



Victorian
Law Reform
Commission

Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries

REPORT FEBRUARY 2016



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Preface

In October 2014, the Victorian Government referred to the Victorian Law Reform Commission the task of reviewing the use of regulatory regimes to help prevent organised crime and criminal organisations entering into or operating through lawful occupations and industries. The term ‘infiltration’ in the heading of the reference comprehends both entering into and operating through lawful occupations and industries.

There is a growing recognition—in Australia and in many other countries—that organised crime groups seek to infiltrate lawful occupations and industries to support their existing illicit activities and to provide new opportunities for profit and influence. That infiltration has the potential to cause great harm to the occupation or industry that is infiltrated, and to the broader community.

In a number of countries, regulatory regimes to counter this threat have been in place for some years and continue to be developed. In others, the traditional law enforcement approach still provides the dominant paradigm. There is a growing movement around the world to use regulatory regimes as a key tool for disrupting the activities of organised crime groups and preventing them from infiltrating lawful occupations and industries.

The Commission’s review is prophylactic: it considers ways to prevent infiltration. It is not directed at the investigation, prosecution or punishment of existing or past organised criminal activity. Further, the review is confined to lawful occupations and industries. It does not comprehend unlawful occupations or industries.

A central concern of the review was to be mindful of the burden that preventative regulatory regimes might place on legitimate occupations and industries and on regulators and law enforcement agencies.

The Commission heard from a range of regulators, law enforcement agencies and occupation and industry representatives about the difficulties in detecting and preventing attempts at infiltration. However, along with the challenges, the Commission also heard many positive stories, including accounts of improved collaboration between regulators and law enforcement agencies, about the quality of information on criminal activity that can be provided by occupation or industry members, and about regulators expanding beyond their traditional roles to develop skills and expertise in combating criminal activity.

The terms of reference ask the Commission whether a framework of principles can be established for assessing the risks of organised crime infiltration of different lawful occupations and industries and for developing suitable regulatory responses. This the Commission has done. The report proposes such principles. The terms of reference do not ask the Commission to make recommendations for law reform, and the Commission has not done so. However, the principles and propositions stated in the report may ultimately lead to legislative reform.

On behalf of the Commission, I acknowledge and warmly thank everyone who contributed to the review, including those who made submissions and attended meetings with the Commission. The Commission has drawn upon the expertise of many people in producing this report. The generosity with which they contributed their time, experiences and ideas is greatly appreciated.

I would also like to thank my fellow Commissioners who worked on this reference for contributing their time and expertise.

Finally, I acknowledge the abilities and dedication of the research team members, Emma O'Neill and Matt Gledhill. I thank them for their efforts.



The Hon. P. D. Cummins AM

Chair, Victorian Law Reform Commission

February 2016

Terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 29 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the use of regulatory regimes to help prevent organised crime and criminal organisations entering into or operating through lawful occupations and industries.

Regulatory regimes include the use of laws, regulations, policies and instruments to regulate a given occupation or industry, including licensing regimes and occupational registration requirements.

In particular, the Commission should consider:

1. the experience of Victoria and other jurisdictions in using occupational and industry regulation to help prevent organised crime infiltration of lawful occupations or industries
2. whether, to what extent and in what circumstances regulatory regimes may be effective in helping to prevent organised crime infiltration of lawful occupations or industries
3. the implications for the overall efficiency and effectiveness of regulatory regimes of using such regimes to help prevent organised crime infiltration of lawful industries or occupations
4. the costs and benefits of regulatory options to assist in preventing organised crime infiltration of lawful industries or occupations
5. how best to structure any regulatory regime to ensure its effectiveness in helping to prevent the infiltration of organised crime without imposing unreasonable regulatory burdens, including consideration of regulatory options such as:
 - licensing (including negative licensing)
 - registration
 - notification
 - statutory exclusions
 - discretionary exclusions
 - fit and proper person tests
 - criminal offences
 - the level of sanctions
6. whether a framework of principles can be established for assessing the risks of organised crime infiltration of different lawful occupations or industries and for developing suitable regulatory responses.

The Commission is to report by 29 February 2016.

Glossary

Accessory liability	Liability for being involved in the contravention of a law by another person, such as by aiding and abetting the contravention or being knowingly concerned in the contravention.
Agency	Unless the context indicates otherwise, a generic term referring to various types of government bodies, including government departments, police forces, and independent statutory authorities.
Australian Crime Commission (ACC)	The national criminal intelligence and investigation agency. The ACC seeks to combat serious and organised crime.
Australian Institute of Criminology (AIC)	A national centre that conducts research into crime and criminal justice issues.
Australian Transaction Reports and Analysis Centre (AUSTRAC)	The national anti-money laundering and counter-terrorism financing regulator and financial intelligence unit.
Beneficial ownership	The beneficial owners of a company are the natural persons who ultimately own or control the company. They may do so directly through personal shareholdings in the company, or indirectly through other persons (such as nominees), intermediary companies or trusts. Sometimes there are several intermediate structures between the company and the beneficial owner.
Cleanskin	This term is typically used in the context of licensing schemes. A 'cleanskin' is a person with a clean background who applies for a licence as a front person for an organised crime group. A 'cleanskin' is likely to have no easily discoverable links to organised crime nor other attributes (such as a relevant criminal record) that make her/him likely to be refused a licence. A 'cleanskin' can, therefore, be used by an organised crime group to attempt to infiltrate an occupation or industry.
Criminal intelligence	Information held by law enforcement agencies that raises suspicions about a person's links to criminal activity as distinct from criminal activity that has been proven (that is, through a successful prosecution).

Financial Action Task Force (FATF)	An international, intergovernmental body that provides guidance about anti-money laundering policies. Australia is a member of the FATF.
Independent Broad-based Anti-corruption Commission (IBAC)	A Victorian Government agency responsible for the investigation and prevention of public sector corruption and police misconduct.
Know your customer (KYC)	A form of due diligence conducted by businesses that involves verifying the identity of a customer and obtaining other relevant information about the customer, in order to avoid enabling/facilitating criminal or other unlawful activity by the customer.
Know your supplier (KYS)	A form of due diligence conducted by businesses and government agencies that involves verifying the identity of a supplier and obtaining other relevant information about the supplier, in order to avoid doing business with a supplier that may be involved in criminal or other unlawful activity.
Money laundering	Dealing with assets (eg money or property) obtained through the commission of crime in a way which masks ownership of those assets and makes them appear to have come from legitimate sources. ¹
Outlaw motorcycle gang (OMG)	A term commonly used by law enforcement agencies to describe motorcycle clubs that may be engaged in, or whose members may be engaged in, criminal activity. An outlaw motorcycle gang is distinct from a law-abiding, recreational motorcycle club.
Phoenix activity	The deliberate liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to avoid tax and other liabilities, such as employee entitlements, and to continue the operation and profit-taking of the business through another trading entity. ²
Precursor chemical/precursor	A chemical that can be used to make illicit drugs.
Regulator	An agency that regulates an occupation or industry. A regulator may, for example, consider applications for licences to operate in an occupation or industry, and monitor compliance with the legislation that governs an occupation or industry.
Regulatory regime	The laws, regulations, policies and instruments that govern the entry of people into, the conduct of people within, and the exit of people from an occupation or industry.
Victorian Civil and Administrative Tribunal (VCAT)	A tribunal, presided over by a Supreme Court judge, that deals with civil and administrative disputes, including the review of decisions by government agencies about business and occupational licensing, and disciplinary proceedings for misconduct in particular occupations and industries.

Executive summary

- 1 On 29 October 2014, the then Attorney-General, the Hon. Robert Clark, MP, asked the Victorian Law Reform Commission to review and report on the use of regulatory regimes to help prevent organised crime and criminal organisations entering into or operating through lawful occupations and industries. In the terms of reference, and in this report, the term ‘infiltration’ means both entering into and operating through lawful occupations and industries by organised crime.
- 2 There is a growing recognition—both in Australia and internationally—that the infiltration of lawful occupations and industries is an important strategy of organised crime groups. Alongside this, there is a growing interest in the use of regulatory regimes to deter and detect that infiltration. Under the terms of reference, the concept of infiltration involves both the entry of organised crime groups into an occupation or industry (for example, through owning or operating a business), and the operation of organised crime groups through an occupation or industry. ‘Operating through’ an occupation or industry includes the use of professional facilitators and specialist service providers.
- 3 The terms of reference do not ask the Commission to make recommendations for law reform. Instead, the Commission is asked to establish a framework of principles for assessing the risks of organised crime infiltration of occupations and industries, and for developing suitable regulatory responses to those risks.
- 4 The Commission’s report therefore contains guidance of a general nature that can be applied to any lawful occupation or industry that may be at risk of organised crime infiltration. Given the diversity of occupations/industries that may be vulnerable to infiltration, and the different forms that infiltration may take, it would not be possible—or advisable—to attempt to present a ‘one size fits all’ regulatory response that could be applied to all lawful occupations/industries at risk of organised crime infiltration. Any changes to the regulatory regime of an occupation or industry to address a risk of infiltration must be proportionate to that risk and the harm likely to be caused by infiltration, and take into account the other policy goals of the regulatory regime. The Commission’s consultations made clear that a regulatory response to infiltration will only be effective and proportionate if it is specific to the at-risk occupation/industry and the particular vulnerabilities and opportunities that organised crime groups may seek to exploit within it.
- 5 The Commission recommends that the report be read in conjunction with the Victorian Guide to Regulation and used by policy makers in assessing the risks of organised crime infiltration of lawful occupations and industries, and in developing regulatory responses to those risks.
- 6 The following key messages emerge from the Commission’s report.

The nature of organised crime

- 7 Organised crime comprises an increasingly broad range of activities. An effective regulatory response to organised crime infiltration requires an understanding of the breadth of activities that may benefit from (or require) the infiltration of lawful occupations and industries, and the particular forms of conduct that organised crime groups may engage in once infiltration has occurred. While infiltration may enable the conduct of 'traditional' organised crime activities such as the trafficking of illicit commodities and money laundering, it may equally enable conduct such as fraud (including investment, taxation or identity fraud), unlawful practices that are specific to an occupation or industry (such as illegal commercial fishing or waste management practices), or labour exploitation or trafficking.
- 8 Regulators should have an understanding of contemporary forms of organised crime activity, and remain abreast of changes to such activity as organised crime groups seek out new markets and means of profit-making. This understanding is necessary not only for the identification of risk factors for infiltration and the choice of regulatory strategies but also for the implementation of the regulatory response. In tackling organised crime, it is becoming more common to take a multi-disciplinary approach to enforcement and consider the enforcement actions available to several government agencies. This requires an understanding of the numerous types of activity in which organised crime groups may be engaged in a particular occupation or industry, such as taxation fraud, employment law contraventions, or migration law contraventions.

Identifying risk factors for infiltration

- 9 Existing analyses of common risk factors for organised crime infiltration are at an early stage of development, and are relatively few. Drawing on the existing analyses and its own consultations, the Commission has identified a series of high-level risk factors that can assist policy makers in identifying a risk of infiltration of a particular occupation or industry. However, as the Commission's consultations made clear, a more detailed, specific risk assessment of a particular occupation or industry should also be conducted to determine the precise vulnerabilities that organised crime groups may exploit and the appropriate regulatory strategies to reduce those vulnerabilities.

Collaboration and information sharing

- 10 An effective regulatory response to organised crime infiltration will require some degree of collaboration among regulatory, law enforcement and other government agencies. No one agency will hold all the necessary information, or be equipped with all the necessary powers and skills, to address organised crime infiltration.
- 11 Information sharing among government agencies is key to any collaborative work. The Commission has suggested that improved information sharing requires addressing any legislative barriers to information sharing, instituting appropriate governance arrangements for the sharing of sensitive information, and creating some form of centralised information-sharing mechanism, whether this comprises a multi-agency network through which information can be requested and circulated, or a centralised agency that can source and evaluate information from multiple agencies where a regulator has concerns about a particular licence applicant or other regulatory matter.
- 12 Collaboration between government agencies and industry is also key. Regulators will need to engage with industry in identifying risks of infiltration, developing a regulatory response, and implementing that response (including utilising industry members as a source of information about organised crime infiltration).

Strategies to reduce the risk of infiltration: licensing and beyond

- 13 The report sets out four main strategies for reducing the risk of organised crime infiltration of a lawful occupation or industry:
- assessing the existing regulatory regime
 - restricting entry into an occupation or industry through a licensing scheme
 - regulating post-entry behaviour in an occupation or industry
 - addressing the use of professional facilitators.

Restrictions on entry

- 14 Where no regulatory regime currently operates, or the existing regime is deficient, it may be appropriate to restrict entry to the occupation or industry through a licensing scheme. However, licensing should not be a default response to a risk of organised crime infiltration. The report sets out a range of factors that should be considered in deciding whether licensing is appropriate, including whether the form of infiltration is of a type that could be addressed through licensing measures, whether the regulator would be willing and able to conduct a rigorous examination of licence applicants, whether the regulator (or possibly Victoria Police) would have the powers and resources to prevent unlicensed operation, and the potential anti-competitive effects of licensing on the occupation/industry.
- 15 Where a licensing scheme is used, a host of factors will need to be considered in order to detect any links to organised crime when assessing a licence applicant's probity and suitability. This includes enquiring into the professional competency of the licence applicant, the beneficial owners of corporate applicants, any history of prior unlawful behaviour (whether criminal or non-criminal) and adverse administrative decisions, and the financial capacity of the applicant to conduct the licensed business. Although criminal intelligence may be heavily relied on in some licensing decisions, it is particularly important that regulators consider a broad range of information in assessing probity and suitability, so as not to place an unreasonable burden on law enforcement agencies, and to establish the most complete picture possible of the applicant's probity and suitability.

