



Victorian  
Competition & Efficiency  
Commission

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The Hon. P. D. Cummins AM  
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Your Honour

I write to comment on the Victorian Law Reform Commission's Consultation Paper on the *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*. The inquiry addresses a very important matter for Victoria, namely advice on regulatory approaches to prevent the pernicious social and economic costs to Victoria from the operations of organised crime bodies. The Consultation Paper sets out a helpful, logical framework for considering the issues in the terms of reference.

My comments focus on five matters aimed at improving the effectiveness of regulation where it is the most appropriate instrument for preventing infiltration by organised crime bodies. (I note the terms of reference preclude consideration of non-regulatory options.)

The five matters are:

- Applying the general principle that good regulation provides net (economic and social) benefit to society. Aspects of the Consultation Paper would, in my opinion, benefit from applying this principle with greater clarity.
- Avoid creating new licensing or registration regimes that, absent a concern for the potential for infiltration by organised crime, would not meet a net benefit test.
- Negative licensing may have net benefit in lawful occupations and industries that are not currently subject to positive licensing or registration requirements.
- The value of better information on high risk individuals and businesses to improving the productivity of regulators in achieving regulatory outcomes. Better sharing of information among relevant regulators would improve their capacity to detect and target organisations and individuals that are high risks for regulatory breaches. This is pertinent to preventing infiltration by organised crime bodies that are known by at least one regulator for breaches.
- The potential relevance of other regulatory models, such as that for invasive species in agriculture, where preventing infiltration and establishment of declared biological threats to the environment and farming is a key regulatory objective.

### **Achieving net benefit from regulatory intervention**

The Commission would be aware of principles of good regulatory design, which may be found in the *Victorian Guide to Regulation* (VGR) and in the recently released NSW Independent Pricing and Regulatory Tribunal (IPART) report *Reforming Licensing in NSW*. I note IPART's discussion on licensing, covering the rationale for it, principles of design and its benefits and costs as a regulatory instrument (Chapter 2 and Attachment B of the IPART report).

I also note that any additional regulation or changed legislation that imposes significant burdens on business, consumers and not for profit organisations will need to meet the requirements of the VGR. These requirements include proportionality of approach, a clear case for regulation compared with other approaches and rigorous assessment of the regulation's impact on stakeholders.

In weighing up net benefit from regulatory change, the VCEC finds it helpful to consider:

- the action or obligation on regulated parties (who is affected and how)
- the intended change in behaviour (how to test for this change)
- the expected benefits (reduced harms) and costs (including direct and indirect effects and unintended consequences for third parties) compared with other options.

Against that background, aspects of the Consultation Paper that merit closer examination are:

- In examining the potential value of regulatory approaches the Paper should apply the concept of net (social and economic) benefit to Victoria. The Paper's discussion of the costs of organised crime (pp. x) lists the intrinsic costs of organised crime with the costs of any regulatory intervention. Net benefit applied to interventions draws a sharp distinction between intrinsic and intervention costs. A regulatory intervention may impose costs, in order to provide benefits – namely a reduction or elimination of the intrinsic social and economic costs. The test of net benefit is whether the reduction in intrinsic costs outweighs the intervention costs.
- In considering costs and impacts, the Consultation Paper would benefit from a more substantive consideration of all parties incurring costs. This includes, in particular, costs and benefits incurred by law abiding individuals and businesses operating in lawful industries and occupations. These benefits and costs include both the direct and indirect regulatory costs and adverse unintended consequences on third parties. This broad approach helps select regulatory options with the highest net benefit.
- The proposed model for identifying lawful occupations and industries at high risk of infiltration could result in a broad range of targets. It is likely that many do not currently have registration/licensing regimes. The broader scope is a consequence of some criteria (e.g. conditions of industry organisation) are not strong markers for the existence or risk of organised crime. Relying on the model could lead to an unjustified and/or inappropriate expansion of regulation and to a disproportionate response. The ultimate value of the model arises from its power to maximise the probability of preventing infiltration by identifying possible targets while also optimising the probability of inappropriately including industries that are not at risk of infiltration. (In essence the model needs to have regard to both Type 1 and Type 2 errors.) If the model aims solely to minimise the risk of failing to identify an infiltration, it will probably impose potentially significant (and unnecessary) costs on law abiding businesses and individuals. Ultimately such costs are borne by consumers and communities.

- The Consultation Paper would benefit from examining the regulatory arrangements applying to occupations and industries currently of interest to Victoria Police. A cursory examination of the potential occupations in the Consultation Paper indicates some are subject to licensing/registration regimes, but others are not. Starting with this specific (narrow) list would help to limit the risk of imposing unnecessary regulatory burdens on law abiding businesses and individuals.

