



Parliamentary Joint Committee on the Australian Crime Commission

Inquiry into the legislative arrangements to outlaw
serious and organised crime groups

August 2009

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Table of Contents

The Committee	iii
Acronyms and abbreviations list	ix
Chapter 1	1
The conduct of the inquiry.....	1
Terms of Reference	1
Background to the inquiry	2
Conduct of the inquiry.....	3
Structure of the report.....	3
Terminology	4
Acknowledgements	4
Chapter 2	7
Overview of serious and organised crime in Australia	7
Organised crime in Australia: a snapshot.....	7
Responding to serious and organised crime	15
Outlaw motorcycle gangs (OMCGS): a growing concern?	22
Conclusion	32
Chapter 3	35
Existing legislative approaches to combating organised crime in Australia	35
Introduction	35
Types of legislation	35
Commonwealth.....	36
New South Wales	41
Victoria	44
Queensland	45

Western Australia	46
South Australia	47
Tasmania.....	48
Australian Capital Territory	49
Northern Territory	50
Conclusion.....	51
Chapter 4	53
Legislation targeting participation in an organised crime group	53
Introduction	53
Association and consorting offences	55
Civil orders	62
Organised crime offences	63
Examples of specific legislative approaches	64
United States of America.....	64
Canada	68
New Zealand.....	74
United Kingdom	75
Asian examples.....	78
South Australia	79
Other states' responses to South Australian laws	89
Conclusions	93
Chapter 5	97
Confiscating the Proceeds of Crime.....	97
Introduction	97
Confiscation of criminal assets.....	97
Proceeds of Crime Act 2002 (Commonwealth)	99
Unexplained wealth provisions	101

Measures supporting criminal assets confiscation	118
Conclusions	127
Chapter 6	129
A holistic and harmonised approach to serious and organised crime.....	129
A coordinated approach to serious and organised crime.....	130
Information and intelligence sharing.....	141
International partnerships	150
A supportive suite of law enforcement capabilities	153
Resources.....	156
Concluding remarks.....	157
Additional comments by the Liberal and Family First members of the committee	161
APPENDIX 1	163
List of public submissions.....	163
Appendix 2	165
Public hearings and witnesses	165
Appendix 3	171
Answers to questions on notice and additional information	171
Appendix 4	173
Appendix 5	177
Appendix 6	179
Appendix 7	181
Appendix 8	187

Appendix 9	189
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Acronyms and abbreviations list

ACC	Australian Crime Commission
ACC Act	<i>Australian Crime Commission Act 2002</i>
ACC Board	Australian crime Commission Board
AFP	Australian Federal Police
AMLAT	Attorney-General's Department Anti-Money Laundering Assistance Team
AML/CTF	Anti-Money Laundering and Counter-Terrorism Financing
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAB	Criminal Assets Bureau (Ireland)
CALEA	<i>Communications Assistance for Law Enforcement Act 1994 (USA)</i>
CCC	Corruption and Crime Commission (WA)
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CMC	Crime and Misconduct Commission (Queensland)
Customs	Australian Customs Service
DPP	Director of Public Prosecutions
FIU	Financial Intelligence Unit
ICT	Information and Communications Technology
IFC	Intelligence Fusion Centres
IP	Intellectual Property
MC	Motorcycle Club
MCPEMP	Ministerial Council for Police and Emergency Management – Police
MDMA	methylenedioxy methamphetamine (ecstasy)

NSW	New South Wales
NT	Northern Territory
OMCG	Outlaw Motorcycle Gang
OMCG taskforce	Outlaw Motorcycle Gangs National Intelligence Task Force
PDPP	Pacific Police Development Program
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
QPS	Queensland Police Service
RICO	<i>Racketeer Influence and Corrupt Organizations Act 1970 (USA)</i>
SA	South Australia
SCAG	Standing Committee of Attorneys-General
SOC NITF	Serious and Organised Crime National Intelligence Task Force
SOCA	Serious and Organised Crime Agency (UK)
UNODC	United Nations Office on Drugs and Crime
WA	Western Australia
the committee	Parliamentary Joint Committee on the Australian Crime Commission

Chapter 1

The conduct of the inquiry

Terms of Reference

1.1 On 17 March 2008, the Parliamentary Joint Committee on the Australian Crime Commission initiated an inquiry into legislative arrangements to outlaw serious and organised crime groups pursuant to paragraph 55(1)(b) of the Australian Crime Commission Act 2002:

To report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed.

1.2 The Terms of Reference required the committee to examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups, with particular reference to:

- (a) international legislative arrangements developed to outlaw serious and organised crime groups and association to those groups, and the effectiveness of these arrangements;
- (b) the need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups;
- (c) Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership of and association with those groups, and the effectiveness of these arrangements;
- (d) the impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of and association with these groups on:
 - (i) society
 - (ii) criminal groups and their networks
 - (iii) law enforcement agencies; and
 - (iv) the judicial/legal system
- (e) an assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the ACC.

Background to the inquiry

1.3 In September 2007, the committee tabled its report, *Inquiry into the future impact of serious and organised crime on Australian society*. The inquiry focused on future trends in serious and organised crime, strategies for countering future serious and organised crime and the economic cost of such strategies, and the adequacy of legislative and administrative arrangements to meet future needs.

1.4 That inquiry found that Australia faces an increased threat from serious and organised crime and from transnational crime, and that while a number of legislative and other arrangements are in place, these alone may not be wholly effective in addressing the threat.

International approaches to serious and organised crime

1.5 During the *Inquiry into the future impact of serious and organised crime on Australian society*, the then Minister for Justice, Senator the Hon. David Johnston, wrote to the committee asking that, as part of that inquiry, the committee examine the effectiveness of Australian legislative arrangements to curtail the activities of organised crime groups. Senator Johnston, also indicated that he sought to ensure that:

Australia's legislative framework for disrupting and dismantling serious and organised crime groups continues to be as up to date and effective as possible.¹

1.6 In particular, the Minister noted that there would be value in examining the effectiveness of approaches taken internationally.

1.7 The committee, at that time, was not able to discharge fully the Minister's request. The committee did however feel that the issue was significant enough to warrant further investigation and recommended in its report that:

... the Parliamentary Joint Committee on the Australian Crime Commission in the next term of the Federal Parliament conduct an inquiry into all aspects of international legislative and administrative strategies to disrupt and dismantle serious and organised crime.²

1.8 In April 2009, a sub-committee of the Parliamentary Joint Committee on the Australian Crime Commission undertook a delegation to North America, Europe and the United Kingdom to examine international trends in serious and organised crime and the legislative and administrative approaches adopted in a number of jurisdictions to tackle both domestic and transnational crime.

1 Senator, the Hon David Johnston, Minister for Justice and Customs, Correspondence 07/5188.

2 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007, p. 62.

1.9 The delegation report identified a number of areas of concern but also a range of approaches which had been effective in addressing serious and organised crime. The delegation report made no specific recommendations but many of its findings inform this current report and support its recommendations. The delegation report should be viewed as a supplementary report to this report.

1.10 The delegation report was tabled in the Senate on 24 June 2009 and in the House of Representatives on 25 June 2009.³

South Australian approaches to serious and organised crime

1.11 The South Australian Government's introduction of the Serious and Organised Crime (Control) Bill 2007 in February 2008 (discussed in chapter 3) provided further impetus for the establishment of this inquiry. The introduction of the Serious and Organised Crime (Control) Bill, signalled a new approach to tackling serious and organised crime in Australia, and while the Commonwealth has no jurisdiction over state and territory law enforcement, the committee felt that it would be useful to consider any potential implications of this new approach.

Conduct of the inquiry

1.12 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website. In addition, the committee wrote to a range of organisations and individuals inviting submissions.

1.13 The committee received 24 submissions, which were published on the committee's website. A list of submissions is included at Appendix 1.

1.14 In addition, the committee held nine public hearings; these were in Adelaide; Perth; Sydney; Hobart; Melbourne; Canberra; Brisbane (two) and Darwin. The witnesses who appeared before the committee at these hearings are listed in Appendix 2.

1.15 The committee adopted the report at a private meeting on Monday 10 August 2009.

Structure of the report

1.16 The chapters of this report are organised around the key themes which emerged during this inquiry and therefore do not neatly mirror the terms of reference. This approach was adopted as it reduced the potential for repetition which would have resulted if each term of reference was considered sequentially.

3 Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom & the Netherlands, The Parliament of the Commonwealth of Australia, June 2009,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

1.17 Chapter 2 provides an overview of serious and organised crime in Australia. The chapter argues that there is a need to be able to define and quantify serious and organised crime in order to develop appropriate responses to it, and canvasses the difficulties in such a task.

1.18 As a result of the South Australian *Serious and Organised Crime (Control) Act 2008* the involvement of outlaw motorcycle groups (OMCGs) in serious and organised crime became a significant issue during the early stages of this inquiry. Chapter 2 also discusses the issue of whether OMCGs are inherently criminal organisations or whether it is individual members within OMCGs who engage in criminal activities.

1.19 Chapter 3 provides an overview of existing legislative approaches to combat serious and organised crime in each Australian jurisdiction.

1.20 Chapter 4 considers in detail national and international association offences. The chapter identifies that there are various legislative models aimed at prohibiting organised criminals from associating with each other, considers the *Serious and Organised Crime (Control) Act 2008* (SA) and reports on national responses to the South Australian approach.

1.21 Chapter 5 evaluates existing legislation which provides for the confiscation of assets derived from criminal activity, and considers the benefits and disadvantages of different legislative models. The chapter also considers legislative and administrative arrangements required to support proceeds of crime laws.

1.22 Chapter 6 brings together the remaining themes of the inquiry to argue that Australia must take a coordinated and holistic approach to tackling serious and organised crime and that strong legislative arrangements in themselves are just one part of a suite of tools and approaches.

Terminology

1.23 It should be noted that some international jurisdictions employ the term 'serious organised crime' whereas the convention in Australia is to use the term 'serious and organised crime'. These terms are used interchangeably within this report. In some cases the abbreviated 'organised crime' is also used.

Acknowledgements

1.24 The committee wishes to express its appreciation to all parties that contributed to the conduct of this inquiry, whether by making a written submission, by attendance at a hearing or, as in many cases, by making written and oral submissions.

1.25 As part of this inquiry the committee conducted a number of site visits, which enabled it to gain a more in-depth understanding of the issues and agencies involved in combating serious and organised crime in Australia. Accordingly, the committee would like to thank officers from the Australian Crime Commission (ACC); the

1.26 The committee would also like to acknowledge the assistance and expertise provided by those state and territory Commissioners of Police and senior police officers who meet with the committee during this inquiry.

Chapter 2

Overview of serious and organised crime in Australia

Organised crime is a phenomenon that has emerged in different cultures and countries around the world. Organised crime is ubiquitous; it is global in scale and not exclusive to certain geographical areas, to singular ethnic groups, or to particular social systems.¹

2.1 Perceptions of serious and organised crime frequently consider it occurring in, or exported from, discrete geographical regions. In reality, organised crime is widespread and impervious to cultural and geographic boundaries. Australia is no exception.

2.2 This chapter provides an overview of serious and organised crime in Australia. It outlines the broad features of organised crime including current illicit markets, the nature of organised crime groups and the impact of organised crime on Australian society.

2.3 This chapter also discusses some of the issues associated with responding to organised crime, including: defining serious and organised crime; quantifying serious and organised crime; and the trend towards preventing rather than reacting to serious and organised crime.

2.4 Lastly, during the course of this inquiry, the involvement of outlaw motorcycle gangs (OMCGs) in organised criminal activity in Australia gained prominence in the political and public domains. Accordingly, the committee sought to understand the extent of OMCG organised criminal activity.

Organised crime in Australia: a snapshot

2.5 There is a long history of organised crime in Australia² and, according to Dr Andreas Schloenhardt, an Associate Professor at the University of Queensland specialising in organised and transnational criminal law, it is widespread in its reach:

Organised crime can be found across the country and even regional centres and remote communities are not immune to the activities of criminal organisations.³

2.6 In its current manifestation, organised crime in Australia exhibits a number of features that largely reflect patterns in organised crime internationally. Unsurprisingly, an enduring feature of organised crime is that it is primarily motivated by financial

1 Dr Schloenhardt, *Submission 1B*, p. 12.

2 Dr Schloenhardt, *Submission 1*, p. 6.

3 Dr Schloenhardt, *Submission 1B*, p. 82.

gain.⁴ Further, it generally involves systematic and careful planning, the capacity to adapt quickly and easily to changing legislative and law enforcement responses and the capacity to keep pace with, and exploit, new technologies and other opportunities.⁵

2.7 The Australian Crime Commission (ACC) likens organised criminal 'enterprises' to conventional businesses in the kinds of measures they adopt to ensure good business outcomes – risk mitigation strategies, the buy-in of expertise (legal and financial for example), and remaining abreast of market and regulatory change. The principal difference is, of course, that their business activities and profits are illicit.⁶

2.8 The impact of organised crime on Australia is significant. The ACC concluded that at a conservative estimate organised crime cost Australia \$10 billion in 2008. These costs include:

- Loss of legitimate business revenue;
- Loss of taxation revenue;
- Expenditure fighting organised crime through law enforcement and regulatory means; and
- Expenditure managing 'social harms' caused through criminal activity.⁷

2.9 Serious and organised crime not only results in substantial economic cost to the Australian community but also operates at great social cost. Organised crime can threaten the integrity of political and other public institutional systems through the infiltration of these systems and the subsequent corruption of public officials. This, in turn, undermines public confidence in those institutions and impedes the delivery of good government services, law enforcement and justice. Along with this are the emotional, physical and psychological costs to victims of organised crime, their families and communities.⁸

Organised crime groups

2.10 Over time a number of criminal organisations have infiltrated or evolved within Australia – Asian triads, Colombian drug cartels, Italian and Russian mafia, and OMCGs.⁹

4 In its report, *Inquiry into the future impacts of serious and organised crime on Australian society*, September 2007, p. 5, the PJC-ACC notes that paedophile groups are an exception to this.

5 ACC, *Organised Crime in Australia 2009*, pp 5-6.

6 ACC, *Organised Crime in Australia 2009*, p. 5.

7 ACC, *Organised Crime in Australia 2009*, p. 5.

8 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007, pp 38-39 & 40-41.

9 Dr Schloenhardt, *Submission 1*, p. 6.

2.11 In the committee's 2007 report on serious and organised crime it was reported that Asian organised crime groups continued to thrive in Australia with a broadening of their activities beyond their traditional involvement in extortion and protection rackets. The presence and expansion of Middle Eastern organised crime groups was also noted, with drug trafficking, property crime and vehicle rebirthing reported as their main activities. European crime syndicates, commonly of Romanian and Serbian origin were reported to be prominent in WA and to an extent in Queensland and Melbourne.¹⁰

2.12 The growing involvement of OMCGs in organised crime was further highlighted in the committee's 2007 report. This is discussed in more detail later in this chapter.

2.13 Whilst the presence of these identifiable organised crime groups was reported, the trend towards 'entrepreneurial crime networks' was also emphasised. The report discussed the shift from communally-based, strongly hierarchical crime groups that centre on a singular identity – a particular ethnicity for example – to more flexible, loosely associated networks.¹¹

2.14 This trend was emphasised in evidence to this inquiry. For example, Assistant Commissioner Tim Morris from the AFP informed the committee that:

The groups are more business driven and will enter into quick and ready partnerships with whoever may be able to do the type of crime business that they need to do. So the traditional models—and we have seen it in the past in documents categorising crime groups along strict ethnic lines—are becoming less and less relevant and are becoming more and more flexible. People are shifting around very, very quickly and flexibly into the most profitable crime types they can find.¹²

2.15 Making a related point, Mr Kevin Kitson from the ACC noted that increasingly, organised crime is moving out of the sphere of a powerful few at the head of tightly structured and hierarchical groups to entrepreneurial and relatively transient partnerships:

[W]e probably need to step away from the concept of a grand puppet-master somehow coordinating this activity nationally. There are undoubtedly people who, at the flick of a phone switch, can command resources and attention and support across the country and internationally, but I think we would characterise it as being much more entrepreneurial, much more available to anyone who really has the commitment to seek out

10 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007, pp. 10-11.

11 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007, p. 6.

12 Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 32.

organised crime profits rather than necessarily being the domain of a select few.¹³

2.16 At a state level the same pattern was observed. Deputy Commissioner Ian Stewart from the Queensland Police Service (QPS) informed the committee that:

Whilst at one time an organised crime group membership was operated possibly on geographic or ethnic lines which reflected a long-term commitment, such membership or participation has migrated to more fluid and flexible approaches that may see a temporary union to execute crime within a thematic context—for example, black market web portals, a cyber based environment hosted and conducted for the express purpose of bringing criminals together to facilitate open trading of illegal commodities and services.¹⁴

2.17 The ACC reported that notwithstanding the increasingly 'diverse' and 'flexible' nature of organised crime groups, 'high-threat organised crime groups' tend to hold in common a range of characteristics. The ACC identified the following features:

- They have transnational connections;
- They have proven capabilities and involvement in serious crime of high harm levels including illicit drugs, large scale money laundering and financial crimes;
- They have a broader geographical presence and will generally operate in two or more jurisdictions;
- They operate in multiple crime markets;
- They are engaged in financial crimes such as fraud and money laundering;
- They intermingle legitimate and criminal enterprises;
- They are fluid and adaptable, and able to adjust activities to new opportunities or respond to pressures from law enforcement or competitors;
- They are able to withstand law enforcement interventions and rebuild quickly following disruption;
- They are increasingly using new technologies; and
- They use specialist advice and professional facilitators.¹⁵

Transnational crime

2.18 The committee notes, in particular, the increasingly transnational nature of organised crime, which the United Nations Office on Drugs and Crime (UNODC) has

13 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 10.

14 Deputy Commissioner Stewart, QPS, *Committee Hansard*, 7 November 2008, p. 18.

15 ACC, *Organised Crime in Australia 2009*, p. 6.

described as 'one of the major threats to human security'.¹⁶ During the course of this inquiry the committee become aware of the scale and destructive effects of serious and organised crime and transnational crime. Mr Antonio Maria Costa, Director General of the United Nations Office on Drugs and Crime (UNODC) outlined his concerns regarding the global crime threat:

I believe we face a crime threat unprecedented in breadth and depth...drug cartels are spreading violence in Central America, Mexico and the Caribbean. The whole of West Africa is under attack from narco-traffickers, that are buying economic assets as well as political power;

collusion between insurgents and criminal groups threatens the stability of West Asia, the Andes and parts of Africa, fuelling the trade in smuggled weapons, the plunder of natural resources and piracy;

kidnapping is rife from the Sahel to the Andes, while modern slavery (human trafficking) has spread throughout the world;

in so many urban centres, in rich as much as in poor countries, authorities have lost control of the inner cities, to organized gangs and thugs;

the web has been turned into a weapon of mass destruction, enabling cyber-crime, while terrorism - including cyber-terrorism - threatens vital infrastructure and state security.¹⁷

2.19 Mr Costa reasoned that the global growth of organised crime would be an ongoing trend, pointing to the current global economic crisis as a trigger for increased criminal activity.¹⁸

Organised criminal activity

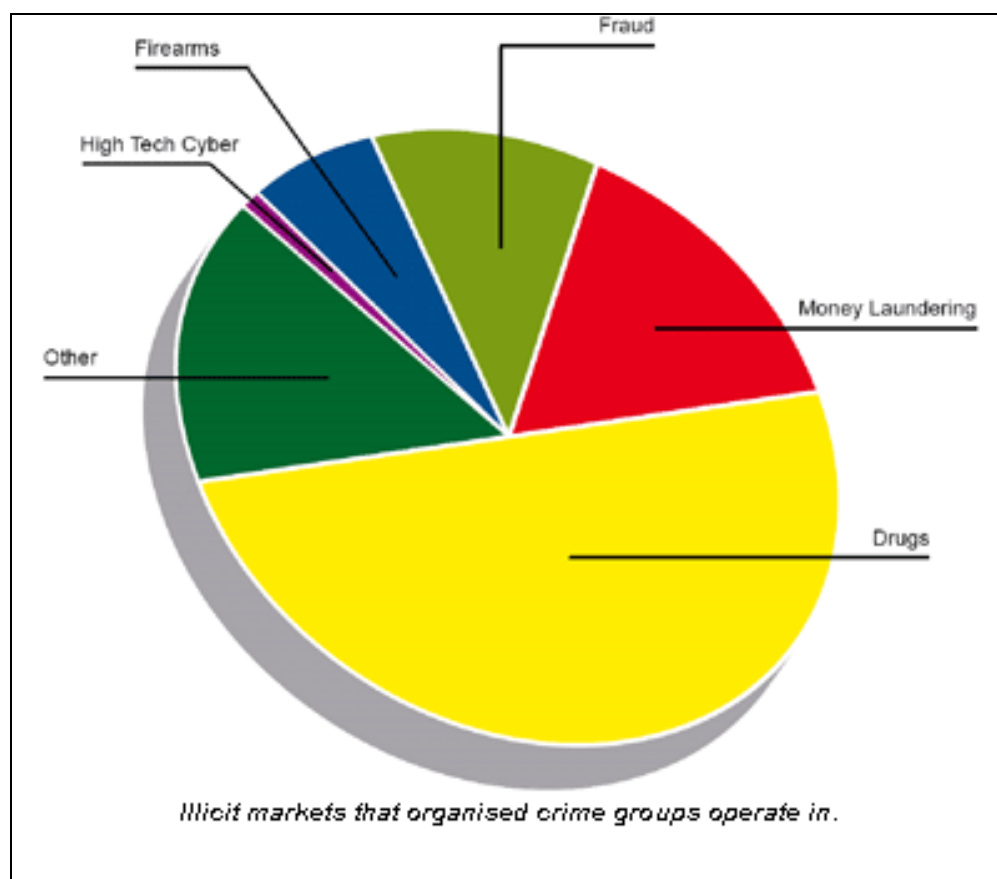
2.20 The ACC's data on organised crime groups in Australia shows that organised crime groups operate in a range of illicit markets: drugs, money laundering, fraud, firearms trafficking, high-tech crime, and other activities (see Chart 1). Each of these is briefly discussed below.

16 UNODC website, www.unodc.org/unodc/en/organized-crime/index.html (accessed 16 June 2009).

17 Mr Costa, Director General, UNODC, *The global crime threat – we must stop it*, 18th Session of the Commission on Crime Prevention and Criminal Justice, Vienna, 16 April 2009, www.unodc.org/unodc/en/about-unodc/speeches/2009-16-04.html (accessed 16 June 2009).

18 Mr Costa, Director General, UNODC, *The global crime threat – we must stop it*, 18th Session of the Commission on Crime Prevention and Criminal Justice, Vienna, 16 April 2009, www.unodc.org/unodc/en/about-unodc/speeches/2009-16-04.html (accessed 16 June 2009).

Chart 1 – Illicit markets that Australian organised crime groups operate in¹⁹



Drugs

2.21 Illicit drugs are a primary market with significant organised crime group involvement in the importation, domestic production, and distribution of these drugs. This includes the production and supply of amphetamines and the supply of methylenedioxymethamphetamine (MDMA, also known as ecstasy), heroin, cannabis and cocaine.²⁰ Mr Kitson from the ACC explained that:

Very few things can give you the same kind of profit margin that illicit drugs can and the ratio between, if you like, the wholesale or manufacturing cost and the retail cost is so large that it is likely to remain for the foreseeable future as the major generator of criminal profit.²¹

Money laundering

2.22 Money laundering comprises a large percentage of organised criminal activity and is used to conceal the origin of criminal profits. This occurs through 'the

19 ACC, www.crimecommission.gov.au, 2009

20 ACC, *Organised Crime in Australia 2009*, p. 7.

21 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 15.

placement of illicit profits into the legitimate economy', which is achieved by a number of means including:

- 'transfers to financial institutions in countries where Australia has limited visibility;
- transfers to other asset types which cannot be easily traced;
- gambling;
- the use of money remitters.²²

2.23 Increasingly, criminal networks are exploiting technological opportunities to launder money – for example, through online transfers and identity fraud.²³

2.24 Money laundering impacts negatively on the Australian community in a number of ways. These include: 'crowding out of legitimate businesses in the marketplace by money laundering-front businesses', influencing the volatility of exchange rates and interest rates through large-scale funds transfers and 'increasing the tax burden' on the community through tax evasion.²⁴

Financial sector crimes

2.25 There are a range of financial crimes including manipulation of the stock market, fraud against investors and tax crime. According to the ACC, new technologies and the globalised economy have provided further opportunities for organised crime - both in terms of new markets and new ways to undertake criminal activity. This has led to an increase in financial crimes.²⁵

Firearms trafficking

2.26 The ACC reports that 'firearms aid criminal activity and can be used to strengthen an organised crime group's market position'. As a result the movement of firearms across state borders continues to be of concern to law enforcement agencies.²⁶

High-tech crime

2.27 High-tech crime has been identified as an area of growth for organised criminal activity. As indicated above, there are two dimensions to high-tech crime: enabling and facilitating. Technology-enabled crime refers to new crime opportunities

22 ACC, *Organised Crime in Australia 2009*, pp 8-9.

23 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, p. 22.

24 ACC, *Organised Crime in Australia 2009*, p. 8.

25 ACC, *Organised Crime in Australia 2009*, p. 9.

26 ACC, *Organised Crime in Australia 2009*, p. 11.

presented by new technologies. An example of this is 'phishing'. That is, email scams, where the sender endeavours to elicit private information from the user by pretending to be a legitimate enterprise. Technology-facilitated crime refers to the use of new technology to undertake traditional crimes. For example, money-laundering via online transfers.²⁷

Other crimes

2.28 The ACC has also reported an international growth in intellectual property (IP) crime, which includes counterfeiting of a range of products (DVDs, pharmaceuticals, car parts etc), trademark counterfeiting and illegal downloads. IP crime has high yields and low penalties, and is therefore a lucrative market for organised crime.²⁸

2.29 Environmental crimes such as wildlife trafficking, poaching and pearl thefts have all been targeted by organised criminals.²⁹

Future trends

2.30 Cultural, political and social changes all impact on the composition of organised crime groups, the way in which organised crime operates and the focus of organised criminal activity. New technologies, increasing globalisation, economic trends and the pace at which change occurs produce particular opportunities for criminal activity and particular challenges for those charged with the task of combating organised crime.³⁰

2.31 The rapid pace of technological change and, correspondingly, the 'dramatic' impacts of this change on organised criminal activity was commented on by several witnesses. It was seen to be an immediate and ongoing challenge for law enforcement agencies. For example, Mr Christopher Keen, Director of Intelligence of the Crime and Misconduct Commission (CMC) in Queensland observed:

I think that in three or five years a lot of the organised crime activity is going to be of a very different complexion to what we have now.³¹

2.32 The ACC reported that 'emerging areas of potential criminal exploitation' include financial sector fraud and primary industries.³² However, it was noted that

27 PJC-ACC, *Inquiry into the future impacts of serious and organised crime on Australian society*, September 2007, p. 17.

28 ACC, *Organised Crime in Australia 2009*, p. 11.

29 ACC, *Organised Crime in Australia 2009*, p. 11.

30 ACC, *Organised Crime in Australia 2009*, p. 12.

31 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 33.

32 ACC, *Organised Crime in Australia 2009*, p. 14.

illicit drugs will most likely remain the primary market for organised criminal activity.³³

Responding to serious and organised crime

2.33 In Australia a range of law enforcement and other government agencies work in partnership to respond to serious and organised crime. The agencies involved in responding to serious and organised crime, and the legislative tools available to them, are discussed in chapter 3.

2.34 At the Federal level, the Australian Crime Commission (ACC) was established to address federally relevant criminal activity, which section 4 of the ACC Act defines as:

- an offence against a law of the Commonwealth or a territory; or
- an offence against a law of a state that has a federal aspect.

In practical terms, federally relevant criminal activity generally equates to serious and organised crime.

2.35 The ACC contributes to the 'fight against nationally significant crime' through 'delivering specialist capabilities and intelligence to other agencies in the law enforcement community and broader government'.³⁴ The ACC works collaboratively with the AFP, state and territory law enforcement agencies, the Australian Attorney-General's Department and a range of Australian Government agencies such as the Australian Customs and Border Protection Service, the Australian Tax Office, the Australian Securities and Investments Commission, the Australian Security Intelligence Organisation and AUSTRAC.³⁵

2.36 Mr Kitson from the ACC emphasised the need for approaches to serious and organised crime to keep pace with developments in organised crime, including the changing nature of organised crime groups:

It is true to say that the criminal environment has become more complex and legislative tools will need to evolve to match the needs of the criminal environment. Our key intelligence reports show the changing nature of serious and organised crime. We know that groups are typically flexible and entrepreneurial and come together and disband as the needs and opportunities arise. They are increasingly using professional facilitators to blur the lines between legitimate and illegitimate sources of revenue.³⁶

33 ACC, *Organised Crime in Australia 2009*, p. 12.

34 ACC website, www.crimecommission.gov.au (Accessed 2 July 2009).

35 ACC, *Australian Crime Commission Annual Report 2007-08*, p. 10.

36 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

2.37 Similarly, Dr Dianne Heriot from the Attorney-General's Department stated:

[M]any groups increasingly operate in fluid, loose networks that come together for specific activities, break and reform. To fight them, we need similar degrees of flexibility and innovation in our legislative framework and in our law enforcement.³⁷

2.38 The committee heard evidence throughout this inquiry about the difficulties that Australian law enforcement face in combating serious and organised crime. Key amongst them are the problems of collecting statistics about, and mapping trends in, organised crime due to the difficulties in defining and measuring organised crime.

Defining serious and organised crime

2.39 Whilst those in the business of monitoring, researching and combating organised crime share some broad observations about the incidence and parameters of serious and organised crime, there is limited agreement over how it should actually be defined. As Dr Schloenhardt submitted:

Despite the omnipresence of criminal organisations in the region, the concept of organised crime remains contested and there is widespread disagreement about what organised crime is and what it is not... Generalisations about organised crime are difficult to make and many attempts have been undertaken to develop comprehensive definitions and explanations that recognise the many facets and manifestations of organised crime.³⁸

2.40 Dr Schloenhardt went on to note that, in turn, the measures adopted to respond to organised crime are varied and are designed to meet the different jurisdictional concepts of serious and organised crime and the potentially different agendas of those in the position of analysing and combating serious and organised crime – that is, governments, law enforcement agencies and researchers.³⁹ In brief, how serious and organised crime is defined determines, to an extent, how serious and organised crime will be approached.

2.41 The Attorney-General's Department submitted that efforts to define serious and organised crime focus on four elements: 'defining the group; connecting the group to crime; determining the crimes to be captured; and the process for determining that the group is criminal'.⁴⁰

2.42 In summary, a 'simple definition' of group is generally employed that includes the structure of the group (such as minimum number of persons) and the

37 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, pp 35-36.

38 Dr Schloenhardt, *Submission 1B*, p. 12.

39 Dr Schloenhardt, *Submission 1B*, p. 12.

40 Attorney-General's Department, *Submission 16*, p. 6.

activities/objectives of the group. The activities/objectives of the group are what link the group to crime. The crimes to be included in the definition are ordinarily identified in three ways: 'crimes of a general type with a penalty of 'x' years imprisonment, listing specific offences, or a combination of these approaches'.⁴¹

2.43 Chapter 4 discusses the various legislative approaches which criminalise association in more detail and considers their respective merits. Appendix 4 provides a comparative overview of various international approaches to these definitional elements.

2.44 Serious and organised crime is defined in the *Australian Crime Commission Act 2002* as follows:

Serious and organised crime means an offence:

- a) that involves two or more offenders and substantial planning and organisation, and
- b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques, and
- c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind, and
- d) is a serious offence within the meaning of the *Proceeds of Crime Act 2002*, an offence of a kind prescribed by the regulations...⁴²

2.45 Mr Kitson from the ACC emphasised the challenges that defining serious and organised crime presents for the drafting and implementation of legislation:

I think one of the major challenges...is that there is very little consistency not only in Australia but internationally about how we define what serious and organised crime is. It is tremendously hard to define. We can characterise it as having a number of features: that it is involved in illicit profit; that it has a level of sophistication; and that there are elements of intimidation involved. But the drafting of any legislation to deal with something that is so ill-defined, and is likely to remain a problem that is challenging to define, will continue to frustrate us for some time.⁴³

2.46 Reflecting on the RICO legislation⁴⁴ in the United States, Mr Peter Brady, Senior Legal Adviser with the ACC, observed that the focus given to the concept of the 'organisation' within the legislation has diminished relevance within the current organised crime environment. The RICO Act enables law enforcement agencies to

41 Attorney-General's Department, *Submission 16*, pp 6-8.

42 Section 4(1).

43 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 9.

44 The *Racketeer Influence and Corrupt Organizations Act 1970* (RICO) provides for extended penalties and a civil cause of action for criminal acts performed as part of an ongoing criminal organisation.

'target an organising entity behind a crime' and not simply just the criminal activity itself.⁴⁵ However, as Mr Brady explained, this type of legislation does not easily accommodate the more informal, flexible and temporary association of individuals whose collaboration is driven by a 'business' opportunity:

...one of the difficulties with that type of legislation is that it revolves around the definition of an organisation. Given that we predominantly see an entrepreneurial environment for serious and organised crime, a lot of your attention is focused on defining something which may not exist. It also gives an opportunity for or reinforces that entrepreneurial coming and going.⁴⁶

2.47 Mr Brady's comments sought to respond to the merits of introducing RICO-style legislation in Australia (discussed in chapter 4). His remarks also touched upon the broader issue of the rapidly evolving nature of serious and organised crime and the importance of keeping pace with these changes. Legislative measures based on an outdated or otherwise insufficient definition of organised crime may become less effective or even redundant.

Quantifying serious and organised crime

2.48 The committee heard from a number of law enforcement agencies about the difficulties in measuring the level of organised crime in Australia to monitor changes over time and assess the effectiveness of new approaches to combating organised crime.

2.49 State and federal law enforcement agencies were only able to provide the committee with speculative figures or broad-range trends with respect to the degree of involvement of organised crime groups in criminal activity in Australia, and the percentage of organised crime undertaken by OMCGs. Chief Inspector Damian Powell from the South Australia (SA) Police commented:

In terms of the percentage of organised crime attributed specifically to OMCGs, I think it is a difficult task for anybody to put that into a percentage quantification, just as it is very difficult to some degree to cost the impact of organised crime on the community. You can get a best guess, but I think probably the best way to describe it is to say that outlaw motorcycle gangs are very prevalent in all levels of crime in South Australia.⁴⁷

2.50 Reflecting on the question of growth of organised crime, Mr Kitson and Mr Outram from the ACC explained that the increasing sophistication of Australian

45 CMC, *Submission 6*, p. 5.

46 Mr Brady, ACC, *Committee Hansard*, 6 November 2008, p. 18.

47 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, p. 11.

criminal intelligence means that benchmarking against data from previous years to determine trends does not produce accurate results.⁴⁸ Mr Kitson concluded:

I think it would be very easy to look at some of the data we have got, and to say, 'Yes, it has expanded quite significantly over the last five, 10 years, 15 years.' But I think what has actually happened is that we have got better at understanding where it is. Would we be in a position in another five years to say, 'Let's benchmark against 2008 and see where we stand?' I do not know because I suspect that, in the next five years, we will also increase our sophistication of understanding how organised crime is operating. We will get more data from our jurisdictional partners; we will get more data from the private sector that will help us to understand parts of it that are probably currently unrecognised as being organised crime activity.⁴⁹

2.51 Mr Kitson went on to note that an accurate picture of the scale of criminal activity was difficult to ascertain because, in part, private sector victims of organised crime were reluctant to present such information:

Private sector necessarily protects knowledge about its losses and might write off something as a bad debt, which we might understand to be the result of fraudulent activity.⁵⁰

2.52 Superintendent Desmond Bray from the SA Police explained that victims of organised crime were at times too afraid to report crimes because of intimidation by the perpetrators.

With extortions and blackmail we believe that what is reported specifically to the Crime Gang Task Force is very much the tip of the iceberg because the majority of people are fearful to report and resolve those issues themselves in other ways. I would suggest that in all or certainly the majority of victim related crime investigations, victims feel as though they are at significant threat from gang members if they report the matter.⁵¹

2.53 Mr Keen from the CMC in Queensland noted that the rather 'fluid' structure that tends to now characterise organised crime groups contributes to the difficulty in measuring the nature of organised criminal groups and the extent of their involvement in organised criminal activity:

You will find that people that we target may come from, for instance, having links with the Middle East or links to South-east Asia or it might be established criminal networks within Australia. They will be quite fluid and move across those boundaries. The fact of the matter is that it is a very hard thing to measure.⁵²

48 Mr Kitson and Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 12.

49 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 12.

50 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 12.

51 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 6.

52 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 29.

2.54 Mr Outram from the ACC informed the committee that the ACC are working with academics on the feasibility of conducting economic modelling. He explained that:

If you can get a handle on the size of the criminal economy, that of course may give you benchmarks over time to then estimate whether or not it is increasing or decreasing. That in itself is a challenging proposition but, as I say, we are engaging with some leading academics, talking to them about whether or not we can introduce economic modelling in and around AUSTRAC data, data from the banking sector and so forth. But there is the cash economy, and that is the challenge. We do not see how big the cash economy is.⁵³

2.55 Mr Terry O'Gorman from the Australian Council for Civil Liberties made the point that the difficulty in quantifying the extent and cost of serious and organised crime weakens arguments that more police powers are required to deal with it:

I do not accept that the organised crime problem is serious, let alone that it is out of control. Nor do I accept that any evidence has been put before you that the existing suite of police powers is inadequate to deal with it. The police can come along to a committee such as yours and throw figures of \$8 billion or \$12 billion or whatever around, and that attracts dramatic headlines. I ask myself often when I read it: where is the evidence that it is \$12 billion as opposed to \$1 billion and, particularly, where is the evidence that the existing powers are so inadequate that the police cannot go and do their job?⁵⁴

2.56 During the course of the inquiry the committee sought on several occasions to quantify criminal group membership in Australia. The committee was informed that data was not, as a matter of course, collected in regard to criminal group membership, and that Australia's federated law enforcement landscape further restricted the collection and consolidation of this data to build a national picture.

2.57 The need to quantify accurately the extent of organised crime, and in particular, to quantify the numbers of criminal groups and those individuals involved is critical.⁵⁵ In quantifying the size of the problem, to develop a national picture of criminal groups and group membership, legislation and policy can be accurately developed, and resources appropriately allocated.

53 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 12.

54 Mr O'Gorman, Australian Council for Civil Liberties, *Committee Hansard*, 7 November 2008, p. 41.

55 The committee notes the current program supported by the United Kingdom's Association of Chief Police Officers to identify and map all organised crime groups operating in the United Kingdom. See: *The Parliament Of the Commonwealth of Australia, Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands, June 2009*, p. 34.
http://www.apf.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

Recommendation 1

2.58 The committee recommends that the ACC work with its law enforcement partners to enhance data collection on criminal groups and criminal group membership, in order to quantify and develop an accurate national picture of organised crime groups within Australia.

A 'harm reduction' approach

2.59 Committee members were told by Mr Bill Hughes, the Director General of the UK's Serious and Organised Crime Agency (SOCA), that UK law enforcement faces similar difficulties in terms of measuring the success of various measures to combat organised crime. In response, SOCA has developed a focus on harm reduction. The committee was told that this focus was established for several reasons:

- Firstly, it is difficult to measure the effectiveness of law enforcement against serious and organised crime, and there are few meaningful performance indicators. A focus on harm and harm reduction is seen as a method which allows the performance of law enforcement to be measured.
- Secondly, the law enforcement response to organised crime is shared over a number of agencies. The different focus and activities of these agencies have not readily allowed a coordinated response to serious organised crime. A harm reduction focus has allowed the various agencies to develop specific agency approaches to a shared target. Mr David Bolt, Executive Director Intelligence at SOCA, told the committee that agencies often tend to focus on areas which are known. A focus on harm reduction allows agencies to look outside these known areas of expertise and provides a common focus for multiple agencies.
- Thirdly, a focus on harm reduction allows law enforcement to actively target serious and organised crime and to intervene before a crime is committed.

Preventative approaches

2.60 Australian law enforcement agencies, along with many of their international counterparts have begun to recognise the importance of reducing harm and preventing serious and organised crime from occurring.

2.61 Assistant Commissioner Anthony Harrison from the SA Police said:

...traditionally law enforcement has adopted very much an investigative approach to the commission of serious and organised crime and serious offences more generally. Throughout the reform process within this state we have really tried to be more innovative and to look at prevention opportunities. As you would probably be aware, police agencies around the world in the last 15 years in particular have tried to move away from a reactive approach to servicing their local communities to a more proactive crime prevention focus.⁵⁶

56 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 2.

2.62 A number of different legislative solutions to this traditionally 'reactive' law enforcement role have been mooted and implemented, along with supporting administrative and policy measures. The fourth and fifth chapters of this report consider the main legislative models that have been adopted to prevent serious and organised crime, and discusses the effectiveness of the different models.

Outlaw motorcycle gangs (OMCGS): a growing concern?

2.63 The committee noted in its 2007 report on serious and organised crime a growth of OMCG membership and participation in illegitimate activities across Australia.⁵⁷

2.64 Reflecting on the involvement of OMCGs in serious and organised crime, Assistant Commissioner Morris from the AFP made the following observation:

We have also started to see a very small element of the outlawed motorcycle gangs becoming corporatised and using more sophisticated business structures in their transactions.⁵⁸

2.65 Directly preceding and during the course of the inquiry, significant legislative developments and other events occurred around the country, which brought the issue of serious and organised crime more prominently in the political and public domain. More specifically, the common theme in these developments was the alleged involvement of motorcycle clubs in serious and organised crime.