Post-entry regulation

- 16 The post-entry regulation of an occupation or industry is just as important as any restrictions on entry.
- 17 Any licensing scheme will need to be supplemented with the ongoing regulation of an occupation or industry in order to detect organised crime groups that evaded detection during the licensing process, or which have corrupted existing occupation/industry members.
- 18 Post-entry regulation is also a potential alternative to restrictions on entry. It may be that the particular vulnerabilities of an occupation/industry are best addressed through a targeted, post-entry measure, such as record-keeping requirements or restrictions on cash-based transactions.
- 19 Post-entry regulation also provides an opportunity to 'widen the regulatory gaze' and harness the capacity of third parties—such as occupation and industry members, customers, and employees/workers—to participate in regulation. In some industries, for example, legitimate businesses may play a key role in deterring and detecting organised crime infiltration by conducting supplier or customer due diligence.
- 20 The report outlines five forms of post-entry regulation that should be considered in order to reduce the risk of organised crime infiltration:

- ongoing monitoring of probity and suitability
- customer and supplier due diligence measures
- record-keeping requirements
- restrictions on cash-based transactions
- controls on coercive conduct.

Professional facilitators

- 21 The use of service providers and ‘professional facilitators’ by organised crime groups is one potential form of infiltration. Professional facilitators may include lawyers, accountants, financial advisers and real estate agents, who wittingly or unwittingly assist with money laundering or other unlawful conduct. Insofar as professional facilitators may be key enablers of such activity, there may be significant disruptive value in addressing their use by organised crime groups.
- 22 Any regulatory strategies that seek to address the use of professionals should have regard to the continuum of facilitating conduct by professionals, which ranges from unwitting assistance through to wilful blindness and, at its highest, voluntary and deliberate facilitation of unlawful activity. With this in mind, consideration should be given to three key regulatory strategies that may help to prevent the use of professional facilitators by organised crime groups:
- professional ethics education and support measures
 - customer due diligence measures
 - accessorial liability provisions.
- 23 The Commission notes that one key issue concerning professional facilitators is the current scope of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), which at the time of delivery of this report was under review by the Commonwealth government in relation to its proposed extension to lawyers, accountants and real estate agents. Being Commonwealth legislation, the Commission has not commented on this proposed reform, and has confined its attention to strategies that may be used under Victorian regulatory regimes.

A comprehensive regulatory response

- 24 By aligning this report with the Victorian Guide to Regulation, the Commission seeks to emphasise that any regulatory response to organised crime infiltration must be comprehensive; that is, it should begin by clearly identifying the particular vulnerabilities of an occupation or industry to infiltration, identify regulatory strategies that directly address those vulnerabilities, and ensure that the regulatory response is able to be effectively implemented.
- 25 The third step—implementation—requires a consideration of:
- which agency—or agencies—are most appropriate to administer the regulatory regime
 - the need to foster information gathering from a broad range of sources
 - which investigative powers are required
 - the necessity of a robust enforcement response.
- 26 In this respect, it is especially important that policy makers first consider the utility of any existing regulatory regime before developing new regulatory strategies. An existing regime may be sufficient ‘on paper’, but its effectiveness may be hampered by inadequate regulatory skill sets, insufficient collaboration and information sharing among relevant government agencies, or a limited and risk-averse enforcement response. Any such issues should be identified and redressed before new regulatory measures are considered.

PART ONE: OVERARCHING PRINCIPLES AND ASSESSING THE RISK OF INFILTRATION

Background

- 2** Referral to the Commission
- 2** The context of the terms of reference
- 3** Scope and nature of the report
- 5** The Commission's process
- 6** Structure of the report

1. Background

Referral to the Commission

- 1.1 On 29 October 2014, the then Attorney-General, the Hon. Robert Clark, MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review the use of regulatory regimes to help prevent organised crime and criminal organisations entering into or operating through lawful occupations and industries. The terms of reference are set out at page viii.
- 1.2 Under the terms of reference, regulatory regimes are described as including ‘the use of laws, regulations, policies and instruments to regulate a given occupation or industry, including licensing regimes and occupational registration requirements’.

The context of the terms of reference

- 1.3 There is a growing recognition—both in Australia and internationally—that the infiltration of legitimate occupations and industries is an important strategy of organised crime groups. Alongside this is a growing interest in the use of regulatory regimes or ‘administrative measures’ to deter and detect that infiltration.
- 1.4 The Australian Crime Commission (ACC) has found that one of the three key characteristics of organised crime groups in Australia is an ‘ability to conceal criminal activity by integrating into legitimate markets’. The ACC notes that while organised crime groups continue to be active in traditional illicit markets, such as drug markets, they have infiltrated legitimate industries in order to generate and launder significant criminal profits, and to facilitate organised crime activity; for example, by establishing businesses in the transport sector that enable the trafficking of illicit goods.¹
- 1.5 In 2014, the Parliament of Victoria Law Reform, Drugs and Crime Prevention Committee recommended that the Victorian Government investigate the appropriateness of using administrative regulatory measures to reduce the opportunities available to organised crime groups for engaging in illegal activities in Victoria.² That recommendation was made following an inquiry into the supply and use of methamphetamines in Victoria.
- 1.6 Under the National Organised Crime Response Plan for 2015–18, one of the five ‘key capabilities’ being pursued by the Commonwealth government is ‘[a] focus on disrupting and dismantling the criminal business model’. The Plan states that this can be achieved through anti-money laundering measures, proceeds of crime investigations and tax collections, and by ensuring that organised crime groups cannot exploit legitimate business structures or use professional advisers to facilitate their activities.³

1 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 7.

2 Law Reform, Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into the Supply and Use of Methamphetamines, Particularly Ice, in Victoria: Final Report* (2014) 430–33.

3 Australian Government, *National Organised Crime Response Plan 2015–18*, 19.

- 1.7 In some European countries, the use of regulatory regimes (or an ‘administrative approach’, as it is more commonly termed in Europe) is a major plank of recent anti-organised crime strategies. Similarly to Australia, European authorities have observed that organised crime groups infiltrate legitimate occupations and industries in order to invest the proceeds of crime, generate further profits, and/or facilitate organised crime activity. A key element of the administrative approach in Europe is the preventative screening and monitoring of applicants for business licences/permits, government subsidies, and tenders for government contracts.⁴
- 1.8 It is within the context of these recent initiatives that the Commission presents this report. To the Commission’s knowledge, this is the first occasion on which a law reform body has been asked to conduct a review of the use of regulatory regimes to prevent organised crime infiltration of lawful occupations and industries. The report therefore represents a relatively early step in the examination of the issues raised by the terms of reference. The Commission anticipates that these issues will be examined again in subsequent years once regulatory responses to organised crime infiltration are further developed, implemented and refined.

Scope and nature of the report

- 1.9 The scope of the Commission’s review was set by the terms of reference. The terms of reference ask the Commission whether a framework of principles can be established for assessing the risks of organised crime infiltration of lawful occupations and industries, and for developing suitable regulatory responses to those risks. The Commission proposes such a framework.
- 1.10 As defined by the terms of reference, regulatory regimes include the use of laws, regulations, policies and instruments to regulate a given occupation or industry. While the focus of this report is on the use of regulatory measures to help prevent organised crime infiltration of lawful occupations and industries, as required by the terms of reference, regulatory regimes are also designed to achieve other policy goals. When policy makers consider using regulatory measures to address a risk of infiltration, they should consider how that will impact on the achievement of the other policy goals of the particular regulatory regime, such as promoting competition, protecting consumers, and preventing harm against particular groups (for example, one of the objectives of the *Sex Work Act 1994* (Vic) is to promote the welfare and occupational health and safety of sex workers⁵). The use of regulatory measures to prevent infiltration may complement, or conflict with, these other policy goals.
- 1.11 The terms of reference did not ask the Commission to make recommendations for law reform. However, the principles outlined in this report may ultimately lead to legislative reform.
- 1.12 The report is intended to be read in conjunction with the Victorian Guide to Regulation (VGR), which was developed by the Department of Treasury and Finance and is intended to be the definitive guide to developing regulation in Victoria.⁶ The VGR sets out the steps that policy makers should take in designing and assessing regulation, with the aim of achieving well-targeted, proportionate regulatory responses that address policy problems while avoiding undue burdens on business, government and other stakeholders, and the creation of undesirable, unintended consequences.⁷

4 See A C M Spapens, M Peters and D Van Daele (eds), *Administrative Approaches to Crime* (2015) <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/crime-prevention/docs/final_report_eu_study_administrative_approaches_to_crime_en.pdf>; Hans Nelen, ‘Situational Organised Crime Prevention in Amsterdam: The Administrative Approach’ in Karen Bullock, Ronald V Clarke and Nick Tilley (eds), *Situational Prevention of Organised Crimes* (Willan Publishing, 2010) 93; Scottish Government, *Scotland’s Serious Organised Crime Strategy* (2015).

5 *Sex Work Act 1994* (Vic) s 4(h).

6 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014).

7 Ibid 1–2.

Recommendation

The Commission's report should be read in conjunction with the Victorian Guide to Regulation and used by policy makers in assessing the risks of organised crime infiltration of lawful occupations and industries, and in developing regulatory responses to those risks.

The meaning of organised crime

- 1.13 There is not a universal definition of organised crime. For the purpose of its review, the Commission was guided by the definitions of organised crime in the *Major Crime (Investigative Powers) Act 2004* (Vic) and the *Australian Crime Commission Act 2002* (Cth). These definitions are set out in Chapter 2. In summary, they establish that organised crime involves serious, group-based offending for financial or other gain, on a planned and often ongoing basis. Organised crime is distinct from immediate or opportunistic offending.
- 1.14 The terms of reference also refer to 'criminal organisations', a concept that is not expressly defined in Victorian or Commonwealth legislation. The Commission understands this concept to mean a group, body or association, whether incorporated or unincorporated, which is involved in serious criminal activity, and may include individuals who are related to one another.⁸
- 1.15 The terms 'organised crime', 'organised crime group' and 'criminal organisation' are used interchangeably throughout the report.

The meaning of infiltration

- 1.16 'Infiltration' denotes incursion by organised crime groups into lawful occupations and industries. The concept of infiltration does not denote organised criminality arising within an occupation or industry that is committed by otherwise legitimate occupation/industry participants; rather, the source of the criminality is external to the occupation or industry.
- 1.17 On the basis of the Commission's review, it appears that there are two key forms of organised crime infiltration of occupations and industries:
- the entry of organised crime groups into an occupation or industry, including through ownership or operation of a business, employment in a business, or a significant connection with a business (such as a management, partnership or financing arrangement)
 - the operation of organised crime groups through an occupation/industry via the use of service providers and professional facilitators.
- 1.18 A range of occupations and industries are said to be vulnerable to organised crime infiltration in one or both of these forms. In order to identify common risk factors for infiltration, examine relevant regulatory regimes, and consult with appropriate regulators and industry representatives, the Commission conducted a literature review to determine which occupations and industries had previously been identified as vulnerable to organised crime infiltration.
- 1.19 Lawful occupations and industries that are said to be vulnerable to entry by organised crime include: private security, debt collection, trucking and heavy haulage, lawful sex work, commercial fishing, labour hire, gaming, waste management, tattooing, and professional sports and fitness.

- 1.20 In relation to the second form of infiltration, organised crime groups were identified in the literature as using the services of: pharmaceutical/chemical manufacturers and suppliers, hydroponic equipment suppliers, licensed firearm dealers, auto-wreckers/recyclers and scrap metal dealers, second-hand dealers and pawnbrokers, and professional facilitators such as lawyers, accountants, financial advisers and real estate agents.
- 1.21 While these are not exhaustive lists, they were deemed to provide a sufficiently broad sample for the purpose of the review.
- 1.22 The Commission notes that the final report of the Commonwealth Royal Commission into Trade Union Governance and Corruption was delivered in December 2015.⁹ That inquiry did not concern the form of infiltration referred to in the present terms of reference; the Royal Commission concerned allegations of criminality within trade unions, rather than the infiltration of those entities, or the occupations/industries in which they participate, by external organised crime groups.

The Commission's process

- 1.23 The Commission's review was led by the Hon. Philip Cummins AM and a Division that he chaired. The other Division members were Commissioners Liana Buchanan, Helen Fatouros, Bruce Gardner PSM, Dr Ian Hardingham QC, His Honour David Jones AM, Eamonn Moran PSM QC, Alison O'Brien, and the Hon. Frank Vincent AO QC.
- 1.24 The Commission established an advisory committee of experts (see Appendix A) to provide technical guidance about the issues raised by the terms of reference. The advisory committee met twice during the course of the review.
- 1.25 In June 2015, the Commission published a consultation paper which addressed the issues raised by the terms of reference and sought written submissions on these issues. The Commission requested that submissions be made by 3 August 2015. Submissions were accepted by the Commission after this date.
- 1.26 The Commission received 32 submissions. They are listed at Appendix B. Most of the submissions are public documents and can be viewed on the Commission's website.
- 1.27 The Commission also received informal comments from individuals and agencies with specialist expertise.
- 1.28 Following the publication of the consultation paper, the Commission consulted with law enforcement agencies, regulatory agencies, and industry representatives. This included meetings with Victoria Police, the Australian Crime Commission, the Australian Federal Police, the Australian Transaction Reports and Analysis Centre, and the Commonwealth Attorney-General's Department. Three roundtables were also conducted—two roundtables were attended by industry representatives, and the third was attended by representatives of regulatory agencies. The full list of consultation participants is at Appendix C.
- 1.29 The Commission records its warm thanks to the members of the advisory committee, and to all individuals and agencies that participated in the consultations and made submissions.

Structure of the report

- 1.30 For the most part, the report is structured in conformity with the Victorian Guide to Regulation. Together, the chapters comprise a series of steps that policy makers should take in identifying risks of organised crime infiltration and developing a regulatory response to infiltration.
- 1.31 Part One comprises chapters 1 to 4.
- 1.32 Chapter 2 ('Overarching principles') lists the overarching principles that should inform any regulatory response to organised crime infiltration of an occupation or industry.
- 1.33 Chapter 3 ('Identifying the problem or issue') outlines how the risk of organised crime infiltration of a particular occupation or industry might best be assessed.
- 1.34 Chapter 4 ('Specifying the desired objectives') briefly outlines the matters that should be considered in specifying the objectives of any regulatory response to infiltration.
- 1.35 Part Two comprises chapters 5 to 9.
- 1.36 Chapters 5 to 8 set out four main strategies to reduce the risk of infiltration:
- assessing the existing regulatory regime
 - restricting entry into an occupation or industry
 - regulating post-entry behaviour
 - addressing the use of professional facilitators.
- 1.37 Chapter 9 ('Considering the effect of the preferred strategies') describes the perverse incentives that may arise through the operation of these strategies.
- 1.38 Part Three comprises chapters 10 to 12.
- 1.39 Chapter 10 ('Developing an implementation plan for the preferred strategies') presents the factors that should be considered in developing an implementation plan.
- 1.40 Chapter 11 ('Detailing the evaluation strategy') briefly outlines the priorities for any evaluation of a regulatory response to organised crime infiltration.
- 1.41 Chapter 12 concludes the report. The advisory committee, submissions and consultations are listed in the appendices.

