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The Hon. P. D. Cummins AM
Chair
Victorian Law Reform Commission

Submission to the Victorian Law Reform Commission on the Consultation Paper for the Regulatory Regimes and Organised Crime Inquiry

Thank you for this opportunity to provide a submission to the VLRC's inquiry into Regulatory Regimes and Organised Crime in response to the recently issued consultation paper. My submission addresses two areas of the consultation paper:

1. The draft model for assessing the risks of infiltration of lawful occupations and industries (chapter 3)
2. The design of regulatory regimes (chapter 4) with particular attention to:
   - Proportionality in regulatory judgments
   - Group-based exclusions (4.50ff)
   - Monitoring tools (Q11)
   - Information sharing (4.147ff)

1. Draft model for assessing the risks of infiltration

The draft model's proposed intended use is not entirely clear from the consultation paper. The draft model is quite complex. It poses "questions that could be asked of the occupation or industry under examination, in order to determine whether a risk of infiltration is present" (3.65) but does not identify the context in which those questions are to be asked or by whom. The use to which the model is intended to be put needs clarification.

Assuming the draft model is to be used by government to determine which industries and occupations to include in a regulatory regime or regimes, it raises a number of issues that in my view need addressing.

A. The way in which the model is to be applied needs clarification. If the answer to one only of the many questions posed about key characteristics of an occupation or industry is 'yes', is that sufficient to say there is a risk of infiltration? Furthermore, is one 'yes' enough to say that there is sufficient risk that the industry or occupation should be subjected to a regulatory regime? The issue here is the *degree* of the risk that would justify introducing specific regulation of an industry or occupation to prevent infiltration by organised crime. It is important to ensure that the regulatory response is proportional to the problem, especially given all the possible downsides of regulation that the paper identifies in Chapter 4, including regulatory costs and the raising of barriers to entry. If the model casts a very wide net, such that any degree of risk is enough to justify regulation, a great many industries and occupations will be included. Such an extensive regulatory environment may be a blunt instrument for addressing the harms that organised crime can cause (outlined in the paper briefly at 3.8 and 3.9). For instance, trade-based occupations (electricians, plumbers etc.) may well provide 'a superior customer base', be 'cash intensive' or provide an opportunity for money-laundering. But the risk of the use of these occupations for criminal activities might be low, and even if that risk exists the harms of that activity might be minimal (for instance, because the business has small geographic coverage or a relatively low financial turnover, and little capacity to commit serious offences). It may not be justifiable to introduce specific regulation to deal with the risk of organised crime infiltration in low-risk cases.

In order to avoid regulatory overreach in its application some method is needed to not only determine the existence of a risk of infiltration into a particular occupation or industry but also to quantify that risk (is it significant?) and the harm that could result. While these are necessarily subjective judgments, some guidance could perhaps be provided in the model as to how those judgments might be formed. For example, could the number of 'key characteristics' an occupation or industry exhibits matter? Do particular characteristics identified in the model complement or exclude each other – how do they work together? Could or should the harms resulting from organised crime's exploitation of vulnerabilities be specifically identified, and how serious do they need to be to have a bearing on whether or not to, or how to, regulate a particular industry or occupation?

B. One indicator of degree of infiltration risk is previous experience both in Victoria and in other jurisdictions. The paper does set out industries and occupations where infiltration has previously been identified in Victoria. It seems to do this in order to provide examples from which to draw characteristics for the draft model, not to pre-judge the sectors where an infiltration risk might arise. Recent revelations about Mafia activity in Australia certainly indicate a broader swag of potentially vulnerable sectors than are mentioned in the consultation paper, including car dealerships, night clubs and the food and telecommunications industries (McKenzie, Baker & Bachelard 2015). Similarly, in the US the Mafia infiltrated a wide variety of organisations and industries including the garment industry and air cargo operations (Jacobs 1999). Proof that an occupation or industry has

previously been (significantly) infiltrated is not currently incorporated into the model as an indicator of potential future risk. Perhaps it should be. This would be consistent with 'evidence-based policy'.

C. Additional examples drawn from the second type of infiltration (operating through professional facilitators or specialist service providers) may make the model more comprehensive.

2. The design of regulatory regimes

Proportionality in regulatory judgments

The question of how to tailor regulation to risk arises also in relation to the issue of how to design regulatory regime or regimes to deal with the risk of organised crime infiltration of occupations and industries. The paper rightly points out (para 4.19) that the regulatory aim of preventing organised crime may not always sit happily with other regulatory objectives such as easing the path of private commerce. However this tension may resolve as regulatory stringency could make an industry or occupation less vulnerable to infiltration over time.

The Dutch administrative system is relevant on the question of proportionality and how that might be incorporated into a licensing regime. It requires that there is a *serious danger* that a licence, permit, tender or subsidy will be used to commit or facilitate criminal offences or to make use of the proceeds of crime, before a decision can be made to refuse to grant or renew or to revoke the particular privilege (licence etc.). The criminal offences that could take place also have to be serious, and there must be a clear connection between the privilege to be granted or already granted and the criminal offence or offences. (For more on how the Dutch deal with this issue, see, Peters & Spapens 2015). As can be seen, this is a much more detailed test than the general 'fit and proper person' or 'public interest' criteria referred to in para 4.37 of the consultation paper. In my view, more specificity better serves the principle of proportionality than do more general tests when it comes to judging the risk that an individual will use an industry or occupation for organised crime purposes. Having to show a connection between the holding of a licence and the prospect of particular offences occurring does not preclude scrutiny of an applicant's associates (indeed, this is sure to be considered) but it does mean that applicants are less likely to be refused a licence only by virtue of unreasonable 'guilt by association' (para 4.49 of the consultation paper).