2.66 The following is a brief history of recent events:

- February 2008 – the South Australian Government introduced *the Serious and Organised Crime (Control) Bill 2007*
- September 2008 – the *Serious and Organised Crime (Control) Act 2008* came into effect in SA. Under the Act, a group or club can be declared an 'organised crime group', which enables various orders to be made to restrict the movement and associations of the group's members. The legislation was introduced to specifically suppress motorcycle clubs, which are viewed by the South Australian Government to present a major organised crime threat in SA. Responses to the legislation were divided with a number of motorcycle clubs, academics, legal organisations and individuals strongly opposed to the legislation, which has been described as 'draconian' and restricting human rights.⁵⁹
- March 2009 – a violent confrontation between members of the Hells Angels and Comancheros Motorcycle Clubs on 22 March resulted in the murder of

57 PJC-ACC, *Inquiry into the future impacts of serious and organised crime on Australian society*, September 2007, p. 8.

58 Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 32.

59 See for example, *Submissions 8, 10, 12, 21, 22 and 23*.

Anthony Zervas at Sydney Airport. His brother, Hells Angel member Peter Zervas was shot and seriously injured in an attack a week later. These events were seen to be a culmination of escalating OMCG violence in New South Wales (NSW), which has included drive by shootings and the bombing of an OMCG club house.⁶⁰

- April 2009 - *The Crimes (Criminal Organisations) Control Act 2009* came into effect in NSW. The legislation was introduced as a direct response to OMCG violent criminal activity and provides a mechanism for declaring an organisation a 'criminal organisation' and strengthens the 'capability of the New South Wales Crime Commission to take the proceeds of crime from these organisations and their associates'.⁶¹
- April 2009 – The Standing Committee of Attorney-Generals (SCAG) discussed 'a comprehensive national approach to combat organised and gang related crime and to prevent gangs from simply moving their operations interstate' in response to public concern about the violent and illegal activities of outlaw motorcycle gangs.⁶²
- June 2009 – On 18 June the Western Australia (WA) Police Minister, the Hon. Rob Johnson MP, announced his intention to take a proposal to cabinet to introduce legislation that would be based on SA's and NSW's 'tough' anti-organised crime laws.⁶³
- June 2009 – The Attorney-General, the Hon. Robert McClelland MP, introduced the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* into Parliament on 24 June. The Bill provides for measures agreed to by state and territory Attorneys-General at their April meeting. The Attorney-General stated that the measures will: 'target the perpetrators and profits of organised crime and will provide our law enforcement agencies with the tools they need to combat the increasingly sophisticated methods used by organised crime syndicates'.⁶⁴

2.67 The Attorney-General's Department provided a summary of the national response to this increase in OMCG organised criminal activity:

- November 2006 – the ACC Board approved the establishment of the Outlaw Motorcycle Gangs National Intelligence Task Force (the OMCG Task Force)

60 See for example, the Hon Michael Gallacher, *NSW Legislative Council Hansard*, 2 April 2009, p. 14331.

61 The Hon Tony Kelly, NSW Minister for Police, *NSW Legislative Council Hansard*, 2 April 2009, p. 14331.

62 Standing Committee of Attorney-General's, 'Communiqué', 17 April 2009.

63 ABC News, *New WA laws aimed at crime gangs*, 18 June 2009, www.abc.net.au (accessed 23 June 2009).

64 The Hon Robert McClelland MP, Attorney-General for Australia, 'Commonwealth Legislation to Combat Serious and Organised Crime', media release, 24 June 2009.

under the High Risk Crime Groups Determination. The OMCG Task Force superseded the ACC Intelligence Operation that concluded on 31 December 2006 after it identified a significant expansion in the activities of OMCGs in 2005-06. The OMCG Task Force developed national intelligence on the membership and serious and organised criminal activities of OMCGs to better guide national investigative and policy action.

- June 2008 - the ACC Board elected to close the OMCG Task Force and replace it with a new Serious and Organised Crime National Intelligence Task Force (SOC NITF), which was to remain in force until 30 June 2009. The SOC NITF will retain a focus on high risk OMCGs for at least the first 12 months, but will also allow the ACC to have a broader focus on organised crime occurring outside the structure of an OMCG.
- June 2007 - the Ministerial Council for Police and Emergency Management – Police (MCPEMP) agreed to establish a working group to examine the issue of OMCGs (the OMCG Working Group). The Final Report of the OMCG Working Group was completed in October 2007, and made 23 recommendations to enhance a national approach to combating the problem of OMCGs. The Final Report of the OMCG Working Group was noted by MCPEMP at its November 2007 meeting.⁶⁵

2.68 Within the South Australian context, the South Australian Government submitted that OMCGs present the greatest serious and organised crime threat in that state.⁶⁶ It was argued that a high proportion of organised criminal activity was attributable to OMCGs and that organised criminal activity was increasing.

2.69 The South Australian Government identified the following threats presented by OMCGs to SA and other jurisdictions:

- Illicit drug manufacturing, trafficking and distribution;
- Infiltration into legitimate industry and partnerships with professional personnel;
- Increased sophistication and resourcefulness, making it more difficult for police to carry out successful investigations;
- Expansion amongst the greater criminal community, particularly organised crime syndicates;
- Inter and Intra gang violence, including blackmail, trafficking and use of firearms and other weapons;
- OMCG expansion, including size, scope and influence.⁶⁷

65 This summary is taken directly from the Attorney-General's Department, *Submission 16*, p. 3.

66 Government of South Australia, *Submission 13*, p. 6.

67 Government of South Australia, *Submission 13*, p. 16.

2.70 OMCG organised criminal activity in SA involves:

- a broad range of criminal activities including the organised theft and re-identification of motor vehicles; drug manufacture, importation and distribution; murder; fraud; vice; blackmail; assaults and other forms of violence; public disorder; firearms offences; and money laundering ;
- the recruitment of street gangs by OMCGS to undertake 'high risk aspects of their criminal enterprise'; and
- a reliance by OMCGS on professionals, such as lawyers and accountants, 'to create complicated structures to hide the proceeds of their crimes'.⁶⁸

2.71 Assistant Commissioner Harrison from the SA Police outlined the growing connection between street gangs and motorcycle clubs:

We have certainly seen the linkage [between motorcycle clubs] with street gangs and youth gangs in this state, and I think that has also been seen in other jurisdictions around Australia. We are now seeing individual members of street and youth gangs graduating to nominees or prospects of outlaw motorcycle gangs, and we are also seeing some of them made full members of outlaw motorcycle gangs. We know that there is a direct correlation between some outlaw motorcycle gangs and some street gangs.⁶⁹

2.72 Consistent with the trends in organised crime groups outlined above, Assistant Commissioner Harrison further observed that the boundaries between motorcycle clubs and other organised crime groups were no longer rigid with groups forming previously unlikely alliances:

We are finding that there is diversification and interrelationships between outlaw motorcycle gangs and the more traditionally based ethnic serious and organised groups of the past.⁷⁰

2.73 The perceived prevalence of OMCG criminal activity was not, however, consistent across all jurisdictions, with some states – Victoria for example – presenting a picture of organised crime in which OMCGs played a less central role. Detective Superintendent Paul Hollowood from Victoria Police stated:

I think we have regained something like \$77 million in assets from Tony Mokbel. That is serious organised crime. I do not see those types of assets with guys riding bikes—nowhere near that. It is where the money is and where it is being derived that is the best indicator for us as to where organised crime is sitting.⁷¹

68 Government of South Australia, *Submission 13*, pp 16-17.

69 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 12.

70 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 5.

71 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 13.

2.74 Reflecting on motorcycle club members, Detective Superintendent Hollowood commented that:

Some are genuine motorcycle enthusiasts I suppose. They are not at the serious end of our organised crime problem in Victoria. I appreciate that the South Australian and Western Australian situations are different. It appears that it is a larger threat to them in those states. However, from a Victorian perspective, we have bigger fish to fry with what we are doing and focusing on. The whole OMCG argument can be an unhealthy distraction. I do not think it is just law enforcement agencies that talk about it; there seems to be a real preoccupation in the media with the subject as well.⁷²

2.75 In Queensland, witnesses from the Queensland Police Service (QPS) observed that there is OMCG involvement in organised criminal activity but warned against concentrating efforts on 'traditional' crime groups. Deputy Commissioner Stewart from the QPS stated:

The service is also mindful of the dangers inherent in focusing too intensively on what may be seen as traditional organised crime groups that are both visually observable and publicly familiar such as outlaw motorcycle gangs, or OMCGs.⁷³

2.76 Consistent with the trends in criminal group activity discussed earlier in the chapter, Deputy Commissioner Stewart went on to point to the increasingly fluid and temporary nature of criminal networks.⁷⁴

2.77 Mr Keen from the CMC in Queensland informed the committee that in view of the relatively flexible nature of organised crime groups the CMC has adopted a 'market-based' approach to dealing with serious and organised crime. He explained that:

We are looking at the crime markets and from there we go and look at the groups that may be perpetrating those crimes. We look at things like illicit drug markets, we look at property crime, we look at money-laundering, and from there it is really a matter of whoever is actually involved in that they will be the subject of our intelligence and investigation action. I put that in context to show that we are looking very much of the actual activities and the markets when we target any particular group.⁷⁵

2.78 Reflecting on the participation of OMCGs in organised crime, Mr Kitson from the ACC observed:

72 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

73 Deputy Commissioner Stewart, QPS, *Committee Hansard*, 7 November 2008, p. 18.

74 Deputy Commissioner Stewart, QPS, *Committee Hansard*, 7 November 2008, p. 18.

75 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 28.

Outlaw motorcycle gangs...are more structured, enduring and more easily identifiable than many other groups that we deal with. However, they are not typical of the majority of organised crime entities that attract national law enforcement attention. While other syndicates or networks may share a common ethnicity or ethos, these are rarely defining characteristics. In reality there is little if any public self-identification by the majority of the key criminal syndicates which we target.⁷⁶

2.79 Whilst not disputing the participation of OMCGs in organised crime in Australia, Mr Kitson was clear that this was not the issue on which the ACC currently believes it should focus its efforts. Mr Kitson explained that the ACC's strategy is to 'identify serious criminal targets through identification of criminal business structures and money flows'. Correspondingly, the ACC's focus from a legislative perspective is on ways to 'improve and tighten legislation' in order to facilitate the interruption of the financial affairs of suspected criminals.⁷⁷

Organised crime groups and groups with organised crime involvement

2.80 A number of witnesses made the distinction between the involvement of groups in organised crime and the involvement of individual group members in organised crime. Mr Kitson from the ACC stated:

OMCGs continue to feature in the Australian criminal landscape; of that there is no question. We would make a distinction between the operation of those groups as networked entities and the criminal enterprises of a number of the significant individuals within those groups. There is no doubt that in some instances those individuals operate entirely as individuals.⁷⁸

2.81 Mr Kitson went on to explain that in some cases those OMCG members operating criminally as individuals carried 'the threat of menace that goes with the OMCGs. He further stated that:

It is true to say that in any analysis of some of the nationally significant crime figures you will find people who have associations with outlaw motorcycle gangs, but I do not know that that would necessarily mean that you would characterise the outlaw motorcycle gangs themselves as being the primary criminal threat in this country.⁷⁹

2.82 Similarly, Detective Superintendent Hollowood from Victoria Police informed the committee that:

You generally find it is the individuals within the gang who are actually engaged in organised crime activity. However, the stated charter or the mandate of the OMCG is to be like a brotherhood, to be very protective of

76 Mr Kitson, ACC, *Committee Hansard*, 6 November 2009, p. 3.

77 Mr Kitson, ACC, *Committee Hansard*, 6 November 2009, p. 3.

78 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 18.

79 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 18.

the members and not to inform on other members. Because of that it is very easy for criminal individuals to operate.⁸⁰

2.83 The same point was made by Superintendent Gayle Hogan from the Queensland Police:

There are people within the groups who work independently. They work as a group within the group and they align themselves with other areas. So there are all ambits of that sort of criminality, but it does not necessarily mean the entire club is involved. They sometimes use being part of that criminal entity as a means of extortion or threat or to be able to stand over potential witnesses or victims.⁸¹

Motorcycle clubs: an unfair target?

2.84 The committee received evidence from a number of individuals and motorcycle clubs arguing that motorcycle clubs were being unfairly targeted. The involvement of some individual bikers in criminal activity was not disputed. However some witnesses alleged that motorcycle clubs had no involvement in organised crime while others contested the extent of this involvement and expressed the view that motorcycle clubs were being unjustly maligned.

2.85 Mr Errol Gildea, President of the Hells Angels Motorcycle Club Queensland, refuted suggestions that motorcycle clubs were involved in organised crime.⁸² Similarly, Mr Gary Dann, Road Captain of the Bandidos MC, commented:

The club does not break the law, as a rule. If individuals do, that is their business. They should be dealt with. But we are not an organised crime outfit.⁸³

2.86 Mr Edward Hayes, a member of the Longriders Christian Motorcycle Club (Longriders CMC) in South Australia observed:

Our own members and many recreational riders have noticed a marked increase in the past couple of years in the public's and uniformed police officers' attitude towards them. They (The public and average cop on the street) can only go on what they've been told and the past six years of the politics of fear has done its job.⁸⁴

2.87 Similarly, reflecting on South Australia Dr Arthur Veno and Dr Julie van den Eynde in their submission characterised that state's attitude to bikers as the 'Great South Australian Bikie Moral Panic'. They argued that a 'politics of fear' was in

80 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 3.

81 Superintendent Hogan, QPS, *Committee Hansard*, 7 November 2008, p. 23.

82 Mr Gildea, Hells Angels MC, *Committee Hansard*, 7 November 2008, p. 6.

83 Mr Dann, Bandidos MC, *Committee Hansard*, 7 November 2008, p. 7.

84 Mr Hayes, Longriders Christian MC, *Submission 12*, p. 3.

operation which presented OMCGs as the 'enemy within' and underpinned the recent introduction of 'draconian' legislative measures.⁸⁵

2.88 The perception that motorcycle clubs are publicly demonised was discussed within the Queensland context. Mr Gildea recounted an instance of alleged unfair treatment from the Queensland Police and stated: 'We are under a barrage of attacks from everywhere'. He went on to remark:

I would love to see the day when parliamentarians can come out to the clubhouse and have a look and make up their own minds and meet us on an individual basis, because we are not the monsters that you guys think we are. We are as human as everybody else. We bleed the same colour as everybody else.⁸⁶

2.89 Mr Edward Withnell, a long-term member of the 'Outlaw Motorcycle Community' in WA, argued that bikers have been 'stereotyped' and 'de-humanized'. He submitted:

We Bikers are not homogeneous, we are heterogeneous. Like yourselves, we have differences within ourselves, as well as between ourselves...We are not driven by drug wars or any of the fanciful creative writings of the media or 'secret police'.⁸⁷

2.90 Mr Adam Shand, a journalist who has worked on organised crime for a number of years, including the Victorian 'Underbelly' era and more recently SA motorcycle club involvement in crime, contrasted organised crime during the 'Underbelly era' with the kind of criminal activity undertaken by some motorcycle club members in South Australia:

You are talking about serious organised crime there [Victoria]. What we are seeing here [SA motorcycle groups] is disorganised crime. We are seeing a lot of street level stuff—assaults, small extortion cases and drug manufacture and supply. Where are these massive convictions? Where are these massive seizures that we keep hearing about?

2.91 Mr Shand argued that the connections between motorcycle clubs and serious and organised crime are overstated. He informed the committee that:

There are some clubs that are completely free of crime. There are others that have some chapters that are riven with crime. Others have some criminals in them. There is an attempt at regulation, certainly in recent years. The clubs are not without some sensitivity towards community attitudes. There have been attempts by more moderate members in clubs to bring others to heel because they want to continue their lifestyle, as well.⁸⁸

85 Dr Veno and Dr van den Eynde, *Submission 10*.

86 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p. 7.

87 Mr Withnell, WA, *Submission 14*, p. 10.

88 Mr Shand, *Committee Hansard*, 3 July 2008, p. 42.

2.92 Pursuing a related theme, Mr Gildea, Hells Angels Motorcycle Club Queensland, observed that club membership 'is about love and respect; it is not about hate' and confirmed that any person interested in motorcycles and the values of love and respect would likely be welcomed into a club 'if they were a good Australian person'.⁸⁹ However, the committee was informed that this culture is predominantly masculine and women are largely excluded.⁹⁰

2.93 Mr Edward Withnell from WA claimed that OMCGs and other 'minority' groups were being used as scapegoats for the real participants in serious and organised crime:

Outlaw motorcyclists and many other ethnic and minority groups and individuals have been 'set-up as fall-guys', persons on whom to shift the focus away from the level of crime and corruption that the ACC is best suited to investigate.⁹¹

2.94 Several witnesses noted that the 'code of silence' adopted by motorcycle clubs contributed to the negative perceptions of the clubs and made it difficult for law enforcement officers to bring individual bikers engaged in criminal activity to justice. For example, Mr Withnell informed the committee that 'immoral journalists' and 'dishonest police officers' perpetuated 'lies' about motorcycle clubs and it was the bikers decision not to engage with this unfair representation that had resulted in the poor public perception of bikers.⁹²

2.95 Mr Hayes, Longriders Christian MC, explained that the 'code of silence' had arisen from a deep distrust of the police, of politicians and of the media:

From a social kind of aspect, when we have a look at the profile of the average man in a club, he has probably got a whole life history of believing that society is against him. Why should he trust a politician; why should he trust a police officer? That is the background to the code of silence—it is the distrust. That goes for the media as well. Often clubs will not talk to the media because they have tried it in the past and they have been represented in a different way to what their intention was.⁹³

2.96 Biker witnesses emphasised positives aspects of motorcycle club membership noting the pleasure of riding, the commitment to rules and values, the importance of the social support network provided through club membership and a 'sense of belonging for individuals who often believe that society has rejected them'.⁹⁴

89 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p. 13.

90 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p. 13.

91 Mr Withnell, *Submission 14*, p. 4.

92 Mr Withnell, *Committee Hansard*, 4 July 2008, p. 29.

93 Mr Hayes, Longriders Christian MC, *Committee Hansard*, 3 July 2008, p. 53.

94 Mr Hayes, Longriders Christian MC, *Submission 12*, p. 4.

2.97 Mr Shane 'Shrek' Griffiths, a 'proud Australian biker', submitted:

In my journeys through out our great nation I have met many a Colourful biker from all walks of life. These gentlemen as individuals were just like me with the same love for motorcycling. I have also had the pleasure of Associating with many of them as a guest of their motorcycle club, weather it be a fund raising ride, a Poker run, Bike and Tattoo show or just as a guest on a club run.⁹⁵

2.98 Mr Robbie Fowler, President of the Outcasts Motorcycle Club Australia, presented an account of a troubled early life and concluded:

I never respected or liked my self I hated Authority and I resent woman, I was released in 1990 went to the Bike club, got married and had five children. ... One must understand the club saved my life and my liberty, as my actions positive or negatives, reflects as you know on my Brothers in the club. I have not been convicted of an offence in 10 years yet I fought men every day since I was eight. The Brotherhood the code of ethics and the old Australian Values is what has taught me respect and how to love. I am happy that I now have respect for my peers; blessed to have learned how to love, and have the pleasure of helping my five kids grow up with the values that made Australia once the greatest free country of people from all over the world.⁹⁶

2.99 Mr Gildea argued that these positive aspects of motorcycle clubs tended to be overlooked:

You never get to hear about the good things we do or all the charity events that we raise money for either; it is always about the drugs and stuff. Yes, there are individuals who have been caught and do drugs.⁹⁷

2.100 However, evidence from other witnesses was at odds with the views outlined above. Assistant Commissioner Harrison from SA Police was adamant that biker involvement in serious and organised crime in South Australia has grown in recent years. He argued that individual bikers and/or motorcycle clubs are implicated in a high proportion of organised criminal activity.⁹⁸

2.101 Concurring with his colleague's observations Chief Inspector Powell commented:

...it is fair to say from a South Australian perspective that outlaw motorcycle gangs are involved at all levels of crime, from the street-level public violence that causes community concern through to sophisticated

95 Mr Shane 'Shrek' Griffiths, *Submission 22*, p. 1.

96 Mr Fowler, Outcasts, *Submission 19*, p. 2.

97 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p. 10.

98 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, pp 10-11.

drug manufacture and distribution which extends not just within the South Australia but across jurisdictions within Australia.⁹⁹

2.102 In the NSW Parliament, The Hon. Michael Gallacher outlined a history of 'violent outlaw motorcycle gang crime' in that state and quoted the NSW Police Force Assistant Commissioner Nick Kaldas's 2006 observation that:

Just because bikies deliver teddy bears to children's hospitals once a year doesn't mean they're not criminals the other 364 days.¹⁰⁰

2.103 Detective Superintendent Hollowood from the Victoria Police Force, whilst questioning the level of involvement of OMCGs in organised crime and describing them as an easy target was, nonetheless, forthright in his appraisal of OMCGs:

I think sometimes it is easier to jump to the OMCGs. It is very easy to portray organised crime and the threat of it by looking at OMCGs. They exist in every state in Australia. I will not go as far as saying that they have become a scapegoat, because by no means are they sitting there as church choir groups.¹⁰¹

2.104 The level of OMCG involvement in serious and organised crime is difficult to clearly establish. The committee acknowledges that it varies across the states. However, the committee is persuaded by the ACC that OMCGs are a visible and therefore prominent target in both the political and public arenas, and that serious and organised crime often involves a level of sophistication or capacity above that of many OMCGs.

CHAIR—...What relationship is there between motorcycle clubs and organised crime, if any?

Mr Gildea—None.

Mr Dann—'Disorganised', if anything.¹⁰²

2.105 However, the committee also notes that if OMCG members wish to challenge public and media perceptions of them, bikers must take an active role in that process, including by proactively assisting police by clearing from their ranks any criminal elements.

Conclusion

2.106 Organised crime is undoubtedly a widespread phenomenon in Australia and internationally. There are a number of broad features that can be said to characterise

99 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, p. 11.

100 The Hon Michael Gallacher, *NSW Legislative Council Hansard*, 2 April 2009, p. 14331.

101 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

102 Senator Hutchins, Mr Gildea and Mr Dann, *Committee Hansard*, Brisbane, 7 November 2008, pp. 6-7.

organised crime – most notably, organised criminal activity is driven principally by the promise of financial gain and is generally well-planned, progressively more sophisticated, and increasingly traverses geographic and demographic boundaries.

2.107 In spite of these common characteristics, jurisdictional differences and the historical choices that the various states have made to deal with these differences means there is no single approach to serious and organised crime in Australia. Nor is there necessarily any one right approach. Notwithstanding this, the committee believes that current trends – in particular the increasingly multi-jurisdictional and transnational character of serious and organised crime – mean that greater legislative consistency, enhanced administrative arrangements and law enforcement capabilities are required. These issues are discussed in the following chapters.

2.108 Overwhelming, evidence on the changing character of organised crime groups from tightly structured, hierarchical, enduring groups to flexible, market-driven networks signals, the committee believes, the need for a strategic response that targets in the first instance the criminal market or activity. This is considered further in the chapter 3 which outlines the legislative responses of the different jurisdictions to serious and organised crime.

Chapter 3

Existing legislative approaches to combating organised crime in Australia¹

Introduction

3.1 This chapter outlines the key pieces of legislation and law enforcement agencies relevant to targeting organised crime in each Australian jurisdiction. It aims to provide a general overview of the existing approach to combating organised crime in each jurisdiction and to provide a context for the discussion of specific legislative approaches which are discussed and compared in later chapters.

Types of legislation

3.2 The evidence received by the committee during this inquiry focussed on three broad types of legislation designed to target serious and organised crime:

- Laws which aim to prevent members of organised crime groups from associating with one another.
- Proceeds of crime or asset confiscation laws which remove illegally acquired assets with the aim of removing the motivation for criminal activity and preventing those assets from being used to fund further organised criminal activities.
- Policing laws which confer additional powers on police to enable them to more easily investigate and prove organised crime offences, for example telecommunications interception and surveillance powers, the ability to conduct controlled operations or assume false identities and coercive questioning powers.

3.3 During the inquiry, it became apparent that there are numerous other laws as well as administrative and policy arrangements which affect the ability of law enforcement to effectively respond to serious and organised crime. For example cooperation and information sharing arrangements between governments and police forces, and anti-corruption measures, both have a very strong influence on the success of attempts to combat organised crime. A summary of legislation in each Australian jurisdiction which contributes to the ability of law enforcement to combat serious and organised crime is set out in the table in Appendix 5.²

1 The committee is particularly grateful to the Commonwealth Attorney-General's Department for preparing a table summarising the existing legislative arrangements in Australian jurisdictions and for assisting the committee with a number of its additional questions.

2 A table of organised crime legislation in key overseas jurisdictions is at Appendix 6.

3.4 It is not within the scope of this inquiry, or of this report, to examine all of the different legislation and administrative arrangements which contribute to fighting organised crime groups in detail. However, a number of the more important aspects are discussed in detail and different approaches compared throughout the report, with a focus on the two main types of legislative measures to prevent organised crime –by targeting association and by targeting assets.

3.5 The aim of this chapter is to outline the main legislative arrangements that currently exist in Australian jurisdictions to combat organised crime, in order to provide a context for the in-depth discussion of preventative legislative arrangement in chapters 4 and 5, and other key legislative, administrative and policy mechanisms in chapter 6.

Commonwealth

Constitutional powers

3.6 While there is no criminal head of power in the Constitution, the Commonwealth can and does make criminal laws using the external affairs power (e.g. in relation to people trafficking), references from the states (e.g. in relation to various aspects of terrorism legislation), the defence power (e.g. in relation to terrorism legislation) and the express and implied incidental powers. However, criminal law is generally regarded as the province of the states so that Commonwealth criminal law is generally restricted to matters which affect the Commonwealth, offences with an international element and Commonwealth/state co-operative regimes.³

3.7 The Commonwealth Parliament has the power to make laws about transnational organised crime because of its ratification of the United Nations Convention against Transnational Organised Crime (UNCTOC).⁴ However, there are currently no offences relating to organised crime in the *Criminal Code Act 1995*.

3.8 During the inquiry the committee was informed that there is uncertainty as to whether the Commonwealth has the power to legislate generally with respect to domestic organised crime. Both Dr Ben Saul from the Sydney Centre for International Law and Professor George Williams from the Gilbert & Tobin Centre of Public Law suggested that ratification of the UNCTOC would not justify such laws in respect of domestic crime:

... the source of power is not immediately obvious, though to the extent that it involves transnational organised crime the external affairs power in section 51(xxix) would provide a suitable basis for that. But that would result in legislation which is focussed upon organised crime which crosses Australian borders rather than legislation which is just generally cast, as the

3 Attorney-General's Department, *Response to Questions on Notice*, 23 December 2008, p. 4.

4 Dr Schloenhardt, *Submission 1*, p. 80.

net is in South Australia. That is often the way with Commonwealth legislation—it needs to speak to the sources of its legislative power, which state legislation does not have to concern itself with. But in that context, if that is the particular activity that is giving rise to concern at the Commonwealth level, that seems to present itself as an obvious support for the enactment.⁵

3.9 Some witnesses also expressed the view that even if the Commonwealth could legislate further with respect to domestic organised crime that this would not be the most effective means of tackling the problem:

We believe these sanctions, to the extent that they can be justified, should be dealt with on a state by state basis. It is our preferred approach to see them targeted specifically to the individual circumstances of the state, where there may be justification for a group based sanction. It is too blunt an instrument to legislate for these matters nationally when, in fact, there may not be any compelling justification in one state as opposed to another. Making the laws at the lower level of the Federation ensures that their harm is minimised and that they are limited only to the justified need.⁶

3.10 Similarly, the ACC said:

It seems to us that the South Australian legislation is very much a matter for the local jurisdiction. It is perhaps easy to see the rationale for their development of that piece of legislation and their intent to apply it. Our perspective nationally is that it would be tremendously hard to replicate that across the national environment and that to have Commonwealth legislation of similar impact would be unwieldy and perhaps difficult to maintain. As we said earlier, the majority of our targets do not readily self-identify as being organisations and I think one of the risks that we see in any move to proscription of any sort is that you simply change the nature of the target and perhaps arguably make it more difficult for you to identify the targets that you are most interested in.⁷

3.11 The Law Council of Australia also argued that the Commonwealth's existing criminal legislation is adequate, and it has no need to pass further legislation to combat serious and organised crime:

The Law Council believes that the existing principles of extended criminal liability set out in the Part 2.4 of the Criminal Code correctly demarcate the limits of criminal culpability. It is true that those provisions may place an onus on law enforcement agencies to establish a nexus between a particular individual and the commission or planned commission of a specific

5 Dr Lynch, Gibert & Tobin Centre of Public Law, *Committee Hansard*, 29 September 2008, p.10.

6 Professor Williams, Gilbert & Tobin Centre of Public Law, *Committee Hansard*, 29 September 2008, p.2.

7 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, pp. 19-20.

offence, but that is entirely appropriate, whatever challenges it may present to investigators and prosecutors...⁸

United Nations Convention against Transnational Organised Crime

3.12 Australia is a party to the United Nations Convention against Transnational Organised Crime (UNCTOC), which sets out a definition of organised crime and provides guidance to states parties on appropriate policy and legislation required to combat transnational organised crime.

3.13 Under Article 5(1) of the Convention, states parties must establish the specified offences under the treaty as criminal offences in domestic law. However, the Convention is limited to transnational organised crime offences, and does not require states parties to criminalise domestic organised crime.

3.14 The Convention provides that an offence is transnational in nature if it:

- (a) is committed in more than one state;
- (b) is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state;
- (c) is committed in one state but involves an organised criminal group that engages in activities in more than one state; or
- (d) is committed in one state but has substantial effects in another state.⁹

3.15 Article 2(a) defines an 'organised criminal group' as a:

Structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other benefit.

3.16 The determination of what constitutes a 'serious crime or offence' is based on the maximum level of penalty that an offence attracts under domestic law, and so is at the absolute discretion of states parties.¹⁰

3.17 When asked whether Australia meets its obligations under the UNCTOC, Dr Schloenhardt told the committee:

Strictly speaking, yes, because the Palermo convention offers different models and our current conspiracy laws would comply with it. So we are meeting what we have signed up to internationally.¹¹

8 Law Council of Australia, *Submission 8*, p. 9.

9 *United Nations Convention against Transnational Organised Crime*, Article 3(2).

10 Dr Schloenhardt, *Submission 1*, p. 12.

11 Dr Schloenhardt, *Committee Hansard*, 4 March 2009, p. 15.

3.18 However, he added that, in his view, Australia's laws are currently not sufficient to combat serious and organised crime because:

I think the conspiracy laws are too narrow. There is some variation between the states, but the bottom line is that most of them require some sort of physical, overt act either as evidence or even as an element of the criminal offence. Also, the fact that in most jurisdictions, such as Queensland, the Attorney-General needs to sign off before you can actually use conspiracy charges seems to limit their use very significantly. Cases of conspiracy are few and far between, really.¹²

Criminal laws

3.19 At the Commonwealth level there are currently various disparate criminal laws which either target one specific element of organised crime or, although not restricted to organised crime, were introduced for the purpose of combating it. These include the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* and the *Measures to Combat Serious and Organised Crime Act 2001*.

3.20 Of the various Commonwealth laws, the Police Federation of Australia said:

...the Commonwealth does not have in place specific legislation or effective legislation to deal with the transnational and organised crime operational environment.

Commonwealth legislation traditionally focuses on predicate offences and the involvement of the persons committing those offences. Commonwealth legislation does not adequately cover all levels of involvement in organised crime. Commonwealth conspiracy and other accessorial type of offences are difficult to prove. The AFP has to rely upon cobbling together various aspects of existing laws in an attempt to prosecute persons involved in this type of activity.

Although transnational organised crime is now considered a national security threat there is no definitive law to outlaw the activity. Specific Commonwealth organised crime legislation is required to enable police to effectively prevent, disrupt, investigate and prosecute organised crime activities. The AFPA submits that there is an obligation on the Commonwealth to enact specific Organised Crime legislation.¹³

3.21 The *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act* added offences to the Criminal Code of trafficking in persons and firearms. Both of these offences are subject to the general provisions in the Criminal Code which provide that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that

12 Dr Schloenhardt, *Committee Hansard*, 4 March 2009, p. 15.

13 Police Federation of Australia, *Submission 3C*, p. 10.

offence,¹⁴ that it is an offence to incite another person to commit an offence¹⁵ and provides for the separate offence of conspiracy.¹⁶

3.22 The *Measures to Combat Serious and Organised Crime Act 2001* expanded the controlled operations provisions in the *Crimes Act 1914* by exempting law enforcement officers who commit narcotic drug offences from liability if the offences are committed in the course of obtaining evidence. It also introduced a new scheme for the conduct of controlled operations and established a framework to govern the use of assumed identities by Commonwealth law enforcement and intelligence officers.

3.23 There is a definition of 'serious and organised crime' in the *Australian Crime Commission Act 2002* (see para 2.44), for the purposes of establishing the ACC's functions and powers. That Act does not create any criminal offences based on the definition.

Proceeds of crime laws

3.24 The *Proceeds of Crime Act 2002* introduced a civil forfeiture regime, meaning that criminal convictions are not required for unlawfully acquired property to be seized, and a court must only be convinced that the property was acquired unlawfully on the balance of probabilities. This makes it easier for organised crime groups to be deprived of the profits of their crimes.

Commonwealth law enforcement and intelligence agencies

3.25 There are numerous agencies at the Commonwealth level involved in combating organised crime including the ACC, AFP, Crimtrac and Austrac. Each has different investigative tools at its disposal depending on the specific activities they are charged with monitoring. The table in Appendix 7 outlines the key responsibilities, investigative and legislative tools of Commonwealth agencies in respect of organised criminal activity.

3.26 Regarding the tools currently available to the ACC, Mr Kitson commented:

...responsibility for tackling serious and organised crime in Australia is spread among a number of agencies at state, territory and Commonwealth levels. The ACC's contribution is really to enhance law enforcement's understanding of and ability to deal with key criminal activities. In this regard we have access to a range of legislative powers. Our experience of these powers leads us to the conclusion that at the present time, and faced with the current criminal environment as we understand it, there is not a

14 *Criminal Code Act 1995*, section 11.2.

15 *Criminal Code Act 1995*, section 11.4.

16 *Criminal Code Act 1995*, section 11.5.

need for significant reform to the legislative suite of powers available to the ACC.¹⁷

3.27 The Law Council of Australia agrees:

So we would say very clearly that the substantive offences that are referred to in the Commonwealth Criminal Code Act 1995 and the investigative powers that clearly exist are adequate.¹⁸

3.28 However, the Police Federation of Australia argued that existing Commonwealth legislative tools are not sufficient to adequately combat serious and organised crime:

The point I am making with regard to organised crime legislation at the Commonwealth level is that there is none, we need it and there are ample examples of the areas we are talking about—drug importation, drug supply and, of course, corporate crime. You have only to look at what is happening in America at the moment. There is ample evidence that there is significant fraud there as well. It is something to be wary of. It happens in Australia a lot...¹⁹

New South Wales

Criminal laws

3.29 New South Wales was the first Australian jurisdiction to introduce specific offences for participation in a criminal organisation in September 2006.

3.30 The *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) (gangs legislation) made amendments to the *Crimes Act 1900* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) in response to increased organised crime activity in Sydney.²⁰

3.31 The Act created four new offences related to participation in a criminal group:

- participation in a criminal group knowing or being reckless as to whether your participation contributes to the occurrence of any criminal activity;²¹
- assaulting another person with the intention of participating in a criminal group;²²

17 Mr Kitson, ACC, *Proof Hansard*, 6 November 2008, p. 2.

18 Mr Ray, Law Council of Australia, *Proof Hansard*, 6 November 2008, p.48

19 Mr Burgess, Police Federation of Australia, *Proof Hansard*, 6 November 2008, p. 86.

20 Dr Schloenhardt, *Submission 1*, p. 81.

21 *Crimes Act 1900* (NSW), subsection 93T(1).

22 *Crimes Act 1900* (NSW), subsection 93T(2).

- damaging property with the intention of participating in a criminal group;²³ and
- assaulting a law enforcement officer with the intention of participating in a criminal group.²⁴

3.32 The gangs legislation also introduced an offence of recruiting a person or child to commit a criminal act.²⁵

3.33 The legislation was intended to target a wide range of criminal organisations reflecting the variety of groups involved in organised crime in NSW.

In recent years there have also emerged significant crime gangs based on common ethnicity. They include Vietnamese and Chinese gangs with a strong involvement in the drug trade, Pacific Islander groups who are specialised in armed robberies, and criminals of Middle Eastern origin who engage in firearms crime, drug trafficking and car rebirthing [...] Many gangs have nothing to do with ethnicity. They are formed rather on the basis of common interest, for example motorbikes, geographical proximity, or, sadly, contacts made in the prison system.²⁶

3.34 Dr Schloenhardt points out that the width of the laws reflect the NSW Parliament's intention that they be capable of being used in respect of traditional organised crime groups which commit crimes for profit as well as more ad hoc groups of violent individuals or mobs.²⁷

3.35 The NSW parliament passed additional legislation in April 2009 in response escalating violence between rival OMCGs, culminating in a fatal brawl between rival gangs at Sydney airport on 22 March 2009. The *Crimes (Criminal Organisations) Control Act 2009* aims to prevent gang members from using the gang structure to assist them in committing crimes. The NSW Minister for Police said:

We do not dispute that the bill introduces extraordinary measures. Old friends will no longer be able to meet or even talk on the phone. Some people will have to quit their jobs in a time of increasing economic pressure. How can such consequences be justified? It is because bkie gangs are serious criminals who are hiding in plain sight. Their very visibility in some ways makes them hard to deal with.²⁸

23 *Crimes Act 1900* (NSW), subsection 93T(3).

24 *Crimes Act 1900* (NSW), subsection 93T(4).

25 *Crimes Act 1900* (NSW), section 351.

26 Mr Tony Stewart, Member for Bankstown, NSW Legislative Assembly Hansard, Crimes Legislation Amendment (Gangs) Bill, Second Reading, 30 August 2006, p. 1142.

27 Dr Schloenhardt, *Submission 1*, p. 83.

28 The Hon Tony Kelly, Minister for Police, Minister for Lands, Minister for Rural Affairs, NSW Legislative Assembly Hansard, Crimes (Criminal Organisations) Control Bill, Second Reading, 2 April 2009, p. 14331.

3.36 The legislation introduced a process through which organisations can be declared 'criminal organisations' by a judge, and members of that organisation made subject to control orders preventing them from associating with each other.

3.37 The new laws also prohibit a person subject to a control order from engaging in certain activities within specified industries, including the casino industry, the private security industry, pawnbroking, operating a tow truck and repairing or dealing in motor vehicles.²⁹

3.38 To date no organisations have been declared under the new laws.

Proceeds of crime laws

3.39 NSW has proceeds of crime legislation³⁰ which is similar to the Commonwealth Act. The NSW Police told the committee that:

Our legislation has been in place for a while and it seems to work pretty well, very much hand in glove with the New South Wales Crime Commission...I am not aware of any proposals or any need at the moment to revamp the legislation.³¹

3.40 The *Crimes (Criminal Organisations) Control Act 2009* amended the proceeds of crime laws to extend them to the gang crimes listed in section 93T of the Crimes Act. In effect this means that a person suspected of having committed one of those crimes may have their assets restrained or confiscated.

Investigative powers

3.41 The *Crimes Legislation Amendment (Gangs) Act 2006* introduced part 16A into the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) which allow police to apply to the courts for fortification removal orders which direct persons to remove or modify any fortifications at the subject premises. The NSW Police gave evidence to the committee that:

We have run an operation over the last 18 months named Operation Ranmore in relation to outlaw motorcycle gangs. It has been a statewide operation involving the State Crime Command and local area commands. There has been a high degree of compliance with police entering those premises, without being rejected or finding heavily fortified premises at outlaw motorcycle gang clubhouses.³²

3.42 The NSW Crime Commission administers the *Criminal Assets Recovery Act 1990* (NSW) and is responsible for investigating serious drug offences and other

29 *Crimes (Criminal Organisations) Control Act 2009*, section 27.

30 *Criminal Assets Recovery Act 1990* (NSW).

31 Deputy Commissioner Kaldas, NSW Police, *Committee Hansard*, 29 September 2008, p. 26.

32 Assistant Commissioner Hudson, NSW Police, *Committee Hansard*, 29 September 2008, p. 27.

serious offences that are referred to it. The NSW Crime Commission has coercive questioning powers, which it has had since its inception in 1986.³³

3.43 NSW also has laws permitting the use by law enforcement of search warrants,³⁴ telecommunications interception, controlled operations,³⁵ assumed identities and witness identity protection³⁶ and surveillance devices.³⁷

Victoria

Proceeds of crime laws

3.44 Victoria has proceeds of crime legislation in the form of the *Confiscation Act 1997* (Vic) which allows the court to make orders for civil forfeiture and restraint of assets in much the same way as the Commonwealth legislation.

Investigative powers

3.45 Between 1999 and 2005, there was a dramatic increase in organised crime activity in Victoria, including extreme violence between feuding organised drug criminals and approximately 27 'gangland' murders. In 2004, the Victorian Parliament passed a legislative framework designed to assist in the investigation of organised crime and police corruption, the cornerstone of which is the *Major Crime (Investigative Powers) Act 2004* (Vic) (Investigative Powers Act).