Overarching principles

- 8** Occupation- and industry-specific regulatory responses
- 9** A collaborative approach to regulation
- 11** Information sharing among government agencies
- 17** Good administrative decision making
- 21** Nationally consistent best practice in regulatory responses
- 22** A uniform concept of 'organised crime'

2. Overarching principles

- 2.1 The following overarching principles should be considered in developing a regulatory response to organised crime infiltration of lawful occupations and industries:
1. The regulatory response should be specific to the occupation or industry at risk of infiltration.
 2. A collaborative approach should be taken in responding to organised crime infiltration.
 3. Government agencies should seek to maximise information sharing.
 4. A regulatory regime should promote good administrative decision making.
 5. Government agencies should pursue nationally consistent best practice in regulatory responses.
 6. A uniform concept of organised crime is necessary for effective regulatory responses.

Occupation- and industry-specific regulatory responses

- 2.2 A regulatory response to organised crime infiltration should be specific to the occupation or industry at risk of infiltration. A key theme to emerge from the Commission's consultations is that there is no single, optimal regulatory regime for the prevention of organised crime infiltration. This view was encapsulated by the Australian Security Industry Association Limited (ASIAL), which stated that 'no one model suits all in preventing the infiltration of organised crime groups into lawful occupations and industries'.¹
- 2.3 Liberty Victoria cautioned that there would be, in fact, significant risk in adopting generalised regulatory responses to infiltration, insofar as a generic approach would disregard the different purposes for which particular occupations and industries are infiltrated, the different scales and characteristics of diverse occupations and industries, and the utility of any existing regulatory regimes within an occupation or industry.²
- 2.4 As this report proposes, policy makers should tailor the regulatory response to organised crime infiltration by: a) examining the particular form that infiltration takes in an occupation or industry and the specific opportunities and vulnerabilities that organised crime groups exploit, and b) considering the most beneficial regulatory strategies to reduce those opportunities and vulnerabilities.

- 2.5 For example, the private security industry is vulnerable to the entry of organised crime groups as providers of private security services. The regulatory response in the private security industry therefore involves the licensing and monitoring of private security operators.
- 2.6 A different regulatory response may be required where an organised crime group does not seek to enter an occupation or industry, but instead seeks to use legitimate service providers or professional advisors for the purpose of unlawful conduct. In this case, the regulatory response may not necessarily require the licensing of business operators, but may instead rely on regulatory measures aimed at bringing transparency to transactions and the provision of goods and services, such as customer due diligence requirements.
- 2.7 In developing an occupation- or industry-specific regulatory response, it is important that policy makers both address risks of organised crime infiltration and avoid undue impediments to the entry and operation of legitimate occupation/industry participants. In other words, the regulatory regime should endeavour to let the 'right' people in, as much as it seeks to keep the 'wrong' people out. As noted at numerous points in this report, a well-functioning, flourishing legitimate business sector can help to marginalise illegitimate operators within a particular occupation or industry and make infiltration by organised crime groups more difficult.

A collaborative approach to regulation

- 2.8 A collaborative approach should be taken in responding to organised crime infiltration. While the Commission recognises that collaborative approaches may be difficult to implement in practice, consultation participants frequently expressed the view that a regulatory response to organised crime infiltration requires greater collaboration among government agencies, and between government agencies and the private sector.³

The stages of collaboration

- 2.9 Collaboration is important at all stages of the regulatory response, from assessing the risks of infiltration to evaluating regulatory measures.
- 2.10 First, in assessing the risks of infiltration, collaboration is important because several government agencies may have information in relation to risk factors. For example, the combined intelligence of Victoria Police, the Australian Taxation Office, and the Fair Work Ombudsman may reveal that an industry is at risk of infiltration due to opportunities for taxation fraud, phoenix activity, and the exploitation of workers.
- 2.11 It would also be desirable for regulators and law enforcement agencies to collaborate at this stage in order to assess the relative risks of infiltration across multiple occupations and industries, and to determine where regulatory intervention is most warranted and limited resources best allocated. In assessing these relative risks, agencies should consider factors such as the degree of harm caused by infiltration in a particular occupation or industry, and whether a regulatory response in a particular occupation or industry is likely to have a significant disruptive effect on organised crime activity more broadly.
- 2.12 Second, relevant government agencies should collaborate in developing a regulatory response to organised crime infiltration of a particular occupation or industry, in order to identify the most beneficial strategies for reducing the risk of infiltration. It is also necessary for government agencies to collaborate with industry in developing a regulatory response. Members of a legitimate occupation or industry are unlikely to support regulatory measures that they perceive as unfair or lacking in credibility.⁴

3 Consultations 2 (Roundtable 1), 4 (Roundtable 3), 6 (Australian Crime Commission), 7 (Australian Federal Police), 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department); Submissions 10 (Australian Tattooists Guild), 11 (Australian Security Industry Association Limited).

4 Submission 10 (Australian Tattooists Guild); Consultation 5 (Professional Tattooing Association of Australia).

- 2.13 Third, the implementation of each of the regulatory strategies outlined in this report requires some degree of collaboration among government agencies, and between government agencies and the private sector. Enforcement activity increasingly requires collaboration between government agencies. The most effective means of disrupting organised crime infiltration may lie within the regulatory regime that governs that occupation or industry (such as the use of licence cancellations), or may lie outside that regulatory regime (such as a prosecution for money laundering, customs or taxation-related offences).

The elements of effective collaboration

- 2.14 Consultation participants remarked on several factors that enable effective collaboration. These factors are not exhaustive; the Commission notes that a considerable body of literature exists on the barriers to inter-agency/inter-sector collaboration and their possible solutions.⁵ The experiences of consultation participants suggest that effective collaboration requires:
- clear organisational structures and role delineation in order to avoid:
 - responsibility shifting between agencies
 - delays in decision making and enforcement action owing to confusion about roles
 - uncertainty among industry members and other stakeholders about points of contact⁶
 - common objectives and projects, which may require a recasting of performance goals and indicators to reward staff and their agencies for collaborative work with other agencies⁷
 - leaders who recognise the importance of addressing organised crime infiltration and promote shared commitments to this goal⁸
 - mechanisms for managing conflicts of opinion between agencies or a clash of organisational cultures⁹
 - the co-location of agencies or individual staff, whether on a permanent or temporary basis, in order to form meaningful, trusting relationships and facilitate information sharing¹⁰
 - governance arrangements which ensure that agencies feel confident in the sharing of information (see [2.33]–[2.38]).¹¹
- 2.15 Potential models for inter-agency collaboration were suggested by consultation participants. One model is the waterfront taskforces used in Melbourne, Brisbane and New South Wales to address waterfront crime (Taskforces Trident, Jericho and Polaris), which involve collaborations between the Australian Crime Commission (ACC), the Australian Federal Police, the Australian Border Force, state police forces and private companies.¹² Another model is the National Environmental Security Task Force (NEST) concept developed by INTERPOL. A NEST is a multi-agency cooperative comprising policing, customs and environmental agencies, prosecutors and non-governmental

5 See, eg, Ronald W McQuaid, 'Theory of Organizational Partnerships: Partnership Advantages, Disadvantages and Success Factors' in Stephen P Osborne (ed), *The New Public Governance? Emerging Perspectives on the Theory and Practice of Public Governance* (Routledge, 2010) 127; Alan Doig and Michael Levi, 'Inter-agency Work and the UK Public Sector Investigation of Fraud, 1996–2006: Joined-up Rhetoric and Disjointed Reality' (2009) 19(3) *Policing and Society* 199.

6 Consultation 9 (Victoria Police); Submissions 20 (Australian Collectors & Debt Buyers Association), 21 (Institute of Mercantile Agents).

7 Consultations 1 (Professor Michael Levi), 6 (Australian Crime Commission).

8 Consultation 9 (Victoria Police).

9 Ibid.

10 Ibid. The co-location of staff has been taken to a high level in Scotland with the establishment of the 'Scottish Crime Campus', which is a multi-agency facility for addressing serious and organised crime in Scotland. A range of agencies are represented at the Campus, including Police Scotland, the Crown Office and Procurator Fiscal Service (ie the public prosecution service), the National Crime Agency, HM Revenue and Customs, and the Scottish Environment Protection Agency.

11 Consultation 9 (Victoria Police).

12 Consultation 6 (Australian Crime Commission).

organisations. INTERPOL publishes guidance on how governments can establish a NEST. The NEST model is being adopted internationally by INTERPOL's member countries.¹³

- 2.16 The ACC cited the Precursor Industry Reference Group (PIRG) as a model for government-industry collaboration.¹⁴ The PIRG is comprised of representatives of the pharmaceutical/chemical manufacturing and supply industries. The PIRG advises the wider Precursor Advisory Group, which is chaired by the Commonwealth Attorney-General's Department and coordinates risk assessments about the diversion of precursor chemicals for illicit drug manufacturing, and recommends strategies to reduce these risks. These collaborations have resulted in regulatory measures such as the Project Stop database for community pharmacies and legislated precursor control regimes.

Information sharing among government agencies

- 2.17 Government agencies should address barriers to information sharing. Many consultation participants stated that improving information sharing is critical to using regulatory regimes to help prevent organised crime infiltration of lawful occupations and industries.¹⁵
- 2.18 Information sharing may improve:
- the quality of decision making, by providing a regulator with information it would not be able to obtain on its own
 - the efficiency of regulation (for example, by enabling regulators to benefit from previous investigations of licence applicants by other agencies).
- 2.19 Several sources of information are likely to be useful to regulators in this context.
- 2.20 First, regulators may rely heavily on criminal intelligence from law enforcement agencies when considering the probity and suitability of a licence applicant or existing occupation/industry participant. Several agencies noted that criminal intelligence is particularly important for detecting 'cleanskins' (applicants with clean backgrounds who apply for licences as front people for organised crime groups).¹⁶ Further, some regulators do not have the skills and powers to investigate organised crime infiltration. For example, they may not be able to perform surveillance or other investigatory functions that can be used to detect the presence of an organised crime group in an occupation or industry. Instead, a regulator may rely on the police to perform such tasks and provide intelligence to the regulator.¹⁷
- 2.21 Second, non-law enforcement agencies may also have useful information. For example, information held by the Australian Taxation Office about a licence applicant may give rise to suspicions and indicate that the applicant should be thoroughly investigated before a licence is granted.
- 2.22 Third, occupation and industry regulators may benefit from sharing their information with each other. For example, a regulator assessing a licence applicant may benefit from investigations previously conducted by another regulator in assessing that applicant and/or its associates.

13 INTERPOL, *National Environmental Security Task Force Manual* (February 2014) <<http://www.interpol.int/Crime-areas/Environmental-crime/Task-forces>>.

14 Consultation 6 (Australian Crime Commission).

15 Consultations 2 (Roundtable 1), 4 (Roundtable 3), 9 (Victoria Police); Submissions 18 (Australian Securities and Investments Commission), 22 (Victorian Competition and Efficiency Commission). See also Submissions 11 (Australian Security Industry Association Limited), 13 (National Heavy Vehicle Regulator), 24 (Victorian Automobile Chamber of Commerce).

16 Consultations 4 (Roundtable 3), 7 (Australian Federal Police).

17 Consultation 4 (Roundtable 3).

2.23 There are a number of barriers to information sharing. A study of the use of 'administrative measures' (a similar concept to regulatory regimes) to combat serious and organised crime in a number of European Union member states found that the sharing of law enforcement intelligence with regulatory agencies can be hindered by legal barriers. Furthermore, law enforcement agencies:

may feel that sharing information with administrative bodies will endanger their own investigations or information sources. [In addition], government agencies may have doubts about the integrity of their counterparts.¹⁸

2.24 Very similar barriers to information sharing were described by Victorian and federal government agencies during the Commission's consultations.

Legislative barriers to information sharing

2.25 Government agencies may be prohibited from sharing information that they hold or they may be restricted with regard to which other agencies (and other entities) they can share information with and the purposes for which it can be shared.

2.26 Barriers can be found in legislation of general applicability (for example, the *Privacy and Data Protection Act 2014* (Vic)) and the legislation which governs a specific government agency.¹⁹

2.27 There is also some potential for government agencies to misunderstand the scope and applicability of legislative restrictions and, as a result, share less information than they could.²⁰

2.28 Policy makers should consider whether any legislative restrictions on information sharing between relevant agencies are appropriate, having regard to the value of information sharing in preventing organised crime infiltration of lawful occupations and industries. That consideration should include whether any available exemptions to legislative restrictions²¹ are sufficiently broad, and whether those exemptions can be obtained in a way that enables regulators to fulfil their functions in a timely manner.

2.29 Policy makers should also consider whether provisions that expressly permit information sharing under an occupation/industry regulatory regime would be appropriate. Under the *Tattoo Parlours Act 2012* (NSW), the Commissioner for Fair Trading is responsible for determining licence applications for tattoo operators.²² The Act allows the Commissioner to enter into information-sharing arrangements with various bodies, including New South Wales Police, government departments and local councils, for the purposes of sharing or exchanging any information held by the Commissioner.²³ Under an information-sharing arrangement, the Commissioner is authorised, despite any other law of the state, to receive information that is held by the other party to the arrangement.