### ***Avoid creating new licensing regimes***

Licensing regimes necessarily impose costs on regulated populations: it is in Victoria's interest that regulation and regulatory burdens be kept to an efficient minimum having regard both to the public interest that justifies the intervention and the costs of the intervention itself. Victoria currently has around 60 regulators regulating various lawful industries and occupations. Around 20 of these regulators have the vast bulk of regulatory resources and have the largest impact on business. (The inquiry is referred to the *Victorian Regulatory System* and to the Wallis Group Survey – *Business and Not For Profit Perceptions of Regulation*. Both documents are published on the VCEC's website.)

For that reason, if, absent considerations of the potential for infiltration by organised crime, specific regulatory intervention in a lawful industry or occupation is not justified (including no net benefits) then no new regulatory regimes should be established. Rather it would be preferable to use other means, including negative licensing options – see below.

### ***Potential value of negative licensing***

Most lawful occupations and industries do not require registration or licensing, although many do. In lawful industries and occupations that have no registration or licensing regime, an option of negative licensing may have merit as a regulatory method to exclude organised crime bodies, individuals and their associates. Provided the proscribed groups can be accurately identified, their lawful presence in the occupations and industries may be prevented. This approach avoids imposing regulatory costs on, and entry barriers to, law abiding participants of lawful occupations and industries. Such an approach gives greater weight to what is presumably a very large majority of law abiding businesses and individuals.

Clearly, the net benefit of this approach, compared with others, will also depend on how easily such prohibitions may be circumvented. (I note this point also applies to regimes of positive licensing and registration.) Incorporating some means of testing to detect (and remove) the presence of prohibited bodies and individuals would increase the value of negative licensing as an anti-infiltration tool.

Some possible options for detection might include enhanced information sharing among regulators and Victoria Police (see below) and occasional joint task forces with relevant broad-based regulators (such as the EPA and WorkSafe). Task forces might be used where regulatory breaches and the presence of organised were suspected. Victoria Police's *Task Force Discover* which looked at the scrap metal industry is one example of this approach.

### ***Consolidate and share information on high risk, serial regulatory offenders***

The VCEC sponsors the Regulators' Forum, an informal group of major Victorian regulators that meets regularly to discuss regulatory issues of common interest. Several discussions over the past year strongly suggest regulatory work would be helped by pooling information on the identity of seriously recalcitrant individuals and businesses. There was a strong view that recalcitrant offenders in one regulatory regime were likely to be high risks under other regimes. Sharing information about serious offenders was considered likely to improve the visibility of high risk organisations and to help detection of regulatory breaches in related regimes. Such serious offenders may include organised crime bodies.

Some regulators have discussed some of these matters with the recently established Commissioner for Privacy and Data Protection. The new regulatory arrangements appear to have significantly increased the scope and simplicity for regulators to share information provided the regulators have appropriate regulatory objectives and authority. The inquiry may find it useful to discuss this issue with the Privacy Commissioner and relevant regulators. It may be that some adjustment to the establishing legislation of some regulators is needed to improve the capacity to share information among regulators (and with Victoria Police).

Efforts to share information among regulators could be made more efficient and effective by consolidating information on serious regulatory offenders with information on organised crime bodies from Victoria Police. This consolidated information would provide an aggregate picture of high risk businesses and organisations. The information might also be used to identify where unlawful activity by organised crime is likely to be occurring or may occur.

Where positive registration and/or licensing regimes apply, this consolidated information would assist with fit and proper person tests amongst other things.

#### ***Possible relevance of regulation of invasive species***

The inquiry no doubt has seen a number of possible regulatory regimes for preventing infiltration of lawful industries and occupations by organised crime. There are models in other contexts aimed at preventing or forestalling invasion by both known and unknown threats; and at containing and/or remediating such threats if they become established. One example is addressing biological threats to Victorian agricultural industries from invasive plant and animal species. There are some parallels with the inquiry's task.

Victorian regulators addressing invasive species have developed a systematic approach based on:

- intelligence on known and potential threats (whilst most biological threats are known and their implications are understood, others are not)
- mechanisms for reporting outbreaks, including active search by designated regulatory staff
- rapid intervention on early outbreaks, with priority given to the highest risks
- moving to a different regime when the invasive species is established to the point that eradication is impractical and has negative net benefits.

The regulatory process and task is built around the concept of an invasion curve, which may be useful to the inquiry.

I would be happy to elaborate on any of these points should you wish. I look forward to the second meeting of the Advisory Committee on 31 August.

Yours faithfully



**Dr Matthew Butlin**  
Chair  
Victorian Competition and Efficiency Commission