3.46 The purpose of the Investigative Powers Act is 'to provide for a regime for the authorisation and oversight of the use of coercive powers to investigate organised crime offences'.³⁸

3.47 An 'organised crime offence' is defined as an indictable offence against Victorian law that is punishable by 10 years imprisonment or more, and that:

- (a) involves two or more offenders, and
- (b) involves substantial planning and organisation, and
- (c) forms part of systemic and continuing criminal activity, and
- (d) has a purpose of obtaining profit, gain, power or influence.

3.48 With approval from the Chief Commissioner, a member of Victoria Police can apply to the Supreme Court for a 'coercive powers order' if the officer suspects on

33 *New South Wales Crime Commission Act 1985* (NSW), sections 16, 17 and 18.

34 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

35 *Law Enforcement (Controlled Operations) Act 1997* (NSW).

36 *Law Enforcement and National Security (Assumed Identities) Act 1998* (NSW).

37 *Surveillance Devices Act 2007* (NSW).

38 *Major Crime (Investigative Powers) Act 2004*, section 1.

reasonable grounds that an organised crime offence has been, is being, or is likely to be committed.³⁹ An order cannot exceed 12 months, but may be extended.

3.49 The Court may make a coercive powers order if it is satisfied that there are reasonable grounds for the officer's suspicion and that it is in the public interest to do so. The Court is to have regard to 'the impact of the use of coercive powers on the rights of members of the community'.⁴⁰

3.50 The applicant then applies to the Court for a witness summons, which requires a witness to attend an examination to give evidence or produce documents.⁴¹ Examinations are conducted by examiners who are appointed by the Governor General, similarly to the ACC. Examiners are not bound by the rules of evidence and can conduct enquiries in any way they see fit. The privilege against self-incrimination does not apply, but there are restrictions on the use that can be made of evidence. Witnesses are entitled to representation⁴² and Legal Professional Privilege applies. The Chief Examiner is also empowered to issue a witness summons on his or her own motion. It is an offence for a witness to fail to attend an examination, fail to produce documents or refuse to answer a question.

3.51 A number of other Acts interact with the *Major Crime (Investigative Powers) Act 2004 (Vic)* to form part of the package of legislation in Victoria to deal with organised crime. The *Crimes (Assumed Identities) Act 2004 (Vic)* formalised police practices of creating 'sting' operations using undercover officers. Similarly the *Crimes (Controlled Operations) Act 2004 (Vic)* makes what were once unregulated police practices of undercover operations more transparent. Victoria also has legislation allowing the use of telecommunications interception and surveillance devices.⁴³

Queensland

Proceeds of Crime laws

3.52 Queensland courts may make orders requiring the forfeiture or restraint of proceeds of crime under the *Criminal Proceeds Confiscation Act 2002 (Qld)* which operate in much the same way as the Commonwealth legislation.

Investigative powers

3.53 The Crime and Misconduct Commission (CMC), created with the enactment of the *Crime and Misconduct Act 2001 (Qld)*, is responsible for investigating major crimes which includes organised crime, paedophilia and serious crime, and for dealing

39 *Major Crime (Investigative Powers) Act 2004*, subsection 5(1).

40 *Major Crime (Investigative Powers) Act 2004*, subsection 8(b).

41 *Major Crime (Investigative Powers) Act 2004*, subsection 14(2).

42 *Major Crime (Investigative Powers) Act 2004*, section 34.

43 *Surveillance Devices Act 1999 (Vic)*

with misconduct and integrity issues within the public sector. The CMC has the power to use and authorise the use of assumed identities,⁴⁴ search and seize,⁴⁵ use surveillance devices⁴⁶ and conduct controlled operations.⁴⁷ The CMC also has coercive investigative powers.⁴⁸

3.54 Queensland was the last jurisdiction in Australia to grant telephone interception powers to its law enforcement officers in May 2009.

Western Australia

Proceeds of crime laws

3.55 Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws in 2000. The *Criminal Property Confiscation Act 2000* (WA) provides that the WA Department of Public Prosecutions can apply to the court for an unexplained wealth declaration, which the court must grant if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth.⁴⁹ The effect of such an order is that the subject person then becomes liable to pay the amount of their unexplained wealth to the state.⁵⁰

Investigative powers

3.56 The WA Corruption and Crime Commission (CCC) was established in 2004 by the *Corruption and Crime Commission Act 2003* (WA) to combat organised crime by authorising and monitoring the use by WA Police of exceptional powers in organised crime investigations, and to reduce the incidence of misconduct in the public service.

3.57 The CCC has extensive investigative powers, including coercive powers, telephone intercept and surveillance powers, running controlled operations, and the ability to use and authorise the use of assumed identities. In its organised crime function, the CCC has the authority to authorise and monitor the use of these exceptional powers by WA Police.⁵¹

44 *Crime and Misconduct Act 2001* (Qld), part 6B.

45 *Crime and Misconduct Act 2001* (Qld), parts 4 and 5 respectively.

46 *Crime and Misconduct Act 2001* (Qld), part 6.

47 *Crime and Misconduct Act 2001* (Qld), part 6A.

48 *Crime and Misconduct Act 2001* (Qld), section 72.

49 *Criminal Property Confiscation Act 2000* (WA), subsection 12(1).

50 *Property Confiscation Act 2000* (WA), section 14.

51 *Corruption and Crime Commission Act, 2003* (WA), section 46.

3.58 The Corruption and Crime Commission Act also authorises the CCC to issue 'fortification warning notices' and 'fortification removal notices' which are enforceable by the WA Police.

3.59 The (then) Opposition introduced a Bill in November 2007 which would have allowed the CCC to investigate serious crime independently of the WA Police, however the Bill was not passed by the Legislative Assembly and lapsed.⁵²

3.60 The *Security and Related Activities (Control) Amendment Act 2008* was assented to on 2 April 2008 but has not yet come into force. The Act aims to close loopholes and improve the regulation of the security industry. Among other things it imposes strict identity checking and character requirements on persons employed in the security industry.

South Australia

Criminal laws

3.61 The *Serious and Organised Crime (Control) Act 2008* (SA) came into force on 4 September 2008 and establishes a framework under which a group or club can be declared an 'organised crime group', which enables various orders to be made to restrict the movement and associations of the group's members. The committee considers this Act in detail in the following chapter.

3.62 The Act was specifically designed to target the organised crime activities of outlaw motorcycle gangs of whom Premier Rann said:

We know that they are involved in numerous and continuous criminal activities from the organised theft and re-identification of motor vehicles and motor-cycles through to drug manufacture, importation and distribution, murder, vice, fraud, blackmail, assaults, public disorder and intimidation, firearms offences and money laundering.

The new laws are aimed at trapping these thugs at every turn. We don't just want to try to run them out of town and turn them into someone else's problem. We want to lock them up - but we also want to break them up.⁵³

3.63 On 14 May 2009, the Finks Motorcycle Club was the first group to be declared under the Act, and control orders were made against a number of its members. However, on a legal challenge being made to the orders, the control orders have been deactivated. The Finks are currently in the process of challenging the constitutionality of the Serious and Organised Crime Control Act.

52 Corruption and Crime Commission Amendment (Investigative Function) Bill 2007

53 The Hon Mike Rann, MP, SA Premier, 'New laws to dismantle criminal bikie gangs', Media Release, 5 July 2007.

Proceeds of crime laws

3.64 South Australia has proceeds of crime legislation which, like the Commonwealth laws allow for the confiscation of assets proven on the balance of probabilities to have been gained through criminal activity.⁵⁴

Investigative powers

3.65 In the 2008 package of legislative amendments, South Australia also enacted the *Firearms (Firearms Prohibition Orders) Amendment Act 2008* (SA) which amended the *Firearms Act 1977* (SA). The amendments provide that people with a history of violence or serious criminal behaviour and their associates may be made subject to a firearms prohibition order which allows police to stop and search those individuals on sight, and their place of residence to be inspected for firearms at any reasonable time.

3.66 South Australian Police also have the power to intercept telecommunications and use surveillance devices⁵⁵ and conduct controlled operations.⁵⁶

3.67 South Australian law enforcement authorities do not have the power to assume and issue false identities or the ability to apply for assets confiscation orders on the basis of an individual having unexplained wealth, although both of these legislative tools are proposed.⁵⁷ South Australian Police also do not currently have coercive investigative powers.

Tasmania

3.68 Organised crime is less prevalent in Tasmania than in other states and Territories. Australian Crime Commission data from 2004 indicates that Tasmania is the only Australian state or territory without the presence of any 'high threat organised crime groups'.⁵⁸

3.69 Tasmanian criminal law does not contain any offences for involvement with, or membership of, organised criminal groups or gangs. However, a number of legislative amendments have been made recently to address specific problems

54 *Criminal Assets Confiscation Act 2005* (SA).

55 *Listening and Surveillance Devices Act 1972* (SA).

56 *Criminal Law (Undercover Operations) Act 1995* (SA).

57 Criminal Investigation (Covert Operations) Bill 2008, introduced 14 October 2008; Assistant Commissioner Harrison, South Australian Police, *Committee Hansard*, 3 July 2008, p. 3.

58 John Sylvester and Ian Munro, 'Organised crime groups 'thriving'', *The Age*, August 25, 2004. Available at: <http://www.theage.com.au/articles/2004/08/24/1093246532792.html#>.

associated with organised crime groups. None of the new provisions have yet been used.⁵⁹

Proceeds of crime laws

3.70 Tasmania is the only Australian jurisdiction without proceeds of crime confiscation legislation based on the civil standard of proof. The *Crime (Confiscation of Profits) Act 1993* (Tas) requires that a person is convicted or has absconded after being charged with a serious crime in order for the assets derived from that criminal activity to be confiscated by the state.

Investigative powers

3.71 The *Police Offences Act 1935* (Tas) was amended in October 2007 to enable to Commissioner of Police to apply to a court for authority to remove or modify heavy fortifications. The amendment was aimed at assisting police to investigate organised crime networks, specifically outlaw motorcycle gangs whose clubhouses are often heavily fortified.⁶⁰

3.72 The *Firearms Act 1996* (Tas) was also amended in October 2007 and now requires that 'close associates' of licensed firearms dealers undergo a backgrounds check to ensure they are 'fit and proper persons'. The purpose of the amendments is to ensure that people with a financial interest in a firearms dealership, and those able to exercise influence over a dealer 'do not impose pressure on dealers to commit unlawful acts'.⁶¹

3.73 Tasmania has four pieces of legislation relating to organised crime groups that are yet to be proclaimed, that relate to the use of surveillance devices, controlled operations, assumed identities and witness protection.⁶² Each is based on the national model legislation. Tasmania already has telecommunications interception laws.

Australian Capital Territory

3.74 The Commonwealth legislation relating to telecommunications interception and surveillance devices (except listening devices) applies in the ACT. The *Crimes Act 1900* (ACT), *Crimes (Controlled Operations) Act 2008* (ACT) and *Confiscation of Criminal Assets Act 2003* (ACT) govern the use of search warrants, controlled operations and the confiscation of proceeds of crime respectively.

59 Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, pp. 3-4.

60 The Hon David Llewellyn MP, *Tasmania House of Assembly Hansard*, 25 September 2007, Part 2, pp. 29-94.

61 The Hon David Llewellyn MP, *Tasmania House of Assembly Hansard*, 22 August 2007, Part 2, pp 28 104.

62 Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 3.

3.75 The ACT does not have legislation allowing the use of assumed identities, preventing fortification or permitting law enforcement to use coercive powers (except the ACC when operating in the ACT).

Northern Territory

Criminal laws

3.76 The *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT) amended the *Sentencing Act* (NT) to give courts the power to make 'non-association orders' and 'place restriction orders'. Non-association and place restriction orders are applied during the sentencing for a 'significant offence'. The former provide that a convicted offender may not associate with the persons specified in the order. Place restriction orders prevent a convicted offender from visiting specified locations during a specified period.⁶³

3.77 The *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT) also introduced a consorting offence into the *Summary Offences Act*⁶⁴ and created a new offence of being part of a group involved in a violent act that creates fear. In the Second Reading Speech to the Bill, the NT Attorney-General indicated that indigenous gang-related violence was a motivation for the Bill, stating that:

The new violent disorder offence will effectively target mid-level, intimidating gag behaviour, as recently seen in the Wadeye fighting and the family feud-related violence in Yuendumu.⁶⁵

Proceeds of crime laws

3.78 The Northern Territory introduced unexplained wealth laws based on the WA legislation in 2003 in the *Criminal Property Forfeiture Act 2002* (NT). The legislation essentially reverses the onus of proof in criminal assets confiscation matters, requiring an individual to prove that their assets were obtained legally. The Northern Territory has been remarkably successful in utilising its unexplained wealth laws to seize assets from suspected organised criminals.

Investigative powers

3.79 Northern Territory Police have the power to intercept telecommunications, use surveillance devices,⁶⁶ obtain search warrants,⁶⁷ and conduct controlled operations.

63 *Sentencing Act* (NT), Section 97A.

64 *Summary Offences Act* (NT), Section 55A.

65 Dr Toyne, *Northern Territory Legislative Assembly Hansard*, 24 August 2006.

66 *Surveillance Devices Act 2007* (NT).

67 *Police Administration Act* (NT).

Conclusion

3.80 This chapter has summarised the key pieces of legislation in each Australian jurisdiction aimed at combating serious and organised crime. Each jurisdiction currently has a different set of legislative tools, including different criminal laws, proceeds of crime laws and a variety of policing powers. The development of different legislation in each jurisdiction is in part a response to specific law enforcement issues and criminal milieu. The benefit of such targeted legislation is that it enables law enforcement to effectively respond to the problems confronting their particular jurisdiction.

3.81 However, with the increasing complexity of organised crime, including its reliance on national and transnational networks, having different laws in each jurisdiction can make the national fight against serious and organised crime in Australia complex. The committee heard that there are often loopholes and weak points created by the variety of legislative approaches in Australia, and that criminals will often move to, or store their assets in, jurisdictions with 'weaker' laws. These issues are examined in further detail in chapter 6.

3.82 While this chapter has provided an overview of legislative arrangements in each Australian jurisdiction, chapters 4 and 5 consider in detail the major legislative approaches in Australian jurisdictions and internationally, which aim to prevent serious and organised crime.

Chapter 4

Legislation targeting participation in an organised crime group

Introduction

4.1 As outlined in chapter 1, this inquiry was, in part, established to consider the legislative developments in South Australia with the *Serious and Organised Crime (Control) Act 2008*. When it was introduced, the South Australian legislation was unique in Australia in that it targeted association with a 'criminal organisation' as the basis for an offence.

4.2 This chapter considers legislation in various jurisdictions, both within Australia and internationally, which has the effect of expanding criminal liability, or using administrative means, to criminalise or otherwise prevent participation in, or association with criminal organisations.

4.3 The justification for laws targeting participation in groups rather than the acts committed by individual members of groups is that they enable law enforcement to proactively prevent organised crime from occurring, rather than simply react to it once it has occurred. The South Australian Government argued that:

The criminal law has a limited capacity for 'prevention' and as such makes legislative reform in this area reactive in nature... In many instances, by the time law enforcement have established the requisite suspicion, associations between those involved in serious and organised crime have advanced into relationship and networks, with positive steps taken towards the commission of the crime. Law enforcement therefore is disadvantaged in 'preventing' the threat an impact of serious and organised crime on the community.¹

4.4 There are various legislative models aimed at prohibiting organised criminals from associating with each other, thereby attempting to prevent organised crime from occurring. The model used in each jurisdiction depends on a number of factors, including:

1 Government of South Australia, *Submission 13*, p. 21.

- the legal system in the jurisdiction. For example, whether a legislature has the constitutional power to enact criminal laws; or limitations on the kinds of laws that can be enacted;²
- the organised crime environment in the jurisdiction. For example China, Hong Kong and Macau have laws specifically targeted at triads, and Italy has laws designed to limit the power and control of the mafia; and
- human rights protections, which may make it extremely difficult for some jurisdictions to pass legislation which criminalises association or consorting.³

4.5 The committee has identified three main types of laws which aim to prevent the members of organised crime groups from associating with each other and committing offences jointly:

- criminal laws which make it an offence for any person (other than legitimate business associates, family members etc) to associate with, or participate in an organised crime group. This is the basis of the South Australian approach;
- civil orders, such as control orders or restraining-type orders, which apply to a specific individual and may state that the individual must not associate with a group or with other named persons, making it a criminal offence to breach the order. This approach has been adopted in the United Kingdom, Canada, New South Wales and South Australia; and
- criminal laws with specific offences for certain activities that occur within organised crime groups, such as racketeering (as in the United States model), or directing a criminal group (as in Canada).

4.6 Each of the above approaches has benefits and drawbacks. It should be noted that the models used in most jurisdictions examined by the committee are not restricted to one of the above approaches. Instead jurisdictions tend to use a combination of association offences, civil orders and/or specific criminal offences.

4.7 The following section analyses some of the general strengths and difficulties of each approach. Then, specific legislative models, both within Australia and overseas, aimed at preventing organised crime by targeting participation in or membership of criminal groups are considered in detail.

2 For example, in the United States of America the federal legislature only has the power to make criminal laws in respect of matters with relevance to the federal government, such as interstate crimes. This means that most criminal law is the responsibility of state governments. This restriction has impacted on the way the US laws are structured in that criminal acts committed by 'enterprises' under the *Racketeering Influenced and Corrupt Organisations Act 1970* must have some connection with interstate commerce.

3 For example, the rights protections in both Canada and the United States of America have meant that those jurisdictions' legislative attempts to prevent organised crime groups from associating have focussed on participation in rather than membership of criminal organisations. See ACC, *Submission 15*, p. 6.

Association and consorting offences

4.8 For the most part the criminal law is designed to prosecute 'isolated crimes committed by individuals.'⁴ This usually requires proof of the main elements of the offence, including the performance of an act, with the necessary intent, and without a legitimate defence. However, as Dr Andreas Schloenhardt explains:

The structure and *modi operandi* of criminal associations... do not fit well into the usual concept and limits of criminal liability. For example, it is difficult to hold directors and financiers of organised crime responsible as they plan and oversee the criminal organisation but frequently have no physical involvement in the execution of the organisation's criminal activities.⁵

4.9 Therefore, various exceptions or extensions to the principles of criminal liability have developed, including consorting or association offences which criminalise associations between individuals.

4.10 In Australia consorting offences have existed since 1835, and have been used as a means of breaking up criminal gangs since 1929.⁶ Most states have an offence along the lines of 'habitually consorting' with 'reputed criminals, known prostitutes or persons with no visible means of support' - or words to that effect - which survive today.⁷

4.11 The South Australian Police submitted that the old consorting offences are problematic because of 'the petty nature of the classification of persons', 'the absence of any defence' and the fact that 'consorting does not include modern forms of communication.'⁸

4.12 The Commonwealth introduced modernised consorting laws in respect of terrorist organisations in 2002,⁹ which make it illegal to be a member of a proscribed terrorist organisation. The anti-terror laws attempt to avoid some of the problems inherent with consorting offences, by targeting preparatory activity. As Mr Geoffrey McDonald, from the Commonwealth Attorney-General's Department explained:

4 Dr Schloenhardt, *Submission 1B*, p. 16.

5 Dr Schloenhardt, *Submission 1B*, p. 16.

6 Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?', 26 *UNSW Law Journal* 3, 2003, 567 at 581.

7 See section 56, Summary Offences Act (NT); section 13, Summary Offences Act 1953 (SA); section 6, Police Offences Act 1935 (Tas); section 6, Vagrancy Act 1966 (Vic); section 65, Police Act 1982 (WA); section 546A, Crimes Act 1900 (NSW); and QLD (since repealed) See table on page 11 of Submission 16.

8 Government of South Australia, *Submission 13*, p. 29.

9 *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

There is no difficulty with the states charging someone with a murder offence—in fact, if attempted murder or other offences is easier to prosecute there is no problem with the states prosecuting people on that basis. The terrorism laws are focused very much on preparatory activity and they try to be more specific about that preparatory activity so that you do not have some of the complications you would have with trying to prove conspiracy, incitement and aiding and abetting. So always the terrorism laws have been understood to allow the states and territories to prosecute with their traditional offences if they want. In fact, the legislation makes it pretty clear that it does not bar the states and territories. Of course, the states and territories work with the AFP when they do prosecute people for terrorism offences—they are very actively involved.¹⁰

4.13 In 2008, South Australia passed legislation introducing consorting laws in respect of organised crime groups. Section 35 of the *Serious and Organised Crime (Control) Act 2008* provides that it is a criminal offence, punishable by up to five years imprisonment, to associate with a member of a declared criminal organisation.

4.14 Other jurisdictions, including Canada and New Zealand, have introduced laws which criminalise association with or participation in criminal organisations, or make such association an aggravating factor in the commission of certain crimes.

The benefits of association offences

4.15 The committee heard from a number of law enforcement agencies about the difficulties they experience in targeting sophisticated criminal networks because:

[a] successful prosecution of one, or even more members of a network, often has only a limited effect on the broader operations of the larger criminal group.¹¹

4.16 Assistant Commissioner Harrison from the South Australian Police told the committee about the specific problems that law enforcement faces in gathering evidence about organised criminals:

I am sure the committee would be aware that, when it comes to investigating crimes committed by gangs and serious and organised crime groups, it is often very, very hard because of their construction in relation to maintaining a code of silence and having a brand of intimidation and fear in respect to witnesses.¹²

4.17 Given the challenges of responding to organised crime some witnesses view association offence laws as an important means for disrupting such criminal activity.

10 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 40.

11 CMC, *Submission 6*, p. 1.

12 Assistant Commissioner Harrison, South Australian Police, *Committee Hansard*, 3 July 2008, p. 3.

4.18 A number of law enforcement agencies argued that association laws are necessary in order to prevent, as opposed to simply react to, serious crime. For example, the South Australian Police gave evidence in this inquiry that:

[Police] traditionally have the investigative focus which is very reactive. We wait for the crime or the criminal activity to occur and then the police put a response strategy in place. Invariably that has not been overly successful when you look at serious and organised crime, established criminal networks and outlaw motorcycle gangs, because of their composition, structure and culture...The anti-association aspect...is all about trying to prevent those associations occurring. We try to disrupt the planning processes and we would like to hope that we then have some impact on preventing crimes occurring within our communities.¹³

4.19 Chief Inspector Powell told the committee that anti-association laws are an important tool for combating organised crime because the association is such an important aspect of their criminality. He said:

Serious and organised crime groups require the communication and the association with each other to become sophisticated, to generate their levels of sophistication and methodologies. When you are talking about gangs, a reputation for violence, a criminal reputation, becomes essentially an asset. It is no different to goodwill for a legitimate business.¹⁴

4.20 Reflecting on this argument, the Law Council of Australia submitted:

The view is that police should not be left frustrated and unable to act when they possess evidence demonstrating associations and connections between 'known criminals' but have no way of sheeting home responsibility for any particular planned or executed offence.

There is nothing new about these types of sentiments. It has always been the challenge of criminal law to define the limits of culpability in such a way that police are empowered to act both: to proactively prevent crimes from occurring; and to bring to account all those who knowingly instigated, facilitated or participated in the commission or planned commission of an offence.¹⁵

The disadvantages of association offences

4.21 Consorting-type offences have attracted a great deal of criticism, particularly from academics, lawyers and judges because they are argued to impinge on the freedom of association.¹⁶ For example, Mr Ray, the President of the Law Council of Australia, expressed the view that:

13 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 5.

14 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, pp. 18-19.

15 Law Council of Australia, *Submission 8*, p. 4.

16 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 45.

The notion of prosecuting people for associations rather than substantive offences is really quite abhorrent. If somebody is involved, is sufficiently proximate and commits an offence, even one of an attempt or one of a conspiracy nature, then the existing laws are there to deal with them. It is very clear that not only do some of these laws have the potential to be structurally unfair and restrict relationships—they introduce laws that are really Big Brother laws, dictating who you can talk to and where you should be—but they also create other issues of accidental capture of conduct that is clearly not criminal. The accidental capture of such conduct is a reflection of legislation that is emotively introduced, such as the terrorism legislation, and has within it changes that are based on fear rather than the logical application of law.¹⁷

4.22 Mr Ray went on to argue that one of the most concerning features of association offences is the potential for them to prevent those subject from associating with family members and friends:

What troubles me about the blanket declaration is that you have legitimate friendships and relationships with neighbours and with relatives that suddenly subject you, through those relationships, to a potential criminal charge. That is quite extraordinary. I know that in the South Australian legislation they do exempt certain relatives so that a spouse, former spouse, brother, sister, parents and grandparents are exempted. But there would still be a broad range of relatives that many people would keep in touch with and there would be absolutely no criminal intent behind that contact and yet it would be the creation of an illegal relationship. We have to be very cautious in this day and age about creating criminal offences that are new and do not reflect criminal intent or criminal conduct.¹⁸

4.23 The fairness of punishing an entire organisation for the actions of what OMCG members insist is a 'small number of individuals',¹⁹ was also raised as an issue. Mr Gildea, President of the Hells Angels in Queensland commented:

How can you hold an organisation responsible for the actions of its individual members? We could give numerous examples of politicians and officers of the police force who have committed crimes and have been charged and convicted as individuals. These crimes include theft, assault, drug-dealing and paedophilia. Those individuals have been punished, and rightly so, but we have not tried to label the government or the police force illegal organisations; nor have we tried to hold the head of government or the commissioner of police responsible for the actions of the individuals.²⁰

4.24 Similar views were expressed by the Law Council of Australia:

17 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 48.

18 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p.50-1.

19 The committee notes that, as discussed in chapter 2, the level and nature of OMCG involvement in serious and organised crime is fiercely disputed.

20 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p.7.

The power of association is one that should not likely by itself lead to criminal liability. The reason for that is clear: it is like a company, and there are fundamental laws in a company dictating whose conduct becomes the conduct of the company. It is called the law of attribution. The conduct of a person in the company under civil law may bind the company but under the criminal law ordinarily will not, historically, unless that person is the mind and will of the company—quite senior—or further down the company if it were to do with other rules of interpretation based on the articles of association or the incorporation et cetera of the company. We need to be very cautious about attributing the conduct of individuals to organisations without clear definition and clear proof. What you do once you do have such attribution and such rules is to then talk of introducing quite extraordinary powers to prosecute and convict on criminal offences that are currently not known to the law.²¹

4.25 The committee also heard evidence from those involved in groups which are at risk of being declared under anti-association legislation. These witnesses talked about the negative impact on their lives of their group being 'outlawed':

Biking has been a major part of my life. I have Rode more kilometres than I care to recall and all those km's as a proud and Free Australian, I Served this country in the Australian army and did so under the assumption I was doing so to Keep our country free from political dictatorship...

I am in no way attached to any 1% club but do associate with some, I have made good friends with individuals within these clubs. I Feel that my way of life (the one I choose to live) is under threat of being taken away from me with the introduction of these new laws. Now I have read in the news and from transcripts of political documents that, I quote "If you are not a criminal or partake in criminal activities you have nothing to fear". I find this utter rubbish as the laws state that if I associate with these individuals or groups more than 6 times in 1 year than I can and will be gaoled. Let me just add here that I have no police record or prior convictions for any criminal or illegal activities.²²

4.26 Accordingly, association and participation laws have resulted in a number of challenges under human rights legislation in those jurisdictions which have statutory rights protections, including Canada and the United Kingdom. Law enforcement agencies in both of those jurisdictions expressed concern that the lengthy legal processes involved in human rights challenges have the potential to make the administration of association laws cumbersome and inefficient.²³

21 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 50.

22 Mr Griffiths, *Submission 22*, p.1.

23 See discussion in: The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 23-24,
http://www.apf.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

4.27 For this reason the police force in Victoria - which is the only Australian state with a human rights act - submitted that:

An adoption of similar reform [to that in South Australia] in Victoria may possibly be inconsistent with Victoria's Charter of Human Rights & Responsibilities.²⁴

4.28 Witnesses informed the committee that there are also a range of difficulties inherent in developing laws that criminalise association with criminal organisations. One of the key challenges is defining 'criminal organisations'. A further challenge arises in developing a fair, efficient and consistent process for making a decision that a specific group falls within the definition of a 'criminal organisation'. As the Hon Roberts-Smith QC, Commissioner of the Corruption and Crime Commission of Western Australia, explained:

From a purely practical point of view, there will be definitional problems. Who is included? Who is not? How do you prove their association? How do you prove participation? What are you proving participation in—membership of a group, the conduct of criminal enterprises or what? All of these are very vexed questions which are actually quite difficult, I would suggest, to deal with in framing legislation.²⁵

4.29 Dr Schloenhardt's submission deals in some detail with the difficulties various jurisdictions have had in developing a suitable definition of 'criminal organisation' (or other similar term). For example, he explains that the definitions initially adopted in both Canada and New Zealand were too narrow, making the legislation in both countries relatively ineffective.²⁶

4.30 The Attorney-General's Department has identified two processes through which a group is determined as criminal: 'the legislative test, and proscription by government official'.

4.31 The legislative test is conducted on a case-by-case basis whereby the court determines whether an organisation meets the criteria of 'criminal organisation' as set out in the legislation. Most jurisdictions internationally have adopted this approach. For example, Canada's legislation requires that a group be proven to be a 'criminal organisation' on each separate occasion that a member of the group is brought before the court, using a test set out in the legislation. This aspect of the Canadian model has been criticised as an inefficient use of police and court resources.²⁷

4.32 By contrast, South Australia's legislation adopts the proscription approach and provides that such a decision is to be made by the Attorney-General. The legislation

24 Victoria Police, *Submission 4*, p. 2.

25 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 16.

26 Dr Schloenhardt, *Submission 1B*, p. 80.

27 Government of South Australia, *Submission 13*, p. 12.

lists a number of factors that the Attorney-General is required to take into account in making a decision to prescribe a group.²⁸

4.33 New South Wales' new laws give the role of deciding to declare an organisation as a criminal organisation to Supreme Court judges. The NSW Police Minister, the Hon Tony Kelly, reasoned that:

By entrusting this role to Supreme Court judges, we can avoid having to include a list of the types of organisations that cannot be declared, such as political parties. Such an exemption list is commonsense. After all, who wants to see a future government trying to declare an opposing party or a troublesome lobby group unlawful? Members should examine what has happened in South Australia. The bkie gangs have formed a political party, ostensibly to oppose the repressive legislation. However, it is obvious that it is really a device to get around the law by using a political party exemption.²⁹

4.34 Noting the difficulties inherent in drafting effective legislation, the ACC further expressed a view that association laws may not have a great impact on disrupting serious and organised crime anyway, echoing the concerns of a number of other organisations and agencies:

Legislative amendment and new regulatory frameworks can have a short-term impact on such criminal groups. However, current trends in group formation and the consequent adaptability and resilience mean that they are increasingly able to minimise their effects. The definition of specific criminal groups has become more difficult and proving membership of or participation in a specified organised criminal group would be challenging in this environment. In particular, there is a clear risk that law enforcement effort would be diverted away from intervention and prevention efforts to the burden of proof required to establish membership of an unlawful organisation.³⁰

4.35 On a related point the Hon Mr Roberts-Smith stated:

How does one deal with those groups which are randomly formed for the commission of the offence, or groups which briefly deal with other groups for a particular criminal enterprise? I think the complexities of trying to cast laws around criminalising conduct of that kind are very great.³¹

28 *Serious and Organised Crime (Control) Act 2008*, section 10.

29 The Hon Mr Kelly MLC, NSW Legislative Council Hansard, 2 April 2009, p. 14341.

30 ACC, *Submission 15*, p. 8.

31 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 16.

Civil orders

4.36 A number of jurisdictions have attempted to limit the ability of organised crime group members to associate with each other through the use of civil orders. There are numerous forms that such orders take, however, on the whole they:

- are made by courts;
- are made against individuals;
- contain restrictions on the activities that the individual may take part in, the places they may visit, the people they may associate with, or other orders designed to prevent them from committing criminal offences; and
- specify that a breach of an order is a criminal offence.

4.37 Orders may be made post-sentencing, or without a criminal conviction. The UK has adopted the former approach, and has made Serious Crime Prevention Orders against people convicted of serious crimes.

4.38 South Australia, New South Wales and Canada have legislation enabling courts to make orders based on a lower, civil standard of proof (the court's reasonable satisfaction),³² that do not require a criminal conviction. In South Australia and New South Wales control orders can be made by courts against members of 'declared organisations'. In Canada 'gang peace bonds' can be made against people who are reasonably likely to commit an organised crime offence, including junior gang members.

4.39 The committee heard that control orders can be an effective means of preventing organised crime gang members from committing offences, and particularly for breaking the cycle for more junior gang members.³³ The Commonwealth Attorney-General's Department said:

In general terms, civil orders might be effective in preventing crime as they allow the conduct of certain persons, such as those involved in criminal activity, to be monitored and restrained with the aim of preventing them from engaging in criminal conduct. Other civil orders allow for the continued detention or supervision of certain convicted persons, once again with the aim of preventing the person from engaging in criminal conduct. These types of civil orders may have a deterrent effect, but this can also be said of criminal laws. Generally, the breach of these types of civil orders is subject to criminal sanction.³⁴

32 See *Serious and Organised Crime (Control) Act 2008* (SA), section 14; *Crimes (Criminal Organisations Control) Act 2009* (NSW), section 14.

33 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 25-26, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

34 Attorney-General's Department, answers to question on notice, 6 November 2008, p. 5.

4.40 The orders are also made against specific individuals, so do not impinge on the freedom of association to the same extent that broader-ranging association laws do. However, in certain forms – including those adopted in South Australia and New South Wales – the orders raise similar human rights concerns as association offences, albeit to a lesser extent. Dr Andrew Lynch told the committee that:

Allowing control orders against individuals simply on the basis of membership of a declared organisation is an extraordinary extension of the regulatory state. Adding an element of criminality to the criteria for making such an order might seem to strengthen the justification for them but the problem is that they are still clearly designed to avoid the rigors of a criminal trial with the appropriate burdens of proof.³⁵

4.41 Canada's approach, which requires a reasonable suspicion that a person may be involved in committing criminal offences – rather than reasonable satisfaction that they are a member of a listed group as in South Australia and New South Wales – avoids some of the concerns raised by Mr Lynch.

4.42 However, substantial resources are required to monitor control orders, and the committee was cautioned that the approach should not be used if law enforcement do not have adequate resources to enforce and monitor the orders.³⁶

Organised crime offences

4.43 The third approach that has been adopted in some jurisdictions is the development of specific criminal offences for acts committed by members of criminal groups, which would not otherwise be criminal acts. For example, Canada has criminal offences for directing a criminal organisation, committing a crime on behalf of a criminal organisation and supporting a criminal organisation.

4.44 Ordinarily, in most common law jurisdictions, the leader of a criminal organisation may be able to be prosecuted for the offence of inciting another person to commit a criminal act, or for conspiracy.³⁷ However these offences tend to attract lesser penalties than the commission of the act itself. It can also be very difficult to prove these offences in relation to organised crime gang leaders, who tend to 'create a corporate veil to insulate them from liability' and do not typically engage in overt

35 Dr Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 29 September 2008, p. 4.

36 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 26,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

37 Dr Schloenhardt, *Submission 1B*, p. 23.

criminal acts themselves.³⁸ In addition, conspiracy laws are generally very complicated, resulting in a high failure rate of conspiracy charges.³⁹

4.45 Under Canadian law, there is a specific offence for instructing the commission of an offence for a criminal organisation, which carries a maximum penalty of life imprisonment. Canada also has a specific criminal offence for participating in the activities of a criminal organisation.

4.46 New South Wales also has criminal legislation targeted at the specific activities of gang members. Section 93T of the *Crimes Act 1900* provides that involvement in a criminal group is an aggravating factor in the commission of certain criminal offences. New South Wales' new laws also introduce an offence of recruiting a person into a criminal organisation.

4.47 The committee was told that the United States RICO laws, which are a variation of this approach, have been very successful in targeting high level members of organised crime groups.⁴⁰ However, they can also be very complex, and similar drafting issues arise in terms of defining 'criminal organisations' as in association offences.

4.48 These three examples are considered in further detail later in the chapter.

Examples of specific legislative approaches

4.49 This section outlines the legislation in key jurisdictions which targets participation in, or association with, criminal organisations, using a combination of the above methods. Where possible, the effectiveness and practical impacts of the legislation are explored.

United States of America

Racketeer Influenced and Corrupt Organisations Act 1970 (USA) (RICO Act)

4.50 The United States of America was one of the first countries to respond to organised crime by expanding their criminal legislation.⁴¹ The *Racketeer Influenced and Corrupt Organisations Act 1970* (RICO Act) aims to combat organised crime:

...by strengthening legal tools of the evidence gathering process through establishing new penal provisions, and providing enhanced criminal

38 Dr Schloenhardt, *Submission 1B*, p. 24.

39 Dr Schloenhardt, *Submission 1B*, p. 24.

40 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 32-33, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

41 Dr Schloenhardt, *Submission 1B*, p. 12.

sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.⁴²

4.51 The RICO Act does not ban membership of criminal organisations, although 'it may have that effect'.⁴³ Instead, it creates additional offences and penalties for 'racketeering', which may be applied to members of criminal organisations which have committed two or more related serious crimes over ten years.

4.52 The Act sets out four racketeering offences, each of which requires some involvement with an 'enterprise'. The offences are:

- (a) having an interest in an enterprise which receives income as a result of a 'pattern of racketeering activity' or the 'collection of an unlawful debt';
- (b) having an interest in an enterprise through a pattern or racketeering activity or collection of an unlawful debt;
- (c) involvement in the activities of an enterprise that is conducting a pattern or racketeering activities or the collection of unlawful debt; and
- (d) conspiring to commit any of the above activities.⁴⁴

4.53 An 'enterprise' is any legal entity, including individuals, partnerships and corporations. It can also include any group of individuals associated in fact, such as a family or motorcycle club. Dr Schloenhardt's submission explains that the broad definition of enterprise means that the RICO Act applies to a wide range of groups, both legitimate and criminal.⁴⁵

4.54 A 'pattern of racketeering activity' means that an enterprise has committed any two of 35 predicate crimes within a ten year period. The predicate crimes encompass almost all serious crimes under state and federal law.⁴⁶

In essence, the offences in §1962 criminalise the investment of 'dirty' money by racketeers, the takeover or control of an interstate business through racketeering, and the operation of such a business through racketeering.⁴⁷

4.55 In addition, prosecutors must also prove that:

- (a) the individuals in the 'enterprise' are associated with one another;

42 *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922, 923.

43 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at p. 303.

44 RICO Act, 18 USC, §1962 (a)-(d).

45 Dr Schloenhardt, *Submission 1B*, pp. 220-223.

46 Dr Schloenhardt, *Submission 1B*, p. 218.

47 Dr Schloenhardt, *Submission 1B*, p. 213, quoting Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 844-845.

- (b) the predicate acts are related; and
- (c) the criminal acts have some impact on interstate commerce (e.g. withdrawing money from an interstate bank account).

4.56 In summary, the RICO Act enables the state to charge people who are involved in businesses or groups that have a history of using illegal means to run their business or group with racketeering. The penalty for racketeering is a maximum of 20 years imprisonment and/or a fine of \$250 000. In addition, the RICO laws provide for the forfeiture of all proceeds of crime plus any additional interest gained through racketeering.⁴⁸

4.57 The RICO Act also has the unique feature of allowing private parties to sue 'racketeers' for damage to their business property. If successful, the court may award triple damages to the affected business owner.⁴⁹

Effectiveness of RICO Act

Over nearly forty years of operation, *RICO* has been used successfully to prosecute a number of high profile leaders of criminal organisations and has incapacitated a diverse range of criminal syndicates.⁵⁰

4.58 Dr Schloenhardt details a number of high-profile prosecutions involving members of La Cosa Nostra, the American branch of the Sicilian Mafia, and notes that the laws have also been successfully applied to members of Asian organised crime groups and members of the Russian Mafia.⁵¹ However, attempts to use the laws to prosecute members of the Hells Angels, including its founder Sonny Barger, failed because the jury was not convinced that a 'pattern of racketeering activity was part of the club's policy'.⁵²

4.59 However, the South Australian Government's submission stated that the complexity of the RICO Act has limited its utility.⁵³ It was submitted that because prosecutors require approval from the Department of Justice, which is only granted in special circumstances, the laws have not been widely used.⁵⁴

4.60 Dr Schloenhardt agrees that initially the uptake of the laws was slow, as it took time for law enforcement to become familiar with the laws. However, he noted that now there is a high frequency of RICO prosecutions, and stated:

48 RICO Act, 18 USC, §1963(a).

49 Attorney-General's Department, *Submission 16*, p. 16.

50 Dr Schloenhardt, *Submission 1B*, p. 225.

51 Dr Schloenhardt, *Submission 1B*, pp. 225-227.

52 Dr Schloenhardt, *Submission 1B*, p. 227.

53 Government of South Australia, *Submission 13*, p. 9.

54 Government of South Australia, *Submission 13*, p. 9.

[s]ince 1980, practically every significant organised crime prosecution has been brought under RICO⁵⁵

4.61 Dr Schloenhardt submitted that the flexibility of the RICO laws has allowed law enforcement to follow and adapt to the dynamism of organised crime groups. This flexibility, he pointed out, derives from the legislation's lack of definition of terms such as 'organised crime' and 'criminal organisation', enabling the courts to change the definition over time so that the laws could be applied to evolving structures and crimes.⁵⁶

The great flexibility with which the legislation operates is also *RICO*'s principal advantage over traditional conspiracy offences and their confined elements that left many key leaders of criminal organisation immune from prosecution.⁵⁷

4.62 Another positive aspect of the laws is their ability to:

Present a complete picture of a large-scale, ongoing, organised-crime group engaged in diverse rackets and episodic explosions of violence.⁵⁸

The ability to join separate trials, and to merge offences and offenders underpin this feature.