2.30 As countenanced by the objects of the Privacy and Data Protection Act, it is important to balance competing public interests in determining whether information should be shared, including the public interest in the free flow of information, and the public interest in protecting the privacy of personal information in the public sector.²⁴

18 A C M Spapens, M Peters and D Van Daele (eds), *Administrative Approaches to Crime* (2015) 553, 554 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/crime-prevention/docs/final_report_eu_study_administrative_approaches_to_crime_en.pdf>.

19 See, eg, *Sex Work Act 1994* (Vic) s 61Z.

20 Consultation 4 (Roundtable 3).

21 See, eg, the provisions in the Privacy and Data Protection Act that allow agencies to seek exemptions to the prohibition on breaching Information Privacy Principles: *Privacy and Data Protection Act 2014* (Vic) s 20.

22 *Tattoo Parlours Act 2012* (NSW) s 16.

23 *Ibid* s 36.

24 *Privacy and Data Protection Act 2014* (Vic) s 5(a). See generally Submission 12 (Scarlet Alliance, Australian Sex Workers Association).

- 2.31 The appropriate balance should be determined on an industry-by-industry basis and will depend partly on the severity of the risk of organised crime infiltration, including the harm that may result from infiltration. In the Commission's view, higher levels of risk may justify greater incursions into the privacy of individuals and entities. In all cases, the assessment of risk should be well-informed and based on the available evidence.
- 2.32 Further, relevant government agencies should ensure that they have staff assigned to facilitating information sharing. Those staff should have a thorough understanding of the nature and extent of the legislative restrictions on information sharing.

Inadequate governance arrangements

- 2.33 Some law enforcement agencies told the Commission that one barrier to information sharing is their concern that non-law enforcement agencies may not handle information in such a way that it remains confidential and will only be used for an appropriate purpose.²⁵
- 2.34 Those concerns were supported (though not exclusively in relation to non-law enforcement agencies) by a 2015 report by the Independent Broad-based Anti-corruption Commission (IBAC). In *Organised Crime Group Cultivation of Public Sector Employees*, IBAC advised that public sector bodies most likely to be targeted by organised crime groups include those with access to law enforcement information.²⁶ Organised crime groups may seek to access that information by corrupting public sector employees. IBAC concluded that:

Many Victorian public sector bodies lack an awareness of the threat posed by organised crime groups and do not have prevention and detection measures to address the threat.²⁷

- 2.35 A reluctance of law enforcement agencies to share information may cause difficulties for regulators. For example, if Victoria Police forms a view that a licence applicant is unsuitable to be granted a licence but does not provide the regulator with the information on which that view is based, then it may be difficult for the regulator to determine how much weight to place on that view.²⁸ Further, a regulator may be provided with relevant information but told that because of the nature and confidentiality of the information it cannot be used in making administrative decisions.
- 2.36 Regulators should develop governance arrangements that will ensure that any information received will be protected and used appropriately.²⁹ Different levels of security may be required for different information, depending on its nature and source. Regulators will need to work with law enforcement agencies to develop satisfactory governance arrangements.
- 2.37 The Commission was frequently told that the development of formal, overarching agreements between regulators and other government agencies (typically through memoranda of understanding) can be effective in facilitating information sharing.
- 2.38 The practices followed by the Australian Securities and Investments Commission (ASIC) provide an example of such arrangements:

ASIC and the ATO have established information-sharing guidelines to clarify how and when information should be shared. Information is released through one formal channel with a single point of contact at each agency. This approach ensures appropriate record keeping, minimises the risk of a request being missed and allows the liaison staff to develop an enhanced understanding of the needs of the other agency.

25 Consultations 9 (Victoria Police), 7 (Australian Federal Police). See also A C M Spapens, M Peters and D Van Daele (eds), *Administrative Approaches to Crime* (2015) 480 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/crime-prevention/docs/final_report_eu_study_administrative_approaches_to_crime_en.pdf>.

26 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 1.

27 Ibid 11.

28 Consultation 4 (Roundtable 3).

29 Consultation 7 (Australian Federal Police).

...

ASIC and the ATO hold a National Liaison Committee meeting every six months where senior staff of both agencies discuss issues of strategic importance, the effectiveness of information exchange, the utility of ongoing working groups and specific operational matters.³⁰

Lack of centralised information-sharing mechanisms

- 2.39 Even if the barriers described above are addressed, there remains the issue that information is diffused among various law enforcement agencies, regulators and other government agencies, such as the Australian Taxation Office. In Australia, this diffusion of information is compounded by the federal system: relevant information may be held by Commonwealth, state or territory, or local government agencies.
- 2.40 This diffusion of information creates a number of problems.
- 2.41 First, a regulator may not be able to access all the information relevant to a decision (either at all or in a timely manner). This could lead to decisions that allow infiltration, such as a person connected with organised crime being granted a licence to operate in an occupation or industry.
- 2.42 Second, checking whether relevant information is held by other agencies may be time-consuming and resource-intensive.
- 2.43 The solution may be some form of centralised information sharing. One option is the creation of a multi-agency information-sharing network. Another option is the creation of a centralised assessment agency that is empowered to access and assess information from a range of agencies for the purpose of licence determinations and other regulatory assessments.
- 2.44 When considering how best to address the issue of diffusion of information (whether by one of the following two options or other options that may be suitable), policy makers should consider how to prevent infiltration while maximising the efficiency of decision-making processes and minimising duplication. In this regard, policy makers should consider the likely behaviour of organised crime groups, including that they may seek to infiltrate multiple occupations or industries, be displaced from one jurisdiction to another, or seek to infiltrate businesses within several jurisdictions. In addition to the risk of infiltration, this behaviour can lead to the duplication of work by different regulators who each independently assess licence applications by the one person or entity across several occupations or industries. Centralised information-sharing mechanisms would likely assist in preventing infiltration and reducing such duplication.
- 2.45 A centralised information-sharing mechanism could also play a relevant role in the post-entry regulation of occupation/industry members, including by helping to discover organised crime groups that have:
- evaded detection during any licensing process
 - corrupted or acquired a legitimate business
 - exploited a lack of restrictions on entry.

Multi-agency network

2.46 Multi-agency information-sharing networks would likely assist regulatory work. In a submission by the Victorian Competition and Efficiency Commission (VCEC) it was noted that recent discussions among major Victorian regulators:

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.³¹

2.47 The new regulatory arrangements to which the VCEC referred are contained in the Privacy and Data Protection Act. That Act allows agencies to seek exemptions to the prohibition on breaching Information Privacy Principles. Exemptions can apply to ongoing practices (and not merely one-off acts) of an organisation.³² It may, however, also be necessary to amend a regulator's governing legislation to remove or modify any restrictions on information sharing.

2.48 An approach used in England and Wales may provide a useful model for a multi-agency information-sharing network. There, the Government Agencies Intelligence Network (GAIN) brings together agencies to share information and intelligence. It is 'specifically aimed at reducing the threat, harm and risk associated with serious and organized crime'.³³

2.49 A range of government agencies are involved in the network, including all police forces, the National Health Service, the Gambling Commission and the Environment Agency. The network allows for the sharing of information and intelligence between partner agencies, within legislative constraints:

Information between the partner organizations is shared through a secure online system comparable to an e-mail network. It uses a standard form for posing a request for information and data-sharing. If a colleague requests information, a GAIN authorized employee fills in the form, signs it, and forwards it to the regional GAIN coordinator. From there, the form is distributed to all the other partners, or a selection depending on the wishes of the requesting agency. The partners establish whether they have relevant information and report this as either a 'hit' or a 'no-hit.' The requesting party is informed about both outcomes. The system itself therefore does not store intelligence. In the event of a hit, further information is exchanged bilaterally.³⁴

2.50 This may be a useful means of facilitating information sharing. Its advantages include that individual agencies remain in control of their information, but are freed from the burden of submitting multiple requests for information to a series of other agencies. This likely enables greater efficiency in decision making.

31 Submission 22 (Victorian Competition and Efficiency Commission).

32 See, eg, *Privacy and Data Protection Act 2014* (Vic) ss 29–33.

33 A C M Spapens, M Peters and D Van Daele (eds), *Administrative Approaches to Crime* (2015) 489 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/crime-prevention/docs/final_report_eu_study_administrative_approaches_to_crime_en.pdf>.

34 Ibid.

- 2.51 In Australia, several federal government agencies and state and territory law enforcement agencies are presently able to exchange information through the ACC's 'Fusion Capability' for the purpose of identifying organised crime threats. The ACC has access to '[m]ore than 1200 data sets collected from a range of government and industry sources' and advanced analytical tools for interpreting the data.³⁵ The ACC has experience in working closely with other, predominantly federal, government agencies in providing intelligence.
- 2.52 Victorian government agencies should consider the merits of multi-agency information-sharing networks such as the GAIN used in England and Wales, and the ACC's Fusion Capability.

Centralised assessment agency

- 2.53 Another option is the creation of a centralised assessment agency that is empowered to both access and assess information from a range of sources. Unlike the approach taken under the GAIN model, such an agency would be responsible for evaluating the information held by government agencies and advising a regulator about whether a licence should be issued or other regulatory step taken (for example, whether a subsidy should be issued).
- 2.54 The Netherlands follows this approach through its 'Bureau BIBOB'. When considering licence (and other) applications in certain high-risk industries, administrative authorities (that is, regulators) will first search for information about the applicant from a range of sources, including the police. If the results of that search cause the administrative authority to suspect there is a serious danger that the licence will be used for criminal activities, the authority may invite the applicant to a meeting to discuss those suspicions. If, following that meeting, the suspicions remain, the licensing authority may request in-depth screening of the applicant by the Bureau BIBOB.³⁶ The Bureau:
- is responsible for systematically analysing the criminal background and affiliations of applicants and, based on this analysis, for advising the administrative authorities about the risks of issuing a licence [to the applicant].³⁷
- 2.55 The Bureau may draw on information from a wide range of sources including public and 'semi-closed' sources such as the Dutch Tax and Customs Administration, the Dutch Immigration and Naturalization Service, and the Unusual Transactions Reporting Centre. The Bureau can also request information from police sources, including criminal intelligence.³⁸
- 2.56 Once the Bureau has provided its assessment of the applicant's integrity and the risks involved in granting it a licence, the licensing decision still rests with the relevant administrative authority.³⁹

35 Australian Crime Commission, *Annual Report 2013–14* (2014) 88.

36 A C M Spapens, M Peters and D Van Daele (eds), *Administrative Approaches to Crime* (2015) 231–33 <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/crime-prevention/docs/final_report_eu_study_administrative_approaches_to_crime_en.pdf>.

37 Ibid 227.

38 Ibid 233.

39 Julie Ayling, "'Going Dutch'? Comparing Approaches to Preventing Organised Crime in Australia and the Netherlands' (2014) 1(1) *The European Review of Organised Crime* 78, 93.

- 2.57 The approach taken by the Bureau BIBOB has been contrasted with the situation in Australia, where:
- systems to access the information of multiple government agencies for the purpose of risk assessment are rare. Police intelligence is usually the sole source of additional information (other than information gathered by the regulatory agency itself) on which the agency can rely to base its decisions, and the extent to which there is any sharing of that information by the police with the agency depends on the governing legislation. In Australia, information exchange between criminal justice and other agencies is usually highly constrained by legislation. Special arrangements may be made for the purpose of whole-of-government initiatives such as task forces, but overall information sharing is not of the same order as the institutionalised form of information exchange that is part of the Dutch administrative approach.⁴⁰
- 2.58 Julie Ayling, a member of the Commission’s advisory committee, suggested in her submission that consideration should be given to the establishment of a body like the Bureau BIBOB in Australia. Ms Ayling noted that:
- [t]he 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.⁴¹
- 2.59 A multi-agency information-sharing network would similarly allow a more comprehensive review of the probity and suitability of a licence or other applicant. However, in performing an evaluative role, a centralised assessment agency would be able to go one step further, by developing particular expertise in the detection of organised crime infiltration, and identifying common organised crime groups and infiltration strategies across several occupations and industries. In this respect, the use of a centralised assessment agency may reduce duplication, such as where the same people may be connected to applications for licences in a number of occupations and industries in different jurisdictions across Australia.

Good administrative decision making

- 2.60 Regulatory regimes should be designed and implemented in a way that promotes good administrative decision making.
- 2.61 The Commission’s research and consultations have highlighted two particular risks to good decision making when using regulatory regimes to help prevent organised crime infiltration of occupations and industries:
- corruption of a regulator’s staff by organised crime groups
 - restrictions on a person’s ability to know all the information relied on by a regulator when making a decision that affects that person.

Corruption of regulatory staff

- 2.62 The ACC and IBAC have each identified the risk of organised crime groups targeting public sector employees.⁴² One motivation for this is to influence decision-making processes.⁴³ Professor Michael Levi, an international expert on organised crime, warned the Commission of the risk of licensing regimes being undermined by the corruption of public sector employees.⁴⁴
- 2.63 In its submission to the Commission, the National Heavy Vehicle Regulator noted the risk of public servants being used as ‘facilitators and insiders for organised crime’ in order to, for example, provide ‘permits or accreditations to entities to whom such would not ordinarily be given’.⁴⁵
- 2.64 In its October 2015 report, the Queensland Organised Crime Commission of Inquiry considered the issue of public sector corruption. It noted that the Australian Institute of Criminology (AIC):
- has reported that little research has been conducted in Australia regarding any links between organised crime and corrupt public officials.⁴⁶
- 2.65 However, despite that lack of research and some indications that the level of public sector corruption in Australia may be relatively low by global standards, the report further noted that, according to the AIC, efforts to combat organised crime through legislation and the actions of law enforcement agencies over the last decade:
- create a risk of ‘tactical crime displacement’. Tactical crime displacement refers to criminals modifying their tactics in order to circumvent the effects of new legislation or increased law enforcement activity. One particular risk of tactical crime displacement is the potential for organised crime groups to focus more on forming corrupt relationships with public officials.⁴⁷
- 2.66 The Western Australia Corruption and Crime Commission told the Commission of the following two areas it has identified as being high-risk areas for public sector corruption, with potential for organised crime infiltration:
- agencies with regulatory functions such as licensing
 - agencies engaged in law enforcement-type activities due to their access to confidential information and the exercise of discretionary powers. This would include not only police forces but also regulators whose officers perform law enforcement-type functions such as investigation of breaches of regulations.⁴⁸
- 2.67 Organised crime groups may also corrupt public sector employees in order to ‘defraud the public purse by subverting public procurement processes’.⁴⁹
- 2.68 IBAC warned that some regulatory agencies are unaware of the threat posed by organised crime groups.⁵⁰ In its 2015 report, *Organised Crime Group Cultivation of Public Sector Employees*, IBAC provided advice on the factors that regulatory agencies should consider when identifying work areas and members of staff that may be vulnerable to corruption. IBAC also provided advice on prevention strategies.⁵¹

42 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 29; Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 1.