Group-based licence exclusions

Whether it is justifiable to exclude whole groups from the ability to hold certain licences via declarations made under the Victorian control order legislation (*Criminal Organisations Control Act 2012)* depends to some extent on the view one takes of that legislation. My own view is that it does institutionalise 'guilt by association' and for that reason (as well as

reasons related to evidential and procedural matters) unfair and inconsistent with established principles of criminal justice. In relation to firearms dealers' licences (para 4.55), I think a test that involved a proper investigation of individuals applying for those licences would be both fairer and more effective at excluding seriously dangerous individuals than any group-based exclusion. Group-based exclusions raise issues about:

- *How to define the group*. This is particularly relevant to OMCGs because research indicates that the primary structures targeted by the control order legislation, the clubs, are not necessarily the ones that criminal OMCG members use to conduct their criminal business; these members will often connect with criminal others outside the group to commit crime, thus participating in a broader criminal network (Ayling 2011). As the consultation paper points out (para 2.7), organised crime is now increasingly operating through more flexible, fluid and entrepreneurial networks such as these. Where the boundaries of a particular group lie for the purpose of making exclusions from licences truly effective is likely to be debatable.
- *The level of criminality of individual members of the excluded group*. Research from Queensland (Goldsworthy 2015) has found that about 60% of OMCG members in that state do not have a criminal history and that, while the level of criminality of these gangs is higher than in the general public, the vast majority of the crimes committed by these members are not organised crime offences but rather minor criminal offences such as public nuisance, breach of bail and low level drug possession. There is no reason to think that Victorian OMCGs would be any different. The issue then is whether it is fair, effective or a good use of regulatory effort to treat all members of a declared organisation the same.
- *The application of group-based exclusion*.
  - The only groups that can be declared under the control order legislation or indeed that could be excluded via a group-based exclusion provision are those which self-identify and have names – in effect, only OMCGs. It is difficult to see how group-based exclusions could be developed to apply to secretive Mafia networks or other unnamed criminal groups which have coalesced from the broader criminal macro-network.
  - It might be thought that any non-criminal member of a declared organisation could leave the group if they wanted to apply for a particular licence. However in relation to firearms dealers' licences that would not work; the definition of a 'declared organisation member' (a category excluded from firearms dealers' licences under the *Firearms Act 1996,* s. 61*)* includes a former member (*Criminal Organisations Control Act 2012*, s.3). While including former members of declared organisations in exclusions from high-risk occupations such as firearms dealers might be thought to be warranted, it is questionable whether that would be the case for all occupations. A more individualised assessment would be more responsive to the details of particular situations and there

would be less risk of overexclusionary outcomes that prevent the reintegration of former members of criminal groups back into society.

There may be some efficiency gains for regulators in being able to exclude members of certain groups from eligibility for licences although, given the limited application of group-based exclusions, these are likely to be minor. The costs to fairness and effectiveness in my view outweigh those advantages in any event, particularly as the decision about the individuals covered by that exclusion are not in the hands of the relevant (traditional) regulators but lie instead with Victoria Police.

Monitoring tools

In relation to monitoring, one area that the consultation paper touches on only lightly is the harnessing of third parties to assist with monitoring. By third parties, I mean actors other than licence-holders and regulatory agencies. How third parties can be harnessed by the state for crime control has been considered in relation to several areas of illegal activity, such as the trafficking of illicit synthetic drugs, crime on the waterfront and transnational environmental crime (Cherney et al. 2006; Brewer 2014; Ayling 2013). In the context of monitoring licence holders with respect to possible organised crime activity, there may be other strategies besides third party record-keeping (para 4.115 of the consultation paper) that would bring to light infiltration, such as:

- requiring private businesses to be audited by formally accredited professionals (the third parties in this case);
- encouraging or requiring property owners to be vigilant about what their tenants are doing, and perhaps to report any instances where they have a reasonable suspicion that organised crime activity is taking place;
- providing financial incentives (e.g. rewards) for the reporting by third parties of organised crime activities (or reasonable suspicions of such activity) conducted by licence holders;
- encouraging the use of civil laws such as council by-laws and health and safety codes against property owners who allow criminal activities at their properties; or even
- giving citizens legal rights to request a court order that an organised crime group vacate certain premises or stop using them for group activities (as has occurred in Japan in relation to the Yakuza).

Information sharing

As suggested in para 4.154 of the consultation paper, it may be worth considering the establishment of a body like the BIBOB Bureau in the Netherlands which is able to gather together confidential information about individuals and groups from multiple sources, and supply advice to regulatory agencies which request it when they are otherwise unable to reach a decision about the risks of granting or renewing a licence based on their own inquiries. Screening by the BIBOB Bureau considers both the applicant (e.g. his or her

criminal history) and his or her business relations, for example the business's financial backers and the company structure (for more on the Bureau's role, see Peters & Spapens 2015). It is up to the regulatory agency how it acts upon the advice the Bureau provides. The advantage of a centralised body would be that last resort risk assessment could be based on a broader picture drawn from police, tax, immigration, customs, and local government agencies, AUSTRAC etc., not just the criminal past/present of an applicant as is the case where the sole repository of information is Victoria Police. To have access to such a body may relieve regulatory agencies faced with tricky cases from the onerous and time-consuming task of seeking out information themselves from a variety of sources, as pointed out in para 4.153 of the consultation paper.

I trust this submission will be of some assistance to you.

Yours sincerely

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