4.63 The RICO laws have managed to avoid some of the criticisms of the models used in other jurisdictions, in particular the level of impingement on the freedom of association. The laws do not criminalise association with other persons, but the commission of certain acts, such as receiving an income from, or having an interest in, an enterprise. This focuses on the illicit business or criminal group itself, rather than the members of the group.

4.64 However, this aspect of the RICO legislation has also limited its flexibility, as it 'does not allow rapid responses to new and emerging organised crime activities as statutory amendments take considerable time.'⁵⁹ This can be contrasted to the greater flexibility of an approach which criminalises association with, or participation in, any listed group, and enables groups to be listed through subordinate legislation or administrative orders, such as the South Australian laws.

4.65 The South Australian Government also commented that the RICO legislation 'has limited prevention capability'.⁶⁰ This is because the RICO laws still require that

55 Dr Schloenhardt, *Submission 1B*, p. 228, quoting James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 170.

56 Dr Schloenhardt, *Submission 1B*, p. 228.

57 Dr Schloenhardt, *Submission 1B*, p. 228.

58 Dr Schloenhardt, *Submission 1B*, p. 229, quoting James B Jacobs et al, *Busting the Mob* (1994) 11.

59 Dr Schloenhardt, *Submission 1B*, p. 229.

60 Government of South Australian, *Submission 13*, p. 10.

traditional criminal acts, albeit an expanded form, have been committed or attempted, as opposed to targeting associations which may lead to conspiracies to commit criminal acts prior to the acts themselves being committed.

4.66 Nonetheless, US Department of Justice officials told committee members that the RICO legislation has been highly successful. In part, its success is based on the fact that law enforcement can more readily make a case against a criminal enterprise than the individuals at the top of the structure running the enterprise. The committee heard that the evidential burden required to establish racketeering activity is so high that members of the criminal enterprise, once identified, would readily give evidence.⁶¹

Canada

In 1997, together with New Zealand, Canada became the first common law jurisdiction in the region to introduce specific offences against criminal organisations. These offences were introduced in response to the activities of outlaw motorcycle gangs (OMCGs or in Canada referred to as 'biker gangs'). Throughout the 1990s the province of Québec saw particularly violent clashes, including bombings and killings, between rival biker gangs, frequently involving the Hell's Angels and the Rock Machine gangs that were fighting for control of Montréal's illicit drug trade.⁶²

4.67 Organised crime in Canada is widespread, but particularly prevalent in the major cities of Montreal, Toronto and Vancouver. Organised criminals are involved in a range of activities, but primarily, like in most industrialised countries, in the manufacture, import and supply of drugs. Illicit drugs are the main organised crime problem for Canadian law enforcement.⁶³

4.68 There is an estimated 900 organised crime groups operating in Canada, comprising a range of different types of groups from Mafia-style groups, OMCGs to loosely associated criminal networks. Several groups have transnational links.⁶⁴

4.69 The Canadian *Charter of Rights and Freedoms* contains a number of features that impact on Canada's options for responding to serious and organised crime, including:

- A provision that guarantees freedom of association.⁶⁵

61 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 32-33, http://www.apf.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

62 Dr Schloenhardt, *Submission 1*, p. 18.

63 Dr Schloenhardt, *Submission 1B*, p. 48

64 Criminal Intelligence Service Canada, 'Report on Organized Crime, 2008' (2008), pp. 12, 14.

65 *Charter of Rights and Freedoms*, Subsection 2(d).

- the requirement that all laws be 'in accordance with fundamental justice'.⁶⁶ This has been interpreted to include a requirement of proportionality,⁶⁷ which means that citizens may challenge legislation on the basis that it is not proportional to the end sought to be achieved.
- The interpretation of section 7 as requiring that all criminal laws have a *mens rea* (or mental) element.⁶⁸ Therefore all criminal offences attracting penalties of imprisonment require the proof of some level of intent.

4.70 The Charter has meant that Canadian criminal legislative approaches have centred on legislation which targets participation in – rather than membership of – a criminal enterprise or organisation.⁶⁹

Criminal Code (Organised Crime and Law Enforcement) 2001

4.71 Amendments to Canada's *Criminal Code* in 1997⁷⁰ and 2002⁷¹ added:

- new offences for participating in and contributing to the activities of criminal organisations;⁷²
- proceeds of crime forfeiture provisions based on the civil standard of proof;⁷³
- orders to 'keep the peace';⁷⁴
- consecutive sentencing provisions;⁷⁵ and
- police surveillance powers.⁷⁶

4.72 The Canadian Criminal Code now provides for three offences targeting various levels of involvement in organised crime offences:

- (a) Participation in the activities of a criminal organisation;⁷⁷

66 *Charter of Rights and Freedoms*, Section 7.

67 *R. v. Heywood* [1994] 3 S.C.R. 761.

68 *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486.

69 ACC, *Submission 15*, p. 6.

70 *Act to amend the Criminal Code (criminal organizations) and to amend other Act in consequence* (Bill C-95).

71 *In the Act to amend the Criminal code (organised crime and law enforcement) and to make consequential amendments to other Act* (Bill C-24).

72 *Criminal Code* (Canada), section 467.1.

73 *Criminal Code* (Canada), subsection 490.1(2).

74 *Criminal Code* (Canada), section 810.01.

75 *Criminal Code* (Canada), section 718.2.

76 *Criminal Code* (Canada), sections 183 and 186.

77 *Criminal Code* (Canada), section 467.11

- (b) Commission of a criminal offence for a criminal organisation;⁷⁸ and
- (c) Instructing the commission of an offence for a criminal organisation.⁷⁹

4.73 The offences act as both distinct, separate crimes, and as sentence enhancers. Each of the offences carries a different maximum penalty of five years, 14 years and life imprisonment respectively.

4.74 A 'criminal organisation' is defined as three or more people whose main purpose or activity is the commission of one or more serious offences for material benefit. It does not include a group that forms randomly to commit a single offence. A 'serious offence' includes an indictable offence with a maximum sentence of five years or more.⁸⁰

4.75 Membership of an organisation itself is not an offence. However, the Code sets out indicia to assist the court in establishing a person's participation in a group, which are clearly intended to capture members. These include:

- the use of a name, word or symbol associated with the group;
- the fact of association; and
- the receipt of a benefit from the group.⁸¹

4.76 In order to prove that a person participated in a criminal group, it is not necessary for the prosecution to prove that an accused took part in a criminal offence, only that they were participants in a criminal group which carries out such offences.

4.77 Similarly, the offence of instructing the commission of an offence, which is intended to capture the leaders of organised crime groups, does not require evidence that an offence has been committed.⁸² However, the offence of committing of a crime for an organisation does require that the elements of an initial indictable offence be proven.⁸³

4.78 The legislation also alters the ordinary evidentiary burdens in favour of the prosecution, recognising the difficulties that prosecutors often have in obtaining evidence from an accused person's alleged associates. For example, the prosecution does not need to prove that the organisation facilitated or committed an indictable offence or that the accused knew the identity of any of the persons who constituted the organisation.

78 *Criminal Code* (Canada), section 467.12.

79 *Criminal Code* (Canada), section 467.13.

80 *Criminal Code* (Canada), section 467.1.

81 *Criminal Code* (Canada), paragraph 467.11(3).

82 Dr Schloenhardt, *Submission 1*, p. 33.

83 Dr Schloenhardt, *Submission 1*, p. 31.

Gang Peace Bonds

4.79 The 1997 amendments to the Canadian Criminal Code also expanded the availability of 'peace bonds' to people likely to commit an organised crime offence. Peace Bonds were originally developed to tackle domestic violence, and may place a range of restrictions on individuals who are suspected on reasonable grounds to be likely to commit a criminal offence.⁸⁴

A Peace Bond is a promise, enforceable under the Criminal Code of Canada, to keep the peace and be of good behaviour and to obey all other terms and conditions ordered by a Judge or Justice of the Peace ('JP'), for period of up to twelve (12) months. Judges and JP's may impose reasonable conditions on those who are subject to the Peace Bond, for example: restrictions on contact with other persons, restrictions on attending certain places, restrictions on possessing firearms and ammunition.⁸⁵

4.80 If a person reasonably suspects that another person will commit an organised crime offence they may, with the consent of the Attorney-General, provide that information to a judge.⁸⁶ If the judge is satisfied that there are reasonable grounds, they can make an order that the person enter into an agreement to keep the peace. Any reasonable conditions may be applied to the person's bond. A bond may be for up to 12 months.

4.81 If a person refuses to enter into such a bond, the court may sentence them to up to 12 months imprisonment. If a person breaks a bond, they will be guilty of an offence punishable by up to two years imprisonment.

4.82 Mr Bill Bartlett, from the Canadian Department of Justice, and Mr Don Beardall, from the Public Prosecution Service of Canada, told committee members that Peace Bonds have been used successfully to break the link of 'lower' level gang members to a criminal gang.⁸⁷

84 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p.25, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

85 Law Societies of the Northwest Territories, *Peace Bonds and Restraining Order*, www.lawsociety.nt.ca/ForthePublic/LegalInformation/PeaceBondsRestrainingOrders/tabid/123/Default.aspx (accessed 1 June 2009).

86 *Criminal Code* (Canada), section 801.01.

87 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 25, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

Effectiveness of Canadian approach

4.83 The South Australian Government's submission commented that the Canadian legislation has been 'somewhat effective' against motorcycle clubs involved in serious and organised crime,⁸⁸ citing the arrest of 31 motorcycle club members and associates on 4 April 2007 following Project DEVELOP, an 18 month investigation by the Royal Canadian Mounted Police, as an indicia of its success.

4.84 One of the strengths of the Canadian model is that it recognises that there are different levels of involvement in organised crime groups, and different levels of culpability for the group's activities.⁸⁹ For example, the committee heard that one of the reasons organised crime groups are so successful is because they use their reputation for violence to intimidate and coerce.⁹⁰ The Canadian law recognises that intimidating and coercive behaviour of gang members, although perhaps not criminal in and of itself when committed outside of a gang situation, contributes to the gang's ability to commit serious crime.

4.85 Dr Schloenhardt submitted that:

Unlike most other jurisdictions, Canada's offences are more suitable to criminalise core directors of criminal organisations as well as persons who only provide rudimentary support.⁹¹

4.86 The Canadian laws have been criticised as being too broad and vague and for imposing criminal sanctions without requiring proof of any specific criminal intention.⁹² For example, a person could be liable for attempting to participate in a criminal organisation. Dr Schloenhardt pointed out that this breadth was deliberate, so that the laws could apply to any one associated with criminal gangs.⁹³

4.87 The Canadian model has also been criticised for requiring 'criminal organisations' to be proved on each separate occasion⁹⁴—i.e. if a group is found to be a criminal organisation in one prosecution, that status does not carry over into subsequent prosecutions of members of the same group.

4.88 However, Dr Schloenhardt notes that case law indicates that a court finding that a group is a criminal organisation in one case does have a flow on effect and may result in 'the quasi-black-listing of some groups',⁹⁵ citing the fact that the decision in *R*

88 Government of South Australia, *Submission 13*, p. 12.

89 Dr Schloenhardt, *Submission 1*, p. 34.

90 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, p. 19.

91 Dr Schloenhardt, *Submission 1B*, p. 69.

92 Dr Schloenhardt, *Submission 1*, p. 35.

93 Dr Schloenhardt, *Submission 1B*, p. 69.

94 Government of South Australia, *Submission 13*, p. 12.

95 Dr Schloenhardt, *Submission 1*, p. 36.

v Lindsay which found that the Hell's Angels motorcycle club was a criminal organisation has been cited in other cases involving the Hell's Angels.⁹⁶

4.89 In practice the laws have 'found limited application', particularly as separate offences. There has also been no noticeable decline in Canadian organised crime since their inception.⁹⁷

4.90 In a number of instances in which the joint trial provisions of the Act have been applied, the laws have resulted in substantial stresses and expense to the judicial system with limited success. For example, the laws were used against an Aboriginal street gang in Manitoba, in which 35 people were accused of participation offences. The trial process took over 2 years, was very expensive, and ultimately resulted in relatively minor penalties - all less than 4.5 years.⁹⁸

Proposed amendments

4.91 Dr Schloenhardt submitted to the committee that:

The recent spate of gangland killings in Vancouver raises further doubts about the adequacy and effectiveness of organised criminal laws in Canada, especially if non-conventional, non-hierarchical syndicates are involved.⁹⁹

4.92 The Vancouver killings led the Canadian Government to introduce new legislation specifically targeted to preventing and prosecuting gang related homicides and shootings. On 26 February 2009, the Minister for Justice and Attorney-General, the Hon Rob Nicholson, introduced *An Act to amend the Criminal Code (organised crime and protection of justice system participants)*. The Bill proposes the following amendments to the Criminal Code:

- Murders connected to organised crime activity will automatically be first-degree. First degree murder is subject to a mandatory life sentence with a 25 year non-parole period.
- The creation of a new offence to target drive-by shootings. The Bill makes it an offence to intentionally discharge a firearm while being reckless as to whether it will endanger the life or safety of another person. The offence carries a mandatory penalty of four years imprisonment, with a maximum of 14 years. The minimum sentence is increased to five years for a first offence and seven years for a subsequent offence if the offence is committed for a criminal organisation.

96 Dr Schloenhardt, *Submission 1*, p. 36; See for example *R v Pink*, 2006 CanLII 38867 (ON S.C.)

97 Dr Schloenhardt, *Submission 1B*, p. 70.

98 Dr Schloenhardt, *Submission 1B*, p. 71.

99 Dr Schloenhardt, *Submission 1B*, p. 71.

- The creation of two new offences of aggravated assault against a peace of public officer that causes bodily harm, and aggravated assault with a weapon on a peace or public officer (any public official employed to maintain public peace or for the service or execution of civil process).
- Clarifying that when imposing sentences for certain offences against justice system participants (including police), courts must give primary consideration to the objectives of denunciation and deterrence.
- Lengthening gang peace bonds from a maximum of 12 months to 24 months, for defendants with previous convictions for certain organised crime offences. The amendments would also make it clear that courts may impose any bond condition they deem necessary to protect the public.¹⁰⁰

New Zealand

4.93 As in Australia, organised crime in New Zealand is transnational in nature, and is characterised by loose networks between groups and individuals. For example drugs may be imported by a group operating transnationally, and distributed using domestic gangs.¹⁰¹

4.94 Notable groups, which vary in size and sophistication, include:

- street level local youth gangs;
- territorial gangs which tend to control regional drug manufacture and distribution;
- outlaw motorcycle and other 'organised gangs' which operate at a national level and whose criminal activity is focussed on money making operations; and
- transnational groups which target New Zealand.¹⁰²

4.95 Organised crime groups in NZ are involved in: drug trafficking, manufacture and supply, of which cannabis is the most prevalent; people smuggling; document forgery; black market fishing and poaching; wildlife smuggling; extortion; fraud; cyber crime; and corruption and money laundering.¹⁰³

100 Department of Justice Canada, *New measures to combat gangs and other forms of organized crime*, February 2009, available at: www.justice.gc.ca (accessed 26 May 2009).

101 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

102 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

103 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

Crimes Act 1961

4.96 New Zealand introduced specific provisions to target organised crime in 1997 'under very similar circumstances and in the same year as Canada',¹⁰⁴ in response to a perceived increase in gang activities, particularly of OMCGs and 'organised criminal groups of Maori and Pacific Islander background'.¹⁰⁵ The laws were amended in 2002.

4.97 A new offence of participation in a criminal gang was added to the *Crimes Act 1961* which provides that it is an offence to knowingly or recklessly participate in an 'organised criminal group'.¹⁰⁶ 'Organised criminal group' is defined as a group of three or more people who have as one of their objectives to obtain material benefit from offences punishable by at least four years imprisonment or to commit specified serious violent offences.

4.98 In order to prove the participation offence, the prosecution must show that the defendant had knowledge of the fact that a group was an organised criminal group and that they had knowledge that their participation contributed to the occurrence of criminal activity, or recklessness as to whether their participation so contributed. However, the term 'participation' is not defined in any further detail and this has been criticised as a 'grave flaw' of the laws.¹⁰⁷

4.99 The offence has broad application because it does not require that the group be structured in any particular way, only that it comprises three or more persons. The offence is punishable by a maximum of five years imprisonment.

4.100 The New Zealand laws have been criticised on the grounds that they extend criminal liability beyond its appropriate limits. In particular, the inclusion of the concept of 'recklessness' as sufficient to form the mental element of the participation offence is questioned.¹⁰⁸

United Kingdom

4.101 The Attorney-General's Department submitted that serious crimes in the United Kingdom are committed by 'career criminals who network with each other', rather than well-established and stable groups such as the mafia groups in the United States. The Department went on to state:

The Home Affairs Committee on Organised Crime could not formulate an adequate definition to encapsulate organised crime as experienced in the United Kingdom. Therefore a different approach to that adopted in other

104 Dr Schloenhardt, *Submission 1*, p. 38.

105 Dr Schloenhardt, *Submission 1*, p. 38.

106 *Crimes Act 1961*, section 98A.

107 Dr Schloenhardt, *Submission 1*, p. 42.

108 Dr Schloenhardt, *Submission 1*, p. 44.

international jurisdictions needed to be adopted to address the issues in the United Kingdom.¹⁰⁹

4.102 The Serious Organised Crime Agency (SOCA) was established in 2005 to lead the UK's efforts to combat serious and organised crime. 'SOCA is an intelligence-led agency with law enforcement powers and harm reduction responsibilities.'¹¹⁰ SOCA has both civil and criminal powers to reduce the impact of organised crime.¹¹¹

Serious Crimes Act 2007

4.103 The *Serious Crimes Act 2007* enables courts to impose control orders on people suspected of organised crime. The Act, which applies in England, Wales and Northern Ireland:

- creates a new scheme of Serious Crime Prevention Orders;
- creates a statutory crime of encouraging or assisting crime; and
- merged the Assets Recovery Agency into SOCA (formerly a separate agency dealing with proceeds of crime matters), creating a new proceeds of crime regime.

4.104 The provisions of the Act governing Serious Crime Prevention Orders (SCPOs) came into force on 6 April 2008. Under the new laws, the courts may make SCPOs containing whatever prohibitions, restrictions, requirements and other terms that the court thinks necessary, if:

- it is satisfied that the person has been involved in *serious crime*, and
- it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime.

4.105 The burden of proof for the court to apply an SCPO is the balance of probabilities.¹¹²

4.106 SCPOs may only be placed on persons over the age of 18,¹¹³ and must be of specified duration, not exceeding five years.¹¹⁴ The breach of an SCPO is a crime, punishable by up to five years imprisonment and/or an unlimited fine. The courts also

109 Attorney-General's Department, *Submission 16*, p. 13.

110 Serious Organised Crime Agency, *About Us*, www.soca.gov.uk/aboutUs/index.html (accessed 30 January 2008).

111 Attorney-General's Department, *Submission 16*, p. 12.

112 *Serious Crimes Act 2007*, sections 35-6.

113 *Serious Crimes Act 2007*, section 6.

114 *Serious Crimes Act 2007*, section 14.

have the power to order the forfeiture of any assets or property involved in the offence.¹¹⁵

4.107 A person has been involved in a *serious crime* if they have:

- committed a serious offence (drug offences, people trafficking offences, arms trafficking, prostitution, armed robbery, money laundering, corruption, bribery etc)
- facilitated the commission by another person of a serious offence, or
- conducted himself in a way that was likely to facilitate the commission of a serious offence, by him/herself or by another person, whether or not the offence was committed.

4.108 SPCOs can also be imposed on businesses and unincorporated associations and can restrict the business's activities, for example, its financial, property or business dealings, contracting and agreements, employment of staff and so on.¹¹⁶

4.109 An order can also require a person to answer questions or provide information or documents specified in the order. The order can specify how, when and where the question must be answered or the information or documents provided to a law enforcement officer.

Effectiveness of UK approach

4.110 The committee was told that in the first year of the operation of the Serious Crimes Act, SOCA successfully applied for 12 SCPOs, and the Courts supported the addition of restrictions and prohibitions.¹¹⁷

4.111 All of the SCPOs that SOCA has applied for have been against persons convicted of serious criminal offences, and will come into effect once the individual is released from prison. Therefore, at present, there are not large numbers of SCPOs in operation and it is too early to gauge their effectiveness. However, the committee was made aware that the orders may become difficult to manage if applied in great numbers, because of the level of resources required to monitor such orders. It is anticipated that in a decade or so, once those subject to the SCPOs begin to be released from prison, law enforcement in the UK will require substantial resources to

115 *Serious Crimes Act 2007*, section 26.

116 *Serious Crimes Act 2007*, subsection 5(4).

117 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

monitor the SPCOs.¹¹⁸ In order to address this issue, the court may appoint an overseer to monitor an SCPO at the expense of the convicted person.

4.112 The committee was informed that a number of concerns regarding the human rights implications of SCPOs had been raised, and the orders had been challenged under the *European Convention on Human Rights Act 1998*. However, none of the challenges to the orders have been successful.¹¹⁹

Asian examples

4.113 The legal systems in China, Hong Kong and Macau differ significantly from Australia's. In spite of this, it is useful to briefly note the legislation dealing with organised crime in those jurisdictions, as the laws have been designed to specifically target triads, which are part of the organised crime environment in Australia.

4.114 Each of those jurisdictions has very sophisticated laws outlawing different levels of involvement in organised criminal groups.¹²⁰ China has criminal offences which extend criminal liability, and also has specific organised crime offences. In addition, there are offences targeting corruption and bribery of law enforcement officials, which has been a particular problem in China over the past two decades.¹²¹

4.115 Hong Kong, which has had legislation targeting organised crime groups for over 150 years, has legislation which specifically mentions the common traits of triads and provides for different penalties for different levels of association with triads.

4.116 Macau has comprehensive legislation that criminalises the different activities which might assist triads in performing their criminal functions, such as bookkeeping for a triad.

4.117 The significant extensions of criminal liability in each jurisdiction are limited by very specific and carefully developed definitions of the groups that are captured as 'organised crime groups'. For example, the Macau laws criminalise bookkeeping and organising meetings for 'secret societies/associations' but limits the extension of liability by narrowly defining the characteristics of 'secret societies/associations'.¹²²

118 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86

http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

119 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86,

http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

120 Dr Schloenhardt, *Submission 1*, pp. 45-73.

121 Dr Schloenhardt, *Submission 1*, p. 53.

122 Dr Schloenhardt, *Submission 1*, pp.45-73.

4.118 Dr Schloenhardt suggests that this model of legislation may be effective in these jurisdictions - particularly Hong Kong and Macau - because of the high proportion of organised crime controlled and committed by triad groups.¹²³ Within this context an approach that targets the broad range of people involved in organised crime groups with a specific, static and definable structure, is appropriate. However, as noted in chapter 2, the committee heard evidence from numerous law enforcement agencies that organised crime in Australia is increasingly diverse and characterised by its fluidity and flexibility.¹²⁴ As such, Australian authorities are concerned with ensuring that the application of legislation is not limited by a narrow understanding of how organised crime groups are structured.¹²⁵

South Australia

Serious and Organised Crime (Control) Act 2007

4.119 As noted earlier in the report, the *Serious and Organised Crime (Control) Act 2008* came into force on 4 September 2008. The Act, based on Australia's anti-terror legislation, provides a framework under which groups can be declared 'organised crime groups', and various orders made restricting the movements and associations of its members.

4.120 Professor George Williams told the committee that, in his view, the use of the terrorism proscription model against organised crime groups is inappropriate:

The terrorism proscription model is an entirely different context. It is also based on entirely different types of criminal activity based as they are upon questions of religion, ideology and the like. There are also specific aspects of the antiterror laws that simply make them an inappropriate model in this context.¹²⁶

4.121 The Commonwealth Attorney-General's Department also expressed concern about the appropriateness of using the anti-terror law model to deal with organised crime groups:

Many people have said about the terrorism laws that these are exceptional circumstances. A lot of the critics at the time were saying, 'we hope there isn't going to be bracket creep on this.' Even amongst the people that talked in the debate about terrorism laws, there was a feeling that they were about exceptional powers.¹²⁷

123 Dr Schloenhardt, *Submission 1*, pp.66 and 73.

124 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3; Deputy Commissioner Stewart, Queensland Police Service, *Committee Hansard*, 7 November 2008, p. 18; Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p.10.

125 Government of South Australia, *Submission 13*, p. 8.

126 Professor Williams, *Committee Hansard*, 29 September 2008, p. 2.

127 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2009, p. 46.

4.122 Although the Act is not restricted in its application to OMCGs, it has frequently been referred to as 'anti-bikie legislation'. This is because the laws were specifically enacted in response to OMCG activity.¹²⁸ However, Chief Inspector Powell, from the South Australian Police noted:

I might just add in relation to the new legislation that it is designed to deal with not only outlaw motorcycle gangs but serious and organised crime groups generally.¹²⁹

Declarations

4.123 Under the Act, the Commissioner of Police may apply to the Attorney-General for a declaration in relation to a specific organisation. If satisfied that the organisation associates for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity, and that the organisation represents a risk to public safety, the Attorney-General can make a declaration.¹³⁰

4.124 The Attorney-General must publish notice of the application for a declaration, and invite public submissions. The Attorney-General is not required to provide reasons for a declaration.¹³¹

Offences

4.125 The Act creates three new offences:

- (a) Associating with a member of a declared organisation, or a person the subject of a control order on more than six occasions in a 12 month period.
- (b) Two persons each with criminal convictions for major indictable offences (or conspiracy to commit such an offence) associating with each other on more than six occasions in a 12 month period.
- (c) Refusal or failure to comply with a requirement under the Act to provide personal details, or to provide false evidence as to personal details, without reasonable excuse.

4.126 The first offence overcomes the ambiguity inherent in the term 'habitually' in the old consorting offence. In proceedings for an association offence, the prosecution does not need to prove that a defendant associated with another person for any

128 Ms Lindsay Simmons, *House of Assembly Hansard*, South Australian House of Assembly, 11 September 2008, p. 40.

129 Chief Inspector Powell, SA Police, *Committee Hansard*, Adelaide, 3 July 2008, p. 11.

130 *Serious and Organised Crime (Control) Act 2008*, sections 8 and 10.

131 *Serious and Organised Crime (Control) Act 2008*, section 13.

particular purpose or that the association would have led to the commission of any offence.¹³²

4.127 The committee is aware of concern within the community about the potential for the South Australian association offence to negatively impact on those innocently associating with criminal organisations:

Maybe the person that sells a ‘designated person’ petrol; groceries; or teaches their children at school etc will be deemed an associate? This is because the South Australian legislation (SOCCA) is open to such a broad interpretation (misinterpretation and abuse), that the powers of the police could be utilised inappropriately and clearly in contravention of basic human rights. What has happened to the basic right of ‘innocent until proven guilty beyond reasonable doubt’?¹³³

4.128 Proponents of the legislation argue, however, that there are sufficient limits in place. Certain associations are not captured by the offences, including associations between close family members and lawful business associates.¹³⁴ It is a defence to the association offences to be unaware that a person is a member of a declared organisation, subject to a control order or had a relevant criminal conviction.¹³⁵

Control orders

4.129 Once an organisation has been declared by the Attorney-General, the Commissioner may apply to the Magistrates Court for a control order against a member or associate of the declared organisation. If the court is satisfied that a person is a member of a declared organisation, the court must make a control order.

4.130 The court has a discretion to make a control order at the request of the Commissioner if:

- (a) the defendant associates with members of a declared organisation and either
 - (i) has been a member of the organisation or
 - (ii) engages, or has engaged, in serious criminal activity, or
- (b) the defendant engages or has engaged in serious criminal activity and regularly associates with other people who engage in such activity.

4.131 A control order may prohibit the person from associating or communicating with specified persons or a class of persons, or being in the vicinity of specified premises, or possessing articles of a specified class.

132 *Serious and Organised Crime (Control) Act 2008*, subsection 35(9).

133 Mr Whittle, *Submission 21*, p. 2.

134 *Serious and Organised Crime (Control) Act 2008*, subsection 35(6).

135 *Serious and Organised Crime (Control) Act 2008 (SA)*, subsections 35(2) and (4).

4.132 The court also has wide discretion in making consequential or ancillary orders under the Act.¹³⁶ This includes a power of entry without a requirement for reasonable grounds for suspected breach of a control order and could include such practical matters as banning the wearing of club colours, a move which motorcycle clubs have publicly resisted and vowed to defy.¹³⁷

4.133 In order to make a control order, a court need only be satisfied of a person's association or involvement in criminal activity on the balance of probabilities. If a control order is breached, that breach must be made out to the criminal standard of beyond reasonable doubt.

4.134 There is no requirement to publish notice of an application for a control order or to notify anyone in particular. A person may only become aware of a control order issued against them once the order is served. A person subject to a control order is, however, provided with a statement of reasons excluding 'criminal intelligence'.¹³⁸

4.135 The South Australian Police gave evidence to the committee about the potential benefits of control orders:

The other danger in the current system is that, if we have to wait until the offenders are in a vehicle en route to cause harm to make out an offence, we then have a position where officers are stopping armed offenders in a vehicle. That increases the risk to officers and the public. It would be my experience that if those people are in a vehicle with firearms when we go to intercept them, they will attempt to evade police and we will have a high-speed pursuit, again causing serious risk to the public and officers. If you wind back the clock, we would be able to take action for a breach of the control order well before there was any risk to the public or the intended victims.¹³⁹

Public Safety Orders

4.136 Part 4 of the Act provides that a senior police officer may make a public safety order in respect of a person, or class of persons, if satisfied that their presence at any premises, event or area poses a serious risk to public safety or security, and that the making of the order is appropriate in the circumstances.¹⁴⁰

136 *Serious and Organised Crime (Control) Act 2008*, subsection 14(7).

137 Adam Shand, 'Taking on South Australia's biker gangs', *Sunday*, 24 February 2008.

138 *Serious and Organised Crime (Control) Act 2008* (SA), subsections 15(1)(d) and 15(2).

139 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 21.

140 *Serious and Organised Crime (Control) Act 2008* (SA), subsection 23(1).

4.137 Public Safety Orders are limited to 72 hours and any extension beyond that time limit must be by order of a court.¹⁴¹ A person the subject of an order will have the right to object to any order beyond seven days.¹⁴²

4.138 A Public Safety Order must be served on the people to whom it applies and must be accompanied by a notice setting out the details of the order and the penalty for breaching it.¹⁴³ The reasons for the order are not required unless the order is extended beyond seven days.

4.139 It is an indictable offence to contravene a public safety order, attracting a maximum penalty of five years imprisonment.¹⁴⁴

Effectiveness of the South Australian legislation

4.140 Given that the *Serious and Organised Crime (Control) Act 2008* is relatively new legislation, it is difficult to assess its effectiveness. On 14 May 2009, the South Australian Attorney-General, the Hon Michael Atkinson, declared the Finks Motorcycle Club to be a criminal organisation for the purposes of the Act, the first and only such declaration made under the legislation.

4.141 Subsequently, eight members of the Finks have been made subject to control orders. Those members have challenged the constitutionality of the legislation.¹⁴⁵ Therefore, there are no control orders yet in effect in South Australia.

4.142 However, during the course of its inquiry the committee heard concerning evidence about the anticipated effects of the South Australian legislation - a similar version of which was adopted in New South Wales in April 2009, and which other states and territories are considering adopting.

4.143 A number of the concerns were summarised by the Hon Leonard Roberts-Smith, from the WA Corruption and Crime Commission:

Having the powers is one thing; using them effectively as part of a broader strategy is another. The commission does not believe that the proscription of groups and making membership or association with members of those groups an offence will be effective. The Victoria Police submission to the committee does not support the proscription of outlaw motorcycle groups, because it is disproportionate, offends human rights, is narrowly focused,

141 *Serious and Organised Crime (Control) Act 2008*, subsections 27(2) to 27(4).

142 *Serious and Organised Crime (Control) Act 2008*, section 26.

143 *Serious and Organised Crime (Control) Act 2008*, section 30.

144 *Serious and Organised Crime (Control) Act 2008*, subsection 32(1).

145 Sean Fewster, 'South Australia's anti-bikie laws grind to a halt', *The Advertiser*, 19 June 2009, available at www.news.com.au/adelaidenow/story/0,27574,25659111-2682,00.html (accessed 22 June 2009).

will drive activities underground and will marginalise groups within the community. The commission agrees.¹⁴⁶

4.144 In response to the concerns about the South Australian law impinging on human rights and the risk of innocent groups being captured by the laws, Assistant Commissioner Harrison from the South Australian Police said:

...for people who are going about their lawful business riding a motorbike on the streets of South Australia, there is no way whatsoever that they could be captured by this piece of legislation. I think [the legislative] thresholds are deliberately set to ensure that there is a significant delineation between those who engage in serious criminal activity—plan, organise, facilitate and so forth and pose a safety risk to the community of South Australia—and those who go about their lawful business.¹⁴⁷

Sending criminal groups 'underground' or interstate

4.145 One of the main concerns with the South Australian model is that it will lead to criminal groups being driven 'underground', or moving interstate, thereby shifting the problem and/or making it less obvious.

4.146 Mr Adam Shand, a journalist who has spent a number of years investigating organised crime, explained these concerns and gave evidence that:

The proposition that underlies [South Australia's] legislation seems to be that the crime in motorcycle clubs is centralised in the clubs. My experience is that that is not the case; it is actually decentralised and the crime tends to be carried out by twos and threes in connection with other individuals outside the club. The issue, ultimately, will be that, if you break the clubs up, you will have no effect on the commission of that crime. There is ample evidence from other jurisdictions that outlawing clubs simply drives them underground, pushes the moderates in the clubs towards the hardcore and ultimately has no effect on the overall commission of crime in that jurisdiction.¹⁴⁸

4.147 Mr Shand told the committee that this was already occurring, and warned of the potential consequences:

I think it is already driving people underground and we will see a much more hardened core of bikies in this state who are not visible and who will exchange their very visible insignia and places of association for hidden ones. There will be new insignia—it might be a flash of colour, it might be a certain handshake or certain tattoos—which would be much harder to discern.¹⁴⁹

146 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 6.

147 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, pp. 12-13.

148 Mr Shand, *Committee Hansard*, 3 July 2008, p. 41.

149 Mr Shand, *Committee Hansard*, 3 July 2008, p. 41.

4.148 Victoria Police echoed these concerns:

[W]e suspect the criminal activity in South Australia will be driven underground. We will start to see the inclusion of more middle people between people to enable enterprise to occur. Then, when it does occur, it will become more difficult to prove that organised criminal behaviour is occurring. In some ways it will improve the way that organised crime groups operate.¹⁵⁰

4.149 The Tasmanian Police gave evidence about the difficulties that Police might encounter if the South Australian legislation drives groups underground:

[O]utlaw motorcycle gangs are probably one of the most high-profile because they are quite overt in terms of saying, 'Hey, here we are.'... When you know who someone is and where they are, if you have a need to target any aspect of what they get up to, from a law enforcement perspective, it is easier to do.

If, for example, you have legislation that is more focused on associations than on actual criminal acts per se, some people are going to be reluctant to be seen to be associated with the organisation even if, in fact, they are. There are no guarantees that they are going to cease any criminal activity they might be involved in; it may just be more difficult for police to identify individuals who are involved because they are not wearing a jacket or attending a clubroom and doing some of those other things.¹⁵¹

4.150 The CEO of AUSTRAC, the Commonwealth Government agency that regulates and analyses financial reporting to counter money-laundering and terrorist financing, noted the potential for the problem to shift to an exposed jurisdiction:

Our issue is only to alert the committee to that fact. In recommending legislation going forward, if it is to close down particular entities, that is not a problem so far as we are concerned but we just need to ensure that anything flowing from that is adequately covered as well so that we are just not pushing them straight in to another area on which we do not have coverage.¹⁵²

4.151 Noting these concerns, Assistant Commissioner Harrison from the South Australian Police presented a different perspective:

I genuinely believe that breaking up associations will cause a state of chaos within some of these organisations whereby the inner sanctums or the code of silence which is maintained will be somewhat disrupted and law enforcement will be more able to identify criminal activities they are involved in. It will also provide us an enhanced opportunity to gather

150 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 4.

151 Acting Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 14

152 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

evidence to put before courts. This legislation could do the reverse of sending criminals underground; I think it will actually bring them out into the open because they will not be able to exploit the culture which has existed for a long time where they can give the tasks out to nominees, prospects and hangers-on—the throwaways, if you like—to undertake the criminal activities for them.¹⁵³

4.152 Furthermore, Superintendent Bray added that he considers the South Australian legislation unlikely to drive criminals underground because:

Most people want known their participation and involvement in gangs because that is one of their tools of trade—the public knowledge and threat that the gang is behind them...It is the serious and organised crime that they undertake that they attempt to conceal from police and law enforcement, and they have done that forever...So I do not believe personally that it will have any effect on the way I do business.¹⁵⁴

4.153 A related issue that was raised was whether the approach of banning gangs, particularly OMCGs, as has been adopted in South Australia and New South Wales, will result in only those 'hardened' members of the gangs remaining. The committee heard from Mr 'Mac' Hayes, a member of the Longriders Christian Motorcycle Club, that there are currently a large proportion of non-criminal members of OMCGs who act as a 'moderating influence' on the gangs as a whole. Mr Hayes said:

Some are and some do [leave or join non-criminal motorcycle groups like the Longriders]. There are some who stay and try to be moderating voices. Their club is their life. My understanding is that part of the angle of this law is to possibly push those moderating people out of those clubs. That is a concern. That could backfire.¹⁵⁵

4.154 Professor Arthur Veno agreed, and referred to the Canadian experience as an example of what the impact of South Australia's laws might be:

It will outlaw them [OMCGs], but that further substantiates their draw to a certain criminal element. As they stand now, I think you are going to see a serious division. In Canada when they jailed every single Hell's Angels that they could, the net effect 15 years on is that the Hell's Angels Motorcycle Club is still the number one organised crime problem.¹⁵⁶

4.155 In terms of whether there has actually been a displacement of OMCG members into other states following the introduction of the South Australian laws, the committee was told that there was evidence in Tasmania of one individual possibly

153 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 7.

154 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 7

155 Mr Hayes, Longriders Christian MC, *Committee Hansard*, 3 July 2008, p.57.

156 Professor Veno, *Committee Hansard*, 28 October 2008, p. 36.

having being 'displaced', however the incident may simply be a case of 'a Tasmanian returning to Tasmania'.¹⁵⁷

Insufficient appeal/oversight mechanisms

4.156 A second concern with the South Australian laws was the perceived lack of review mechanisms and oversight, particularly of the Attorney-General's decision to declare an organisation. Mr Grant Feary, the President of the Law Society of South Australia stated that:

In our view, it undermines the presumption of innocence; restricts or removes the right to silence; lacks proper procedural fairness; and removes access to the courts to challenge decisions of the Attorney-General or, indeed, of the police which might be unfounded or unreasonable.¹⁵⁸

4.157 The Commissioner of the Western Australian Corruption and Crime Commission (CCC), the Hon Leonard Roberts-Smith QC, noted that the lack of oversight and breadth of the South Australian laws may leave them open to abuse.

Laws of that kind, because of their potential ambiguity and potential width, suffer from two main difficulties. They are open to abuse by the executive, including police and investigative agencies generally—and one sees that reflected in a number of the submissions which are already before this committee—for example, the experience in Queensland before the Fitzgerald royal commission and so on.¹⁵⁹

4.158 The Queensland Bar Association and Law Society expressed similar reservations in relation to Queensland's plan to introduce similar laws, arguing that the laws might see a return to the corruption that was exposed in the 1980s Fitzgerald Inquiry:

Certain offenders can be given free rein in return for corrupt payments, while competition is arrested and charged...The handmaiden of organised crime is the corruption of officials, with police officers being the No1 target.¹⁶⁰

4.159 Conversely, the South Australian Police argued there are sufficient accountability mechanisms. Assistant Commissioner Harrison stated:

It is actually documented within the legislation itself...in respect of the safeguards, if you like, to ensure that the legislation is appropriately administered and utilised by law enforcement. That certainly includes an

157 Commissioner Hyne, Tasmania Police, *Committee Hansard*, 27 October 2009, p. 5.

158 Mr Feary, Law Society of South Australia, *Committee Hansard*, 3 July 2008, p. 25.

159 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 15.

160 Chris Merrit, 'Queensland Bar Association and Law Society warning on anti-bikie powers', *The Australian Online*, 2 June 2009, available at: www.theaustralian.news.com.au/story/0,25197,25572815-5006786,00.html (accessed 22 June 2009).

annual review by an independent judicial officer and a report to parliament. It looks at a review at the four-year mark of the legislation and it also includes a sunset clause at the five-year mark, which is rather unusual for pieces of legislation as well.¹⁶¹

An expansion of police powers

4.160 Mr O'Gorman, the President of the Australian Council for Civil Liberties, criticised the continual expansion in police powers and strengthening of criminal legislation, suggesting that the trend is more about politics than a need for law enforcement to actually use those increased powers.

If you look state by state and at the federal level, police and law enforcement agencies year by year are always being given greater powers. In relation to cybercrime, if the police can make out an evidence based case that they do not have sufficient powers to deal with cybercrime—as opposed to empty political banging-the-law-and-order-tub rhetoric—then they should be given extra powers. If they cannot make an evidence based case that they do not have enough powers, then they should not be given any extra powers.¹⁶²

4.161 The Hon Leonard Roberts-Smith, the Commissioner of the WA Corruption and Crime Commission expressed similar concerns, warning that while the legislative powers granted to police may be adequate, often they are not utilised effectively, making them appear inadequate.