43 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 3.

44 Consultation 1 (Professor Michael Levi).

45 Submission 13 (National Heavy Vehicle Regulator).

46 Queensland, *Organised Crime Commission of Inquiry, Report* (October 2015) 531.

47 Ibid.

48 Information provided to the Commission by the Corruption and Crime Commission (Western Australia) (4 August 2015).

49 Submission 5 (Professor Louis de Koker and Kayne Harwood).

50 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 4.

51 Ibid 8–11.

- 2.69 Victorian regulatory agencies should review IBAC’s advice and consider whether they are taking appropriate measures to guard against the risk of their staff being corrupted, particularly where a regulator oversees an industry that is likely to be attractive to organised crime, conducts procurement that may be attractive to organised crime, or has access to law enforcement information, large volumes of identity information or credit card details.⁵²
- 2.70 In addition to IBAC’s recommended measures, the risk of organised crime profiting from public procurement processes may be mitigated by effective due diligence measures that aim to identify possible organised crime involvement (see [7.22]–[7.38]).

Disclosure of material relied on by regulator

- 2.71 Ordinarily, procedural fairness requires that a person be given an opportunity to deal with adverse information that is credible, relevant and significant to a decision to be made that will affect that person.⁵³ However, this principle is not absolute and public interest considerations may circumscribe the disclosure of information.⁵⁴
- 2.72 This issue may arise where criminal intelligence is used in the assessment of licence applications. Regulators may rely heavily on criminal intelligence when determining the probity and suitability of a licence applicant, especially if a regulator is attempting to discover any hidden links between an applicant and organised crime.
- 2.73 There may be a public interest in keeping criminal intelligence confidential where, for example, its disclosure would reveal police methods or the identity of informants.⁵⁵
- 2.74 If criminal intelligence used in licensing decisions were to be revealed to applicants as a matter of course, law enforcement agencies would be far more reluctant to share their intelligence with regulators. Regulators would then not be able to consider that intelligence when making a licensing decision. That might lead to unsuitable people being granted licences.
- 2.75 However, if an applicant does not know all the information relied on by the regulator in making its determination, then the applicant’s ability to challenge that decision is undermined. That may lead to suitable people being denied licences. Not only would that be contrary to the interests of the applicant, but the public has an interest in competition in occupations and industries not being unduly stifled by suitable applicants being denied entry.
- 2.76 In 2003, the Council of Europe described the risk of relying on untested information:
- Though pragmatically useful, the use of agency ‘intelligence’ is especially controversial, since it may not have been tested in any adversarial proceedings, and the suspected offenders who in consequence are excluded from exercising ‘normal’ rights may not have had the opportunity to refute the allegations. In repressive hands, such approaches can be abused or even become the tools of extortion by public authorities, sometimes in league with external criminals.⁵⁶
- 2.77 One option for resolving the conflicting interests in disclosure and non-disclosure is to rely less on criminal intelligence in administrative decision making and to rely more on alternative, non-confidential sources of information (see [6.59]–[6.150]).

52 Ibid 8.

53 *Kioa v West* (1985) 159 CLR 550, 629.

54 See *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99–100.

55 *Evidence Act 2008* (Vic) s 130(4).

56 Council of Europe, *Preventive Legal Measures Against Organised Crime*, Best Practice Survey No 9 (2003) 23.

- 2.78 However, assuming that the use of criminal intelligence is likely to be necessary, at some point, in order to prevent organised crime infiltration of an occupation or industry, a regulatory regime could incorporate measures that allow a court/tribunal to consider criminal intelligence on any review of a licensing decision, while allowing a regulator to seek restrictions on the disclosure of that intelligence to a licence applicant.
- 2.79 The High Court held in *Assistant Commissioner Condon v Pompano Pty Ltd* that the permissibility of such restrictions will require a consideration of the statutory scheme as a whole, and the particular powers given to the court or tribunal under that scheme to resolve the matter on review.⁵⁷
- 2.80 The *Private Security Act 2004* (Vic) provides an example of a regime that seeks to balance the public interest in the disclosure of information, with the public interest in the protection of sensitive criminal intelligence.
- 2.81 The Private Security Act contains a number of provisions that allow Victoria Police to seek to prevent the disclosure of ‘protected information’ on review of licensing decisions (Victoria Police issues licences in the private security industry). Protected information has a broad definition under the Act which incorporates criminal intelligence.⁵⁸
- 2.82 If Victoria Police makes a decision not to grant a private security licence, to the extent that its reasons relate to protected information, the applicant is not entitled to be provided with those reasons and the applicant is not entitled to be given an opportunity to comment on those reasons before the decision is made.⁵⁹
- 2.83 If the applicant applies to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the licence refusal, Victoria Police must provide VCAT with the reasons for its decision.⁶⁰ VCAT must then determine whether or not the information in question is protected information under the Act.⁶¹ This provides the applicant with some protection, as it should reduce the likelihood of information being arbitrarily classified as protected, and allows VCAT to be the arbiter of this classification.
- 2.84 If VCAT rules that the information is indeed protected information, then VCAT may determine that the hearing of the appeal (insofar as it relates to that protected information) will be held in private. In that case, only Victoria Police and a special counsel appointed by VCAT to represent the applicant may be present.⁶² The special counsel’s ability to communicate with the applicant will be restricted; the special counsel may only seek further instructions from the applicant in relation to the protected information with the approval of VCAT.⁶³
- 2.85 In making its determination, VCAT must decide what weight to give the protected information and any other evidence adduced.⁶⁴
- 2.86 How well this regime balances the competing interests depends on how it operates in practice; for example, how effectively a special counsel can challenge the protected information when the ability to take instructions from the applicant is limited.
- 2.87 In its submission, the Australian Security Industry Association Limited stated:
- In general a legislative framework that respects the rights of individuals and provides for a review of Regulator decisions exists within the security industry.

57 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 78, 100.

58 *Private Security Act 2004* (Vic) s 3.

59 *Ibid* s 29A(1).

60 *Ibid* s 29A(2)(d).

61 *Ibid* s 150C(1).

62 *Ibid* s 150D(1).

63 *Ibid* ss 150D(3), 150B(4).

64 *Ibid* s 150D(2)(a).

The industry recognises the need for legislative provisions that exist to protect Police criminal intelligence from being revealed at or upon a legislative review process. The industry expects Regulators to have access to and use Regulatory tools to manage criminal intelligence and criminal infiltration...⁶⁵

- 2.88 The tension between the competing interests in disclosure and non-disclosure of criminal intelligence should be reconciled on an industry-by-industry basis. Where organised crime infiltration could cause significant harm to the industry and/or the community, it might be preferable to maximise the potential for excluding unsuitable people, even at the risk of unfairly denying entry to some suitable people. In that case, the tension would be resolved by favouring the use and protection of criminal intelligence. For example, significant harm may arise where infiltration endangers the community as a whole (such as where an organised crime group infiltrates firearm supply) or endangers other industry participants (such as where an organised crime group engages in violent or coercive practices against competitors). Conversely, in industries where organised crime infiltration would cause less harm, the tension may be resolved by placing less reliance on the use of criminal intelligence that may have to be withheld from people affected by regulatory decisions. Engaging in this balancing exercise will help guard against the normalisation of measures that circumscribe procedural fairness.

Nationally consistent best practice in regulatory responses

- 2.89 Government agencies should pursue nationally consistent best practice in the regulatory response to organised crime infiltration of an occupation or industry. This is distinct from the pursuit of nationally consistent regulatory responses per se, which may result in the adoption of relatively poor practices for the sake of consistency.
- 2.90 Nationally consistent best practice is particularly important in relation to organised crime. Organised crime groups often operate on a national or transnational basis.⁶⁶ The infiltration of an occupation or industry may therefore occur across multiple jurisdictions, requiring a consistent and coordinated regulatory response. Inconsistent regulatory responses between jurisdictions may result in the displacement of organised crime infiltration from one jurisdiction to another. Having observed the displacement effects of anti-money laundering initiatives, the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Commonwealth Attorney-General's Department cautioned that organised crime groups will move to those sectors and jurisdictions where there is 'the least resistance' (that is, those with weak or non-existent anti-money laundering/counter-terrorism financing regulatory oversight).⁶⁷ Victoria Police, the Australian Crime Commission, and the Australian Federal Police warned that the national ramifications of any state-based regulatory response need to be considered by government, in relation to their potential displacement effects.⁶⁸
- 2.91 Harmonised regulatory responses (where they reflect best practice) assist legitimate business operators and employees, by improving labour and business mobility, allowing skills and experience to be shared between jurisdictions,⁶⁹ and removing the costs and difficulties of complying with inconsistent regulatory regimes as part of national/interstate trade.⁷⁰ The Australian Collectors & Debt Buyers Association stated that the absence of a nationally consistent licensing system is a significant issue for the debt collection industry because it 'unnecessarily complicates the regulation of the collections industry and effectively works against the goals of achieving a fully compliant regulation of all participants in the collections industry in Australia'.⁷¹

65 Submission 11 (Australian Security Industry Association Limited).

66 Australian Crime Commission, *Organised Crime Groups* (2013) <<https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/organised-crime-groups>>; Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 8.

67 Consultation 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department).

68 Consultations 9 (Victoria Police), 6 (Australian Crime Commission), 7 (Australian Federal Police).

69 Submission 10 (Australian Tattooists Guild).

70 Consultations 2 (Roundtable 1), 3 (Roundtable 2).

71 Submission 20 (Australian Collectors & Debt Buyers Association), submission endorsed by Submission 21 (Institute of Mercantile Agents).

- 2.92 In relation to licensing schemes, the provisions of the mutual recognition scheme may potentially be used by businesses and employees to avoid the financial costs, delays and other burdens arising from nationally inconsistent licensing laws. Under the *Mutual Recognition Act 1992* (Cth), a person holding a licence in one jurisdiction is entitled to apply for recognition of that licence in another jurisdiction if equivalent work is licensed in both jurisdictions. Equivalency is based on whether substantially the same activities are performed under each licence; it is not based on whether the probity and other requirements for each licence are substantially the same.⁷²
- 2.93 Organised crime groups may take advantage of the mutual recognition scheme by ‘shopping and hopping’; that is, obtaining a licence in the jurisdiction with the least stringent requirements in relation to probity and suitability, then using the scheme to move to a preferred jurisdiction.⁷³ The Productivity Commission has found that concerns about shopping and hopping are more apparent in some industries (such as the private security industry) than others.⁷⁴ The Australian Collectors & Debt Buyers Association shares these concerns.⁷⁵
- 2.94 The potential for organised crime groups to abuse the mutual recognition scheme, by seeking the path of least resistance, emphasises the importance of nationally consistent best practice in a regulatory response to organised crime infiltration.

A uniform concept of ‘organised crime’

- 2.95 A uniform concept of organised crime is necessary for effective regulatory responses to organised crime infiltration. A lack of clarity about the meaning of organised crime and the scope of organised crime activity may hinder the development of a regulatory response—an inordinate amount of time may be spent on definitional issues, or agencies may not have a common understanding of the risks of infiltration or appropriate regulatory responses. It is becoming more common to take a multi-disciplinary approach to enforcement and consider the enforcement actions available among several government agencies.⁷⁶ This requires an understanding of the numerous types of activity in which organised crime groups may be engaged in one particular occupation or industry, such as taxation fraud, employment law contraventions, or migration law contraventions.
- 2.96 At a minimum, Victorian government agencies should seek to establish a uniform concept of organised crime. Ideally, a nationally consistent concept should also be pursued.
- 2.97 In order for different agencies to collaborate on organised crime issues, they require a uniform concept of organised crime that delineates both the structural features of organised crime and the breadth of activities committed by organised crime groups.

Structural features of organised crime

- 2.98 There are different definitions of organised crime under Victorian and Commonwealth legislation. Ideally, these definitions should be made as consistent as possible.
- 2.99 At a high level, definitions of organised crime commonly require that:
- the criminal activities are undertaken for financial or other material gain
 - the offences are serious
 - the offending is carried out by a group of two or more people, and

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Mutual Recognition Act 1992 (Cth) pt 3 div 2, div 4.
Productivity Commission, ‘Mutual Recognition Schemes’ (Research Report, Productivity Commission, September 2015) 134.
Ibid 134–9.
Submission 20 (Australian Collectors & Debt Buyers Association), endorsed by Submission 21 (Institute of Mercantile Agents).
See [10.71]–[10.77].

- the offending is planned and often ongoing, and is distinct from the offending of groups that are formed for the immediate or opportunistic commission of an offence.⁷⁷
- 2.100 Some of these features are embodied in the key definitions of organised crime in Victorian and Commonwealth legislation, which provide a starting point for policy makers in clarifying the structural features of organised crime.
- 2.101 The *Major Crime (Investigative Powers) Act 2004* (Vic) (MCIPA) contains the main definition of organised crime in Victorian legislation.⁷⁸ The MCIPA provides powers to Victoria Police to investigate and prosecute 'organised crime offences'. Under section 3AA of the MCIPA, an 'organised crime offence' is an indictable offence against the law of Victoria that is punishable by level 5 imprisonment (10 years maximum) or more, involves two or more offenders and:
- involves substantial planning and organisation, forms part of systemic and continuing criminal activity, and has a purpose of obtaining profit, gain, power or influence or of sexual gratification where the victim is a child, or
 - two or more of the offenders involved in the offence are, at any time, either declared individuals or declared organisation members.⁷⁹
- 2.102 Under the *Australian Crime Commission Act 2002* (Cth) (ACC Act), a 'serious and organised crime' is defined as an offence that:
- involves two or more offenders and substantial planning and organisation
 - involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques
 - is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind
 - is a 'serious offence',⁸⁰ an offence involving the use of postal or carriage services for sexual activity with a person under 16 years of age or the distribution of child pornography or child abuse material, an offence of a kind prescribed by the regulations, or an offence involving any of the things specified in section 4(1) of the ACC Act,⁸¹ and
 - is punishable by imprisonment for a period of three years or more or is a 'serious offence' as defined by the *Proceeds of Crime Act 2002* (Cth).
- 2.103 The definitions of organised crime under the MCIPA and the ACC Act were borne in mind by the Commission in preparing this report.

