interest in real property, generally property owned with a spouse. During the course of the proceedings, the Commission may determine that there are grounds for seeking a confiscation order against the second person as well as the original defendant.

When the Court grants a restraining order, the Court requires the Commission, on behalf of the State, to give an undertaking as to damages.

Warranties

When proceedings are finalised by consent the defendant is required to provide a warranty as to his, her or its interests in property as at the date of the signing of the final consent orders. If the Commission subsequently discovers that the defendant failed to disclose an interest in property, the provisions of the CAR Act provide for the forfeiture of the undisclosed interest. If the defendant disposed of the undisclosed interest before it was discovered, the provisions allow for an order to be made requiring the defendant to pay to the Treasurer an amount equal to the value of the undisclosed interest.

'Estimated realisable value' of confiscation orders

Two of the principal objects of the CAR Act are the recovery of proceeds of illegal activity and the recovery of unlawfully obtained wealth. As such the Commission believes that the estimated realisable value of confiscation orders made during the year provides the best measure of the effectiveness and results of confiscation proceedings.

The Commission considers that the value (or estimated value) of interests in property which are subject to restraining orders is a much less significant and valuable measure of the Commission's confiscation work. Indeed, without the exercise of due care it could be a very misleading measure of the Commission's work and could produce an inflated impression of the Commission's success.

The nominal value of confiscation orders is similarly prone to giving a misleading and inflated impression of the Commission's success. In certain cases, most commonly those that are fully litigated rather than settled, a PAO or UWO will be made that exceeds the value of the defendant's interests in property. In such cases it is considered unlikely that the balance of the proceeds of the confiscation order will ever be collected and so only the estimated realisable portion is reported.

Estimates of the realisable value of a defendant's estate are made when matters are referred to the Commission for consideration of commencement of proceedings: the estimate is one factor that informs the decision. When aggregated, the estimates can be used to produce an estimate of the realisable value of a set of restraining orders.

Estimates of the realisable value of confiscation orders have the following main components. In the case of PAOs and UWOs, the first component is the amount specified in the Court's order. If the defendant is estimated to have sufficient property interests that are liquid or can be liquidated then the estimate equals the Court's order, and the estimate is reliable both in its precision and in the

likelihood that the amount will be realised. If the defendant is not thought to have sufficient property interests to cover the debt then the Commission's estimate of the realisable value of the PAO or UWO is its estimate of the realisable value of the available property interests: the estimate is necessarily somewhat less certain than in the earlier-mentioned type of case. In the case of an AFO in respect of money, the estimate of the realisable value of the order is usually reached simply and is the same as the amount of money. In the case of interests in property that are forfeited and then have to be sold (with the proceeds then going to the Treasury), the estimate again must necessarily be less certain: the asset is taken into the control of the NSW Trustee and Guardian for disposal (*e.g.* by auction): not only is an estimate less likely to be accurate, but the delay between the making of the estimate and the disposal of the asset can affect the ultimate accuracy of the estimate.

An attempt to compare the (estimated realisable) value of restraining orders with the (estimated realisable) value of the confiscation orders later made—especially on a general scale (*e.g.*, by reference to all of the cases completed in a given year) can produce only a very broad indication of the comparison. Such a comparison is built on the uncertainty and imprecision in both of the figures being compared. Moreover, restraining orders are usually made in terms that apply not merely to specific, identified interests in property but to all a defendant's interests in property, whether or not the Commission has discovered them yet. Accordingly, restraining orders (in the typical case) necessarily apply to a larger set of assets than AFOs (the CAR Act does not allow an order for the forfeiture of all of a person's interests in property—only specified ones). Furthermore, the total wealth of a defendant (which will be restrained by an all interests restraining order) will not necessarily be wholly unlawfully obtained and may be larger than the total of proceeds derived by the defendant from illegal activity. It should also be noted that the values of assets can change during the time proceedings are on foot.

In addition, on occasion confiscation orders are made but not recorded as realisable despite the fact that the defendant may have been deprived of value.

Exclusion orders

When the Commission resolves confiscation proceedings by consent, the terms of settlement usually include a term that the defendant will not challenge the making of the confiscation order. However, in some cases the defendant will consent to the making of the confiscation order but will preserve his or her right to make an application for relief from the effect of the confiscation order.