Many powers, both traditional and coercive, are available to law enforcement agencies under various laws. Their existence does not necessarily translate to their application. It is not simply the existence of the powers or the law that is effective but their use as part of a broader strategy.¹⁶³

Resources involved in enforcing legislation

4.162 The committee heard concerns that the resources involved in enforcing the Serious and Organised Crime (Control) Act and orders made thereunder, may outweigh any benefits of the laws:

I suspect our state legislation will more than likely fail in practical terms (1) because it overreaches and (2) because it will unnecessarily divert police resources from proper policing of criminal activities. It creates crimes which are not crimes at all.¹⁶⁴

161 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 9.

162 Mr O'Gorman, Australian Council for Civil Liberties, *Committee Hansard*, 7 November 2008, p. 41

163 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 5.

164 Mr Mancini, Law Society of South Australia, *Committee Hansard*, 3 July 2008, p. 29.

4.163 Detective Superintendent Paul Hollowood from Victoria Police agreed that this was a significant issue with the legislation:

To enforce the legislation you have to use the scant resources available to be bale to prove the association. So, the whole focus will be on proving associations between people to enact that part of the legislation rather than the activity it is designed to prevent. I do not think that anyone is saying that drug trafficking, armed robbery, extortion and so on will stop. Who will be investigating those if our resources are concentrating on the association aspect? That is our fear about it.¹⁶⁵

Other states' responses to South Australian laws

4.164 The introduction of strong laws in South Australia has clear implications for other states and territories, including, as discussed above, the risk of organised criminals moving interstate and the chance that other states will be seen as 'soft on organised crime'.

4.165 New South Wales Police Commissioner Andrew Scipione noted the potential impact of the South Australian laws on other states:

There could be a displacement effect. However, if it is done well, if there is some harmonisation across the country and we have some really effective strategies, you might see a very good result.¹⁶⁶

4.166 However, he also said:

I am yet to be convinced that [proscription] is the way to go. I could stand convinced, and I am sure there will be an opportunity for this to be considered, but at this stage I am yet to be convinced.¹⁶⁷

4.167 Other state police agencies were similarly cautious. In October 2008, Tasmania Police stated that it would take a 'wait and see approach'¹⁶⁸ to the Australian legislation and commented that South Australia has a:

...bigger issue than [Tasmania] in relation to outlaw motorcycle gangs anyway. We have far fewer problems and issues obviously than they have.¹⁶⁹

4.168 Queensland Police also noted they have adopted a 'wait and see approach' and commented:

165 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p.10.

166 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p.25.

167 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p.31.

168 Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p.5.

169 Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p.5.

Anti-gang laws of the type enacted in South Australia will undoubtedly have a deterrent effect on the growth and prospective membership of groups, including the recruitment of youth...The introduction of South Australia's legislation provides an opportunity to monitor its impact on OMCGs and other organised crime groups as a model for consideration of wider application.¹⁷⁰

4.169 The Queensland Police agreed with the South Australian government that there is a need to focus on prevention for public safety reasons and conceded that 'more aggressive law enforcement attention could lead to the reduction in organised criminal activity and consequently less victimisation'.¹⁷¹ However they also noted some of the potential negative implications of the South Australian model discussed earlier in this chapter: that is, the possibility that groups will go underground; the displacement of organised criminal activity to jurisdictions with less-rigorous measures in place; and the possibility that 'business and corporations' registrations could be driven offshore'.¹⁷²

4.170 Victoria Police were particularly opposed to the suggestion of introducing similar laws in Victoria.

[F]rom a community perspective it [the SA legislation] causes us a few concerns about how it impacts on our charter of human rights...We have concerns that it may be a sledge hammer being used to crack open a walnut. From an investigator's perspective, we just do not think it will work. The reason it will not work is that we require the association to occur for us to be successful. If the whole focus is just trying to prevent association between people, we only have to look at the fact that we have had consorting laws in most Australian states, including Victoria, for many decades, and they have not worked. That is, people find a way to get around them.¹⁷³

4.171 In Western Australia in July 2008, the Commissioner of the Corruption and Crime Commission (CCC), the Hon Leonard Roberts-Smith QC, also gave evidence that the CCC was not supportive of the approach taken in South Australia because of the civil rights implications. The Commissioner added that those civil rights concerns would likely lead to significant delays resulting from legal challenges being made to the laws.¹⁷⁴

170 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 20.

171 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 21.

172 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 21.

173 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 4.

174 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 15.

A turning point: the Sydney Airport incident

4.172 The fatal incident involving rival OMCGs at Sydney airport in March 2009 (noted in chapter 2) prompted a heightened interest and investment in the approach taken up in South Australia. While prior to the incident, most states had adopted a 'wait and see' position, more recently all states and territories have expressed an intent to adopt laws along the lines of the *South Australian Serious and Organised Crime (Control) Act*,¹⁷⁵ and New South Wales adopted similar laws in April.

New South Wales – Crimes (Criminal Organisations) Control Act 2009

4.173 New South Wales has had legislation targeted at criminal groups since 2006. Its anti-gangs legislation,¹⁷⁶ which is based on the New Zealand laws, was introduced in 2006 in response to concerns about the violent actions and organised criminal behaviour of ethnic gangs.¹⁷⁷

4.174 In September 2008, the NSW Police gave evidence to the committee that they were satisfied with the legislation from a law enforcement perspective.¹⁷⁸ The committee was informed that since the introduction of the legislation, 168 individuals have been charged with gang participation offences, 23 of whom were members of motorcycle clubs.¹⁷⁹

4.175 However, Mr Ray from the Law Council of Australia pointed out that of the 168 charges only half have led to a conviction. He stated:

On no occasion has there been a conviction only of those specific breaches. They have always been hand in glove with other substantive offences. So we should say to ourselves, 'What's wrong with charging the substantive offence?' If there is a specific intent that is more heinous in nature, that becomes an aggravating factor for sentencing and is appropriately dealt with within the criminal justice system on that basis.¹⁸⁰

4.176 The NSW Parliament indicated its belief that the gang laws were not sufficient to prevent and prosecute organised criminals, by passing additional legislation in April 2009 that goes a step further by criminalising membership of, and not just participation in, organised crime groups.

175 The Australian, 'Two more jurisdictions sign up for bikie-gang laws', *The Australian online*, 20 June 2009, available at: <http://www.theaustralian.news.com.au/story/0,25197,25662681-5013871,00.html> (accessed 22 June 2009).

176 *Crimes Legislation Amendment (Gangs) Act 2006*.

177 NSW Legislative Assembly Hansard (30 August 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Steward, Bankstown), 1142.

178 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p. 31

179 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p. 23.

180 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 48.

4.177 The *Crimes (Criminal Organisations) Control Act 2009* restricts members of criminal organisations from associating with each other, thereby aiming to disrupt the activities of criminal groups.

4.178 Under the Act, the NSW Police Commissioner can apply to a Supreme Court Judge, acting in an administrative capacity, for a declaration that an organisation is a criminal organisation under the Act.¹⁸¹ If the judge is satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and the organisation represents a risk to public safety, then the Judge may make an order declaring the organisation to be a criminal organisation for the purposes of the Act. The Act lists a number of considerations that the Judge may take into account.¹⁸²

4.179 Once a declaration has been made, the Supreme Court of NSW may make control orders against a declared organisation's members if it is satisfied that a person is a member of a declared organisation and there are sufficient grounds for making such an order.¹⁸³ The Act then creates two offences for controlled members:

- association between two controlled members (excluding certain relationships – such as family);¹⁸⁴ and
- recruiting other members to the organisation.¹⁸⁵

4.180 The new laws also prohibit a person subject to a control order from engaging in certain activities within specified industries, including the casino industry, the private security industry, pawnbroking, operating a tow truck and repairing or dealing in motor vehicles.¹⁸⁶ The NSW Police Minister, the Hon Tony Kelly said that this is necessary because:

It is often said that organised crime cannot flourish without the capacity to infiltrate industries and occupations that can assist them both to commit the crimes and to launder the profits. This is why we have taken the strong measure of saying that if you are a declared member of a criminal organisation you are not a fit and proper person to work in a high-risk industry. In some cases existing licences will be revoked. In all cases declared members will not be able to apply for licences.¹⁸⁷

181 *Crimes (Criminal Organisations) Control Act 2009*, section 6.

182 *Crimes (Criminal Organisations) Control Act 2009*, subsection 9(2).

183 *Crimes (Criminal Organisations) Control Act 2009*, sections 14 (interim orders) and 19 (final orders).

184 *Crimes (Criminal Organisations) Control Act 2009*, section 26.

185 *Crimes (Criminal Organisations) Control Act 2009*, section 26A.

186 *Crimes (Criminal Organisations) Control Act 2009*, section 27.

187 The Hon Tony Kelly (Minister for Police, Minister for Lands, and Minister for Rural Affairs), NSW Legislative Assembly Hansard, 2 April 2009, p. 14331.

4.181 In the Bill's second reading speech, the NSW Police Minister justified the expansive reach of the new laws by saying:

[T]his legislation will, for the first time, take on these crime gangs as a whole and not just charge individual members for individual offences. We must stop them acting as a group or as a gang if we are to break their power. That is why the new non-association orders are needed. No doubt some will say that not everyone, even in an outlaw motorcycle gang, commits offences. Even if that is true, their membership of the brotherhood, their respect for the code of silence, and the extra menace their numbers bring help the gang to carry on its criminal enterprise. If they do not like the crime they are surrounded by, they should leave the gang.¹⁸⁸

4.182 As with South Australia's legislation, the laws have been criticised by various groups, including the NSW Law Society. The President, Mr Joe Catanzariti, said:

The legislation simply will lead to people going underground and we're very concerned about that¹⁸⁹

4.183 The Australian Council for Civil Liberties also expressed concern over the NSW laws, and other states' intentions to adopt similar laws.¹⁹⁰

4.184 To date no organisations have been declared under the new NSW laws.

Conclusions

4.185 During this inquiry, the committee heard about a range of ways in which law enforcement is taking a more preventative approach to combating organised crime by using laws which restrict association. This may be done through laws which criminalise particular groups, civil orders which restrict the associations and activities of individuals suspected or known to be criminals, the introduction of new criminal offences such as racketeering, or a combination of these methods.

4.186 The committee notes that the development of legislative approaches to combat serious and organised crime is an evolving process, and must continuously adapt to the changing organised crime environment. For example, the committee was informed that the Irish government has recently introduced a Bill which seeks to 'address the increasing levels of violence and intimidation directed at witnesses and other members of the public' by providing for a 'Special Criminal Court for the hearing of particular

188 The Hon Tony Kelly (Minister for Police, Minister for Lands, and Minister for Rural Affairs), NSW Legislative Assembly Hansard, 2 April 2009, p. 14331.

189 Sydney Morning Herald, 'NSW Government Rushes Anti-Bikie Laws', *Sydney Morning Herald online*, April 2 2009, available at <http://news.smh.com.au/breaking-news-national/nsw-govt-rushes-antibikie-laws-20090402-9jys.html> (accessed 22 June 2009).

190 Herald Sun, 'Australian Council for Civil Liberties urge caution on 'rushing' anti-bikie laws', *Herald Sun online*, 13 April 2009, available at <http://www.news.com.au/heraldsun/sport/afl/story/0,26576,25326978-1702,00.html> (accessed 22 June 2009).

organised crime offences'.¹⁹¹ Special Criminal Courts have flexible procedures, can hold hearings in private and do not require a jury.¹⁹²

4.187 The committee examined the various approaches that have been adopted in Australian and overseas jurisdictions, each of which has benefits and disadvantages. However, the approaches share a number of common difficulties, including: the challenge in defining 'organised crime groups', and the challenge of developing an efficient and transparent process by which a group or individual is found to be involved in organised crime. These aspects make laws targeting association very complex, and fraught with legal and constitutional difficulties.

4.188 Of the approaches examined by the committee, the UK's Serious and Organised Crime Prevention Orders (SPCOs) seem to be an effective way of managing the activities of known criminals. One of the key advantages of SCPOs is that they can be targeted to specific individuals, and do not attract many of the concerns about criminalising entire groups. However, the committee is also cognisant of the costs of monitoring such orders, and for that reason considers that the orders would really only be cost-effective for use against the most high-risk criminals. The committee considers that such an approach may have significant benefits if applied in Australia and urges that further consideration be given to implementing SPCOs in Australia.

Recommendation 2

4.189 The committee recommends that the ACC monitor the Serious Crime Prevention Orders, of the United Kingdom's Serious and Organised Crime Agency, and report to both the Minister for Home Affairs and the Parliamentary Joint Committee on the Australian Crime Commission on the operation of the orders and on any benefits to Australian law enforcement agencies.

4.190 Obviously, such an approach alone will not be sufficient to deal with the significant problem of serious and organised crime. However, the committee's view is that, after examining all of the evidence presented to it during this inquiry, there may be less complex ways of targeting and dismantling serious and organised crime than by the implementation of far-reaching anti-association laws. One of the committee's concerns with anti-association laws is that they may not make it any easier for police to target the leaders of gangs, and instead be used against those at the lower echelons of organised crime groups, as has occurred to an extent with participation offences in Canada.¹⁹³

191 Criminal Justice (Amendment) Bill 2009 (No 45 of 2009), introduced 30 June 2009, Explanatory Memorandum, p. 1.

192 *Offences Against the State Act 1939* (Ireland), Part V.

193 Dr Schloenhardt, *Submission 1B*, p. 71.

4.191 The committee is strongly of the view that in order to prevent serious and organised crime, it is critical to remove or reduce the motivations for it – the money. Therefore, the next chapter considers an alternative approach to preventing serious and organised crime – targeting finances.

Chapter 5

Confiscating the Proceeds of Crime

Introduction

5.1 Although this inquiry initially focussed on the effectiveness of association-type offences to prevent organised crime groups from committing criminal offences, the committee heard repeatedly, from almost every law enforcement agency with which it met, that one of the most effective ways of preventing organised crime is by 'following the money trail'.

...organised crime is for the most part about profit. They are not generally about a better quality of firearm or a better quality of drug. Perhaps there is something of that in there but by and large it is about the balance sheet for them. Our focus then is not necessarily about the predicate activities or even some of the individuals involved in it, but recognising that, wherever the criminal activity takes place and whatever crimes are involved in it, if we can take away the profit benefit then we are having more impact than we would through any number of—and I hesitate to use this term— minor charges. If we drive at what is the profit motive here, I think we will be more successful in unpicking and deterring—and perhaps even in the crime prevention area.¹

5.2 This chapter discusses various existing legislation which provides for the confiscation of assets derived from criminal activity, and considers the benefits and disadvantages of different legislative models. It also considers the laws and process used to support proceeds of crime laws, such as ways that law enforcement can collect financial information and monitor suspected individuals, to gain the necessary information and evidence to confiscate criminal assets.

Confiscation of criminal assets

5.3 It is a well-accepted common law principle that the Crown may confiscate assets derived from criminal action, with forfeiture laws having existed in England since at least early Anglo-Saxon times.² Modern proceeds of crime provisions generally take two forms: conviction based laws and civil confiscation laws.³ The former requires a criminal conviction before assets may be confiscated, the latter uses

1 Mr Kitson, ACC, *Committee Hansard*, 6 November 2009, p. 5.

2 For a brief discussion of the history of proceeds of crime laws see Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, Report 87, 1999, chapter 2.

3 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, p. 4.

the courts' civil jurisdiction to confiscate criminal assets, and does not require a criminal conviction.

5.4 The US was one of the first jurisdictions to introduce civil confiscation laws as a means of preventing organised crime in its RICO legislation. The reason for this extension of confiscation laws from conviction-based to civil, is due to the effectiveness of the laws in preventing organised crime from occurring. Confiscating illegally obtained assets undermines the profit motive of crime and prevents the re-investment of those assets into further criminal ventures.

5.5 The committee heard from a number of sources, including the ACC and the Italian authorities, that the confiscation of criminal assets 'hits criminals where it hurts most'. The ACC told the committee that:

The seizure of criminal proceeds is a key available means of disrupting the activities of serious and organised criminal groups. Whereas they continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities.⁴

5.6 Mr Raffaele Grassi, from the Italian National Police, highlighted the importance of 'going after the money' and depriving criminal groups of their assets. He noted that:

Mafia members are prepared to spend time in prison, but to take their assets is to really harm these individuals.⁵

5.7 Civil forfeiture laws may still be based on a criminal standard of proof – such as is the case in Canada, whereby if a person has not been convicted of a criminal offence, but the Crown can prove beyond reasonable doubt (to the 'criminal standard') that assets are the proceeds of crime, then a court may make an order that those assets be forfeited to the Crown.

5.8 However, more commonly, civil forfeiture laws are based on a lower, civil standard of proof, as is the situation under the Commonwealth's *Proceeds of Crime Act 2002*, section 18 of which provides that a court may make an order restraining assets, if 'there are reasonable grounds to suspect that' the assets are the proceeds of crime.

4 ACC, *Submission 15*, p. 11.

5 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

5.9 The Australian Law Reform Commission found in its 1999 report, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, that conviction-based forfeiture regimes are relatively ineffective,⁶ resulting in the Commonwealth adopting a civil regime. All jurisdictions in Australia, with the exception of Tasmania, now have civil forfeiture regimes in addition to conviction-based forfeiture laws.⁷ The UK and Ireland also have civil forfeiture regimes, however conviction-based forfeiture remains the norm in the rest of the world.⁸

5.10 The legislation in Western Australia and the Northern Territory goes one step further, allowing the respective Directors of Public Prosecutions to apply to the courts for a confiscation order if a person has 'unexplained wealth'. This means that in those jurisdictions it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead places the onus on an individual to prove that their wealth was acquired by legal means.

5.11 The table below summarises these positions:

	Conviction-based forfeiture	Civil forfeiture	Unexplained Wealth
Test	Beyond reasonable doubt – conviction for criminal offence	On the balance of probabilities/more likely than not	On the balance of probabilities/more likely than not
Onus of Proof	Crown	Crown	Respondent
Jurisdictions	Tasmania	Cth, ACT, NSW, Qld, SA, Vic	NT, WA

5.12 This chapter is divided into three parts: the first outlines the existing Commonwealth proceeds of crime laws and their effectiveness; the second part outlines the development of unexplained wealth laws, and discusses the benefits and concerns with unexplained wealth legislation; and the third section looks at various laws which support criminal assets confiscation legislation, particularly mechanisms for obtaining information about suspected individuals' financial affairs.

Proceeds of Crime Act 2002 (Commonwealth)

5.13 The Proceeds of Crime Act provides that the Commonwealth Director of Public Prosecutions (CDPP) may apply to a State or Territory court for:

6 Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, chapter 4.

7 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, pp. 5-6.

8 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, p. 11.

- restraining orders prohibiting a person from disposing or dealing with the subject property;
- forfeiture orders which require a person to forfeit property to the Commonwealth;
- pecuniary penalty orders which require a person to pay money to the Commonwealth based on the proceeds they have received from crime; and
- literary proceeds orders which require a person to pay money to the Commonwealth based on literary proceeds of crime.

5.14 A court may make these orders if satisfied on the balance of probabilities that the subject property is the proceeds of crime.

5.15 The Act also provides for the use of coercive investigative techniques to assist law enforcement agencies in investigating proceeds of crime matters including compelling examination, the production of documents or information, warrants and monitoring. Further, the Act provides:

- that law enforcement may give a notice to a financial institution to provide specified information about the suspected proceeds of crime;⁹
- that the court may make a monitoring order which requires a financial institution to provide certain information about the transactions in a particular account.¹⁰ This enables law enforcement to monitor the financial affairs of suspected persons;
- directions as to how the Commonwealth must deal with confiscated property including the purposes for which payment may be made from confiscated funds (such as payment of legal aid); and
- that arrangements may be made for the equitable sharing of confiscated proceeds between international or state and territory agencies involved in an investigation.

5.16 With respect to the final point, Dr Dianne Heriot, Assistant Secretary of the Attorney-General's Department informed the committee that such arrangements are made at the discretion of the ministers involved:

If a jurisdiction has had a significant contribution to an investigation that has led to proceeds seizure, then it is put to the minister to determine the equitable distribution.¹¹

9 *Proceeds of Crime Act 2002*, section 213.

10 *Proceeds of Crime Act 2002*, section 219.

11 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 37.

Effectiveness of Commonwealth's proceeds of crime laws

5.17 The committee heard that there are a number of weaknesses in the Commonwealth's existing proceeds of crime legislation, which could be strengthened by:

- (i) reversing the onus of proof in criminal assets confiscation proceedings; and
- (ii) greater interaction and cooperation between different agencies in proceeds of crime investigations, and the appropriate responsibilities of different agencies involved in proceeds of crime matters.

5.18 These two issues are discussed in detail in the following two sections.

5.19 The committee notes that a major review of the Proceeds of Crime Act was undertaken in 2006 by Tom Sherman, to which the Government is yet to respond. Mr Sherman made a number of specific recommendations as to how the effectiveness of the Act may be improved. In its last report,¹² the committee urged the Government to implement the recommendations made by Mr Sherman.

5.20 In this inquiry, the Committee heard from a large range of agencies about the importance of assets confiscation laws in preventing organised crime. Law enforcement agencies around Australia were unanimous about the need for strong and effective laws to enable the confiscation of assets from those involved in organised crime.

5.21 The ACC agrees with the need for the government to implement the recommendations of the Sherman report:

The implementation of recommendations of the Sherman report on the operation of the Proceeds of Crime Act 2002 would strengthen the proceeds of crime regime.¹³

5.22 As in its previous report the committee urges the government to give consideration to the findings of the Sherman report.

Unexplained wealth provisions

5.23 Numerous law enforcements agencies, both within Australia and internationally, gave evidence to the committee about the benefits of unexplained wealth legislation as a means of disrupting serious and organised crime. Unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings.

12 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, p. 55.

13 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

5.24 A number of jurisdictions, including the UK, Italy, Western Australia and the Northern Territory, have already adopted legislation which reverses the onus of proof, enabling authorities to restrain assets that appear to be additional to an individual's legitimate income and requiring that individual to demonstrate that those assets were obtained legally.

The United Kingdom approach

5.25 Detective Inspector John Folan, head of the Dedicated Cheque and Plastic Crime Unit in the UK, told the committee that the historical approach to policing involving 'identifying suspects and getting prosecutions' had failed with regard to organised crime. Detective Inspector Folan argued, like his counterparts around the world, that UK law enforcement needs to focus on the motivations of criminals, and target the profits of organised crime in order to successfully dismantle criminal groups.¹⁴

5.26 The UK's *Proceeds of Crime Act 2002* provides for the confiscation and restraint of proceeds of crime. In order for a person's assets to be confiscated under the Act, the person must have been convicted. However, in order for assets to be restrained, it is only necessary that the person is being investigated and that there is reasonable cause to believe that they have committed an offence.

5.27 The UK also has a set of offences under the Proceeds of Crime Act which enable the confiscation of assets obtained from a 'criminal lifestyle'. Under section 75 of the Act, a person has a 'criminal lifestyle' if they:

- have been convicted of one of the offences listed in Schedule 2 (drug trafficking offences)
- have been convicted of any offence over a period of at least 6 months, from which they obtained at least £5000, or
- have been convicted of a combination of offences which amount to 'a course of criminal activity' which is either:
 - (a) conviction in the current proceedings of at least four offences from which they have benefited; or
 - (b) conviction in the current proceedings of one offence from which they have benefited in addition to at least two other convictions on at least two separate occasions in the past 6 years.

5.28 Where a court has decided that a defendant has a criminal lifestyle, section 10 of the Act contains provisions which enable an assessment to be made as to the

14 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 83-85, http://www.apph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

financial benefit they have derived from their criminal lifestyle. The court may make certain assumptions in relation to property and expenditure, which the defendant is then required to disprove, thus reversing the onus of proof in relation to the assets held by those proven to have a criminal lifestyle.

5.29 The amount recoverable by the Crown is an amount equal to the defendant's total benefit from criminal conduct, unless the defendant is able to prove that the available amount is less than the recoverable amount.

5.30 The committee was informed by Mr Ian Cruxton, from the Proceeds of Crime Office within SOCA, that the 'criminal lifestyle' provisions have been an effective tool for recovering criminal assets. However, it was also acknowledged by SOCA officers and other UK police officers that the civil recovery process in the UK is extremely lengthy, and can take up to three years to go to trial.¹⁵

The Italian approach

5.31 The committee was told that Italy has also developed laws based on a reverse onus of proof which allow law enforcement to prevent the mafia from using illegally obtained assets to reinvest in further criminal enterprises.

5.32 Officers from the Italian Central Directorate for Antidrug Services informed the Committee that Chief Police Officers and Public Prosecutors can undertake investigations into suspected illegally obtained assets without having prima facie evidence of a predicate offence. At the conclusion of such an administrative investigation, the matter can be referred to a judge who can investigate the matter further to establish the source of the assets. During the trial process, the burden of proof falls on the defendant to explain the source of their assets.¹⁶

5.33 The committee was told that this process had been very effective in confiscating criminal assets and preventing organised crime in Italy.

5.34 The committee notes that Italy is a civil law jurisdiction with an inquisitorial judicial system and in this context a judge can investigate the source of the individual's assets, and require evidence from the individual. The same system could not be applied in the same form in the Australia. However, the committee was

15 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 84,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

16 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 62-63,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

interested to learn about the successful use of reverse onus of proof investigations in a civil law jurisdiction.

Western Australia and Northern Territory approaches

5.35 Western Australia introduced unexplained wealth provisions in 2000 in Division 1 of Part 3 of the *Criminal Property Confiscation Act 2000* (WA), and the Northern Territory followed in 2003 with the *Criminal Property Forfeiture Act 2002* (NT). Given the similarities between the two acts, both are discussed together.

5.36 The laws both provide that the relevant DPP may apply to the court for an unexplained wealth declaration against a person. The court must make an order 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.¹⁷ Both Acts also reverse the onus of proof.

5.37 The key aspects of the laws are:

- The *requirement* that courts make an order if satisfied that a person's total wealth is greater than their lawfully acquired wealth.¹⁸ Courts therefore have minimal discretion regarding the making of such orders.
- The reversal of the onus of proof in favour of the Crown, providing that 'any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary'.¹⁹
- Both Acts set out how law enforcement and prosecutors can obtain information about criminal assets,²⁰ which includes:
 - The DPP or police may require a financial institution to provide information about the transactions and/or assets of a particular person²¹ (this information may also be volunteered by financial institutions);

17 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

18 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

19 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(2); *Property Confiscation Act 2000* (WA), section 12(2).

20 *Criminal Property Forfeiture Act 2002* (NT), Part 3; *Property Confiscation Act 2000* (WA), Part 5.

21 *Criminal Property Forfeiture Act*, section 14; *Property Confiscation Act 2000* (WA), section 54.

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- The DPP can apply to the courts for an order allowing the DPP to conduct an examination of a suspect individual, which can require a person to furnish the court with information and/or documents;²²
 - The DPP can also obtain documents relating to assets or property by applying for a production order;²³
 - The DPP can apply to the court for monitoring and suspension orders which require a financial institution to monitor or suspend a person's account, and provide that information to the police or DPP;²⁴ and
 - The police can detain a person if they have a reasonable suspicion that the person has in their possession property liable to forfeiture under the Act, or documents identifying or determining the value of a person's unexplained wealth.²⁵
 - Provisions to ensure that property remains available for forfeiture, including:
 - Police have the power to seize property if they reasonably believe it was derived from or used in a crime;²⁶ and
 - Police and the DPP may apply to the courts for a restraining or freezing order, which prevents property or assets from being used for a period of time.²⁷ It is a criminal offence to deal with property otherwise than is permitted by a restraining or freezing order.²⁸
 - People have a right to object to their property being restrained within 28 days of being served with an order restraining the property.²⁹
 - In addition to unexplained wealth declarations, the court can make:
 - Criminal Benefit Declarations which declare that certain property is, at least in part, more likely than not to have been derived from a specific forfeiture offence committed by the suspect or that the property was more likely than not unlawfully acquired;

22 *Criminal Property Forfeiture Act*, Part 3, Division 2; *Property Confiscation Act 2000* (WA), Part 5, Division 2.

23 *Criminal Property Forfeiture Act*, Part 3, Division 3; *Property Confiscation Act 2000* (WA), Part 5, Division 3.

24 *Criminal Property Forfeiture Act*, Part 3, Division 4; *Property Confiscation Act 2000* (WA), Part 5, Division 4.

25 *Criminal Property Forfeiture Act*, section 33; *Property Confiscation Act 2000* (WA), section 73.

26 *Criminal Property Forfeiture Act*, section 39; *Property Confiscation Act 2000* (WA), section 33

27 *Criminal Property Forfeiture Act*, Part 4, Division 2; *Property Confiscation Act 2000* (WA), Part 4, Division 3

28 *Criminal Property Forfeiture Act*, Part 4, Division 3; *Property Confiscation Act 2000* (WA), section 50.

29 *Criminal Property Forfeiture Act*, Part 5; *Property Confiscation Act 2000* (WA), Part 6.

- Crime-used Property Substitution Declarations which are available when the actual property used in the crime is not available for seizure, e.g. when they are no longer in the suspect's possession. They enable the state to declare equivalent property that is in the suspect's possession as a substitute;
- The Acts also allow the same orders to be made against 'declared drug traffickers'.

Differences between WA and NT unexplained wealth laws

5.38 While the WA and NT laws are very similar, there are a few substantive differences between them. These are:

- The WA legislation does not enable confiscation to be taken into account in sentencing. The NT law allows courts to take into consideration an offender's cooperation in forfeiture proceedings when sentencing the offender. The NT laws also provide that the courts should have regard to a forfeiture order that required the forfeiture of property that was not crime-derived when sentencing a convicted offender.
- The WA laws only require that a drug trafficker has been convicted of one offence before they can be declared for the purposes of their assets being confiscated. The NT laws require that a drug trafficker be convicted of 3 offences before they can be declared a drug trafficker and have their assets confiscated.
- The WA Act is declaration-based. Once a court has declared certain assets to be 'unexplained wealth', a 'criminal benefit' or 'crime-used property substitution', those assets may be confiscated by the government.³⁰ However, because the NT is a Territory, the Constitution requires that property can only be confiscated by the government 'on just terms'. This means that a court order is required for confiscation, even after a declaration has been made that the relevant property is 'unexplained wealth' etc. Should the Commonwealth enact unexplained wealth provisions, the same constitutional restraint would apply, requiring a judicial order before assets could be confiscated.

Effectiveness of NT and WA approaches

5.39 Although the NT Act is based on the WA legislation, the committee heard that the NT Act expanded and improved on the WA Act. With regard to the effectiveness of its unexplained wealth legislation, the Northern Territory Police submitted:

Whilst traditional methods of illicit drug interventions are still employed, legislation that targets the entire criminal enterprise is extremely effective.

30 *Criminal Property Confiscation Act 2000 (WA)*, section 6.

In this respect, assets forfeiture legislation allows Police to seize the wealth created by these criminal enterprises without the need for a conviction.³¹

5.40 The Northern Territory Police gave evidence to the committee that the laws have been very successful in addressing the issues of OMCGs in the Northern Territory, as well as other criminal groups.³²

To date the Northern Territory Police has seized over \$13 million dollars in criminal property forfeiture cases with approximately \$5 million forfeited to the Crown at this time.³³

5.41 Commander Colleen Gwynne from the Northern Territory Police explained to the committee how the unexplained wealth laws work in practice to dismantle the control of key individuals over criminal groups:

I think it makes life much more difficult. They just cannot return to where they were. The problem we have had over the years is once a criminal, always a criminal, because you can just return to what you were doing. You continue to make money out of illegal activity. But that is so much more difficult if you do not have that financial support behind you to commence those activities. With a lot of the networks, if you do not have that financial support then it is very hard to gain the support of other criminal networks as well.³⁴

5.42 Assistant Commissioner McAdie further explained to the committee why the unexplained wealth approach to assets confiscation is superior to the civil confiscation regime contained in, for example, the United States' RICO laws:

Our understanding—and we are hardly what you would call experts in the RICO laws in the United States—is that, in order to be enforced, they involve very long, very complex and very sustained investigations. There is a cost-benefit ratio in everything. Our understanding is that the success ratio is not very high and the cost of each investigation is extremely high. I guess we are looking for simpler-to-administer and easier means to achieve the same ends.³⁵

5.43 However, Commander Gwynne also highlighted that one of the impacts of the new legislation has been the movement of some criminals out of the Northern Territory:

We have had a couple of cases where people have chosen to move. We had an unexplained wealth case in Alice Springs where we restrained \$2.2

31 Northern Territory Police, *Submission 20*, p. 3.

32 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 7.

33 Northern Territory Police, *Submission 20*, p. 3

34 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 7.

35 Assistant Commissioner McAdie, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 12.

million worth of assets and cash. That matter has now finalised. At the end of the day, nearly \$1 million was forfeited. In a lot of these cases, people also have to pay their debts off. If they have \$2.2 million worth of assets, they may owe a bank or a financial institution half of that, so part of the assets pays the debt off before the government sees the end amount. People involved in that couple of cases, who are quite significant in trafficking illegal drugs within Central Australia, have since moved interstate. There have been other cases that I could talk about where people have chosen to move elsewhere.³⁶

5.44 This evidence concerns the committee because it indicates that while the legislation may be effective in those jurisdictions that have it, due to the federated nature of the Australian justice system, strong laws in one jurisdiction can cause problems to relocate to another jurisdiction. For this reason, the committee's view is that, whatever approach to assets confiscation is taken, it is critical that Australian governments work together to ensure that there are no 'weak points'. This issue is discussed in further detail in chapter 6.

5.45 The Northern Territory Police agree with this assessment:

If there is a jurisdiction that does not have the type of legislation the Northern Territory has, you are creating a vulnerable area, a soft target. People will say, 'We can go to New South Wales, South Australia or elsewhere where we won't be subjected to such legislation.' It is important that it is consistent.³⁷

5.46 The committee notes that a number of jurisdictions are now considering the adoption of unexplained wealth provisions.³⁸ This is discussed in more detail later in the chapter.

Arguments in favour of unexplained wealth laws

5.47 A large number of agencies from various jurisdictions mentioned the effectiveness of unexplained wealth legislation, and suggested that it may be appropriate to adopt such laws at the Commonwealth level. The ACC, AFP, Victoria Police, Tasmania Police, Queensland Police, South Australia Police, the Northern

36 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, pp. 7-8.

37 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 8.

38 Assistant Commissioner Harrison, South Australian Police, *Committee Hansard*, 3 July 2008, p. 3; ABC News, 'Reforms Proposed to Tackle Organised Crime', *ABC News Online*, <http://www.abc.net.au/news/stories/2009/06/24/2607555.htm> (accessed 3 July 2009).

Territory Police, the Police Federation of Australia and the Australian Tax Office all support the wider adoption of unexplained wealth laws.³⁹

5.48 There is some support in international law for the adoption of such provisions at a Commonwealth level with the Interpol General Assembly having resolved in 1997 that:

...unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country's domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect on unexplained wealth.⁴⁰

5.49 The primary reason given by most agencies in support of unexplained wealth laws is the fact that, if applied successfully, they remove the financial incentive to commit organised crime.

[I]f there is an evident downturn in criminal profits then it acts as a discourager, a potential preventer, of organised crime activity. It may perhaps deter those who want to get into it and it may make it more difficult for those already engaged in it, forcing them to take greater risks than they currently do and therefore exposing themselves to greater risk of detection and prosecution.⁴¹

5.50 Unexplained wealth laws do this to a greater extent than proceeds of crime laws because they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard. As such there is a greater likelihood that the assets of crime will be confiscated.

5.51 Unexplained wealth provisions are in many ways better adapted to dealing with the specific law enforcement problem, such as OMCGs. Detective Superintendent Hollowood gave evidence that, in the experience of Victoria Police, it is generally individuals within the clubs who are involved in organised crime as opposed to the whole club, or groups within the club, conspiring to commit organised criminal offences. Detective Superintendent Hollowood explained that while individuals may use their position within the club as leverage to support their organised crime activity, it is those individuals who are directly benefiting from organised crime, and not a motorcycle club as a whole. Therefore he suggested that

39 see Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8; Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 29; Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11; Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, pp. 11-12; Northern Territory Police, *Submission 20*, p. 3; Mr Burgess, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 80; and Mr Barlow, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73 respectively.

40 Mr Hunt-Sharman, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 81.

41 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

unexplained wealth laws may be better adapted to preventing the criminal behaviour taking place within motorcycle clubs as they target the benefits accumulated by the individuals of greatest concern to law enforcement.⁴²

5.52 Similarly, the Police Federation of Australia explained:

Do Australian police know who is involved in organised and serious crime in Australia? Do we know who they are? The answer is yes. Can we prove beyond reasonable doubt that these criminals are involved directly in those crimes? The answer is no. Are we aware that these criminals possess or have effective control of unexplained wealth? The answer is yes. Can these criminals or those holding the assets and wealth for these criminals explain on the balance of probability that they legally obtained that wealth or assets? The answer is no. We do not have to link anything to a crime. It is about them on the balance of probability explaining that they have got legally obtained wealth...We have not got any legislation in Australia to deal with that at the Commonwealth level...Unexplained wealth is the easiest way as a crime prevention method to stop further crime, because, if the individuals who are holding onto these assets cannot explain them...the tendency is to just hand it over because they do not want to get into a debate about whether they are involved in criminality or not.⁴³

5.53 Queensland Police illustrated the same point by using an example:

You may have someone who, intelligence suggests, sits at the top of the tree in a hierarchical structure that amasses vast amounts of assets, millions of dollars, and yet, while the intelligence lends itself to that, the on-the-ground investigation would be such that the evidence convicts the underlings. Wealth creation provides an onus on them to account for that asset wealth.⁴⁴

5.54 It was also suggested that the laws may assist law enforcement agencies in investigating criminal offences:

As I understand it, on many occasions when people are brought in for questioning about unexplained wealth, rather than implicate themselves in more crime, sometimes these things are not even contested. There is no criminality attached to it, if you understand that. I think there are some great opportunities in this to use some specific pieces of legislation that can go a long way towards fighting serious and organised crime in this country.⁴⁵

42 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 3.

43 Mr Hunt-Sharman, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 81.

44 Detective Superintendent Hay, Queensland Police, *Committee Hansard*, 7 November 2008, p. 25.

45 Mr Burgess, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 80.

5.55 Mr Barlow from the Australian Tax Office gave evidence to the committee about the assistance that unexplained wealth laws would give them in enforcing tax legislation:

From a practical perspective, we obviously do deal with unexplained wealth. That is a basis of some of our assessments. We would raise assessments on particular taxpayers on the basis that they cannot explain where their wealth has come from. That is a process which involves doing the investigation, raising an assessment and then collection after that litigation. It all takes a lot of time. As I understand it, if you had an unexplained-wealth regime within a proceeds structure then you would have the ability to have restraining orders at the start, which would secure assets, so I can see that in that sense there would be a way of securing those assets upfront, which is quite difficult to do from a tax context because we have to go through the process.⁴⁶

5.56 Agencies also noted the benefits of nationally consistent confiscation legislation. Detective Superintendent Hollowood from Victoria Police gave evidence about the difficulties that Australian law enforcement agencies have in identifying and confiscating assets which may be located in, or moved between, various jurisdictions.⁴⁷ Some of these problems, he said, would be overcome if there was nationally consistent unexplained wealth legislation.

5.57 The ACC reiterated this view, agreeing that nationally consistent unexplained wealth laws would improve the ability of law enforcement to combat serious and organised crime.

I think following the money is obviously very important from the point of view of identifying the areas of risk and the individuals who represent the greatest risk, but then it is a question of how you actually do anything about that, given the size of the criminal economy and the amount of money that is restrained and forfeited. There is a big disparity, so the performance would appear to warrant some improvement, I guess, in terms of the way we recover money.⁴⁸

Arguments against unexplained wealth laws

5.58 The committee also heard evidence against the adoption of unexplained wealth laws by the Commonwealth from a small number of organisations.

5.59 The main concern with unexplained wealth laws is the reversal of the onus of proof. A member of the motorcycling community, Mr Withnell, expressed concerns that such laws risk confiscating assets from innocent people because of their breadth:

46 Mr Barlow, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73.

47 *Committee Hansard*, 28 October 2008, p. 11.

48 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

[T]he only problem I have with [unexplained wealth laws is] I do not believe most people could actually explain everything they own.⁴⁹

5.60 The Law Council of Australia noted concern with unexplained wealth laws, submitting that they 'offend common law and human rights principles'.⁵⁰ Specifically, the Law Council is concerned that:

- a) The reverse onus of proof undermines the presumption of innocence. The Law Council's concerns regarding the presumption of innocence also apply to the Commonwealth's existing proceeds of crime legislation, but are heightened in respect of unexplained wealth laws.⁵¹
- b) The provisions infringe on the right to silence and exclude legal professional privilege. The unexplained wealth laws in WA and the NT enable the respective DPPs to use information found in the process of examining unexplained wealth to be used for criminal prosecution. The suspicion of a person having obtained wealth illegally is sufficient for the DPP to obtain an order compelling a person to answer questions on oath.⁵² The WA laws also exclude legal professional privilege by requiring lawyers and other professionals to provide information that would otherwise be privileged.⁵³
- c) There is a lack of appeal rights in respect of unexplained wealth declarations.⁵⁴ The committee notes that individuals have a right to appeal decisions of a court to make an unexplained wealth declaration and freezing order to a higher court on a matter of law, as is the case with proceeds of crime confiscation orders.
- d) The potential for arbitrary application of the laws. The Law Council expressed concern that those who fail to keep receipts or records may be

49 *Committee Hansard*, 4 July 2008, p. 38.

50 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

51 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

52 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13; see *Criminal Property Forfeiture Act 2002* (NT), section 17; *Property Confiscation Act 2000* (WA), section 57.