77 See *United Nations Convention Against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 2 (definitions of 'organized criminal group' and 'structured group'); Shona Morrison, 'Approaching Organised Crime: Where Are We Now and Where Are We Going?' *Trends & Issues in Crime and Criminal Justice* no. 231 (Australian Institute of Criminology, 2002).

78 *Major Crime (Investigative Powers) Act 2004* (Vic) (MCIPA) s 3AA. The MCIPA definition appears in the same or similar form in other Victorian Acts such as the *Summary Offences Act 1966* (Vic) s 49F (consorting with a person found guilty of, or reasonably suspected of having committed, an organised crime offence) and the *Sex Work Act 1994* (Vic) s 26(ab)(iii) (referral of allegations and information about organised crime offences to Victoria Police).

79 'Declared individual' and 'declared organisation member' have the same meaning as they have in s 3 of the *Criminal Organisations Control Act 2012* (Vic): *Major Crime (Investigative Powers) Act 2004* (Vic) s 3. A 'declared organisation member' means a member, former member or prospective member of a declared organisation. The Supreme Court may make a declaration that an organisation is a declared organisation for a range of reasons, including that the organisation has engaged in or supported serious criminal activity or that any two or more members, former members or prospective members of the organisation have used the organisation for a criminal purpose. An individual may be declared by the Court to be a declared individual if, for example, the Court is satisfied that the individual is a member of an organisation, that the individual and another member of the organisation are using that organisation for a criminal purpose, and their activities pose a serious threat to public safety and order: *Criminal Organisations Control Act 2012* (Vic) ss 3(1), 19.

80 In this context, a serious offence has the meaning given by the *Proceeds of Crime Act 2002* (Cth) s 338: *Australian Crime Commission Act 2002* (Cth) s 4(1) (definition of 'serious offence').

81 The definition of serious and organised crime in section 4(1) of the *Australian Crime Commission Act 2002* (Cth) refers to offences involving any of the following: theft; fraud; tax evasion; money laundering; currency violations; illegal drug dealings; illegal gambling; obtaining financial benefit by vice engaged in by others; extortion; violence; bribery or corruption of, or by, a Commonwealth, state or territory officer; perverting the course of justice; bankruptcy and company violations; harbouring of criminals; forging of passports; firearms; armament dealings; illegal importation or exportation of fauna into or out of Australia; cybercrime; and matters of the same general nature as one or more of the matters listed above.

Organised crime activities

- 2.104 A uniform concept of organised crime should also incorporate the breadth of unlawful activities that constitute organised crime. There is some potential for government agencies to narrowly conceive of organised crime as largely limited to conduct such as the trafficking of illicit commodities (particularly illicit drugs and firearms), and illicit enabling activities such as money laundering.
- 2.105 While these activities remain a key pursuit for many organised crime groups, the ACC emphasises that organised crime increasingly involves conduct within the mainstream economy, particularly the commission of various types of fraud, such as investment and financial market fraud, taxation fraud, identity fraud, and superannuation fraud.⁸²
- 2.106 Based on the Commission's consultations and the available public materials, organised crime groups may infiltrate an occupation or industry in order to engage in, or facilitate, numerous forms of unlawful conduct, such as:
- the trafficking of illicit commodities (for example, through infiltration of the trucking and heavy haulage industry)
 - unlawful industry-specific practices (for example, unlawful debt collection, commercial fishing, and waste management practices)
 - labour exploitation (for example, through the operation of labour hire firms, or entry into specific industries)
 - property theft (for example, through the use of second-hand dealers, auto-wreckers/recyclers and scrap metal dealers to distribute stolen goods)
 - taxation fraud
 - investment fraud
 - money laundering (through both the operation of ostensibly legitimate businesses and the use of professional advisors).⁸³
- 2.107 Each occupation or industry will need to be examined individually to determine which forms of conduct may be enabled by infiltration, and which enforcement responses are available. For example, international and interstate experience would suggest that an examination of the waste management industry may reveal that it is vulnerable to infiltration for the purpose of unlawful waste management practices, the trafficking of illicit commodities (for example, by allowing the transportation of drugs in waste management vehicles, and the disposal of drug manufacturing waste), and money laundering.⁸⁴ However, this enquiry should be guided by a common understanding of the breadth of activities that may constitute organised crime in order that different agencies can work together to assess the risks of infiltration and determine the appropriate response.

82 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 12–15, 35–6, 56–9.
83 Consultations 2 (Roundtable 1), 3 (Roundtable 2), 4 (Roundtable 3); *ibid* 12–15, 23–7, 60–1, 65–7, 72–5.
84 Information provided to the Commission by the Environment Protection Authority Victoria (3 August 2015).

Identifying the problem or issue: is the occupation or industry at risk of organised crime infiltration?

27 Vulnerability to infiltration

34 Likelihood of infiltration

35 Harms of infiltration

36 The vulnerability of professionals to use by organised crime groups

3. Identifying the problem or issue: is the occupation or industry at risk of organised crime infiltration?

- 3.1 For a regulatory response to be both justified and effective, there must be a clear and demonstrable issue that needs to be addressed.¹ This requires an assessment of the risk of organised crime groups infiltrating an occupation or industry.
- 3.2 At the risk assessment stage, policy makers should bear in mind the key forms of infiltration identified by the Commission, being:
- entry into an occupation or industry, including through ownership or operation of a business, employment in a business or a significant connection with a business (such as a management, partnership or financing arrangement)
 - the operation of organised crime groups through an occupation/industry via the use of service providers and professional facilitators.
- 3.3 In the first scenario, an organised crime group could corrupt legitimate owners/operators or employees in order to infiltrate an occupation or industry. An organised crime group may pressure a business owner to relinquish the management of the business to the group.
- 3.4 An occupation or industry may be at risk of either or both forms of infiltration identified above. An investigation by Victoria Police and other agencies revealed that the auto-wrecking/recycling and scrap metal industry is vulnerable to both the entry of organised crime groups as business operators, and the use of existing operators by organised crime groups for the distribution of stolen property.² By contrast, the available materials suggest that professional services—such as those offered by lawyers, accountants and real estate agents—may be vulnerable to use by organised crime groups as clients, and that infiltration is not generally attempted through the establishment of businesses in these sectors.³
- 3.5 A risk assessment in this context should aim to identify:
- whether the occupation or industry is vulnerable to organised crime infiltration, and the form that infiltration may take
 - the likelihood of infiltration occurring
 - the harm that is likely to be caused by infiltration.

1 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 14.

2 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014) 3–5, 7.

3 See [3.35]–[3.68].

Vulnerability to infiltration

- 3.6 Two tools may assist policy makers in assessing whether an occupation or industry is vulnerable to organised crime infiltration and the form infiltration would be likely to take:
- a 'crime script analysis' of particular forms of organised crime, in order to determine whether that crime would be facilitated by, or requires, the infiltration of certain occupations and industries
 - an analysis of whether the occupation or industry contains common risk factors for infiltration, as the starting point for a detailed, individualised vulnerability study of the occupation/industry.

Crime script analysis

- 3.7 A crime script analysis involves mapping out the essential steps required for the commission of a particular crime, and identifying the critical 'pinch points' at which regulatory intervention is likely to be most effective.⁴ By identifying the critical steps in the crime script, the vulnerabilities of several occupations or industries may be revealed.
- 3.8 Chiu, Leclerc and Townsley have conducted a crime script analysis of methamphetamine trafficking. Their analysis indicates that the essential steps involve locating a clandestine laboratory, procuring goods (including precursor chemicals), storing goods, manufacturing and packaging the drug, distributing the drug, and managing the proceeds of crime.⁵ The infiltration of various industries may be helpful or even necessary at each of these steps, including the diversion of precursor chemicals from legitimate manufacturers and suppliers, the potential infiltration of the trucking and/or private security industries to distribute the drug, and the potential use of real estate agents to both source/manage premises for drug production and storage, and to assist in laundering the proceeds of crime.
- 3.9 The use of crime script analysis is a relatively new technique in addressing organised crime, including organised crime infiltration of legitimate occupations and industries. Policy makers should have regard to the studies compiled by Bullock, Clarke and Tilley in their collection, *Situational Prevention of Organised Crimes*, which provide guidance about how a crime script might be mapped for a particular form of organised crime.⁶
- 3.10 As crime script analysis focuses on the criminal activity rather than a particular occupation or industry, it may better allow regulators to form a comprehensive picture of the extent of occupations/industries that are at risk of infiltration in order to enable the commission of a particular form of organised crime. It is likely to be most useful when conducted in collaboration with law enforcement agencies and other regulators whose industries may also be affected by the crime(s) under analysis. Regulators can gain an understanding of the crimes that may be connected to their occupations/industries by engaging with law enforcement agencies and considering common risk factors for infiltration.

Common risk factors

- 3.11 Internationally, analysts are attempting to identify common risk factors for infiltration as a way of alerting policy makers to vulnerable occupations/industries. The Commission is not aware, however, of any Australian analyses of common risk factors for infiltration. Ideally, the identification of common risk factors should be further advanced through an empirical study that is able to use the data-holdings of regulatory and law enforcement agencies and other sources. Such a study could potentially be undertaken by the Australian Crime Commission (ACC) in collaboration with other government agencies and academic specialists.

4 Graham Hancock and Gloria Laycock, 'Organised Crime and Crime Scripts: Prospects for Disruption' in Karen Bullock, Ronald V Clarke and Nick Tilley (eds), *Situational Prevention of Organised Crimes* (Willan Publishing, 2010) 172.

5 Yi-Ning Chiu, Benoit Leclerc and Michael Townsley, 'Crime Script Analysis of Drug Manufacturing in Clandestine Laboratories' (2011) 51 *British Journal of Criminology* 355, 362–70.

6 Karen Bullock, Ronald V Clarke and Nick Tilley (eds), *Situational Prevention of Organised Crimes* (Willan Publishing, 2010).

- 3.12 As a starting point, the Commission has sought to identify high-level risk factors for organised crime infiltration of occupations and industries, as set out in Table 1 (page 31). The factors outlined in Table 1 have been identified in the following way.
- 3.13 First, the Commission conducted a literature review to determine lawful occupations and industries that have previously been identified as vulnerable to organised crime infiltration, and to ascertain the apparent purposes of that infiltration. These occupations and industries are: private security, debt collection, trucking and heavy haulage, sex work, commercial fishing, labour hire, gaming, waste management, tattooing, professional sports and fitness, pharmaceutical/chemical manufacturing and supply, hydroponic equipment supply, firearm dealing, auto-wrecking/recycling and scrap metal dealing, second-hand dealing and pawnbroking, and professional services such as the legal, accounting and real estate sectors. This is not intended to be a comprehensive list; rather, it is a sample of occupations and industries that provides insights into common risk factors for infiltration.
- 3.14 Second, the Commission formulated a 'draft model for assessing the risk of infiltration', as set out in the consultation paper in June 2015. Consultation participants commented on the relative merits and shortcomings of the draft model.
- 3.15 Third, as a result of that consultation, the draft model was substantially modified and the list of high-level risk factors in Table 1 was prepared.

Existing research

- 3.16 Table 1 is also informed by international studies of risk factors. Such studies are rare, reflecting the relatively recent government and academic interest in the use of legitimate occupations and industries by organised crime groups, and the development of regulatory measures to counter such use.⁷
- 3.17 In a 2004 study, Vander Beken formulated a set of high-level indicators for assessing the vulnerability of legitimate business sectors to organised crime infiltration. The majority of these indicators are classified as 'market indicators', and include:
- whether a sector contains many small firms or is controlled by monopolies or oligopolies (it may be more difficult to enter a sector characterised by the latter)
 - the level of demand for a product, the level of barriers to entry and exit, and the degree of regulatory oversight
 - the level of professionalisation in a sector
 - the extent of any prior organised crime infiltration of a sector.⁸

The vulnerability indicators put forward by Albanese in 2008 are similar to those advanced by Vander Beken.⁹

7 The majority of existing studies are industry-specific: see Tom Vander Beken et al, 'The Vulnerability of Economic Sectors to (Organised) Crime: The Case of the European Road Freight Transport Sector' in Petrus C van Duyne et al (eds), *The Organised Crime Economy: Managing Crime Markets in Europe* (Wolf Legal Publishers, 2005) 19; Tom Vander Beken and Annelies Balcaen, 'Crime Opportunities Provided by Legislation in Market Sectors: Mobile Phones, Waste Disposal, Banking, Pharmaceuticals' (2006) 12 *European Journal of Criminal Policy Research* 299; Tom Vander Beken and Stijn Van Daele, 'Legitimate Businesses and Crime Vulnerabilities' (2008) 35(10) *International Journal of Social Economics* 739; *ibid.*

8 Tom Vander Beken, 'Risky Business: A Risk-based Methodology to Measure Organized Crime' (2004) 41 *Crime, Law and Social Change* 471, 504–11. Vander Beken's model draws on earlier iterations of vulnerability/risk indicators by Jay Albanese, 'Where Organized and White Collar Crime Meet: Predicting the Infiltration of Legitimate Business' in Jay Albanese (ed), *Contemporary Issues in Organized Crime* (Criminal Justice Press, 1995) 35 and Rens Rozekrans and Eduard J Emde, 'Organized Crime—Towards the Preventative Screening of Industries: A Conceptual Model' (1996) 7 *Security Journal* 169.

