

# CRIME COMMISSION ACT 2012

## PARAGRAPH 57 (3) (a)

### GUIDELINES

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By resolution passed on 5 February 2013, pursuant to paragraph 57 (3) (a) of the *Crime Commission Act 2012*, the Management Committee of the New South Wales Crime Commission furnishes to the Crime Commission the following guidelines with respect to the negotiation by the Commission of the terms of agreements regarding orders made by consent to resolve finally proceedings under the *Criminal Assets Recovery Act 1990*:

1. Settlement negotiations may only be conducted by a person delegated by the Commissioner to do so ('the Delegated Negotiator'). Standing delegations may only be made to the Assistant Commissioners, lawyers or members of the Financial Investigation Division. Other staff members may only receive delegations specific to particular cases.
2. The terms of settlement may only be approved by the Commissioner or an Assistant Commissioner with special legal qualifications ('the Decision Maker').
3. When recommending terms of settlement to the Decision Maker the Delegated Negotiator must be of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation). In formulating this opinion the Delegated Negotiator is to have regard to factors including:

- (a) the sufficiency of the evidence available to prove a relevant serious crime related activity;
- (b) the sufficiency of the evidence available to quantify the defendant's derivation of, or acquisition of property derived from, proceeds of illegal activities;
- (c) the particulars of any previous confiscation proceedings taken by the Commission against the defendant;
- (d) the likelihood that the defendant would be able to discharge his or her onus to prove that he or she has not derived proceeds of illegal activities;
- (e) the estimated value of the defendant's interests in property and the degree of futility in seeking to secure a larger order;
- (f) the likelihood of other person(s) successfully claiming an interest in property that may be subject to an assets forfeiture order or may become security for an proceeds assessment order or unexplained wealth order;
- (g) the likelihood of a successful application for hardship being made from an interest in property potentially subject to an assets forfeiture order;
- (h) the likelihood of the defendant successfully applying for an order for the release of reasonable legal expenses and the estimated quantum of such an order; and
- (i) the cost to the Commission of continuing to litigate the matter rather than settling the matter (such costs including not only the Commission's internal costs but also the estimated costs of briefing external counsel and the opportunity cost of continued litigation of the matter rather than devoting the Commission's resources to potentially more productive other matters) and the risks of a costs order being made against the Commission.

4. The Negotiator must also confirm to the Decision Maker that:

- (a) the financial investigation of the defendant has been appropriately thorough and extensive (having regard to the likely return to the Crown) and has been sufficient to provide a reasonable level assurance that all of the defendant's interests in property have been identified (in so far as it is feasible to do so) and that all factors relevant to the making of the confiscation order have been considered; and
  - (b) the financial investigation has been conducted by an appropriately qualified and skilled person.
  
- 5. Should the Decision Maker approve the Delegated Negotiator's recommended terms of settlement:
  - (a) the Delegated Negotiator must certify that, having regard to factors that include those listed above, the Delegated Negotiator is of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation) ('the Delegated Negotiator's Certification'); and
  - (b) the Decision Maker must certify that he or she is satisfied that the Delegated Negotiator's certification has been made on a reasonable basis.