53 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13; see *Property Confiscation Act 2000* (WA), subsection 139(1).

54 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13.

subjected to the legislation,⁵⁵ and that use of the laws may be politically motivated.⁵⁶

5.61 Similarly, Mr O'Gorman, the President of the Australian Council for Civil Liberties said:

To those who wanted confiscation laws, from where I sit, we say that a conviction based regime was working quite well. I think the current scheme, under which people can simply have their assets frozen and taken away, even without being charged with any criminal offence, from a philosophical point of view as to where the reach of the criminal law should end, is utterly obnoxious.⁵⁷

5.62 Additionally, the unexplained wealth provisions in WA have had limited use, with only 13 declarations made between its commencement in 2000, and June 2008.⁵⁸ This supports the evidence that the committee heard from the Queensland Crime and Misconduct Commission that 'the jury is still out...on unexplained wealth.'⁵⁹

5.63 The WA Police gave evidence to the Western Australian Joint Parliamentary Standing Committee on the Corruption and Crime Commission that the DPP was reluctant to use the provisions.⁶⁰ The DPP told that Committee that it was not reluctant to use the laws, but as unexplained wealth applications are often made on the basis of information obtained in the course of another investigation in which confiscation proceedings had already commenced, the initial investigation must be completed prior to any action for unexplained wealth being commenced.⁶¹ The Law Council of Australia argued that this evidence indicates that the WA unexplained wealth laws are unnecessary.⁶²

5.64 The Northern Territory appears to have resolved this problem to a large extent by using an investigative and prosecutorial model that has a much greater level of

55 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

56 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 14.

57 Mr O'Gorman, Australian Council for Civil Liberties, *Committee Hansard*, Brisbane, 7 November 2008, pp. 37-8.

58 Western Australia DPP, *Annual Report: 2007-08*, p. 30.

59 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 31

60 Detective Superintendent Porter, Western Australia Police, *Western Australia Joint Parliamentary Standing Committee on the Corruption and Crime Commission: Transcript of Evidence*, 1 August 2007, pp. 3-4.

61 Mr Jones, WA DPP, *Western Australia Joint Parliamentary Standing Committee on the Corruption and Crime Commission: Transcript of Evidence*, 26 September 2007, p. 8.

62 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 16.

interaction between prosecutors, police and the Department of Justice.⁶³ This issue is discussed further at paragraph 5.118.

5.65 Deputy Commissioner Kaldas of the NSW Police told the committee that the existing legislation in NSW, which like the Commonwealth legislation allows assets to be restrained or confiscated if a person is suspected of having obtained those assets through serious crime related activity, is 'working pretty well' and that there are no 'proposals or any need at the moment to revamp the legislation'.⁶⁴

Conclusions on unexplained wealth laws

5.66 The committee notes the concerns of the Law Council and others with unexplained wealth legislation. However, in the view of the committee unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime including:

- preventing crime from occurring by ensuring profits cannot be reinvested in criminal activity, as opposed to simply reacting to serious and organised crime;
- disrupting criminal enterprises;
- targeting the profit motive of organised criminal groups; and
- ensuring that those benefiting most from organised crime – i.e. those gaining profits – are the ones captured by the law, which they are often not under ordinary criminal laws, and proceeds of crime laws which require a link to a predicate offence.

5.67 The committee's view is that it may be possible to deal with the concerns of the Law Society through well-constructed legislation which incorporates safeguards such as administrative or judicial review mechanisms and evidentiary safeguards.

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Commonwealth)

5.68 The Commonwealth Attorney-General, the Hon Robert McClelland MP, introduced legislation into Parliament on 24 June 2009, which proposes to introduce unexplained wealth provisions into the *Proceeds of Crime Act 2002*.

5.69 The Attorney-General explained the purpose of the unexplained wealth amendments:

In many cases, senior organised crime figures who organise and derive profit from crime are not linked directly to the commission of the offence.

63 Commander Gwynne, Northern Territory Police, *Committee Hansard*, Darwin, 2 March 2009, p. 8.

64 Deputy Commissioner Kaldas, NSW Police, *Committee Hansard*, 29 September 2008, p. 26

They may seek to distance themselves from the offence to avoid prosecution or confiscation action.

Unlike existing confiscation orders, unexplained wealth orders will not require proof of a link to the commission of a specific offence and in that sense they represent a quantum leap in terms of law enforcement strategy.⁶⁵

5.70 This reasoning is consistent with the evidence that the committee heard from law enforcement agencies around the world.

5.71 The Bill adds 'unexplained wealth' to the existing categories of assets that may be subject to restraining or forfeiture orders under the Act. A person has 'unexplained wealth' if 'there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired.'⁶⁶

5.72 In proposed Part 2-6 to the Proceeds of Crime Act, the Bill provides for the making of 'Unexplained Wealth Orders'. In order for the Court to make an order:

- (a) a preliminary order must have been made (with an 'authorised officer' having made an affidavit under proposed section 179B(2)), and
- (b) the court must not be satisfied that the total wealth of the person was not derived from one or more of the following:
 - (i) an offence against a law of the Commonwealth;
 - (ii) a foreign indictable offence;
 - (iii) a state offence that has a federal aspect.

5.73 The additional requirement of the court not being satisfied of the unexplained wealth not being derived from an offence with a Commonwealth aspect is a result of the constitutional constraints on the Commonwealth's capacity to enact criminal laws. '[T]he Commonwealth is limited to confiscating unexplained wealth derived from offences within Commonwealth Constitutional power.'⁶⁷ Other than this additional aspect, the confiscation provision appears to operate in much the same way as the equivalent provisions under Northern Territory and Western Australian law.

Concerns with the operation of restraining orders in the Commonwealth Bill

5.74 In considering the Bill, the committee identified a potential drafting weakness. The proposed restraining orders in item 5 of the Bill appear to place a greater burden

65 The Hon Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 24 June 2009, p. 17.

66 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Schedule 1, Item 13, proposed subsection 179B(2)(b).

67 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, p. 5.

on the Crown, as the orders are not based on a reverse onus of proof. In order to make a restraining order, the Crown must satisfy the court that:

- (a) there are reasonable grounds to believe that a person has unexplained wealth; and
- (b) there are reasonable grounds to suspect either or both of the following:
 - (i) that the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect;
 - (ii) that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

5.75 Item 5 is based on the restraining order provisions for the existing proceeds of crime orders under the act, which do not carry a reverse onus of proof.

5.76 As with unexplained wealth orders, the additional requirement is based on the Commonwealth's constitutional restrictions. However, because the restraining order provisions are not based on a reverse onus of proof (like the unexplained wealth orders are), the restraining order provisions in the Commonwealth Bill appear to be narrower than those in the Northern Territory or Western Australia, as a link to a Commonwealth offence, and some level of proof thereof, will still be required. It is unclear how strong the evidence linking the unexplained wealth to an offence will need to be in order for the court to grant a restraining order.

5.77 The committee notes that it is not necessary for the CDPP to seek a restraining order prior to seeking an unexplained wealth order, as is the case with forfeiture orders in relation to those suspected of having committed a serious offence⁶⁸ or conduct constituting an indictable offence.⁶⁹

5.78 The explanatory memorandum to the Bill states that the purpose of restraining order is to 'ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.'⁷⁰ A restraining order also enables the CDPP to apply for an order to conduct an examination so that further property can be located.

5.79 In short, it appears that restraining orders may be more difficult to obtain than confiscation orders in respect to unexplained wealth in the Commonwealth Bill. Both orders require some link to a Commonwealth offence, but restraining orders require the link to be a positive burden on the Crown, whereas with unexplained wealth orders it is a negative burden.

68 *Proceeds of Crime Act 2002*, paragraph 47(1)(c).

69 *Proceeds of Crime Act 2002*, paragraph 49(1)(c).

70 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, p. 6.

5.80 The committee is uncertain as to how the requirement of a link to Commonwealth offence will be interpreted by the courts as it relates to both restraining orders and confiscation orders. Although the committee understands that constitutionally, such a requirement is necessary, the committee is concerned that the Commonwealth's unexplained wealth orders should not be interpreted to require substantial evidence linking the accused to a Commonwealth offence. Such an interpretation would, in the committee's view, defeat the purpose of unexplained wealth orders.

5.81 The committee is also concerned with the complexity of both restraining order and confiscation order provisions, and notes that both sets of provisions contain double negatives, making them difficult to understand and interpret.

5.82 The committee suggests that these aspects of the Bill be given further scrutiny in order to ensure that the Commonwealth's unexplained wealth laws do not require the CDPP to demonstrate a link to a predicate commonwealth offence.

5.83 The committee notes that the Bill will be examined by the Senate Legal and Constitutional Affairs Legislation Committee, and looks forward to considering its report. The committee will continue to monitor the progress of the Bill and of the more widespread adoption of unexplained wealth laws with interest.

Conclusions on the Commonwealth's Bill

5.84 The committee commends the Commonwealth Government on proactively dealing with the problem of organised crime and in considering the evidence of this inquiry to introduce unexplained wealth provisions. In the committee's view, the unexplained wealth provisions in the Commonwealth's Bill are a reasoned and measured approach to the problem of organised crime

5.85 In particular, with regard to the concerns of the Law Council and others about unexplained wealth laws, set out above, the committee notes that the unexplained wealth provisions proposed by the Commonwealth government are civil provisions, and that no presumptions of criminal guilt or innocence are involved. Furthermore, the committee notes that existing section 198 of the Proceeds of Crime Act provides that information obtained in an examination relating to a restraining order, cannot be used as evidence in criminal proceedings against the person.

5.86 The committee notes that the unexplained wealth provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 are supported by the findings of the committee's inquiry. Therefore, the committee recommends that these provisions, in particular, be enacted.

Recommendation 3

5.87 The committee recommends that the unexplained wealth provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 be passed.

5.88 Noting the above comments of Victoria Police, the Northern Territory Police and the ACC regarding the importance of having uniform unexplained wealth provisions, the committee also urges the Commonwealth to continue to consult with the States and Territories about the adoption of uniform unexplained wealth laws.

5.89 The committee notes that the Commonwealth government is already involved in a number of consultation and negotiation processes with the States and Territories, which aim to achieve uniformity in legislation targeting serious and organised crime. These include chairing a Senior Officers Group of the Standing Committee of Attorneys-General (SCAG), and leadership of the Ministerial Council for Police and Emergency Management – Police (MCPEMP). These developments are discussed in chapter 6.

Measures supporting criminal assets confiscation

5.90 During the course of this inquiry, the committee became acutely aware of the importance not only of having strong legislative measures to prevent serious and organised crime, but also of having a suite of legislation and administrative and policy arrangements to support those measures. In particular, the need for law enforcement to have access to financial intelligence and for the development of effective investigative and prosecutorial models for criminal assets confiscation proceedings.

Financial intelligence

5.91 With the increasing law enforcement focus on 'the money trail', financial intelligence has become a crucial law enforcement tool. Mr Neil Jenson, CEO of AUSTRAC, highlighted the importance of financial intelligence:

...financial intelligence is critical to the fight against organised and serious crime. It is valuable for both operational and strategic purposes...[financial intelligence] information assists law enforcement to uncover previously undetected criminal activity and connections among crime groups as well as to identify emerging patterns and threats.⁷¹

5.92 There are a range of ways in which different jurisdictions collect financial intelligence and monitor suspicious transactions.

Australian approach

5.93 AUSTRAC's submission to the inquiry notes:

AUSTRAC plays a vital role in supporting the ACC and other law enforcement and security agencies through supplying the financial intelligence expertise needed for this approach. AUSTRAC's ability to link financial data and cross-match information assists in detecting suspicious activity as it is evolving. AUSTRAC's expertise in data mining and real

71 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 20.

time tracking allows analysts to detect criminal activity and track resources moved in preparation for planned activities.⁷²

5.94 AUSTRAC was established under the *Financial Transaction Reports Act 1988* and is continued in existence by section 209 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). AUSTRAC's purpose is to detect and counter money laundering and the financing of terrorism.⁷³

5.95 The AML/CTF Act imposes a number of obligations on organisations involved in certain industries (including financial service providers, the gambling industry and 'cash dealers'), when they provide designated services, including:

- customer identification and verification of identity;
- record keeping; and
- establishing and maintaining an AML/CTF program.

5.96 For example, reporting entities must report international funds transfers, 'suspicious transactions' and transactions of \$10 000 or more.

5.97 One of AUSTRAC's roles is to oversee compliance with these reporting requirements and collate the information. AUSTRAC then provides transaction reports and intelligence to law enforcement agencies and revenue agencies both within Australia and internationally (depending on whether an international agency has an agreement with AUSTRAC).⁷⁴

5.98 The CEO of AUSTRAC, Mr Neil Jensen, told the committee that:

Our information contributed to a record 2,698 operational matters in 2007-08, making a total of more than 15,000 such operational matters over the past 10 years. In addition, taxation revenue directly resulting from AUSTRAC's financial transaction reports amount to \$76 million in the 2007-08 financial year and approximately \$685 million over the past 10 years.⁷⁵

International approaches

5.99 A number of European countries have similar arrangements. The committee's delegation to North America, Europe and the UK was told that the European Union has developed a model approach to financial transactions and reporting, to enable law enforcement to better target the proceeds of crime. The approach involves:

- banning the use of cash payments

72 AUSTRAC, *Submission 17*, p. 3.

73 AUSTRAC, *Submission 17*, p. 2.

74 AUSTRAC website, 'About AUSTRAC', at http://www.austrac.gov.au/about_austrac.html (accessed 6 July 2009)

75 Mr Jensen, CEO, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 20.

- the identification and control of all financial operators
- the creation of common databases with the obligation for financial operators to report all suspicious transactions, and
- strong cooperation between all involved authorities.⁷⁶

5.100 Italian legislation prohibits the use of cash for transactions over €12 500 (AU\$21 800). Transactions over this amount are required to be processed through a financial institution. All transactions over €15 000 (AU\$26 000) require the collection and verification of personal details, with these records kept for ten years.

5.101 Italian banks and financial institutions are responsible for ensuring that they are not involved in money laundering. Strong punitive legislation targeted at the financial sector ensures the cooperation of banks in this area. The committee was told of a case in which €160 million (AU\$280 million) of illicit funds was deposited into a bank account in China. The bank failed to comply with the relevant reporting requirements relating to this transaction. Accordingly, the bank was required to pay a penalty of 40% of the money transferred, and bank officials involved in money laundering or in the non-compliance with financial record keeping and reporting were able to be charged under mafia association legislation.⁷⁷

5.102 The Dutch Police (KLPD) have a similar system and store information regarding unusual financial transactions on a secure database so that law enforcement are able to target 'hot spots'. The KLPD told the committee that they have identified that 85% of suspicious transactions involve international money transfers.⁷⁸

Effectiveness of existing arrangements

5.103 The ACC told the committee that the work done by AUSTRAC is critical to the confiscation of proceeds of crime, and ultimately organised crime prevention.

As you would all know, the key motivator for undertaking criminal activities is predominantly the profit which these activities bring. The underlying strategy of the ACC is to identify serious criminal targets through identification of criminal business structures and money flows. For

76 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

77 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 66-67,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

78 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 63,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

example, the identification of suspect money transfers and repositories is a key methodology for target generation and development. This is a proactive risk-based approach to identifying high-risk money flows and it does not rely on the identification of an original offence to start an investigation.⁷⁹

5.104 AUSTRAC told the committee that there are a number of amendments that could be made to the AML/CTF laws to make them stronger, and that it is working with the Attorney-General's Department to achieve this:

As we are moving forward with the AML/CTF legislation we are finding areas that the legislation may not cover adequately, or the legislation may require further amendment. Remittance dealing is an area in which we continue to work. They have an obligation to register with AUSTRAC. We are aware that quite a number, potentially 500 or more, may not have registered with us, and we are looking at the range of activities available to move forward. We will propose to the Attorney-General's Department, which has responsibility for this legislation in the sense of amending it, issues that are arising as a result of that. We have a number of concerns at the moment about which we are talking to the Attorney-General's Department. We would be looking for some future possible amendment to assist our program in enforcing the legislation.⁸⁰

5.105 Mr Jensen went on to argue:

The major concern is how to enforce non-registration, or where entities have not registered, to be able to ensure that they register so that we can provide information. It would be some strengthening of the ability to take an action, whether it is through the courts or in some other form, to show them that they have a responsibility and they have to meet those responsibilities.⁸¹

Recommendation 4

5.106 The committee recommends that the Commonwealth Government give urgent consideration to strengthening the enforcement of registration obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

5.107 The ACC also suggested a number of models that have been successful in other jurisdictions that might be effective in strengthening Australia's legislative, administrative and policy arrangements for collecting financial intelligence. Specifically, the ACC commended the United Kingdom's system of Financial Reporting Orders as a model that might enhance Australia's existing laws. Mr Kitson from the ACC told the committee:

...financial reporting orders, FROs...[are] a useful way to monitor the activities of key persons of concern. FROs, in combination with the easily

79 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

80 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

81 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

applicable proceeds of crime legislation, may enhance our capacity to attack the criminal economy.⁸²

Financial Reporting Orders in the United Kingdom

5.108 Chapter 3 of the *Serious Organised Crime and Police Act 2005* gives SOCA the power to apply for Financial Reporting Orders (FROs), which are a civil mechanism of restraining the use of assets by convicted organised criminals. FROs may be made against persons convicted of certain specified criminal offences including money laundering, fraud and terrorism.⁸³

5.109 The orders may be for a period of up to 15 years and ordinarily require a person to provide financial statements and details to the authorities periodically.⁸⁴ Failure to do so is an offence.⁸⁵

5.110 The orders are intended to prevent known organised criminals from using their assets to fund further crime. They essentially make it much more difficult for those people to establish new criminal enterprises and to evade detection.

To verify the accuracy of information provided in a financial report, UK agencies can request information from any source without use of a production order and disclose information in the financial report to any party. Where a person's lifestyle is inconsistent with the financial position reported, there are avenues to pursue the seizure of assets.⁸⁶

5.111 The ACC told the committee that:

Financial reporting orders could simplify the ACC's push to understand high-volume money flows associated with those involved in the more serious ends of organised crime.⁸⁷

5.112 However, FROs only came into effect in the UK in 2005 and to date there is little evidence of their effectiveness. The ACC acknowledged this, but noted that they will continue to monitor the orders and discuss their effectiveness with SOCA to determine whether they may be useful in the Australian context.

I think you would be aware that the UK's laws have not been enacted long enough to give us a decent body of information on which to judge its success or otherwise. Indeed, in our dialogue with them, they also observed that it is too early to make a judgement...I suspect that that we are a year or so away from having an understanding of how that operates in their context

82 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 2.

83 *Serious and Organised Crime and Police Act 2005*, sections 76 and 79-81.

84 *Serious and Organised Crime and Police Act 2005*, section 79.

85 *Serious and Organised Crime and Police Act 2005*, subsection 79(10).

86 ACC, *Submission 15*, p. 5.

87 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

and, when we try to apply that across the Australian context with some of the difficulties we might have with a non-unitary law system and the different state and territory policing agencies we have here, I think there will be a fair bit of study and work to be done in that area.⁸⁸

5.113 Mr Kitson also noted the role that FROs might play if unexplained wealth laws are adopted at the federal level in Australia.

...the reason that we identified particularly financial reporting orders as something that was of interest to us is because it deals with the capacity of some of the most enduring and resilient organised crime figures to maintain their wealth regardless of the individual or concerted efforts of law enforcement across the country. If we shift the burden of proof so that people have to explain unexplained wealth then there may be some benefit to us in trying to understand how they are operating, who they are operating with and what they are doing with those assets.⁸⁹

Recommendation 5

5.114 The committee recommends that the ACC continue to monitor the effectiveness of the United Kingdom's Financial Reporting Orders, and report to both the Minister for Home Affairs and the Parliamentary Joint Committee on the Australian Crime Commission whether similar reporting orders may be of benefit in the Australian law enforcement context.

Investigative and prosecutorial arrangements for confiscating criminal assets

5.115 The ACC's submission argues that the Commonwealth's existing proceeds of crime laws are not as effective as the models used in other jurisdictions. The ACC points to the NSW and UK models as examples of laws that have been more successful than the Commonwealth's existing legislative arrangements.⁹⁰

5.116 The committee notes that the NSW laws are similar to the Commonwealth's in terms of when assets can be seized or restrained by the Crown. The UK's *Proceeds of Crime Act 2002* is not as strong as the Commonwealth and NSW legislation in that it requires that a person has been convicted before assets can be confiscated.⁹¹ However, the ACC suggests that one of the reasons for the greater success of the NSW and UK laws is the fact that the NSW Crime Commission and SOCA respectively are responsible for investigating and prosecuting criminal assets recovery matters. Accordingly, the ACC suggests that there is a:

88 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

89 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

90 ACC, *Submission 15*, p. 12.

91 Although the restraint of assets under the *Proceeds of Crime Act 2002 (UK)* may be on the basis that the person is under investigation and there is reasonable cause to believe that they committed an offence.

...need for a clearer separation of responsibility for prosecution and seizure action at Commonwealth level.⁹²

5.117 The ACC elaborated on this statement:

Although a variety of models are available, there are compelling arguments for the location of responsibility with an agency at the national level with responsibility for targeting the most resilient and enduring serious and organised crime groups and equipped with the cost-effective capability offered by coercive powers. In addition, agencies being able to draw on a range of tools, including the appropriate use of coercive powers from another service agency, provides another model for consideration. While the primary purpose would be improved rates of criminal asset recovery, there would also be opportunities to improve a broader range of outcomes in terms of disrupting and dismantling criminal enterprise structures through corporations or taxation law action.⁹³

5.118 This suggestion was echoed by police forces both within Australia and internationally. The Northern Territory Police suggested that one of the key reasons for the initial success of their unexplained wealth laws is the fact that they have altered the way in which investigations and prosecutions work, to a more integrated approach with greater interaction between police, the Department of Justice and the DPP.

One of the other things that are unique to the Northern Territory legislation is the way we manage the process. We have an area in the Department of Justice that deals just with criminal property forfeiture. We have a sergeant who is an experienced prosecutor working within that area, so we have a conduit between the police and the Department of Justice, who are taking the matters before the local courts and the Supreme Court. We work very closely with the lawyers in preparing the cases and prosecuting them through the system.⁹⁴

5.119 The committee heard that this change in approach to the traditional model of prosecution has contributed substantially to the success of the Northern Territory's unexplained wealth regime.

5.120 It is not uncommon in some international jurisdictions for the 'prosecutorial' function for civil, proceeds of crime related matters to be handled by a law enforcement or assets recovery agency rather than by the public prosecution service. For example the Director of the UK's Serious and Organised Crime Agency (SOCA) has the ability to apply directly to the courts for assets confiscation orders.⁹⁵

92 ACC, *Submission 15*, p. 12.

93 ACC, *Submission 15*, p. 12.

94 Commander Colleen Gwynne, Northern Territory Police, *Committee Hansard*, Darwin, 2 March 2009, p. 8.

95 *Proceeds of Crime Act 2002* (UK), section 6.

5.121 Mr Kitson informed the committee that the NSW Crime Commission also has responsibility for bringing proceeds of crime actions under the NSW *Criminal Assets Recovery Act 1990*, and not the NSW DPP. Similarly, Assistant Commissioner Mandy Newton told the committee of the value of the NSW arrangements.⁹⁶

5.122 The committee also heard that other jurisdictions have found advantages in combining all assets recovery functions into one agency – including both taxation and criminal assets recovery. The UK has adopted this approach, and the committee was informed that SOCA have launched hybrid cases – which involve both tax recovery and criminal asset confiscation. Mr Andy Lewis, Head of Civil Tax Recovery, SOCA, informed the committee that the ability to target both aspects of criminal assets has been successful, and the use of tax investigation enables SOCA to examine records from the previous 20 years.⁹⁷

Irish model

5.123 The ACC recommended that the committee examine the Irish proceeds of crime model, as in its view, the Criminal Assets Bureau (CAB) in Dublin is 'the most successful recovery agency in Europe.'⁹⁸

5.124 The CAB is a division of the Garda Síochána that was established by Statute in 1996. It reports directly to the Minister for Justice, Equality and Law Reform. The CAB has both investigative and enforcement powers, and operates independently of other criminal prosecution agencies.⁹⁹

5.125 The CAB is comprised of officers from the Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community and Family Affairs. Thus it takes a multi-agency approach to confiscating the assets of organised criminals. The CAB is able to apply tax legislation, proceeds of crime legislation as well as any relevant criminal laws to their investigations and prosecutions. This allows the most effective and appropriate legislation to be used in each situation in order to deny organised criminals of their

96 Assistant Commissioner Newton, AFP, *Committee Hansard*, 6 November 2008, p. 31.

97 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 84-85, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

98 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7. However, the committee was also informed about some difficulties with the current Irish legislation, including the fact that the existing 7-step process for assets recovery on a reverse onus of proof adds complexity to the Irish assets recovery regime.

99 An Garda Síochána, 'Criminal Assets Bureau', at www.garda.ie/Controller.aspx?Page=28 (accessed 7 July 2009).

assets. According to the ACC in around 60 or 70 per cent of cases the CAB uses tax legislation to confiscate assets suspected of being the profits of crime.¹⁰⁰

5.126 Within the Australian context, the committee heard that the ability of the Australian Tax Office and law enforcement agencies to work together was a key element of the success of the Piranha Taskforce:

One of the key aspects of our success with Piranha is having an embedded person from the Australian Taxation Office within the operation. The cooperation we have had with the ATO in tracking assets has worked extremely well for us. If we attack the wealth we attack the incentive for people to be engaged in organised crime.¹⁰¹

5.127 However, Mr Cranston from the ATO informed the committee that in some instances tax laws will not be the best adapted means of removing assets:

The tax law is looking at a particular tax liability. On balance of probabilities, looking at the facts, we can make an assessment of whether there is a tax liability. We have done well in that particular area in the past in dealing with some of these organised groups. There is a problem in relation to collection, however. Sometimes it is very difficult to collect on those particular assessments. In relation to whether it is better than the proceeds of crime legislation, I think that would depend on the particular matter and the particular circumstances. When we raise tax assessments, they have to adhere to the various taxation acts. However, the proceeds of crime is because you have to have a criminal offence and that becomes sometimes a bit difficult.¹⁰²

5.128 The Irish model allows law enforcement to take a pragmatic approach to the removal of assets by establishing permanent working relationships between officers from different areas of law enforcement, tax, customs and community affairs.

5.129 In the ACC's opinion this model of combining assets confiscation agencies into one investigative and enforcement agency also enables law enforcement to overcome some of the difficulties that result from complicated and sophisticated organised crime business structures.¹⁰³

The difficulty is that because of the complexity and sophistication of some of these business structures and the intermingling of legitimate and illegitimate sources of income, it is very, difficult for an investigator to disentangle all that to the satisfaction of a court, where you prove reasonably that that particular amount of money over there is from an illegal source that money over there is legitimate. That is the difficulty we

100 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

101 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

102 Mr Cranston, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73.

103 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

face. And, of course, acquiring people with the skills to understand money, money flows, business structures and the way businesses and markets work will be a big trick for law enforcement down the track.¹⁰⁴

5.130 The committee considers the effectiveness of multi-agency taskforce in further detail in chapter 6.

Conclusions on investigative and prosecutorial arrangements

5.131 The best model for investigating and prosecuting criminal assets confiscation matters and other assets confiscation matters was not the primary focus of this inquiry. However, the committee did hear substantial evidence and received numerous recommendations as to how the Commonwealth's approach to these issues could be strengthened, thereby improving the success of criminal assets confiscation laws in Australia.

5.132 In the committee's view, Australia may benefit from an assets recovery agency like CAB, for example by vesting the capacity to bring proceeds of crime and unexplained wealth matters in the ACC, or by the establishment of permanent multi-agency taskforces with a lead role in investigating and prosecuting criminal assets recovery matters, or from a combination of these approaches.

5.133 The committee recommends that this issue be given further consideration by the Commonwealth government.

Recommendation 6

5.134 The committee recommends that the Commonwealth government examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency, such as the ACC.

Conclusions

5.135 During this inquiry the committee examined a range of preventative law enforcement approaches to serious and organised crime. On the evidence it has received, the committee is persuaded that the most effective way of targeting and disrupting serious and organised crime is to pursue the motivation behind it – which is the financial gain.

5.136 While there are differences of opinion, both within law enforcement and the community generally, about the effectiveness and appropriateness of anti-association laws, law enforcement agencies both within Australia and internationally, are unanimous that criminal assets recovery laws are an effective way of combating organised crime at the highest level.

104 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

5.137 The committee believes that strong criminal assets recovery laws, specifically unexplained wealth laws, are a significant way forward, as they:

- prevent crime from occurring by ensuring criminal profits cannot be reinvested in further criminal activity;
- disrupt criminal enterprises;
- target the profit motive of organised criminal groups to deprive them of this incentive; and
- ensure that those benefiting most from organised crime – i.e. those receiving financial gain – are the ones captured by the law, which they are often not under ordinary criminal laws, and proceeds of crime laws which require a link to a predicate offence.

5.138 The committee acknowledges that unexplained wealth laws are a departure from the traditional approach to proceeds of crime, which requires a person to be convicted of a predicate offence before the proceeds of that crime may be confiscated. However, the committee has heard throughout this inquiry about the increasing sophistication and transnational nature of serious and organised crime groups. The directors of modern organised crime have sophisticated and dynamic methods of avoiding the law. They are well-informed and well-resourced. The committee is therefore convinced that such a departure from traditional approaches to confiscating the proceeds of crime is necessary and defensible.

5.139 Accordingly, the committee commends the Commonwealth Government for the introduction of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, which includes unexplained wealth laws. However, the committee also notes that in order for any law which targets a national problem to have maximum effect, it is critical that all levels of government adopt harmonised approaches to unexplained wealth confiscation. The committee encourages the states and territories to give this matter due consideration.

Chapter 6

A holistic and harmonised approach to serious and organised crime

6.1 Throughout the inquiry the committee heard that there is no single solution to the problem of organised crime. A number of experts highlighted that strong and targeted legislation needs to be supported by a range of broader law enforcement strategies. The Attorney-General's Department's submission noted that:

...legislation specifically targeting serious and organised crime groups is only one of the possible approaches to combating such groups...it is noted that intelligence, investigative and operational capabilities and collaboration, both nationally and internationally, remain vital to addressing criminal networks.¹

6.2 Similarly, the Australian Crime Commission (ACC) noted in its submission:

Legislation alone may not effectively deal with the ongoing threat posed by serious and organised crime. It is only one aspect of the law enforcement approach to organised crime groups. It is vital to also retain a focus on ongoing development of responses to the actual crimes, and to ensure that any legislative response is consistent with structures, focuses and responsibilities of law enforcement agencies. Intelligence collection, information sharing and development of knowledge is fundamental to combating serious and organised crime.²

6.3 In particular, the committee heard that the development and implementation of association offences should be considered as part of a suite of tools available to law enforcement agencies. Deputy Commissioner Ian Stewart, from the Queensland Police Service told the committee:

I would like to stress that the development and introduction of anti-gang legislation is only one part of the law enforcement response to targeting serious and organised crime groups. We must strive for continuous improvement in investigations, using forensic evidence gathering and analysis, intelligence, collections and information exchange within law enforcement agency and government networks. The effort to collect and further develop intelligence with respect to significant crime issues and criminal networks from the national perspective is strongly supported by the Queensland Police Service.³

1 Attorney-General's Department, *Submission 16*, p. 3.

2 ACC, *Submission 15*, p. 3.

3 Deputy Commissioner Stewart, QPS, *Committee Hansard*, 7 November 2008, p. 20.

6.4 Similarly, the Government of South Australia, in its submission also noted the need for a holistic approach to serious and organised crime:

The South Australia Government's current legislative reform program provides a holistic approach to serious and organised crime by targeting the associations of and between members of criminal organisations, enhancing criminal laws relating to organised crime activity including public violence, drugs and firearms as well as targeting unexplained wealth and assets of these members.⁴

6.5 While the previous chapters of this report have canvassed the key issues set out in the inquiry's terms of reference, the inquiry also identified further administrative, policy and legislative approaches critical to supporting Australia's response to serious and organised crime. These include:

- a coordinated law enforcement approach through:
 - the development of national priorities;
 - the harmonisation of legislation; and
 - political will;
- improved information and intelligence sharing arrangements;
- improved international partnerships;
- a supportive suite of law enforcement capabilities; and
- adequate levels of resourcing.

6.6 In developing effective strategies for combating serious and organised crime, Australia must take a holistic and coordinated approach. This chapter highlights the issues which the committee believes should be considered in conjunction with any legislative developments in the areas of association and unexplained wealth.

A coordinated approach to serious and organised crime

6.7 Chapter 2 discussed in detail the nature of serious and organised crime in Australia, and identified that crime does not respect domestic or international borders. As the ACC noted in its submission, serious and organised crime is increasingly sophisticated and is beyond the capacity of a single jurisdiction to disrupt and dismantle:

Reducing the harm caused by serious and organised crime is a complex composite of policy and intelligence issues that are beyond the capacity of any one jurisdiction or agency.⁵

4 Government of South Australia, *Submission 13*, p. 46.

5 ACC, *Submission 15*, p. 8.

6.8 The Attorney-General's Department also argued that, as law enforcement responsibilities are divided between the Commonwealth and the states, there is a need for coordination and cooperation in order to develop an effective national approach:

In our federal system of government, law enforcement responsibilities and interests overlap, so national coordination and cooperation between the Commonwealth and the states and territories is vital. In considering the possible legislative approaches to serious and organised crime groups in Australia, we also need to be mindful that this is a complex problem that requires a multifaceted approach.⁶

6.9 A national coordinated approach to serious and organised crime was widely supported by all the law enforcement agencies. In his submission, the Hon Jim Cox, Minister for Police and Emergency Management, Tasmania, noted that:

Due to the ease in which serious and organised criminal groups operate across borders, it is advocated that a co-ordinated national approach will be the only effective strategy. Consequently, my department supports the development of a national response following appropriate discussions which strengthens the ability of all Australian law enforcement agencies, including the Australian Crime Commission (ACC) and other Commonwealth agencies to respond to serious and organised crime groups.⁷

6.10 Mr Christopher Keen, the Director of Intelligence of the Queensland Crime and Misconduct Commission (CMC), told the committee about the multi-jurisdictional nature of serious and organised crime in Queensland. He also noted the importance of taking a coordinated law enforcement approach to combating organised crime, and of the crucial role of the ACC in that approach:

The other aspect that is generally well accepted is that Queensland crime is not just Queensland crime. It transcends borders, you move between states and also overseas. When you start looking at those sorts of aspects, it is one of the reasons why law enforcement needs to be very much coordinated and linked into both interstate and overseas agencies and federal agencies. That is where the Australian Crime Commission plays a major role because we need to be able to have that coordination and those links with other investigative agencies.⁸

6.11 Similarly, Mr Neil Jensen from AUSTRAC noted the importance of the ACC in coordinating the efforts of a range of agencies in regard to serious and organised crime:

Joint task forces that are set up under the ACC are significant. Certainly the use of the powers that they have available to them can assist us, even

6 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 35.

7 The Hon Jim Cox, Minister for Police and Emergency Management, Tasmania, *Submission 5*, p. 1.

8 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 29.

though they may not be directly related to us. Those powers might enable them to find further information, associates, what is happening with transactional activity, and what is happening with drug activity. We can then go back to our database and provide them with further information. I think the importance of the ACC is linking together a number of agencies, including us, but also understanding what we are doing and where we are going.⁹

6.12 The committee notes that the ACC was established to bring together and support all Australian law enforcement agencies and develop a coordinated focus on nationally significant crime. It does this via its statutory criminal intelligence and investigation functions. The ACC notes:

Our purpose is to unite the fight against nationally significant crime.

As an agency we provide intelligence, investigation and criminal database services. We are a flexible and dynamic organisation and change our work priorities to adjust to the ever changing criminal environment.¹⁰

National priorities

6.13 The significance of lead agencies such as the ACC in Australia, the Criminal Intelligence Service Canada, and the Serious and Organised Crime Agency (SOCA) in the United Kingdom,¹¹ is that these organisations can collate intelligence to produce a national picture of the nature and threat of serious and organised crime. In Australia, the ACC produces both the National Criminal Threat Assessment and the Picture of Criminality. This national picture informs law enforcement priorities and assists in the development of appropriate responses to serious and organised crime. The committee was told that:

Both the National Criminal Threat Assessment and Picture of Criminality in Australia, undertaken by the ACC, assist to develop a better national understanding of the significant crime issues as well as improving the ability to undertake coordinated law enforcement action against identified high-threat crime networks possessing transnational and cross-jurisdictional capabilities.¹²

6.14 Mr Kevin Kitson from the ACC noted that the production of national intelligence on serious and organised crime is an evolving process, which over time is becoming more comprehensive and therefore more useful:

9 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, pp. 29-30.

10 ACC website, www.crimecommission.gov.au/our_work/index.htm (accessed 30 June 2009).

11 See: *The Parliament Of the Commonwealth of Australia, Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands, June 2009*, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

12 Deputy Commissioner Stewart, QPS, *Committee Hansard*, 7 November 2008, p. 20.

I referred earlier on to a maturing process of understanding and working with our partner agencies. What we have seen, particularly over the last three to four years, is a much greater understanding of what it is that we are looking at...I think that we as a community are now getting better generally at understanding the nature of the problem and in dealing with some of its more serious manifestations.¹³

6.15 Mr Michael Outram from the ACC highlighted the value of nationally targeted priorities based on risk assessments in assisting law enforcement agencies to target serious and organised crime in a coordinated and prioritised manner:

I should say also that there is a coordination occurring across the states under the Australia and New Zealand Police Advisory Agency that was recently established by the state police... The police commissioners have asked for ... a national triaging system, if you like, to determine which groups and individuals represent the highest threat nationally so that we can agree between the states and the Commonwealth on the targets we should take on, based on an agreed risk-threat assessment methodology, so that everyone is actually on the same page.¹⁴

6.16 The committee commends this approach and was concerned to hear that, at times, jurisdictional particularities can take precedence over the implementation of the national priorities identified by the ACC Board.¹⁵ Mr Kitson explained that:

The ACC's mandate includes the responsibility for developing a set of national criminal intelligence priorities, which we recommend to the board each year and which the board makes its own commentary and adjustments on. That has some impact over the menu of work for the ACC but, arguably, it does not have particularly significant influence over the work of the jurisdictions and the level of resources that are focused nationally towards those nationally identified criminal intelligence priorities.

We would recognise that in each state and territory there are peculiar challenges to law enforcement, there are different political pressures and there are different natures of criminality. But I think we would be more effective dealing with some of the national challenges that are before us if there was a flow-down effect, a cascading effect, from those national criminal intelligence priorities across the resourcing commitments of the state and territory jurisdictions, particularly in terms of gathering information and intelligence to fill those gaps in our knowledge.¹⁶

6.17 The committee recognises that, as with all government agencies, law enforcement agencies operate in a political environment with finite resources.

13 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 12.

14 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, pp 13-14.

15 The ACC Board is comprised of representatives from law enforcement and other agencies from the Commonwealth and from each of the states and territories.

16 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, pp 6-7.

However, direct political involvement in the redirection of national priorities diminishes and undermines the value of an intelligence lead agency, such as the ACC, to set national priorities on serious and organised crime. The committee is concerned that the value of the national threat assessment and picture of criminality will be diluted by increasing political involvement, at all levels of government, which redirect both law enforcement priorities and resources to areas outside of the national priorities.¹⁷

6.18 The continued ability of the ACC to be a truly national agency to unite the fight against nationally significant crime requires that the ACC Board set the national criminal priorities, and that those priorities be accepted nationally.¹⁸ In addition, the committee strongly believes that the ACC needs to be adequately resourced to ensure that it can continue to support its partners in their execution of the national priorities, and that the ACC's jurisdictional partners must continue to give due support to the national criminal priorities. The committee is concerned that there is a perception that this may not be the case:

...it is reasonable to anticipate a diminished or diminishing capacity of the Australian Crime Commission to deliver support to Western Australian police in light of competing national priorities and budget pressures. The proposed state based legislation will ensure that the Corruption and Crime Commission of Western Australia will be able to support Western Australian police in meeting the serious and organised crime challenges specific to Western Australia.¹⁹

6.19 The committee urges Commonwealth, state and territory governments and law enforcement agencies to continue to work together to ensure that the ACC has the necessary information, resources and support to develop a national approach to serious and organised crime.

Harmonisation of legislation to tackle serious and organised crime

6.20 The value of harmonising legislation to more effectively tackle serious and organised crime was raised throughout this inquiry. Commissioner Andrew Scipione, from the NSW Police Force, told the committee that:

It would be difficult to mount an argument to suggest that we would not look at trying to harmonise on the basis of getting maximum effectiveness, and that is what it is all about at the end of the day. It is trying to put a

17 PJC-ACC, *Examination of the Australian Crime Commission Annual Report 2007-08*, June 2009, see discussion on the National Indigenous Violence and Child Abuse Intelligence Task Force, paragraph 2.69.