9 Jay S Albanese, 'Risk Assessment in Organized Crime: Developing a Market and Product-Based Model to Determine Threat Levels' (2008) 24(3) *Journal of Contemporary Criminal Justice* 263, 269–71.

3.18 One of the most comprehensive studies of common risk factors has been conducted by a European research centre known as ‘Transcrime’. This 2015 study involved a pan-European analysis of organised crime group infiltration of legitimate business, through either the creation of new businesses or the corruption or acquisition of existing businesses.¹⁰ The business sectors identified as vulnerable to infiltration were the hospitality sector (bars, restaurants and hotels), construction, wholesaling and retailing of food and clothing, transportation and real estate. In addition, renewable energy, waste and scrap management, money transfer services and gambling were found to be emerging areas of infiltration.¹¹ The study found that organised crime groups are motivated to infiltrate legitimate businesses in Europe in order to:

- launder the proceeds of crime
- profit from legal activities, which may be facilitated by illicit activities such as the unlawful discouragement of competition
- profit from various types of fraud (including insurance, tax and government benefit frauds)
- facilitate and conceal illegal activities (including the use of transport companies and licensed venues for the distribution of illicit goods).

3.19 The study also found that cultural or personal reasons may motivate infiltration. An organised crime group may invest in certain businesses because there is a cultural or familial tradition of business investment in a particular sector. Infiltration can also enable an organised crime group to achieve social acceptance by creating new business and jobs, or achieve control over a particular economic sector.¹²

3.20 Four main risk factors for infiltration were identified in the European study. These are:

- Territory—a business is more vulnerable to infiltration if it is situated in a territory with past evidence of organised crime infiltration, a high presence of organised crime groups, large urban centres (which provide access to key economic activities and major transport facilities such as harbours and airports), high levels of infrastructure development (industrial, commercial and financial systems), and/or widespread shadow economies and corruption.
- Business sector—a sector is more vulnerable to infiltration if it has been previously infiltrated by organised crime groups, has low levels of competition, is low-tech (which ‘ensure[s] high profits without entailing high research and development costs, or requiring specific knowledge’), has small average company sizes (the study found that organised crime groups frequently infiltrate small, unlisted companies to reduce visibility and the risk of oversight), has low barriers to entry (including limited start-up costs and an absence of licensing requirements), and/or has weak or developing regulation.
- Business ownership structure—organised crime groups tended to conduct business through limited liability companies, often used nominee or other third-party shareholders (though direct shareholdings by group members were also common), and created complex corporate ownership schemes.

10 Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015); Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015).

11 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 12.

12 Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 78–82.

- Financial management of business—among infiltrated businesses, it was common for the business to have a low level of financial debt (which may indicate that funding is being obtained from illegitimate sources), a high level of current assets, such as cash (which may indicate that the business is not being used for productive purposes and requires assets that can be easily liquidated in anticipation of disruption by law enforcement agencies), and low revenue and profitability.¹³
- 3.21 The factors identified by Transcrime demonstrate that risk assessments of organised crime infiltration, at least in the absence of more detailed data, require regard to be had to broad, high-level indicators of potential vulnerability to infiltration. As with the risk factors proposed by the Commission (set out below), they provide a foundation for European policy makers and regulatory and law enforcement agencies to assess, in further detail, possible vulnerabilities to infiltration. The authors of the Transcrime study noted that their list of risk factors constitutes a first step in the development of a model to assess the risk of organised crime infiltration of legitimate businesses in Europe, and that further data and analysis is required to advance the Transcrime model.¹⁴
- 3.22 The infiltration of legitimate occupations and industries for the purpose of facilitating ‘traditional’ organised crime activity, such as the trafficking of illicit goods, appears to be relatively well understood. There are fewer analyses of the opportunities that exist for the commission of less traditional organised crimes through legitimate occupations and industries, such as taxation fraud and investment fraud. In Australia, fraud is now a key species of organised crime, and it is becoming one of the most profitable activities of organised crime groups in Europe.¹⁵
- 3.23 Another area of vulnerability that is relatively under-analysed is the potential for organised crime groups to uniquely maximise profits and exploit competitive advantages by the infiltration of legitimate occupations and industries. This may occur through non-compliance with regulatory fees and other obligations or the unlawful avoidance of taxation, labour and other business costs.¹⁶ Studies by Transcrime, Vander Beken, and Morgan and Clarke have sought to highlight these types of vulnerabilities,¹⁷ but further analysis appears to be limited. European researchers are also beginning to examine the exploitation of government subsidies by organised crime groups in particular business sectors (which could provide an opportunity for increased profits) including through the corruption of government officers responsible for the granting of subsidies.¹⁸

High-level risk factors for vulnerability assessments

- 3.24 Drawing on the existing studies and the Commission’s consultations, Table 1 sets out broad, high-level risk factors for organised crime infiltration of an occupation or industry. Based on the available information, non-exhaustive examples of purported forms of

13 Ibid 119–123.

14 Ibid 17, 124.

15 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 62–76; Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 9–10.

16 Russell Morgan and Ronald V Clarke, ‘Legislation and Unintended Consequences for Crime’ (2006) 12 *European Journal of Criminal Policy Research* 189.

17 Tom Vander Beken, ‘Risky Business: A Risk-based Methodology to Measure Organized Crime’ (2004) 41 *Crime, Law and Social Change* 471, 504–11; Tom Vander Beken and Annelies Balcaen, ‘Crime Opportunities Provided by Legislation in Market Sectors: Mobile Phones, Waste Disposal, Banking, Pharmaceuticals’ (2006) 12 *European Journal of Criminal Policy Research* 299; Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 109–110; *ibid*.

18 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 12, 84, 156; Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 38, 40; Stefano Caneppelle, Michele Riccardi and Priscilla Standridge, ‘Green Energy and Black Economy: Mafia Investments in the Wind Power Sector in Italy’ (2013) 59 *Crime, Law and Social Change* 319.

infiltration are provided in relation to each risk factor;¹⁹ policy makers should consider whether the occupation/industry under examination contains a similar vulnerability to organised crime infiltration.

- 3.25 The presence or absence of one or more of these risk factors is not determinative of the need for a regulatory response. Several consultation participants said that an individualised study of an occupation or industry should be conducted in order to determine the particular ways in which the occupation/industry may be vulnerable to organised crime infiltration and the degree of any such risk.²⁰ However, the risk factors set out below provide a starting point for policy makers to gain an appreciation of the reasons organised crime groups may seek to infiltrate an occupation or industry.

Table 1: High-level risk factors for organised crime infiltration of an occupation or industry

Risk factor	Examples of purported forms of infiltration
(a) Factors facilitating the commission of crime:	
Access to sectors/markets for the commission of crime	<ul style="list-style-type: none"> • Entry into the private security industry for the purpose of organised theft (access to property and confidential information of clients) • Use of professionals to facilitate investment frauds in particular markets
Access to inputs for the commission of crime	<ul style="list-style-type: none"> • Use of pharmaceutical/chemical manufacturers and suppliers to divert precursor chemicals • Use of licensed firearm dealers for the purpose of firearm trafficking
Opportunities for the distribution of illicit goods and services	<ul style="list-style-type: none"> • Entry into the trucking and heavy haulage industry (access to supply networks and secure sites) • Entry into the private security industry (supply of illicit drugs at licensed venues) • Use of auto-wreckers/recyclers, scrap metal dealers and second-hand dealers/pawnbrokers to distribute stolen property • Use of established tobacco retailers for the distribution of illicit tobacco products

19 Submissions 2 (National Motor Vehicle Theft Reduction Council), 8 (Philip Morris Limited), 13 (National Heavy Vehicle Regulator), 24 (Victorian Automobile Chamber of Commerce); Consultations 2 (Roundtable 1), 3 (Roundtable 2), 4 (Roundtable 3); Information provided to the Commission by the Environment Protection Authority Victoria (3 August 2015); Tim Prenzler and Rick Sarre, 'Developing a Risk Profile and Model Regulatory System for the Security Industry' (2008) 21(4) *Security Journal* 264; Tim Prenzler and Alastair Milroy, 'Recent Inquiries into the Private Security Industry in Australia: Implications for Regulation' (2012) 25(4) *Security Journal* 342, 343–8; Australian Crime Commission, *Criminal Infiltration in the Private Security Industry* (July 2013) <<https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/criminal-infiltration-private-security>>; Australian Institute of Criminology and Australian Crime Commission, *Serious and Organised Investment Fraud in Australia* (July 2012) 12–15; Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 12–15, 27; Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015); Samantha Bricknell, *Firearm Trafficking and Serious and Organised Crime Gangs*, Research and Public Policy Series no. 116 (Australian Institute of Criminology, 2012) 23–6, 28, 32; Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014); Judy Putt and Diana Nelson, 'Crime in the Australian Fishing Industry' *Trends & Issues in Crime and Criminal Justice* no. 366 (Australian Institute of Criminology, 2008); Judy Putt and Katherine Anderson, *A National Study of Crime in the Australian Fishing Industry*, Research and Public Policy Series no. 76 (Australian Institute of Criminology, 2007) 28–39; Australian Crime Commission, *Organised Crime and Drugs in Sport: New Generation Performance and Image Enhancing Drugs and Organised Crime Involvement in their Use in Professional Sport* (2013) 31–3; Noel Towell, 'Tax Office in \$1.5 Million Win Over Bikers', *Sydney Morning Herald* (online), 24 March 2015 <<http://www.smh.com.au>>; *Roberts v Deputy Commissioner of Taxation* [2015] FCA 238 (19 March 2015).

20 Submissions 9 (Liberty Victoria), 11 (Australian Security Industry Association Limited), 13 (National Heavy Vehicle Regulator); Consultation 4 (Roundtable 3).

Risk factor	Examples of purported forms of infiltration
Opportunities for the intermingling of lawful and unlawful goods and services	<ul style="list-style-type: none"> Entry into the auto-wrecking/recycling and scrap metal industry (stolen and lawful vehicle parts can be intermingled for sale on domestic and export markets)
Cash-intensive transactions, which hinder the creation of an audit trail in transactions for unlawful goods and services	<ul style="list-style-type: none"> Entry into the auto-wrecking/recycling and scrap metal industry (cash-based transactions obscure the chain of vehicle acquisition and parts disposal)
(b) Factors enabling the maximisation of profits and the exploitation of competitive advantages by organised crime groups:	
<p>Low barriers to entry,²¹ such as:</p> <ul style="list-style-type: none"> low sunk costs low labour costs a low level of professionalisation and skill the presence of many small firms rather than a concentration of large firms 	<ul style="list-style-type: none"> Entry into the trucking and heavy haulage industry Entry into the waste management industry Entry into the auto-wrecking/recycling and scrap metal industry
Access to government subsidies, on a lawful or unlawful basis	<ul style="list-style-type: none"> Entry into the trucking and heavy haulage industry (access to fuel rebates)
Opportunities for vertical integration or business expansion following previous infiltration of a related occupation or industry	<ul style="list-style-type: none"> Entry into the waste management industry may be facilitated by any previous infiltration of the construction industry Entry into the private security industry may be facilitated by any previous infiltration of the hospitality industry/liquor licensed businesses
<p>Opportunities to unfairly undercut market prices through:</p> <ul style="list-style-type: none"> non-compliance with the costs of lawful business (for example, non-compliance with regulatory obligations and taxation obligations) supplementation of lawful revenue with revenue from unlawful activity 	<ul style="list-style-type: none"> Entry into the commercial fishing industry (supplementation of fishing revenue with revenue from drug trafficking) Entry into the waste management industry (illegal disposal of hazardous waste, avoiding regulatory fees)

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Low barriers to entry may be particularly attractive to organised crime groups, which may need to quickly exit an occupation or industry if there is a risk of detection by regulatory or law enforcement agencies. In addition, organised crime groups may not be able to liquidate stock as easily as competitors in the event of business failure, since there is likely to be a smaller market for tainted business stock and organised crime groups may not wish to reveal commercial assets and income as willingly as competitors. An organised crime group may therefore seek to minimise sunk costs and other investment costs.

Risk factor	Examples of purported forms of infiltration
Opportunities to differentiate goods and services from competitors by engaging in unlawful or unscrupulous conduct	<ul style="list-style-type: none"> • Entry into the debt collection industry (recovery of debts using unlawful methods) • Entry into the commercial fishing industry (harvesting of high-demand fish stock in contravention of quotas or prohibitions)
Opportunities to intimidate or extort competitors in order to increase market share	<ul style="list-style-type: none"> • Entry into the private security industry
(c) Factors enabling the concealment or laundering of the proceeds of crime:	
Cash-intensive transactions, which allow the intermingling of lawful and unlawful revenue	<ul style="list-style-type: none"> • Entry into the hospitality industry/liquor licensed businesses • Use of established tobacco retailers (intermingling of lawful cash sales with unlawful revenue from illicit tobacco sales and any other unlawful activity)
Access to sectors/markets that facilitate money laundering	<ul style="list-style-type: none"> • Use of professional facilitators such as lawyers, accountants and real estate agents in order to launder the proceeds of crime through, for example, complex corporate structures and securities and real estate markets • Entry into the trucking and heavy haulage industry (purchase and resale of plant and equipment as a laundering method)
(d) Factors indicating insufficient external or internal 'guardians' (such as government agencies, occupation and industry members, and industry/professional associations):	
Deficient or developing regulatory oversight	<ul style="list-style-type: none"> • Use of real estate agents, who are not required to comply with anti-money laundering legislation
The use of complex supply chains and outsourcing arrangements, where this complicates government or private sector oversight of the provision of goods and services	<ul style="list-style-type: none"> • Entry into the waste management industry • Entry into the labour hire industry
Occupation and industry members having pre-existing relationships with organised crime groups on a licit or illicit basis	<ul style="list-style-type: none"> • Corruption of professional facilitators in the course of providing licit services or due to unpaid gambling debts or illicit drug use • Entry into the professional sport industry (pre-existing social relationships may be exploited for the purpose of drug distribution, match-fixing or the acquisition of inside information for gambling purposes)

Risk factor	Examples of purported forms of infiltration
A preponderance of low margin and/or undercapitalised businesses, such that existing occupation and industry members may be susceptible to doing business with or relinquishing the business to organised crime groups	<ul style="list-style-type: none"> • Use of existing members of the trucking and heavy haulage industry for the distribution of drugs and other unlawful activity
(e) The occupation or industry has a history of organised crime infiltration	<ul style="list-style-type: none"> • Entry into the racing industry, or the use of members of the racing industry

Likelihood of infiltration

- 3.26 After identifying any vulnerabilities to organised crime infiltration in an occupation or industry, the likelihood of infiltration should be assessed. The number of vulnerabilities identified in an occupation or industry is not necessarily indicative of the likelihood of infiltration. The existence of only one vulnerability may nonetheless expose an industry to a high likelihood of infiltration; for example, a legitimate industry may provide an essential input for the commission of crime that is more difficult to source elsewhere. Alternatively, an industry may be identified as having several vulnerabilities to infiltration, but the existence of particular protective factors may mean that the likelihood of infiltration is low.
- 3.27 In assessing the likelihood of infiltration, it may be useful to identify whether any protective factors exist in an occupation or industry that mitigate the risk of infiltration. An analysis of protective factors is sometimes used to assess risk in crime prevention and community health contexts.²² Protective factors will vary by occupation or industry. In order to identify protective factors, regard could be had to such factors as:
- the scope and utility of any existing regulatory regimes
 - the degree of self-regulation (the existence of strong industry associations may make entry into an occupation or industry more difficult)
 - whether customers (including public and private sector procurers of services) are well-informed and conscientious in their dealings with business operators, such that unscrupulous business operators may be more easily detected and less able to find a market for the provision of sub-standard or unlawful services
 - whether businesses in the occupation/industry are profitable, enjoy secure trade, and are conscientious in their dealings with customers, such that the supply of goods and services to organised crime groups may be less likely to occur.