This most commonly occurs when the Commission has applied for an AFO and the defendant has been convicted of a SCRA. In such cases the making of an AFO cannot be defended, but the defendant may consider that they can prove that some, or all, of the forfeited interest in property was acquired from legitimate sources. In such cases the defendant may consent to the making of the order but retain their statutory right to seek to have some or all of the forfeited interest in property excluded from the order on the grounds that the interest was not illegally acquired.

Summary judgements and appeals

In matters where all avenues to try to settle the proceedings have been unsuccessful, but the defendant has been convicted of a sufficiently serious offence, the Commission usually makes an application for summary judgement on its claim for a confiscation order. This generally occurs in matters where the Commission sought a PAO at the commencement of proceedings. In such cases,

the Commission seeks leave to amend its summons to seek an AFO as well as the PAO and, on proof of a serious crime related activity, will obtain both orders. The Commission will also request that the quantum of the PAO be assessed at a later date.

By employing this strategy, the Commission only incurs the cost of the summary judgement application (which simply requires proof of the SCRA in respect of which the defendant has already been convicted) and, depending on whether the defendant files an application for exclusion, may not need to go to the considerable expense of quantifying the PAO. If the defendant files an exclusion application, the Commission generally seeks to have the exclusion application heard at the same time as quantifying the PAO.

This strategy does have an impact on reported confiscation outcomes. In these matters, at the time the orders are made the Commission reports on the estimated realisable value of the forfeited interests in property. Whether or not this will be the final outcome of the matter will depend on such contingencies as whether the defendant makes an exclusion application, the degree of success the defendant has in that application, and the amount that is finally quantified as a proceeds assessment matters.

Living and legal expenses

The CAR Act makes allowances for applications for reasonable living and legal expenses. People whose interest in property are restrained can make an application to the Court for an order varying the restraining order to allow for reasonable living expenses (of the defendant or his or her dependents) and/or reasonable legal expenses (of confiscation or criminal proceedings) to be met.

Costs

A consequence of the Commission's resolving almost all proceedings by negotiated settlement is that it is rare that an order is made that the Commission pay the defendant's costs of the proceedings or that the defendant pay the Commission's costs of the proceedings.

Within proceedings, the Commission will often defend applications made under s. 10C of the CAR Act, or for living expenses or legal expenses. Although an order for the payment of costs may be made in such matters it is often the case that whether or not the amount is actually paid will depend on the outcome of the substantive proceedings.

The Commission employs lawyers and paralegals who work principally on confiscation litigation. Those legal staff draft legal documentation and appear for the Commission to make most applications for restraining orders and consent orders. In more complex cases, the Commission will occasionally brief counsel to make applications for restraining and consent orders.

Finalising confiscation proceedings

CAR Act proceedings are finalised by one of two methods: the Court makes a confiscation order; or the Court makes an order dismissing the Commission's application for a confiscation order. In both cases, the orders may be made by consent or as a result of a contested hearing.

When proceedings are finalised by consent the defendant is required to provide a warranty as to his, her or its interests in property as at the date of the signing of the final consent orders. If the Commission subsequently discovers that the defendant failed to disclose an interest in property, the

provisions found in Division 2A of the CAR Act provide for the forfeiture of the undisclosed interest. If the defendant disposed of the undisclosed interest before it was discovered, the provisions allow for an order to be made requiring the defendant to pay to the Treasurer an amount equal to the value of the undisclosed interest.

Sharing with other jurisdictions

NSW is able to share the proceeds of confiscation proceedings with other jurisdictions. This occurs in situations where confiscation proceedings under the CAR Act arise from a joint investigation involving the Commission and law enforcement agencies of another jurisdiction.

To facilitate the sharing of proceeds with other jurisdictions, the Commission makes a recommendation to the Minister for Police and Emergency Services as to the matters and the proportions of the recovered amounts that should be shared. In the event that the Minister agrees with the recommendation, the Minister makes the recommendation to the Treasurer. If the Treasurer agrees, he issues a Direction pursuant to subs. 32 (3) (d) of the CAR Act that the amount be shared.