18 Also see: 'The commissioner proceeds in an orderly direction,' *The Age*, April 23, 2009.

19 The Hon Leonard Roberts-Smith QC, Commissioner, CCC, *Committee Hansard*, 4 July 2008, p. 4.

regime into place backed by legislation that allows us to best control and minimise the effect of serious and organised crime across the nation.²⁰

The need for harmonisation

6.21 The committee heard that the lack of legislative coordination and harmonisation undermines law enforcement strategies and causes displacement of criminal activity to the jurisdiction with the weakest legislation and law enforcement tools.²¹

I guess it is a ‘weak link in the chain’ type philosophy, where people will look for the easiest opportunity to exploit the laws of the state or the land to go about their criminal enterprises and activities.²²

6.22 A significant amount of evidence was taken on the potential for displacement of serious and organised crime groups from one state to another when legislation and law enforcement approaches are not harmonised across jurisdictions. It was argued that criminal activity will more readily occur in, or that individuals involved in criminal activity will locate themselves in, those states which are considered to be less hostile to serious and organised crime. Chapter 4 discussed this issue as a possible consequence of the South Australian anti-association laws. The South Australian Government told the committee that as a result of South Australia's strong law enforcement reform process, displacement of organised crime was viewed as a legitimate outcome.²³

6.23 The ACC highlighted the potential for the displacement of organised criminal groups across jurisdictions as a result of fragmented legislative reform, and the possibility of intelligence gaps resulting from this displacement:

Displacement of criminal activity is a potential consequence of legislation to outlaw serious and organised crime groups. Legislative reforms targeting criminal groups may lead to shifts in the dispositions and activities of some criminal groups or the displacement of criminal activities to new locations, new targets or other crime types. Displacement of criminal activity generally creates new intelligence gaps for national law enforcement, albeit sometimes for a relatively short period. Anticipating legislation that will effectively outlaw OMCGs in South Australia, there are indications that some outlaw groups have already relocated to other jurisdictions.²⁴

6.24 AUSTRAC, in its submission, also raised the potential for displacement of criminal activity as an unintended consequence of any legislative reform:

20 Commissioner Scipione, NSW Police Force, *Committee Hansard*, 29 September 2008, p. 26.

21 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007.

22 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 8.

23 Government of South Australia, *Submission 13*, p. 46.

24 ACC, *Submission 15*, p. 10.

The ACC note in their submission to the Committee that there is a risk of displacing criminal activity and driving crime syndicates underground as an unintended consequence of legislation to outlaw serious and organised crime groups. From our perspective as Australia's FIU, we agree with this assessment. This risk and the associated repercussions for law enforcement and intelligence need to be weighed carefully when considering the overall impact of legislative solutions of this nature.²⁵

6.25 The committee also heard that the lack of consistency in legislation between jurisdictions has administrative implications for law enforcement. As Detective Superintendent Paul Hollowood from Victoria Police highlighted for the committee:

Probably the biggest challenge we face in tackling organised crime across the board is interoperability between the jurisdictions.²⁶

6.26 The Australian Federal Police Association's submission highlights some of the administrative challenges arising from this lack of legislative consistency. These include barriers to information-sharing and extradition, when different rules apply in different jurisdictions regarding obtaining evidence.²⁷ The lack of legislative consistency creates problems for cross-border investigations. The Commonwealth has recently introduced a Bill which, if emulated by other jurisdictions, would resolve many of these difficulties. That Bill, and the harmonisation process, is discussed at paragraph 6.33 below.

Challenges in achieving harmonisation

6.27 Despite the identified concerns, harmonisation of legislation in the area of serious and organised crime appears to be difficult to achieve. The inquiry identified a number of reasons for this, such as: the federated nature of law enforcement in Australia; the different law enforcement, cultural, and social issues of each state and territory; and the different political priorities of individual governments.

6.28 The Commonwealth's constitutional framework also presents difficulties for the development of nationally consistent legislation, as officers from the Attorney-General's Department identified:

However, clearly it was difficult enough with terrorism to put a constitutional framework under it, and to actually have a general law like you have in the South Australian law would, of course, be much more difficult constitutionally. No doubt it would be a patchwork type outcome, which is not always good for law enforcement if there is uncertainty about what the coverage is.²⁸

25 AUSTRAC, *Submission 17*, p. 4.

26 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

27 Australian Federal Police Association, *Submission 3B*.

28 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 40.

6.29 A number of witnesses identified different jurisdictional law enforcement issues and priorities as a barrier to standardising legislation, despite the potential benefits for law enforcement:

Standardising any law makes it easier to police and makes it easier for the public to understand what the law is. But, whilst standardising law is a great concept, it is not easy for each state to adopt standardised laws. We have a number of standardised laws anyway. Whether they are for road rules or crimes, they were all based on the Westminster system anyway. It is just different laws for different states dealing with different problems.²⁹

6.30 The differing politics and priorities of federal, state and territory governments was identified as contributing to the development of a fragmented approach nationally to serious and organised crime. The establishment of the national DNA laws was frequently cited as an example of the complexity of achieving legislative harmonisation in Australia's federated system:

I was involved in a project to develop uniform DNA laws. Even though people were trying, it took a long time for the states and territories to get to a point where we had some consistency between them...One of the reasons it takes a long time—we certainly found it with DNA and we will probably find it with this too—is that the individual parliaments themselves have a different tolerance of how far the laws should go... That was quite a good example of how it takes some time to get consistency and how it is a very difficult process.³⁰

6.31 As noted earlier, the committee acknowledges that each state and territory has different law enforcement issues and priorities. As Acting Commissioner Hine told the committee:

It is one of those things where you would do a risk based assessment or an assessment of what is going to suit your community and what issues you are actually dealing with in your state or jurisdiction. We are not facing the same issues that South Australia are obviously facing; therefore, they saw the need to enact different legislation... We obviously do not have the same problems that they do. It is a matter, again, of what your community expects, what risks you are facing and what problems you are facing.³¹

6.32 However, considerable resources have been spent over an extensive period of time to harmonise the law enforcement landscape in Australia, yet progress in this area appears slow and piecemeal.

A huge amount of resources has been put into harmonising laws. The federal government has pretty well implemented a model criminal code. That has been implemented by the ACT, and other states have implemented bits and pieces of it. It is quite a good example of how governments can

29 Acting Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 14.

30 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 42.

31 Acting Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 11.

work cooperatively to put together good laws. At the same time, it is also an example of how independent each of the parliaments is. I am not saying that the area of serious and organised crime is not an area where we can work together in the way we have with proceeds of crime and other stuff like that, but it is likely to be an area where different jurisdictions will have different views and it is not something that would be achieved quickly.³²

Attempts to harmonise police investigation laws

6.33 In response to the significant problems that police face in conducting cross-border investigations, in 2002, Commonwealth, state and territory leaders agreed to adopt harmonised, national laws dealing with cross-border investigations covering controlled operations, electronic surveillance devices and witness anonymity.³³

6.34 The Standing Committee of Attorneys-General agreed to a set of model laws on these issues in 2004. The model laws have currently been adopted to varying degrees by the states and territories.

6.35 The adoption of the model laws by all jurisdictions would result in:

- an authority for a law enforcement agency to conduct a controlled operation to be recognised in other jurisdictions, making cross-border controlled operations much simpler;
- assumed identities acquired in one jurisdiction to be recognised in other jurisdictions; and
- a witness identity protection certificate issued in one jurisdiction to be recognised in other jurisdictions.

6.36 The committee notes that the Commonwealth government recently introduced the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, discussed in chapter 5, which seeks to implement model laws at the federal level relating to controlled operations, assumed identities and witness identity protection.

The intent of the model legislation is to harmonise, as closely as possible, the controlled operations, assumed identities and protection of witness identity regimes across Australia and enable authorisations issued under a regime in one jurisdiction to be recognised in other jurisdictions.³⁴

6.37 Key aspects include:

32 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 43.

33 Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, Leaders Summit on Terrorism and Multijurisdictional crime, *Report on cross-border investigative powers for law enforcement*, November 2003.

34 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, p. 46.

- Providing for protection from liability to informants who participate in a controlled operation;
- providing for recognition of state and territory controlled operation laws;
- extending the timeframes for controlled operations (although to a lesser extent than under the model laws);
- streamlining reporting requirements;
- increasing the Ombudsman's inspection powers;
- prescribing offences for the unauthorised disclosure of information;
- introducing a new assumed identities regime, which recognises state and territory assumed identities;
- expanding the class of people who may be authorised to assume identities to intelligence officers and foreign law enforcement officers;
- introducing a new witness identity protection regime which recognises state and territory witness protection laws; and
- introducing offences for the unauthorised disclosure of protected witness' identities.³⁵

6.38 The committee commends the Commonwealth for its work to implement the model laws and encourages all state and territory governments to give proper consideration to the implementation of the model laws.

The importance of political will

6.39 A national approach to serious and organised crime based upon national priorities and legislative harmonisation is dependent upon political will.³⁶ The committee notes that the senior law enforcement officers with whom it met were all cognisant, if not vocal, about the importance of political will to remove or minimise identified legislative and administrative barriers.

Having nationally consistent laws in relation to anything is obviously going to be an advantage, again, to the public and to law enforcement, but again it comes down to the level of risk that you have within your community, the level of laws governing your community and what your community is going to accept... I hear your question. It is probably more a question for your side of the table than for this side of the table...³⁷

35 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, pp. 46-50.

36 The importance of political will is also canvassed at length in The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands, June 2009*, http://www.apf.gov.au/Senate/committee/acc_cte/laoscg/delegation_report/delegationfinal.pdf

37 Acting Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 15.

6.40 The committee notes consideration is being given to the development of model legislation to provide a nationally consistent approach to addressing serious and organised crime through the Standing Committee of Attorneys-General (SCAG) and the Ministerial Council for Police and Emergency Management – Police (MCPEMP).

6.41 SCAG is comprised of the Attorneys-General of each state and territory, the Attorney-General of the Commonwealth and the Attorney-General of New Zealand. It provides a forum for Attorneys-General to discuss and progress matters of mutual interest. SCAG seeks to achieve uniform or harmonised action within the portfolio responsibilities of its members. SCAG meets three times per year.

6.42 The committee notes that at the SCAG meeting in April 2009, Ministers agreed to develop a national response to combat organised crime. In summary, they:

- noted that the Commonwealth should develop an Organised Crime Strategic Framework;
- noted the Commonwealth's intention to consider the introduction of a range of reforms including:
 - strengthened assets confiscation provisions, including unexplained wealth;
 - consorting laws;
 - police powers;
 - telecommunications interception; and
 - addressing the joint commission of criminal offences;
- agreed that states and territories would consider these legislative issues if they had not already done so, and develop model provisions;
- agreed to arrangements to ensure cooperation between jurisdictions in relation to organised crime, including coordinated law enforcement priorities; and
- agreed to establish a SCAG officers' group to undertake work on interoperability and information-sharing measures.³⁸

6.43 The Ministerial Council for Police and Emergency Management – Police (MCPEMP) (formerly known as the Australasian Police Ministers' Council) promotes a coordinated national response to law enforcement issues to maximise the efficient use of police resources. Since 1986, MCPEMP has been involved in efforts to coordinate the national approach to organised crime.

6.44 MCPEMP is comprised of the Ministers responsible for policing from the Commonwealth, each of the states and territories and New Zealand. The chairmanship of MCPEMP rotates annually. MCPEMP meets twice per year (with associated officers meetings).

38 See Appendix 8 for the SCAG 'Resolutions for a national response to combat organised crime'.

6.45 Commissioner Scipione informed the committee that MCPEMP sought to consider and enact complementary and harmonised legislation targeting serious and organised crime:

In June 2007 the Ministerial Council for Police and Emergency Management—Police, commonly known as MCPEMP, established a working group to develop a national approach to gangs. At the November 2007 MCPEMP meeting, each of the jurisdictions agreed to review its legislation pertaining to the disruption and dismantling of serious and organised crime and to consider enacting complementary and harmonised legislation to achieve this outcome.³⁹

6.46 Similarly, the Government of South Australia also noted in its submission that governments through the MCPEMP are seeking to progress a nationally consistent approach to serious and organised crime.⁴⁰

6.47 The committee commends the Commonwealth, state, and territory governments for taking a coordinated approach to the issue of serious and organised crime but urges that the issue of serious and organised crime continue to be viewed as an area of national importance requiring both continued political focus and resource allocation.⁴¹

Information and intelligence sharing

6.48 The increasingly multi-jurisdictional and transnational nature of serious and organised crime was a significant theme to emerge during the inquiry, as was the need for law enforcement agencies to share both information and intelligence to deal with this aspect of criminal activity. Mr Jeffery Buckpitt, from the Australian Customs Service, told the committee:

The timely exchange of information and intelligence amongst law enforcement agencies is crucial to counteracting the increasingly transnational and multi-jurisdictional nature of serious and organised crime activity. Over the coming years, Customs anticipates an increase in the volume of trade and passenger movements across the Australian border in concert with growth in the sophistication and complexity of the serious and organised crime environment. In this context the importance of timely, coordinated and appropriate responses by Australian policy, regulatory and

39 Commissioner Scipione, New South Wales Police Force, *Committee Hansard*, 29 September 2008, p. 23.

40 Government of South Australia, *Submission 13*, p. 48.

41 The committee also acknowledges the role played by the Criminal Law Branch of the Attorney-General's Department which is coordinating the Commonwealth's involvement in the national response to combat organised crime, including acting as the Secretariat for the Senior Officers' Group on Organised Crime. In particular, the Organised Crime Task Force, established within the Criminal Justice Division, will develop a Commonwealth Organised Crime Strategic Framework in partnership with relevant agencies.

law enforcement agencies to serious and organised crime cannot be underestimated.⁴²

6.49 While a number of witnesses identified the importance of information and intelligence sharing, information exchange appears to be problematic. When asked what mechanisms would assist law enforcement agencies in tackling serious and organised crime, Assistant Commissioner Tim Morris, from the AFP, told the committee:

...anything that would assist in harmonising the transfer of information across jurisdictions in Australia.⁴³

6.50 During the committee's previous inquiry into *the future impact of serious and organised crime on Australian society*,⁴⁴ the committee examined at length, issues around information and intelligence sharing and databases. It is not the intention of the committee to revisit in any detail the issues canvassed in that report. However, it is apparent that law enforcement agencies are still hampered by many of the same issues in regard to information and intelligence sharing between agencies, across jurisdictions and with international partners.

The Australian Criminal Intelligence Database

6.51 Evidence to this inquiry focused on the Australian Criminal Intelligence Database (ACID). As required by the *Australian Crime Commission Act 2002*, the ACC provides this national criminal intelligence database. ACID is a 'secure, centralised, national repository for criminal intelligence',⁴⁵ which enables the sharing of intelligence between Commonwealth, state and territory law enforcement agencies. Mr Kitson from the ACC characterised ACID as follows:

ACID sits as the sole national criminal intelligence repository...It is perhaps best described as a place where law enforcement agencies and a relatively select number of other agencies can go to search nationally held information about a particular crime type. Some jurisdictions use ACID as their sole intelligence database, so it will include all of their intelligence from street-level crimes to relatively—if I can take the risk of describing it thus—insignificant crimes compared with, say, nationally significant crimes. But it also contains information about things like clandestine laboratories, and we will include information about some of the major crime figures.⁴⁶

42 Mr Buckpitt, Australian Customs Service, *Committee Hansard*, 29 September 2008, p. 15.

43 Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 29.

44 PJC-ACC *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007.

45 ACC, *Australian Crime Commission Annual Report 2007-08*, p. 19.

46 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 21.

6.52 The ACC has made a number of enhancements to the database over time such as the addition of new analysis tools and improved search functionality.⁴⁷ This was noted by witnesses to the inquiry. Mr Keen, Director of Intelligence with the CMC in Queensland, noted that there had been a number of improvements with respect to the usefulness to ACID in the past few years and that the ACC had encouraged greater participation across the states in uploading information to ACID.

6.53 The value of law enforcement information or intelligence depends upon the quality and completeness of the information being placed in to the system. Mr Keen told the committee:

It still comes down to the fact that it is only as good as the input. You need to have the different agencies responding and putting it in in a very comprehensive manner.⁴⁸

6.54 Mr Keen went on the note:

You would probably need to check with the Australian Crime Commission, but I suspect they would say that some agencies are better than others and that can come down to simply our workload. A lot of police services, in particular, have such high volumes that it is very hard for them to always put that intelligence onto the database in a timely manner.⁴⁹

6.55 The unevenness in intelligence exchange presents limits to how comprehensive a picture of organised crime can be elicited. Mr Kitson, from the ACC, emphasised the need for ongoing investment in information and intelligence technologies and their use. He stated:

The challenges of maintaining a modern comprehensive and cutting-edge information technology system are huge. There is no doubt that we will face challenges as we step into the future about the funding of the existing ACID and ALEIN arrangements. At the moment I believe they represent a good range of tools for us and for our partner agencies, but they will continue to require investment into the future.⁵⁰

The need for a consistent and standardised approach

6.56 A number of witnesses raised the need for a nationally consistent and standardised approach to the collection and storage of information, with the current fragmented systems identified as a challenge for law enforcement:

To make use of intelligence and information you have to disseminate it to someone for action... In terms of the quality of information that comes to the ACC, we are always dependent on how the other agencies compile their

47 ACC, *Australian Crime Commission Annual Report 2007-08*, p. 20.

48 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 30.

49 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 30.

50 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 4.

information, how they express their information. There are constant challenges for all of law enforcement, particularly when we come to share information nationally, about the standardisation of terms. I think we said to this committee in a different context that different jurisdictions might record methylamphetamine differently; they might record something as ice or as crystal methylamphetamine. That presents some challenges in validating the quality of information that we get.⁵¹

6.57 The committee was told that several Commonwealth law enforcement agencies were considering a greater level of collaboration in the area of information and communications technology (ICT). The committee commends this approach and views this collaboration as a means to standardise some aspects of information collection and storage:

If we take the specific area of ICT, yes, I think there are some compelling arguments for greater collaboration, particularly when we are all investing in major new systems as well, which we all inevitably need to do to keep pace with technology and with the demands of acquiring, holding, using and appropriately managing increased volumes of datasets. The ACC has worked with some of its Commonwealth partners to examine systems that might apply across Commonwealth law enforcement agencies. We have talked to Customs and to the AFP about investing jointly in new systems.⁵²

Enhanced interoperability

6.58 A previous committee inquiry⁵³ noted that multiple information and intelligence databases and case management systems exist across Australia as a result of each jurisdiction establishing and maintaining its own systems and technologies. The inquiry also identified that the interoperability of these systems did not allow for the smooth transfer of information and created vulnerabilities for law enforcement agencies and opportunities for organised crime to escape detection. While it was acknowledged that a single national system for intelligence, information or case-management was not feasible, it was recommended that steps be taken to enhance the interoperability of the existing systems.

6.59 As noted above, the ACC has improved the connectivity of its databases, however the ACC again confirmed the need to pursue greater interoperability of systems to assist information and intelligence sharing across jurisdictions:

In terms of national approaches, we have used a lot of the funding that we had arising out of the review of aviation security and policing, otherwise known as the Wheeler review, to help jurisdictions to contribute to ACID to improve connectivity so that we would overcome some of the obstacles of

51 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 5.

52 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 21.

53 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian Society*, September 2007.

incompatibility of technology and language used in the databases so that there is a seamless transition between the databases. As long as we have our current system of government, one of the most efficient ways of doing things is to make the existing systems talk to each other more effectively. The scale of enterprise that would be required to dispense with the existing systems and replace them with a whole national framework would be beyond measure, I think.⁵⁴

Legislative restrictions

6.60 The committee was informed of legislative barriers to the exchange of information between agencies and organisations. However, it was noted that information sharing between jurisdictions and between agencies is an evolving process:

Indeed that scope as to partner agencies is constantly evolving so there is probably no point in time when it is a static picture. I think we will always need to continue to strive to share information and we could never be satisfied that we have a comprehensive set of arrangements. I am confident that it is as good as it could be for the most part. There are areas where we need to work harder and areas where we would welcome greater assistance from some of our partner agencies and areas where perhaps our own legislation might enable us to share information better, particularly with the private sector.⁵⁵

6.61 During discussions with a number of international law enforcement agencies legislative barriers to sharing information both domestically and internationally was raised as an issue. Assistant Commissioner Mike Cabana, from the Organized Crime Committee, Federal and International Operations, Royal Canadian Mounted Police, told a Canadian Parliamentary Committee:

I was talking about the multi-faceted approach, is to deal with the importance for us of ensuring the enforcement community's ability to share information and intelligence between agencies, both domestically and internationally...

In the legislative reviews, aside from lawful access there's also a need to look at some of the legislation put in place, sometimes several decades ago, governing the exchange of information—including the Privacy Act—to make sure that federal agencies can share the intelligence, among themselves and with the provincial and municipal agencies and vice versa. A gap exists now that is actually putting Canadians at risk.⁵⁶

54 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 21

55 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 4.

56 Standing Committee on Justice and Human Rights, *Committee Hearing* 25 March 2009, by Assistant Commissioner Mike Cabana, Organized Crime Committee, Federal and International Operations, Royal Canadian Mounted Police.

6.62 One of the specific problems that the committee heard about was that created by differences in privacy legislation. Some international privacy regimes, such as the EU model, require that agencies cannot share personal information with their counterparts in another jurisdiction unless that jurisdiction has equivalent privacy protections. The committee heard that this has resulted in delays and barriers to information sharing between law enforcement agencies.

6.63 In Australia, while legislative barriers currently exist with regard to some aspects of information exchange, the committee notes that these matters are being progressed. Mr Cranston from the Australian Taxation Office, told the committee:

The tax office has a suite of powers at its disposal under the various acts we administer. This was enhanced with a relatively newly acquired power in April 2007 to enhance information sharing—section 3G in connection with the Wickenby task force. In the year ending 30 June 2008 the tax office made 133 disclosures of information acquired under taxation law to Wickenby agencies for the purpose of this task force.⁵⁷

Multi-agency taskforces

6.64 During the inquiry the committee formed the view that multi-agency taskforces greatly enhance information and intelligence sharing and allow a range of specific expertises to be brought to investigating a criminal issue. The committee heard that Project Wickenby was an example of this approach:

I believe Project Wickenby has brought together five agencies with one outcome. I think it has been successful.⁵⁸

6.65 Mr Neil Jensen, from AUSTRAC, highlighted the effectiveness of regulatory approaches and law enforcement processes being brought together in multi-agency taskforces to investigate potential criminal activity:

It is important for each agency to have a specific expertise... Each agency brings to the table, if you like, the expertise that it has available....We have financial transaction analysis expertise and we provide that to the ACC and also to other agencies. But it is important that that is identified and that any changes do not diminish the skills set that we have, or that each of the other agencies has available to them. We do [not] want duplication; we just need it to be complementary.⁵⁹

6.66 Similarly, Mr Michael Cranston, Australian Taxation Office, told the committee that a taskforce approach better allows for complex and multi-jurisdictional issues to be investigated:

57 Mr Cranston, Australian Taxation Office, *Committee Hansard*, 6 November 2008, pp 68-69.

58 Mr Cranston, Australian Taxation Office, *Committee Hansard*, 6 November 2008, p. 75.

59 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, pp. 29-30.

The Project Wickenby task force has enabled the agencies involved to deal with very complex structures and arrangements across borders. The Wickenby task force approach is proving effective in tackling abusive use of tax havens. This approach is equally effective in dealing with organised crime groups that have similar complex business models and arrangements.⁶⁰

6.67 The committee notes that at a Commonwealth level, agencies and organisations appear to be moving towards greater engagement with partners. Any attempt to breakdown organisational silos is to be commended. Mr Neil Jensen from AUSTRAC outlined that agency's approach:

We play an integral part in the whole-of-government task force operations and continue to work closely with the Australian Crime Commission and other agencies. We have in place memorandums of understanding with 34 domestic partner agencies. Our network of outposted liaison officers means that we are able to provide direct on-site support to a number of partner agencies. In addition to operational intelligence support we also have a research and analysis program which produces strategic assessments, analyses feedback from our partner agencies, and disseminates information on money laundering risks and typologies.⁶¹

6.68 The committee notes that law enforcement agencies and officers continue to work together to minimise operational and legislative gaps. The committee commends them for their professionalism in this regard:

...coordination across the federation will always remain a challenge that we have to keep working on...⁶²

Secondments to other agencies

6.69 The secondment of law enforcement and departmental officers to other agencies was also identified as an effective mechanism to enhance information sharing.

We are again probably unique being a smaller jurisdiction. We work very closely with the Australian Crime Commission, the Australian Federal Police, Customs and the Attorney-General's Department, so we have representatives of this state in all those organisation, so we work very closely with them. We have a good intelligence-sharing network with those organisations, and we often share resources across the various organisations.⁶³

60 Mr Cranston, Australian Taxation Office, *Committee Hansard*, 6 November 2008, pp 68-69.

61 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 20.

62 Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 32.

63 Acting Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 8.

6.70 The committee was able to see first hand the value of placing law enforcement officers with international law enforcement agencies. The committee was particularly impressed with the effectiveness of AFP officers working with international partners. Assistant Commissioner Mandy Newton, from the AFP, told the committee:

[W]e have a person placed at SOCA and a member of SOCA placed in the Australian Federal Police as well. We work very closely together and have joint groups that come together on a regular basis across the world to discuss new technologies, new crimes and internet related or non-financial-transaction types of crimes and how we counter those, including legislation across countries, and we monitor each other's successes in those areas.⁶⁴

Integrated justice units

6.71 In their submission, the Police Federation of Australia quoted Justice Moffitt, former President of the NSW Court of Appeal, who stated:

Most Australians have come to realise that, despite the many inquiries, convictions, particularly of leading criminals, are few and that organised crime and corruption still flourish. The path to conviction is slow, tortuous and expensive. ... The criminal justice system is not adequate to secure the conviction of many organised crime figures. ...

Those participating in organised crime or white-collar crime, often part of organised crime, are usually highly intelligent and often more intelligent than the police who deal with them. They have the best advice. They exploit every weakness and technicality of the law. When they plan their crimes they do so in a way that will prevent their guilt being proved in a court of law. They exploit the freedoms of the law, which most often are not known and availed of by poorer and less intelligent members of the community.

Crimes are planned so there will be no evidence against those who plan and, if by accident there is, it is often suppressed by murder or intimidation.⁶⁵

6.72 During discussions with both the Royal Canadian Mounted Police and Senior Counsel from the Department of Justice and the Public Prosecution Service of Canada, the complexity of the Canadian criminal justice system was raised as a significant challenge facing both the judiciary and law enforcement. The increasing sophistication of organised criminal enterprises and their activities requires the judiciary and law enforcement officers to have greater specialised knowledge. Of concern, was the practice of specialised defence counsel who used the complexity of the case to considerably slow the judicial process.

6.73 Department of Justice officers highlighted a range of reforms currently being implemented in Canada to address the challenges that complex criminal cases present

64 Assistant Commissioner Newton, AFP, *Committee Hansard*, 6 November 2008, p. 30.

65 Police Federation of Australia, *Submission 3C*, p. 12.

to law enforcement and prosecutors. As discussed in chapter 5, Integrated Justice Units were flagged as a significant new approach. The units integrate the investigation and prosecution of criminal cases by having both police and prosecutors involved in cases from the outset. This approach moves away from the more traditional silo approach in which police are responsible for the investigation of a case and then hand it over to the Public Prosecution Service of Canada to prosecute. Integrated Justice Units allow prosecutors to be involved with police to ensure that the case and brief of evidence are collected and prepared in a manner which is compatible with the prosecution process. It was noted that while this approach has little public or political appeal, it has significant benefits for law enforcement.

6.74 This integrated approach was raised during the inquiry by the South Australian Government who argued:

Law enforcement training of investigators, intelligence practitioners and prosecutors has traditionally focused on the criminal justice system and its corresponding rules of evidence. A multi-faceted investigation approach combining civil administrative procedures with the criminal law has generally been limited and dealt with by a select group of employees. Enhanced knowledge, skills and aptitude across broader investigation, intelligence and prosecutorial disciplines will be required to ensure effective application for this 21st Century investigation approach.⁶⁶

6.75 The committee sees great merit in such an approach. By involving both law enforcement officers and judicial officers, the process is more targeted and can be developed in such a manner as to more readily satisfy the requirements of a successful prosecution. As noted earlier in this report, individuals involved in criminal activities are increasingly able to hide their illegal activities through the use of professionals and complex business structures. Within this context integrated justice units are a fitting response.

6.76 The committee acknowledges that while the issue of information and intelligence sharing remains a major impediment for law enforcement agencies, law enforcement officers do work together to enhance information sharing and operating procedures.

...we work very closely with each commissioner to make sure that we share information and have a common set of operating procedures or approaches to various threats.⁶⁷

6.77 The committee urges all jurisdictions to work collaboratively to resolve key issues around information and intelligence sharing.

66 Government of South Australia, *Submission 13*, p. 49.

67 Acting Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 15.

International partnerships

6.78 In the committee's report on the delegation to North America, Europe and the United Kingdom,⁶⁸ the committee clearly identified the global and transnational nature of serious and organised crime. The submission from the Australian Crime Commission noted:

The threat from organised crime demands the pursuit of constant innovation in law enforcement capabilities and adaptation to the changing threat environment. The ACC is developing advanced capability to generate, prioritise and proactively monitor groups and individuals that represent the highest threat to the Australian community and economy and to attack criminal enterprise structures that are highly successful at generating wealth. Of particular concern is the extent that offshore connections can manipulate, influence and assist the flight of capital from the Australian economy.⁶⁹

6.79 Serious and organised crime is a global problem which increasingly requires global solutions. As Dr Dianne Heriot from the Attorney-General's Department told the committee:

To combat organised crime effectively, there needs to be a global approach as well as an effective regional and national approach.⁷⁰

6.80 Countries increasingly have to engage with international partners, and while Australia faces a range of domestic hurdles regarding the need to harmonise and coordinate law enforcement approaches to serious and organised crime, increasing challenges are also emerging in regard to engagement and coordination globally:

It is not just a matter of getting our laws right with regard to operating across the nation; it is what is occurring now overseas that is starting to become a bigger challenge for us.⁷¹

6.81 A key issue to emerge in the inquiry was the ability to share information and to share it in a timely manner with international law enforcement partners:

...getting information from offshore jurisdictions. That is a particular concern for us—not only the process, but the timing of that and the extended time that it takes.⁷²

68 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands, June 2009*, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

69 ACC, *Submission 15*, p. 2.

70 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 35.

71 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

72 Mr Barlow, Australian Taxation Office, *Committee Hansard*, 6 November 2008, p. 69.

6.82 The committee heard from several commonwealth departments about Australia's need to engage with international partners and about the strategies employed to facilitate productive bilateral relationship. Mr Michael Cranston, from the Australian Taxation Office told the committee:

The first answer to that is that it is not just an Australian problem; this is a global problem with tax havens, and we are working closely with the OECD to get information exchange agreements in place, which will enable us to have this particular information that we find necessary disclosed to us. We have negotiated four taxation information exchange agreements, and there is global pressure for other tax haven jurisdictions to also go down that path and enter agreements with countries. We are very proactive in that area.⁷³

6.83 Similarly, in its submission, AUSTRAC told the committee that its international network is both effective and vital in the exchange of information, and that the agency has been successful in establishing exchange instruments with 53 international financial intelligence units (FIUs):

AUSTRAC also has exchange instruments in place with 53 international FIUs. Through AUSTRAC, partner agencies are able to share information on operational cases with international counterparts. AUSTRAC's exchange instruments provide access to an international network of financial intelligence and enables Australia to trace transactions as funds flow across borders... these ties are vital to the early detection of and response to emerging money laundering and terrorism financing threats and trends in the region.⁷⁴

6.84 Mr Jeffery Buckpitt from the Australian Customs Service spoke of the importance of Customs' domestic and international partnerships to successfully tackle serious and organised crime:

Customs's engagement in cooperative and collaborative partnerships with domestic and international law enforcement and regulatory agencies greatly enhances our role in disrupting and dismantling serious and organised criminal activity.⁷⁵

6.85 The committee heard that effective information sharing needs to occur through both formal and informal networks. One informal model that the committee heard has been particularly successful is the Camden Assets Recovery Inter-agency Network (CARIN), of which Australia is a member. CARIN provides an informal network of contacts between law enforcement officers working in assets recovery. The committee did not look at the model in depth, however, further information about it can be found at Appendix 9.

73 Mr Cranston, Australian Taxation Office, *Committee Hansard*, 6 November 2008, p. 70.

74 AUSTRAC, *Submission 17*, p. 4.

75 Mr Buckpitt, Australian Customs Service, *Committee Hansard*, 29 September 2008, p. 15.

6.86 The committee also heard about 'Intelligence Fusion Centres' (IFC) in a range of international locations, which provide a forum for international sharing of intelligence and resources, as well as a mechanism for providing technical training and assistance. The committee was told of the following Fusion Centres:

- Spain is the lead nation for the Marine Operations Analysis Centre which brings together seven nations to share intelligence on Class A drug shipments.
- France is the lead nation for an IFC in the Mediterranean with a focus on human smuggling.
- UK is the lead nation for an IFC in West Africa.
- USA has an IFC in Miami with a focus on drug trafficking.⁷⁶

6.87 The committee was told that currently no IFC is located in the Oceania region. It was suggested that there is a case for one to be established in this region and that Australia is well placed to progress this issue.

Recommendation 7

6.88 The committee recommends that the Australian Government, in consultation with regional partners, give consideration to establishing an intelligence fusion centre in the Oceania region.

6.89 A second issue identified in relation to international partnerships, and related very much to the first issue, is the capacity of partner law enforcement agencies to engage in collaborative law enforcement strategies.

6.90 Australia has a range of programs which assist countries in the Asia-Pacific region to develop strong legislation and enhance their capacity to combat serious and organised crime.

6.91 The committee notes that the AFP has a number of highly effective programs whereby it assists its counterparts in the region with capacity building in law enforcement.

6.92 The Attorney-General's Department has a range of teams that assist other countries in the region with capacity building. This includes:

- The Regional Legal Assistance Unit, which assists South-East Asian countries in the development of effective terrorism and transnational crime legislation

76 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands, June 2009*,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

and advises and conducts training on the 'practical implementation of legislation'.⁷⁷

- The Anti-Money Laundering Assistance Team (AMLAT), which assists Pacific Island countries with the implementation of anti-money laundering and counter-financing of terrorism arrangements.⁷⁸
- The Pacific Police Development Program (PDPP), which is delivered jointly by the Attorney-General's Department and the AFP and 'provides legal policy and legislative assistance to Pacific island countries on police and criminal justice issues'.⁷⁹

6.93 The committee was informed of a range of international partnership across Commonwealth agencies which assist law enforcement in the Asia-Pacific region.⁸⁰ The committee views these programs as a key element in addressing serious and organised crime in our region. It is through the development of strong international partnerships and capacity building, that law enforcement, is better equipped to ensure that Australia is not an attractive destination for transnational crime. As Assistant Commissioner Tim Morris from the AFP told the committee:

...the profits are so huge and so lucrative that people will take the risk continually. They are too big to ignore, so we are always going to have players willing to inject themselves into the market no matter what the risk. So I think the ultimate, if you like, endgame for us is to make the Australian market one of the more risky in the world to deal in, so that people will perhaps look at other markets than Australia—this is from an international perspective—to do their business and make their money in.⁸¹

A supportive suite of law enforcement capabilities

6.94 In addition to appropriate laws targeting organised crime groups, and strong mechanisms by which criminal assets can be confiscated, law enforcement agencies need a range of capabilities to support their efforts to dismantle and disrupt serious and organised crime. The Attorney-General's Department's submission sets out some of the key policing tools:

Controlled operations are undercover operations where law enforcement officers conceal their identities to associate with people suspected of being

77 Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 January 2009), p. 1.

78 Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 January 2009), p. 2.

79 Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 January 2009), p. 2.

80 Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 January 2009), p. 4.

81 Assistant Commissioner Tim Morris, AFP, *Committee Hansard*, 6 November 2008, p. 32.

involved in criminal activity and to gather evidence or intelligence about them. During a controlled operation, it will often be necessary for law enforcement officers to commit offences to obtain evidence and to conceal their law enforcement role.

Assumed identities are false identities used by undercover operatives to investigate an offence or gather intelligence. Assumed identities protect undercover operatives engaged in investigating crimes and infiltrating organised crime groups. To substantiate their assumed identities, undercover operatives need proper identification documents, such as birth certificates, drivers' licences, passports and credit cards. In the absence of a verifiable identity, the safety of undercover operatives can be jeopardised.

Witness identity protection in some circumstances, it is necessary to allow an undercover operative to give evidence in court proceedings without disclosing his or her true identity. This is to ensure the personal safety of the operative or his or her family. Certain measures are provided by Australian jurisdictions to protect the identity of an operative; including holding court proceedings in private, excusing the operative from disclosing identifying details, and enabling an operative to use a false name or code name during court proceedings.

Coercive powers enable a person to be compelled to give oral evidence and/or produce documents or things.⁸²

6.95 Regarding the importance of witness protection laws, the Queensland Crime and Misconduct Commission (CMC) explained:

Witness protection is seen worldwide as an increasingly valuable asset in the suppression and prosecution of organised crime. Organised crime flourishes in an environment where threats encourage silence, and the witness protection program supports witnesses through allowing them to safely provide crucial evidence in relation to serious offences; evidence that, due to fear and intimidation, may have otherwise gone unheard... The role of witness protection in investigating organised crime is instanced by the success of a witness protection operation conducted by the CMC.⁸³

6.96 The South Australian police agreed with these sentiments, and discussed the special challenges that organised crime groups present to the ability of law enforcement to gain evidence.

...we have had many victims that, because of the very real threats they perceive, do not want to proceed or give evidence because they feel that they may not be protected. Some victims feel that the criminal justice system may not support them, and the likelihood of getting a successful prosecution for witness intimidation is extremely low because those witnesses for the most part will not give evidence.⁸⁴

82 Attorney-General's Department, *Submission 16*.

83 CMC, *Submission 6*, p. 9.

84 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 7.

6.97 The committee also received evidence during this inquiry about the importance of telecommunication interception and other surveillance devices to law enforcement. The committee also heard about the challenges that the dynamic and fast-paced developments in technology present to law enforcement in this area. In its discussions with law enforcement agencies in Canada, the committee was told that developments in telecommunications often occur without the provision of 'backdoor access' for law enforcement, so that law enforcement agencies are unable to intercept some of the newer telecommunications technologies.

6.98 Assistant Commissioner Mike Cabana, Organized Crime Committee, Federal and International Operations, Royal Canadian Mounted Police told the Canadian Standing Committee on Justice and Human Rights, that:

[An area] we need to progress is the area of lawful access. While communications technology has evolved considerably and criminals are embracing and taking advantage of it, Canadian law has not kept pace with the rapid changes. Increasingly, complex technologies are challenging conventional lawful access methods. Communication carriers are not required to provide access technology. Law enforcement agencies are simply asking that telecommunication carriers build interception capability into existing or new networks and provide access to important customer name and address information.⁸⁵

6.99 Consequently, Canadian law enforcement agencies are required to develop their own post-implementation solutions, which can be both complex and costly.

6.100 In contrast, in the United States (US), the committee heard that it is a requirement under the *Communications Assistance for Law Enforcement Act 1994* (CALEA) that before any telecommunications provider can roll-out services they must provide 'backdoor' access for law enforcement.

6.101 CALEA enhances the ability of law enforcement and intelligence agencies to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of telecommunications equipment, modify and design their equipment, facilities, and services to ensure that they have built-in surveillance capabilities. A paper from the Congress Research Service notes:

The Communications Assistance for Law Enforcement Act (CALEA, P.L. 103-414, 47 U.S.C. 1001-1010), enacted October 25, 1994, is intended to preserve the ability of law enforcement officials to conduct electronic surveillance effectively and efficiently despite the deployment of new digital technologies and wireless services that have altered the character of electronic surveillance. CALEA requires telecommunications carriers to modify their equipment, facilities, and services, wherever reasonably

85 Standing Committee on Justice and Human Rights, Committee Hearing 25 March 2009, by Assistant Commissioner Mike Cabana, Organized Crime Committee, Federal and International Operations, Royal Canadian Mounted Police.

achievable, to ensure that they are able to comply with authorized electronic surveillance actions.⁸⁶

6.102 In the years since CALEA was passed it has been modified to include all VoIP (Voice over Internet Protocol) and broadband internet traffic. However, the committee was told that criminal organisations have sought to evade surveillance of their telecommunications by developing their own broadband internet system using wireless servers.

6.103 During this inquiry the issue of telecommunications access was not specifically discussed with Australian law enforcement agencies. However, this matter was discussed at length in the committee's previous inquiry and a number of concerns were identified. The committee considers it is imperative that legislation allows law enforcement to keep pace with developments in technology, at a reasonable cost.

Resources

6.104 While this inquiry predominantly considered legislative arrangements to outlaw serious and organised crime groups, paramount to any attempts to tackle serious and organised crime is the operational response. The success or otherwise of legislative tools is dependant upon the existence of appropriate law enforcement resources to monitor, police and prosecute any legislative arrangements. The Hon. Leonard Roberts-Smith QC, Commissioner for the Corruption and Crime Commission of Western Australia, informed the committee that:

Legislative solutions need to be appropriately framed to strike cleanly, even surgically, at the criminal conduct, individuals or organisations which they are intended to affect whilst minimising the collateral effects on others. They must be crafted to produce an effective, practical result... But even if the legislation meets these criteria it will not work. That is to say, it will not produce the desired practical social result unless the law enforcement agency which is responsible for administering it is given the financial and other resources to do so.⁸⁷

6.105 He went on to argue:

The relative success of these initiatives can be put down to a focus of resources sustained over a significant period of time... A direct consequence of this intense law enforcement activity was the collection of intelligence on, and an understanding of, their criminal activities and their method of operation. This has better informed both tactical and strategic decisions. Unfortunately, the inability to sustain this focus has enabled the gangs to rejuvenate and re-establish their presence within the criminal

86 Patricia Moloney Figliola, Congressional Research Service, *Digital Surveillance: The Communication Assistance for Law Enforcement Act*, <http://www.fas.org/sgp/crs/intel/RL30677.pdf> (accessed 2 June 2009).

87 The Hon Leonard Roberts-Smith QC, Corruption and Crime Commission of WA, *Committee Hansard*, 4 July 2008, p. 2.

landscape. The significance of persistent law enforcement attention, and the disruptive effect, cannot be understated and needs to be part of the broad strategy to deal with the problem... This confirms the belief that the sustained application of these resources to the problem is the most effective strategy in deterring, disrupting and discouraging organised and serious criminal activity.⁸⁸

6.106 In essence, the committee was told:

I think the police, properly resourced, do a terrific job.⁸⁹

6.107 The committee considers that while targeted legislative tools are critical, some of the measures being currently mooted, and which are canvassed in this report, will have significant resource implications for law enforcement agencies. The committee cautions that due consideration should be given to this aspect and that ultimately, legislative tools are only fully effective when law enforcement agencies have the human and technical resources to support them. The committee concurs with Assistant Commissioner Tim Morris:

...they are complex pieces of legislation. I sometimes wonder how much extra resource would need to go in to monitoring some of these pieces of legislation. We have a finite resource in the Australian Federal Police and in most law enforcement agencies. There would have to be a very careful calibration between the expected benefit and the resource that you would put into the back end to get the benefit.⁹⁰

Concluding remarks

6.108 This inquiry into legislative arrangements to outlaw serious and organised crime was established in part to consider the legislative developments in South Australia with the enactment of the *Serious and Organised Crime (Control) Act 2008*. This Act signalled a new approach on the part of law enforcement agencies in Australia to tackle the growing and complex issue of serious and organised crime.

6.109 This report has sought to present: a current snapshot of serious and organised crime in Australia; the increasing threat of transnational organised crime; and the current legislative developments to address this. Central to this inquiry was the examination of legislation which targets association offences, as this was the foundation of the *Serious and Organised Crime (Control) Act 2008 (SA)*.

6.110 During the course of this inquiry, political and public acceptance for association offences has changed. Initially all other states and territories adopted a 'wait-and-see' approach to the South Australian legislation. However, the events of

88 The Hon Leonard Roberts-Smith QC, Commissioner, CCC, *Committee Hansard*, 4 July 2008, p. 5.

89 Mr Ray, QC, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 57.

90 Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 30.

March 2009 at Sydney airport, in which a confrontation between two OMCGs resulted in the murder of one man and later the attempted murder of another, produced a concerted political response to target 'gang' membership.

6.111 A number of jurisdictions already had a range of association offences, but in light of the Sydney airport murder, these were enhanced to mirror, to a large degree, the legislation in South Australia. While not all states and territories acted as swiftly as NSW, a number have publicly stated that they are considering enhancing or enacting association offences.

6.112 The committee acknowledges that OMCGs present a very public and threatening face of serious and organised crime. The committee has also heard that the structure of OMCGs, and indeed of many groups involved in serious and organised crime, is sophisticated and allows them to evade law enforcement. Accordingly, it seems to be a logical response for law enforcement to attempt to restrict the members of criminal groups from meeting to plan and execute their activities. The committee sees some value in this response.

6.113 However, during this inquiry, the committee heard of a number of alternative methods for both restricting association, and for preventing serious and organised crime. In the committee's view, some of these approaches share many of the benefits of South Australia's laws without some of its difficulties, complexities and costs.

6.114 The committee also became aware that the threat of serious and organised crime goes far beyond OMCGs, and that the groups committing some of the most serious and lucrative crimes, and driving the lower-level criminal groups, do not have such a public face. Moreover, witnesses emphasised the changing nature of organised crime groups from tightly structured and enduring groups to loosely affiliated and transitory networks. The committee heard time and time again that organised crime is fundamentally motivated by financial profit, and that those directing serious and organised crime will be those benefiting most financially from it. Consequently, the committee also considered criminal asset confiscation in this report as another means of preventing serious and organised crime.

6.115 Chapter 5 of this report discusses in detail, legislative approaches to target and confiscate the proceeds of crime. The committee heard that by confiscating criminal assets, law enforcement can deprive organised criminals of the motive for and benefits of their activities, and restrict their ability to finance further criminal activities. The committee is persuaded that the confiscation of criminal assets is an effective way of tackling serious and organised crime. The committee commends the Commonwealth government for pursuing this approach and those states and territories that have or are also enhancing legislation in this area.

6.116 Finally, the committee's inquiry highlighted that appropriate legislative tools are only part of the law enforcement equation. The operational capacity of law enforcement agencies is paramount to any attempts to tackling serious and organised crime. Clearly, operational capacity is dependant on appropriate numbers of skilled

law enforcement personnel, but it is also dependant upon greater coordination of law enforcement approaches across the country, improved information and intelligence sharing arrangements, improved international partnerships, a supportive suite of law enforcement capabilities and adequate levels of resourcing.

6.117 As a result of the federated system of government, Australia's approach to law enforcement is currently fragmented. This situation presents opportunities for serious and organised crime and great challenges for law enforcement agencies. It is these vulnerabilities that criminal groups exploit. The committee recognises the significant challenges that Australian law enforcement faces in tackling serious and organised crime. In order to do this effectively, law enforcement agencies must be well supported with resources, law enforcement tools and administrative and policy arrangements. However, the committee urges that any legislative developments be considered and evidence-based rather than politically driven. Ill-considered legislation risks increasing the problems of Australia's already piecemeal legislative framework.

Senator Stephen Hutchins

Chair

Additional comments by the Liberal and Family First members of the committee

The Liberal and Family First members of the Committee believe that outlaw motorcycle gangs are serious criminal organisations and to believe otherwise is a dangerous misconception. Outlaw motorcycle gangs are a major player in serious and organised crime in Australia, particularly in the illegal drug trade.

The Report's recommendations do not directly target the dismantling of organised crime gangs or criminal syndicates. The Liberal and Family First members of the Committee strongly believe that anti-association laws/and or laws specifically aimed at dismantling organised crime groups are a crucial element of legislative arrangements to control organised crime groups involved in serious and organised crime.

Internationally, laws targeting criminal associations have been used with great effect:

- In Italy, anti-association laws in conjunction with unexplained wealth provisions have been pivotal in prosecuting major figures in the Mafia.
- In the United States, the Racketeer Influenced and Corrupt Organisations Act (RICO Act) has been used effectively to prosecute major figures in organised crime, including the heads of the Gambino and Genovese crime families and their known associates.
- In Canada, the Royal Canadian Mounted Police use laws targeting specific offences for participating with a criminal organisation to control outlaw motorcycle gangs, in particular the Hells Angels, which were very effective.
- In Hong Kong, anti-association laws were used with great effect against the Triads.

The *Serious and Organised Crime (Control) Act 2008* in South Australia includes anti-association provisions, as does the *Crime (Criminal Organisations) Act 2009* in NSW, and the Queensland Government has signalled its intention to implement similar anti-association laws.

Therefore, we strongly support national anti-association laws that target known criminal associates involved in organised crime.

It is our view that both anti-association laws AND unexplained wealth provisions are necessary in targeting serious and organised crime.

Senator Sue Boyce

Senator Steve Fielding

The Hon. Sussan Ley MP

Senator Stephen Parry

Mr Jason Wood MP

APPENDIX 1

List of public submissions

- 1 Dr Andreas Schloenhardt, Associate Professor, University of Queensland
- 1A Dr Andreas Schloenhardt (Supplementary Submission)
- 1B Dr Andreas Schloenhardt (Special Supplementary Submission)
- 2 Gilbert + Tobin Centre of Public Law
- 3 Police Federation of Australia
- 3A Police Federation of Australia (Supplementary Submission)
- 3B Australian Federal Police Association Branch of the Police Federation of Australia (Supplementary Submission)
- 3C Police Federation of Australia (Supplementary Submission)
- 4 Victoria Police
- 5 The Hon Jim Cox MP, Minister for Police and Emergency Management, Tasmania
- 6 Crime and Misconduct Commission, Queensland
- 7 The Hon David Campbell MP, Minister for Police, New South Wales
- 8 The Law Council of Australia
- 9 Dr Ben Saul, Director, Sydney Centre for International Law
- 10 Professor Arthur Veno, Monash University and Dr Julie van den Eynde, University of Queensland
- 11 Mr Leslie James Hunter
- 12 Mr Edward "Mac" Hayes, Longriders Christian Motorcycle Club
- 13 Government of South Australia
- 14 Mr Edward Withnell
- 15 Australian Crime Commission

- 16 Australian Government Attorney-General's Department
- 17 Australian Transaction Reports and Analysis Centre
- 18 Mr Juan de Soto
- 19 Mr Robbie Fowler, Outcasts Motorcycle Club
- 20 Northern Territory Police
- 21 Dr David Whittle
- 22 Mr Shane "Shrek" Griffiths
- 23 Mr Brad Parfitt
- 24 Northern Territory Government Department of Justice

Appendix 2

Public hearings and witnesses

Adelaide, Thursday 3 July 2008

Mr Adam Shand, Investigative Reporter (private capacity)

Law Society of South Australia

Mr Grant Feary, President

Mr George Mancini, Chair, Criminal Law Committee

Mr Geoff Britton, Member, Human Rights Committee

Longriders CMC Australia, Adelaide Chapter

Mr Edward 'Mac' Hayes, Founding Member and Public Relations Officer

Mr Basil Sumner, Associate Member

South Australian Bar Association

Mr Jonathan Wells QC, Immediate Past President and Executive Member

South Australia Police

Assistant Commissioner Anthony Harrison

Superintendent Desmond Bray

Chief Inspector Damian Powell

Perth, Friday 4 July 2008

Mr Mark Trowell QC (private capacity)

Mr Eddy Withnell (private capacity)

Corruption and Crime Commission of Western Australia

Commissioner the Hon Leonard Roberts-Smith RFD QC

Sydney, Monday 29 September 2008

Australian Customs Service

Mr Jeffrey Buckpitt, National Director Intelligence and Targeting

Dr Benjamin Evans, Acting National Director, Law Enforcement Strategy

Gilbert + Tobin Centre for Public Law, University of NSW

Professor George Williams, Foundation Director

Dr Andrew Lynch, Director

Ms Nicola McGarrity, Director, Terrorism and Law Project

NSW Police

Commissioner Andrew Scipione

Deputy Commissioner Naguib (Nick) Kaldas

Assistant Commissioner David Hudson

Hobart, Monday 27 October 2008

Professor Robert White, University of Tasmania (private capacity)

Tasmania Police

Acting Commissioner Darren Hine

Acting Deputy Commissioner Scott Tilyard

Inspector Fiona Lieutier, State Intelligence Service

Sergeant Steve Herbert, State Intelligence Service

Melbourne, Tuesday 28 October 2008

Professor Arthur Veno, Monash University, (private capacity)

AUSTRAC

Mr Neil Jensen, Chief Executive Officer

Ms Jane Atkins, Acting Executive General Manager

Mr Claude Colosante, Senior Manager, Operational Intelligence

Victoria Police

Detective Superintendent Paul Hollowood

Canberra, Thursday 6 November 2008***Attorney-General's Department***

Mr Geoffrey McDonald, First Assistant Secretary, Security and Critical Infrastructure
Division

Dr Dianne Heriot, Acting First Assistant Secretary

Dr Susan Cochrane, Acting Assistant Secretary

Ms Elsa Sengstock, Director, Criminal Law Branch Division

Ms Susan Mihalic, Acting Principal Legal Officer

Ms Mandy Angus, Senior Legal Officer, Criminal Law Branch

Australian Crime Commission

Mr Kevin Kitson, Acting Chief Executive Officer

Mr Michael Outram, Executive Director, Programs Division

Ms Kim Ulrick, Acting Executive Director, Strategic Outlook and Policy

Mr Michael Manning, Principal Specialist, Legal Policy and Reform

Mr Peter Brady, Senior Legal Adviser

Australian Federal Police

Assistant Commissioner Mandy Newton, National Manager, Economic and Special Operations

Assistant Commissioner Tim Morris, National Manager, Border and International

Australian Taxation Office

Mr Michael Cranston, Deputy Commissioner, Serious Non-Compliance

Mr Chris Barlow, Assistant Deputy Commissioner, Serious Non-Compliance

Mr Peter Zdjelar, Assistant Commissioner, Serious Non-Compliance

Department of Immigration and Citizenship

Mr Todd Frew, First Assistant Secretary, Border Security Division

Ms Laura Angus, Director, Strategic Policy Section, Compliance and Integrity Policy Branch

Law Council of Australia

Mr William Ross Ray QC, President

Ms Rosemary Budavari, Senior Policy Lawyer

Ms Sarah Moulds, Policy Lawyer

Police Federation of Australia

Mr Mark Burgess, Chief Executive Officer

Mr Jonathan Hunt-Sharman, Vice-President and President, Australian Federal Police Association

Brisbane, Friday 7 November 2008

Mr Rodger Cunningham (private capacity)

Bandidos Motorcycle Club

Mr Gary Dann, Road Captain

Hells Angels Motorcycle Club

Mr Errol Gildea, President, Queensland Chapter

Queensland Police Service

Deputy Commissioner Ian Stewart, Specialist Operations

Assistant Commissioner Ross Barnett, State Crime Operations Command

Detective Superintendent Brian Hay, Fraud and Corporate Crime Group

Superintendent Gayle Hogan, Organised Crime Group

Detective Acting Superintendent Robert Weir, State Intelligence Group

Crime and Misconduct Commission

Mr Christopher Keen, Director of Intelligence

Mr Andrew Stapleton Manager Intelligence

Australian Council for Civil Liberties

Mr Terry O'Gorman, President

Darwin, Monday 2 March 2009

Department of Justice

Elizabeth Morris, Deputy Chief Executive Officer, Policy Coordination

Northern Territory Police

Assistant Commissioner Mark McAdie, Crime and Support Service

Commander Colleen Gwynne, Crime and Support Command

Brisbane, Wednesday 4 March 2009

Professor Rod Broadhurst (private capacity)

Dr Andreas Schloenhardt, Associate Professor, University of Queensland
(private capacity)

Appendix 3

Answers to questions on notice and additional information

Questions on Notice

NSW Police Force (from public hearing, Sydney, 29 September 2008)

Professor Arthur Veno (from public hearing, Melbourne, 28 October 2008)

Law Council of Australia (from public hearing, Canberra, 6 November 2008)

Department of Immigration and Citizenship (from public hearing, Canberra, 6 November 2008)

Attorney-General's Department (from public hearing, Canberra, 6 November 2008)

Australian Taxation Office (from public hearing, Canberra, 6 November 2008)

Australian Taxation Office (from public hearing, Canberra, 6 November 2008)

Australian Federal Police (from public hearing, Canberra, 6 November 2008)

Australian Federal Police (from public hearing, Canberra, 6 November 2008)

Attorney-General's Department (from public hearing, Canberra, 6 November 2008)

Additional Information

Law Council of Australia

Protecting the client relationship - lawyers and anti-money-laundering laws, speech given by Ross Ray QC, President, Law Council of Australia at the 21st LAWASIA Conference, Kuala Lumpur, 30 October 2008

Mr Edward Withnell

Supplementary documents supplied to the committee which Mr Withnell refers to in his submission

Appendix 4

Jurisdiction	Structure	Activities/Objectives
<i>United Nations Convention against Transnational Organised Crime</i>	3 or more persons	committing serious crime or Convention offences <u>in order to</u> obtain a financial or material benefit
<i>Canadian Criminal Code</i>	3 or more persons	facilitating/committing one or more serious offences <u>likely to result in</u> material (including financial) benefit to the group or its members
<i>China Criminal Law 1997</i>	3 or more persons	committing joint crimes
<i>Hong Kong Serious and Organised Crime Ordinance</i>	2 or more persons + substantial planning and organisation	planning specified offences <u>or</u> committing specified offences <u>and involves</u> loss of life or serious harm to a person (or substantial risk of such loss/harm) or serious loss of liberty of a person
<i>Macau Organised Crime Law 1997</i>	'constituted organisation'	agreement to commit one or more specified offences to obtain advantages or other illicit benefits
<i>New South Wales Crimes Act 1990</i>	3 or more persons	obtaining material benefit from serious indictable offences <u>or</u> committing serious violence offences
<i>New Zealand Crimes Act 1961</i>	3 or more persons	obtaining material benefit from offences punishable by at least four years imprisonment <u>or</u> committing serious violence offences punishable by at least 10 years imprisonment
South Australian Serious and Organised Crime (Control) Bill	3 or more persons	organisation represents a risk to public safety and order <u>and</u> organises, plans, facilitates, supports or engages in serious criminal activity
United States RICO legislation	refers to the concept of an enterprise, which is broadly defined as any group of individuals who are associated in fact.	

* Note: these elements are included in the definition of 'serious and organised crime' in the *Australian Crime Commission Act 2002* (Cth). See paragraph 63 below.

Past offences of specific kinds	United States RICO legislation requires that the prosecution prove a pattern of racketeering activity linking past offences of kinds specified in the legislation to the enterprise (eg group) under investigation.
Criminal activity in this instance	The more serious 'organised crime' offences in the Canadian <i>Criminal Code</i> link the organisation to criminal activity by requiring evidence of the commission of an indictable offence by the accused.
The criminal purposes of the group	The New Zealand <i>Crimes Act 1961</i> does not require any substantive offence to be committed, rather the group must simply have come together to commit a proscribed activity. The common intention of the group must be to commit either offences for material benefit punishable by four or more years imprisonment or serious violent offences.
	The New South Wales <i>Crimes Act 1900</i> is based closely on the New Zealand model, requiring the same sort of common purpose connection to criminal activities.
The threat of future crime or misconduct	The South Australian Serious and Organised Crime (Control) Bill provides an extra avenue for law enforcement to target criminal groups. In addition to capturing organisations that engage in activities relating to serious criminal activity, there is also the opportunity for the South Australian Attorney-General to declare an organisation as a future risk to public safety. At this stage there is no further guidance as to what factors can be used to determine this risk and what sort of connection to crime needs to be satisfied.

Jurisdiction	crimes of X years imprisonment	listing specific offences	combination
<i>United Nations Convention against Transnational Organised Crime</i>			Convention offences (eg laundering proceeds of crime, corruption of public officials and obstruction of justice) <u>or</u> offences with a penalty of at least 4 years imprisonment
<i>Canadian Criminal Code</i>	offences with a penalty of at least 5 years imprisonment (+ others by Regulation)		
<i>China Criminal Law 1997</i>	not limited to any particular type of crime		
<i>Hong Kong Serious and Organised Crime Ordinance</i>		range of crime types including: murder, kidnapping, drugs, forgery, firearms, robbery and copyright infringement	
<i>Macau Organised Crime Law 1997</i>		21 different crime types including: murder, kidnapping, loan sharking, extortion, fraud and robbery	
<i>New South Wales Crimes Act 1990</i>	serious indictable offences with a penalty of at least 5 years imprisonment <u>or</u> serious violence offences with a penalty of at least 10 years or more imprisonment		
<i>New Zealand Crimes Act 1961</i>	offences with a penalty of at least 4 years imprisonment <u>or</u> violent offences with a penalty of at least 10 years imprisonment		
<i>South Australian Serious and Organised Crime (Control) Bill</i>	indictable offences		
<i>United States RICO legislation</i>		range of federal and state offences including murder, kidnapping, gambling, arson, robbery, bribery, extortion and illicit drugs	

Appendix 5

Legislative tools for combating serious and organised crime – Australian jurisdictions

	Search warrants	Telecommunications interception	Controlled operations	Assumed identities	Witness identity protection	Surveillance devices	Coercive powers ¹	Control orders	Anti-fortification	Proceeds of crime ²	Unexplained wealth	Financial reporting orders
Cth	Y	Y	Y	Y	Y	Y	Y	Y ³	N	Y	N	N
NSW	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N	N
Vic	Y	Y	Y	Y	Y	Y	Y	N	N	Y	N	N
Qld	Y	Proposed	Y	Y	Y	Y	Y	N	N	Y	N	N
WA	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	N
SA	Y	Y	Y	Proposed	Proposed	Y	N	Y ⁴	Y	Y	Proposed	N
Tas	Y	Y	Proposed	Proposed	Proposed	Proposed	N	N	Y	Y ⁵	N	N
ACT	Y	N ⁶	Y	N	N	Y ⁷	N	N	N	Y	N	N
NT	Y	Y	Y	N	N	Y	N	N	N	Y	Y	N

Source: Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 December 2008), Appendix A.

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- 1 Coercive powers are contained in the *Australian Crime Commission Act 2002* and the mirror ACC legislation of the States and Territories. Additionally, legislation in NSW, Victoria, Queensland and WA gives certain state agencies coercive powers in relation to serious organised crime.
 - 2 There are provisions in WA and NT (and proposed in SA) allowing for more severe recovery action to be taken where a person has been declared a drug trafficker on the basis of certain conditions (e.g. a number of convictions for drug offences, or being convicted of a certain category of drug offence). For example, in WA all property of a declared drug trafficker may be forfeited regardless of whether it is the proceeds of crime.
 - 3 A person can be subject to a control order if the order substantially assists in preventing a terrorist attack or if the person has trained with a terrorist organisation.
 - 4 Control orders can be issued against members of 'declared organisation', former members of such organisations and others who engage in serious criminal activity. The Attorney-General can make a declaration about an organisation if satisfied that the members of the organisation associate for the purpose of organising, planning, supporting, facilitating or engaging in serious criminal activity and the organisation represents a risk to public safety and order in SA.
 - 5 There are no civil confiscation provisions in Tasmania.
 - 6 There is no ACT specific legislation. The Commonwealth legislation applies in the ACT to offences committed against the Commonwealth.
 - 7 Listening devices only. The Commonwealth legislation applies in the ACT to offences committed against the Commonwealth.

Appendix 6

Legislative tools for combating serious and organised crime – Overseas jurisdictions

	Search warrants	Telecommunications interception	Controlled operations	Assumed identities	Witness identity protection	Surveillance devices	Coercive powers	Control orders	Anti-fortification	Proceeds of crime	Unexplained wealth	Financial reporting orders
Canada	Y	Y	Y	Y	Y	Y	Y ⁸	Y ⁹	Y ¹⁰	Y	N	N
NZ	Y	Y	Y	Y	Y	Y	Y ¹¹	N	Y ¹²	Y ¹³	N	N
UK	Y	Y	Y	Y	Y	Y	Y ¹⁴	Y ¹⁵	N	Y	N	Y

Source: Attorney-General's Department, answer to question on notice, 6 November 2008 (received 23 December 2008), appendix B

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- 8 A judge may order an investigative hearing in relation to a terrorism offence and require a person to attend an examination before a judge to answer questions and produce specified things. A judge may also order a person (other than the person under investigation) to produce documents or data to a specified public officer if the judge believed an offence has been committed against the Criminal Code or any other Act.
- 9 A recognizance with conditions (in relation to terrorist activity) and a 'peace bond' (in relation to a criminal organization offence or a terrorism offence) are the closest things to control orders in Canada. See ss 83.3 and s 810.01 respectively of the *Criminal Code 1985*.
- 10 Canada does not have federal legislation. However, some provinces have anti-fortification legislation.
- 11 The Serious Fraud Office has the power to demand documents and information to be produced and questions to be answered in relation to serious or complex fraud offences. The *Search and Surveillance Powers Bill 2008* makes provision for the Police Commissioner to apply for an examination order in a business and non-business (serious or complex fraud and organised crime) context, and for police to apply for an order to produce documents (applies in relation to specified offences).
- 12 New Zealand does not have federal legislation. However, some local councils have anti-fortification legislation.
- 13 Amendments are proposed to allow for civil forfeiture in New Zealand.
- 14 A disclosure notice may be issued in relation to specified offences (e.g. evasion of duty, drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, intellectual; property offences, counterfeiting and blackmail). A disclosure notice can require a person to answer questions, provide information and produce documents. The Director of Public Prosecutions, Director of Revenue and Customs Prosecutions, or the Lord Advocate may issue a disclosure notice. Alternatively, these persons may authorise a constable, a members of staff of SOCA, or an officer of the Revenue of Customs to issue a disclosure notice.
- 15 Includes control orders and serious crime prevention orders. Control orders can be issued for the purpose of protecting the public from a terrorist act. Serious Crime Prevention Orders can be used against those involved in serious crime and their purpose is to protect the public by preventing, restricting or disrupting involvement in serious crime.

Appendix 7

Commonwealth agencies with responsibility for combating serious and organised crime and their relevant legislative tools³

Agency (head)	Role in combating organised crime	Relevant legislative tools
Australian Crime Commission (ACC) <i>(CEO – John Lawler)</i> <u>Board:</u> AFP Commissioner; State and Territory police commissioners, Director-General of Security, Chair of ASIC, CEO of Customs, Secretary of Attorney-General's Department and ACC CEO as non-voting member.	• Combat serious and organised crime by working with Commonwealth, State and Territory law enforcement agencies. • Collect, correlate, analyse and disseminate criminal information and intelligence and maintain a national database of that information and intelligence • Undertake, when authorised, intelligence operations • Investigate, when authorised, matters relating to federally relevant criminal activity • Provide strategic criminal intelligence assessments, and any other criminal information and intelligence, to the Board; • Advice to the Board on national criminal intelligence priorities.	• <i>Australian Crime Commission Act 2002</i> - witness protection (section 34) - coercive powers (section 30) • <i>Surveillance Devices Act 2004</i> - surveillance devices (section 14) • <i>Telecommunications (Interception and Access) Act 1979</i> - telecommunications interception • <i>Crimes Act 1914</i> - controlled operations - Part IAB - assumed identities – Party IAC • <i>Proceeds of Crime Act 2002</i> - require production of records from financial institutions – section 213) - monitoring orders – Part 3-4 - search warrants – Part 3-5
Australian Federal Police (AFP) <i>(Commissioner Mick Keelty APM)</i>	• Investigate and enforce the laws of the Commonwealth • Advise Government on policing issues • Provide community policing to territories (except	• <i>Australian Federal Police Act 1979</i> - arrest, search, seizure, • <i>Surveillance Devices Act 2004</i> - surveillance devices (section 14)

³ This table is compiled from information made available to the committee by a range of agencies. It is intended as an overview of key legislative mechanisms available to Commonwealth agencies to tackle serious and organised crime only. It is not intended as a complete table of legislation governing the activities of the agencies listed and does not mention the responsibilities and activities of agencies with no or only incidental relevance to organised crime.

	- NT); protective services to Government - International peacekeeping and policing	<i>Telecommunications (Interception and Access) Act 1979</i> - telecommunications interception <i>Crimes Act 1914</i> - Search warrants - Part IAA - controlled operations - Part IAB - assumed identities – Part IAC <i>Criminal Code Act</i> - control orders (in respect of suspected terrorists (interim/confirmed with Attorney-General's/ Court's consent respectively) - Division 104 <i>Proceeds of Crime Act 2002</i> - require production of records from financial institutions – section 213) - monitoring orders – Part 3-4 - search warrants – Part 3-5 <i>Financial Transactions Reports Act 1988</i> - search and questioning – section 33
Australian Commission for Law Enforcement Integrity (ACLEI) <i>(Integrity Commissioner - Philip Moss)</i>	Preventing, detecting and investigating serious and systemic corruption issues in the Australian Federal Police and the Australian Crime Commission.	<i>Crimes Act 1914</i> - controlled operations - Part IAB - assumed identities – Part IAC <i>Telecommunications (Interception and Access) Act 1979</i> - telecommunications interception <i>Surveillance Devices Act 2004</i> - surveillance devices (section 14) <i>Proceeds of Crime Act 2002</i> - require production of records from financial institutions – section 213) - monitoring orders – Part 3-4 - search warrants – Part 3-5
AUSTRAC <i>(CEO – Neil Jensen)</i>	Oversees compliance with anti-money laundering and counter-terrorist financing legislation by financial institutions, the gambling industry and	<i>Financial Transactions Reports Act 1988</i> - offence for cash dealer to fail to provide AUSTRAC with reports; injunctions – Part V

	- others. - Gathers financial intelligence data which is provided to law enforcement and revenue agencies.	- inspection of premises - part IVA • <i>Anti-Money Laundering and Counter Terrorist Financing Act 2006</i> - monitoring warrants; production of documents; external audits – Division 3
Australian Hi-Tech Crime Centre <i>(Director – James McCormack)</i> Part of the AFP	- Co-ordination of technology enabled crime matters between Australian law enforcement, Federal Government and international agencies. - Investigation of high tech crimes. - Intelligence services	
CrimTrac <i>(CEO - Ben McDevitt AM APM)</i>	- Leads the development national policing information services; advanced national police investigation tools; and national criminal history record checks for accredited agencies. - Developing a new National Automated Fingerprint Identification System; a National Criminal Investigation DNA Database; a National Child Sex Offender System; and the provision of rapid access to national operational policing data.	• <i>Intergovernmental Agreement for the Establishment and Operation of "CrimTrac", a National Law Enforcement Information System for Australia's police services</i> - Jurisdictions agreed to cooperate to provide CrimTrac with the information necessary to establish a National Automated Fingerprint Identification System, National DNA Criminal Investigation System, National Child Sex Offender System and access to national operational policing data – Clause 3.2; Recital D • <i>Telecommunications (Interception and Access) Act 1979</i> - telecommunications interception
Attorney-General's Department <i>(Secretary - Roger Wilkins AO)</i> <i>(First Assistant Secretary, Criminal Justice Division - Elizabeth Kelly)</i>	- The Criminal Justice Division is responsible for Australian Government crime prevention initiatives, national law enforcement policy, fraud policy, legal and policy advice on criminal law and legal aspects of the Commonwealth criminal justice system as well as international criminal law and transnational crime issues. - The National Law Enforcement Policy Branch provides policy advice on the operational law enforcement agencies within the Attorney-General's portfolio (AFP, ACC and ACLEI); firearms; illicit	• Attorney-General's consent required to approve interim control order in respect of suspected terrorists requested by AFP.

	drugs and fraud against the Australian Government. • The Strategic Policy Coordination Branch provides advice on a range of crime prevention and criminal justice issues, including: transnational organised crime, trafficking in persons, anti-money laundering and counter-terrorism financing, corruption and foreign bribery. • The Identity Security Branch is coordinates the development of the National Identity Security Strategy and other measures to enhance identification and verification processes and combat identity crime.	
Australian Customs Service (ACS) (CEO – Michael Carmody)	• Managing security and integrity of Australian borders • Intercepting illegal and harmful goods such as drugs and weapons. This is done using intelligence, computer-based profiling and analysis, x-ray, CCTV monitoring, detector dogs.	• <i>Customs Act 1901</i> - examination of goods for import or export; production of documents, search - search warrants - Part XII - coercive questioning powers – section 243SA • <i>Crimes Act 1914</i> - controlled operations - Part IAB - Assumed identities – Part IAC • <i>Proceeds of Crime Act 2002</i> - monitoring orders – Part 3-4 - search warrants – Part 3-5 • <i>Financial Transactions Reports Act 1988</i> - search and questioning – section 33
Australian Tax Office (ATO) (Commissioner Michael D'Ascenzo)	• Works with AUSTRAC to identify tax evasion and fraud including money laundering	• <i>Crimes Act 1914</i> - Assumed identities – Part IAC • <i>Taxation Administration Act 1953</i> - recovery of tax debts; penalties for failure to meet tax obligations • <i>Income Tax Assessment Act 1936</i> - compel production of documents and evidence, access to books (sections 263 and 264)

Commonwealth Director of Public Prosecutions (CDPP) <i>Director – Christopher Craigie SC)</i>	• Independent prosecuting service that prosecutes alleged offences against Commonwealth law, and deprives offenders of the proceeds and benefits of criminal activity. • The main cases prosecuted by the CDPP include drug importation, money laundering, offences against the corporations legislation, fraud on the Commonwealth, people smuggling, people trafficking, terrorism and a range of regulatory offences.	
Department of Immigration and Citizenship <i>(Secretary – Andrew Metcalfe)</i>		• <i>Migration Act 1958</i> - Deportation of non-citizens convicted of certain offences– Part 2, Division 9 - Refusal or cancellation of visa on character grounds – section 501

Appendix 8

SCAG Resolutions for a national response to combat organised crime

Ministers:

Agreed that organised crime is a national issue requiring a nationally coordinated response by all jurisdictions.

Noted that the Commonwealth is developing an Organised Crime Strategic Framework, with mechanisms to engage the States and Territories, for agreement by the Commonwealth Government by mid-2009. The purpose of the Framework is to enhance understanding of the threats from organised crime; improve our capacity to effectively prevent, disrupt, investigate and prosecute organised crime activities; and strengthen information sharing and interoperability.

Noted that the Commonwealth will consider the introduction of a package of legislative reforms to combat organised crime including measures to:

- strengthen criminal asset confiscation, including unexplained wealth provisions
- to the extent practical and effective and having regard to constitutional power, consorting or similar provisions that prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation
- enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection
- facilitate greater access to telecommunication interception for criminal organisation offences, and
- address the joint commission of criminal offences.

Noted that the Ministerial Council on Corporations is considering the issue of director disqualification under the Corporations Act 2001 in relation to organised criminal activity.

Agreed to the States and Territories considering the introduction of the following legislative measures to combat organised crime where they have not already done so:

- Measures that permit coercive questioning of individuals to assist with the investigation of organised crime offences
- Consorting or similar provisions that prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation
- Measures that enable police to engage in controlled operations
- Measures that enable the use of assumed identities to facilitate investigations and intelligence gathering
- Legislation to permit the use of surveillance devices for the purposes of investigating serious and organised crime
- Witness protection legislation
- Asset confiscation legislation to enable a court to restrain and forfeit a person's assets where they are tainted
- Model cross-border investigative powers for controlled operations, assumed identities, witness identity protection and surveillance devices.

Agreed to arrangements to ensure cooperation between each jurisdiction in relation to organised criminal activity in any particular jurisdiction.

Agreed to coordinate law enforcement efforts through developing shared priorities including improving interoperability, facilitating improved information and intelligence sharing and coordinating investigative and target development activities.

Agreed to establish a SCAG Officers' Group to undertake work on legislative, interoperability and information sharing measures in consultation with MCPEMP officers and report back to SCAG as soon as possible.

Appendix 9

The Camden Assets Recovery Inter-Agency Network (CARIN)¹

Introduction

CARIN is an informal network of contacts and a cooperative group in all aspects of tackling the proceeds of crime.

Aim

The aim of CARIN is to increase the effectiveness of members' efforts, on a multi-agency basis, in depriving criminals of their illicit profits.

Key Objectives

In seeking to meet its aim CARIN will:

- establish a network of contact points;
- focus on the proceeds of all crimes, within the scope of international obligations;
- establish itself as a centre of expertise on all aspects of tackling the proceeds of crime;
- promote the exchange of information and good practice;
- undertake to make recommendations to bodies such as the European Commission and the Council of the European Union, relating to all aspects of tackling the proceeds of crime;
- act as an advisory group to other appropriate authorities;
- facilitate, where possible, training in all aspects of tackling the proceeds of crime;
- emphasise the importance of cooperation with the private sector in achieving its aim
- encourage members to establish national asset recovery offices

➤ The History of CARIN

➤ Membership and Functioning of CARIN

➤ CARIN Member and Observer Countries, States, Jurisdictions, Principalities and International Organisations

1 Source: http://www.europol.europa.eu/publications/Camden_Assets_Recovery_Inter-Agency_Network/CARIN_Europol.pdf

Europol holds the permanent Secretariat for CARIN. For further information contact info@europol.europa.eu indicating your email is for the attention of the CARIN Secretariat (SC4)

The History of CARIN

In October 2002 a conference was held in Dublin co-hosted by the Criminal Assets Bureau Ireland and Europol. The conference was attended by representatives of all Member States of the European Union and some applicant states together with Europol and Eurojust. Participants were drawn from law enforcement agencies and judicial authorities within member states. Workshops were held between practitioners and the objective was to present recommendations dealing with the subject of identifying, tracing and seizing the profits of crime.

One of the recommendations arising in the workshops was to look at the establishment of an informal network of contacts and a cooperative group in the area of criminal asset identification and recovery.

The name agreed for the group was the Camden Assets Recovery Inter-Agency Network (the Camden Court Hotel Dublin being the original location of the workshops where the initiative started).

The aim of the Camden Assets Recovery Inter-Agency Network is to enhance the effectiveness of efforts in depriving criminals of their illicit profits. This is now a major law enforcement tool in targeting organised crime gangs with particular reference to financial deprivation. There is added value in that membership of the group will improve cross-border and inter-agency cooperation as well as information exchange, within and outside the European Union.

The Official start of CARIN took place during the CARIN Establishment Congress in The Hague, 22-23 September 2004. The aim of this congress was the establishment of an informal network of practitioners and experts with the intention of improving mutual knowledge on methodologies and techniques in the area of cross-border identification, freezing, seizure and confiscation of the proceeds from crime. It is expected that this network will improve international co-operation amongst law enforcement and judicial agencies, which in turn will provide a more effective service.

The following states and jurisdictions attended the launch congress
Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, UK (including the UK Crown Dependencies of Isle of Man, Guernsey, Jersey and Gibraltar), USA.

Membership and Functioning of the CARIN Network

Membership

Membership is open to EU Member States and to those states, jurisdictions and 3rd Parties who were invited the CARIN launch congress 2004. Each Member may nominate two representatives, one from a Law Enforcement Agency and one from a Judicial Authority to be their CARIN contacts. Assets Recovery Offices may represent law enforcement or the judiciary

Observer Status

Observer status will be available to states, jurisdictions and 3rd parties, which can not be Members. Observer status does not entitle the state, jurisdiction or 3rd party to a vote at any plenary meeting or to membership of the Steering Group.

Criteria to be fulfilled by each Member and Observer:

- 1) they should provide the network with clearly identified national contact point(s). The number of contact points should be the minimum necessary for effective operation of the network. Therefore it is recommended that no more than two national contact points are nominated. One contact point should be the central agency involved in asset tracing and forfeiture. If not, this point of contact must have direct access to practitioners in this area;
- 2) they will supply an outline and summary of their legislation and practical procedural guidelines relating to asset forfeiture, civil and criminal, for information sharing with other Members and Observers and for inclusion on the CARIN website; and
- 3) to undertake to meet the objectives and functions as set out in the Statement of Intent.

What does commitment to CARIN mean for Members and Observers

- 1) they may exchange information with each other, as far as their national legislation will allow, on an informal cooperative basis;
- 2) they should advise on and facilitate mutual legal assistance. Mutual legal assistance requests must be made through the appropriate formal legal channels;
- 3) they should share good practices, knowledge and experiences, on their own initiative and should provide feedback to assist in research and development;
- 4) they should raise awareness with appropriate law enforcement and judicial authorities on the importance of developing all aspects of tackling the proceeds of crime and the dissemination of information;
- 5) they will fund their own costs and expenses, other than when external funding is available.

Functioning of the CARIN Network

General

- 1) CARIN's working language will be English.
- 2) CARIN will consist of an Annual General Meeting of its Members and Observers (AGM) to be hosted by the nominated Presidency who will be both President of the Steering Group and the Plenary for their one year term, running from 1 January.
- 3) Each Member shall have one vote in plenary. Decisions will be made on the basis of simple majority.
- 4) There will be a website designated for CARIN hosted by Europol and administered by the Secretariat. The details can be found in the Annex attached.

Steering Group

- 1) CARIN will have a Steering Group comprising of up to nine members from which one member will be elected President. The Steering Group period will run from 1 January each year and conclude on 31 December to allow for planning of the AGM.
- 2) Membership of the Steering Group will rotate periodically with two members offering to stand down each year to enable other Members to join the Steering Group. If the number of candidates exceeds the number of vacancies there will be a vote of all Members.
- 3) The Steering Group will oversee the administration of the network.
- 4) The Steering Group will receive applications for membership and observer status and will decide if a state, jurisdiction or 3rd party meets the criteria for membership.
- 5) Eurojust will have permanent observer status in the Steering Group.
- 6) The Steering Group may establish working groups to examine and report on legal and practical issues.
- 7) The Steering Group will assist in the preparation of the annual conference agenda and will identify areas for consideration at plenary.

The Presidency

- 1) The Steering Group will elect the Presidency.
- 2) Each Presidency will be elected two years in advance.
- 3) One member of the Steering Group will hold the Presidency for a period of one year.
- 4) The Presidency period will commence on 1 January each year and conclude on 31 December to allow for planning of the AGM.

- 5) The Presidency will oversee the external communication on behalf of the Network.
- 6) The Presidency and Steering Group in cooperation with the Secretariat will oversee the preparation of a summary on the activities of CARIN for the year.

The Secretariat

Europol will provide a permanent Secretariat function. The Secretariat will, support and facilitate the Presidency and the Steering Group, manage the web site and will administer the functioning of the network¹.

¹ Email to info@europol.europa.eu for the attention of the CARIN Secretariat (SC4)

CARIN Members and Observers²

Countries, States, Jurisdictions Principalities and International Organisations

- Australia
- Austria
- Belgium
- Bulgaria
- Canada (observer)
- Croatia (observer)
- Cyprus
- Czech Republic
- Denmark
- *Egmont Group* (observer)*
- Estonia
- *Eurojust* (permanent observer in Steering Group)*
- *Europol* (Secretariat)*
- Finland
- France
- Germany
- Gibraltar
- Guernsey
- Hungary
- *Interpol*(observer)*
- Ireland
- Isle Of Man
- Italy
- Jersey
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Monaco (observer)
- The Netherlands
- Norway

² As at 1 June 2007

- *OLAF*(observer)*
- Poland
- Portugal
- Romania
- Russia (observer)
- Slovak Republic
- Slovenia
- South Africa (observer)
- Spain
- Sweden
- United Kingdom
- *UN Investigations Division, Office of Internal Oversight Services**
(Observers)
- United States of America