22

Australian Institute of Criminology, on behalf of the Australian and New Zealand Crime Prevention Senior Officers' Group, *National Crime Prevention Framework* (2011) <http://www.aic.gov.au/crime_community/crimeprevention/ncpf.html>; Alister Lamont and Rhys Price-Robertson, *Risk and Protective Factors for Child Abuse and Neglect* (March 2013) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/publications/risk-and-protective-factors-child-abuse-and-neglect>>.

Harms of infiltration

- 3.28 It is important to assess the harm that is likely to arise—or is arising—from organised crime infiltration of a particular occupation or industry. Infiltration may have significant consequences that justify the various costs of regulatory intervention.
- 3.29 At a minimum, infiltration is likely to facilitate organised crime activity in some form, such as through the concealment or laundering of the proceeds of crime, and through the enabling of unlawful activities such as the trafficking of illicit goods, organised fraud and organised property theft.
- 3.30 However, infiltration may have broader consequences. As the Transcrime research centre has emphasised, it is equally important to consider the economic- and market-based harms of infiltration. Two particular forms of harm were identified in the Transcrime study.
- 3.31 First, businesses operated by organised crime groups may be sub-optimal or sub-efficient. These businesses may have poor profitability or deliberately operate at a loss, such as where the business is used as a front for unlawful activity rather than as a source of revenue. This may result in reduced taxation revenue. Further, an organised crime group may deliberately engage in tax avoidance strategies where substantial profits are generated. There will be further reductions in taxation revenue if an organised crime group is underpaying workers.²³
- 3.32 Second, markets may be distorted by organised crime infiltration. During the course of its consultations, the Commission frequently heard that organised crime groups engage in unfair competitive practices once they have infiltrated an occupation or industry.²⁴ These practices have also been observed in Europe.²⁵
- 3.33 Organised crime groups may reduce their operating costs through non-compliance with the regulatory obligations of a particular occupation or industry, and through non-compliance with broader legal obligations, such as taxation and employer obligations. An organised crime group may also use coercive and intimidatory practices to achieve commercial outcomes (for example, in the collection of debts), or to drive competitors from the market. In these circumstances, legitimate operators may be forced to leave the market, or may refrain from further investment if the integrity of the industry is significantly impaired or the acquisition of financing or insurance becomes difficult due to organised crime infiltration. The Commission was told that some legitimate tattooists are finding it difficult to obtain commercial insurance due to reports of organised crime infiltration of that industry.²⁶
- 3.34 Market distortion may also occur if significant investments in legitimate businesses and market sectors are primarily motivated by the need to conceal or launder the proceeds of crime, rather than fundamental investment characteristics. As the Australian Crime Commission (ACC) has stated, in these circumstances ‘funds are likely to be invested not on the basis of likely returns, but in businesses or schemes that provide the greatest chance of concealing the origins of the money’.²⁷ This may distort the value of certain business types and asset classes (such as real estate) and result in legitimate investors being priced-out. There is a risk that markets may collapse, or at least be impaired, if a change in laundering strategies by organised crime groups results in capital flight from particular markets.²⁸

23 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 218.

24 Consultations 2 (Roundtable 1), 4 (Roundtable 3), 10 and 11 (Victorian Automobile Chamber of Commerce).

25 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 218–9; Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 109.

26 Submission 10 (Australian Tattooists Guild).

27 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 15.

28 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 219.

The vulnerability of professionals to use by organised crime groups

- 3.35 There is some controversy surrounding the claim that professionals are vulnerable to use by organised crime groups for the purpose of money laundering or other illicit activity.
- 3.36 A number of regulatory and law enforcement agencies have noted that professionals such as lawyers, accountants and real estate agents may wittingly or unwittingly facilitate money laundering and other illicit activity on behalf of organised crime groups. This was noted by the ACC in its most recent organised crime assessment,²⁹ and during the course of the Commission's consultations with the ACC, the Australian Federal Police, the Australian Transaction Reports and Analysis Centre (AUSTRAC), and the Commonwealth Attorney-General's Department.³⁰ In recent years, AUSTRAC has particularly sought to highlight the use of lawyers and real estate agents for the purpose of money laundering.³¹ Other potential professional facilitators of organised crime include liquidators, financial services providers and lenders.³²
- 3.37 The analysis below does not propose or conclude that the professionals reviewed are engaged in unlawful activity. Rather, the analysis is directed at the potential for infiltration, and therefore the need for vigilance.
- 3.38 The available Australian research does not indicate that organised crime groups engage in infiltration in this context by entering into business in professions such as legal services, accounting and real estate. Instead, organised crime groups are said to seek the services of existing operators.³³
- 3.39 The United Kingdom's National Crime Agency (NCA) states that:
- [t]he ability of criminals to launder large sums of money themselves without attracting attention is limited. Therefore, criminals need someone professional, capable and trustworthy to make the necessary arrangements. Although there are many ways to launder money, it is often the professional enabler who holds the key to the kind of complex processes that can provide the necessary anonymity for the criminal. Professionals such as lawyers, trust and company formation agents, investment bankers and accountants are among those at greatest risk of becoming involved, either wittingly or unwittingly.³⁴
- 3.40 However, the NCA acknowledges that it has a relatively limited understanding of the scale of involvement and complicity of professionals in money laundering.³⁵

29 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 15, 27, 66, 71.

30 Consultations 6 (Australian Crime Commission), 7 (Australian Federal Police), 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department).

31 Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015); Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015).

32 Consultation 4 (Roundtable 3).

33 However, the risk of organised crime groups entering into the legal services sector has been identified in the United Kingdom: Solicitors Regulation Authority, *Cleaning Up: Law Firms and the Risk of Money Laundering* (November 2014).

34 National Crime Agency, *High End Money Laundering: Strategy and Action Plan* (December 2014) [5].

35 *Ibid* [16].

- 3.41 The Financial Action Task Force states that lawyers, real estate agents and other professionals are vulnerable to use by organised crime groups for the purpose of money laundering, including professionals who provide company and trust services.³⁶ The World Economic Forum has singled out the use of professional facilitators as one of two key enablers of money laundering, alongside the related activity of concealing beneficial ownership through complex corporate and trust structures for the purpose of illicit financial transactions.³⁷
- 3.42 There is presently limited empirical evidence of the use of professional facilitators by organised crime groups. The 2015 Queensland Organised Crime Commission of Inquiry (QOCC) found no evidence of professionals in Queensland such as lawyers, real estate agents, accountants and financial advisers knowingly performing enabling tasks for organised crime groups, but concluded that there is a risk of professionals being targeted for the purpose of money laundering.³⁸ In relation to lawyers specifically, the QOCC reviewed materials produced by the ACC and AUSTRAC that set out the types of enabling tasks that may be performed by lawyers, and the reasons why lawyers may be vulnerable to use by organised crime groups. In its June 2015 consultation paper, the Commission also referred to materials prepared by the ACC and AUSTRAC about the enabling tasks that lawyers, accountants and financial advisers may perform for organised crime groups (the Commission's summary was in turn referred to by the QOCC in its final report).³⁹ After reviewing these materials, the QOCC stated that '[a]lthough it is likely that lawyers in Queensland are facilitating organised crime in at least some of the ways outlined by the ACC, the Victorian Law Reform Commission and AUSTRAC, the [QOCC] found no reported cases'.⁴⁰ No specific evidence was proffered by the QOCC for the statement of likelihood as distinct from risk.⁴¹
- 3.43 In a study of Australian lawyers, accountants and real estate agents, the Australian Institute of Criminology (AIC) found little evidence of intentional money laundering. While participants in the study were generally of the view that the risk of unwitting involvement in money laundering was low, it was possible that the participants 'could simply have been unaware of instances of unwitting involvement in money laundering taking place within their sector'.⁴²
- 3.44 The case study reviews by Middleton and Levi indicate that lawyers in the United Kingdom have facilitated money laundering and other illicit activity on behalf of organised crime groups, such as investment fraud. Middleton and Levi acknowledge that the extent and nature of facilitation of money laundering by lawyers is disputed, and that further research is required on this topic.⁴³ The risk of solicitors facilitating money laundering has been recognised by the Solicitors Regulation Authority, which oversees solicitors in England and Wales.⁴⁴

36 Financial Action Task Force, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013); Financial Action Task Force, *Money Laundering Using Trust and Company Service Providers* (October 2010); Financial Action Task Force, *Money Laundering and Terrorist Financing through the Real Estate Sector* (29 June 2007).

37 World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers* (July 2012).

38 Queensland, Organised Crime Commission of Inquiry, *Report* (October 2015) 413–6, 522–3, 529–30.

39 Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries: Consultation Paper* (June 2015) 29.

40 Queensland, Organised Crime Commission of Inquiry, *Report* (October 2015) 416.

41 The QOCC noted that in 2015 two solicitors were charged with structuring offences under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), but that in accordance with the QOCC's terms of reference, the QOCC could not have regard to these matters as they were the subject of judicial proceedings as at the time of the QOCC's inquiry: see Queensland, Organised Crime Commission of Inquiry, *Report* (October 2015) 416.

42 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) xii–xiii, 60–76.

43 David J Middleton and Michael Levi, 'The Role of Solicitors in Facilitating "Organized Crime": Situational Crime Opportunities and their Regulation' (2004) 42 *Crime, Law and Social Change* 123; David Middleton, 'Lawyers and Client Accounts: Sand through a Colander' (2008) 11(1) *Journal of Money Laundering Control* 34; David Middleton and Michael Levi, 'Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services' (2015) 55(4) *British Journal of Criminology* 647.

44 Solicitors Regulation Authority, *Cleaning Up: Law Firms and the Risk of Money Laundering* (November 2014); Solicitors Regulation Authority, *Risk Outlook 2015/16: An Overview of our Priority Risks* (July 2015) 38–40.

- 3.45 The pan-European Transcrime study found that financial institutions, professionals such as lawyers and accountants, and company service providers are key enablers (whether wittingly or unwittingly) of money laundering by organised crime groups, though some groups in Europe (such as the Italian 'Ndrangheta) were found to prefer more direct control over businesses without the involvement of external professionals and managers.⁴⁵
- 3.46 Other studies have sought to ascertain the role of professionals by analysing police files relating to particular organised crime groups or a sample of money laundering cases. In a study of a Canadian drug network by Malm and Bichler, 102 of the 916 individuals known to be involved in drug market activity were identified as performing money laundering roles. Of those 102 members, the majority (80 per cent) were identified as 'self-launderers'; that is, the laundering activity was carried out by the offenders themselves.⁴⁶ A minority (8 per cent) of members were identified as professionals who performed money laundering roles.⁴⁷ In a review of 52 Dutch money laundering cases, van Duyne found that only 3.8 per cent of cases involved the use of a professional.⁴⁸
- 3.47 A lack of empirical evidence of the use of professional facilitators does not necessarily demonstrate the absence of such use, or the use of professionals to a limited degree. Sophisticated organised crime groups may successfully distance professionals from detection.⁴⁹ Professionals may also be subject to less suspicion due to their relatively high social status.⁵⁰
- 3.48 Further, the investigation of professional facilitators, and the financial dimensions of organised crime activity more generally, are developing fields of inquiry. Accordingly, the use of professionals by organised crime groups may be under-detected. In one study of 31 European drug importation cases, a correlation was found between a focus on financial matters at the beginning of the investigation and the identification of professional facilitators.⁵¹
- 3.49 Policy makers should be alert to the potential for professionals to be engaged by organised crime groups in order to facilitate money laundering or other illicit activity. According to AUSTRAC and the ACC, key avenues for money laundering are investment in real estate and securities, foreign exchange trading, the use of complex corporate structures to conceal illicit funds (including in offshore jurisdictions), and the establishment of legitimate, particularly cash-intensive, businesses.⁵² Further, organised crime groups may use complex business structures in order to conceal beneficial ownership of entities for the purpose of obtaining an occupational/industry licence, and to avoid detection when operating in an occupation or industry.⁵³ These arrangements may involve the use of professionals at various stages, on a complicit or non-complicit basis.⁵⁴

45 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 159, 219.

46 Aili Malm and Gisela Bichler, 'Using Friends for Money: The Positional Importance of Money-launderers in Organized Crime' (2013) 16 *Trends in Organized Crime* 365, 373–5.

47 The remaining 12% of members were 'opportunistic launderers', that is, people who engaged in money laundering for one person involved in the drug market and who had familial or friendship ties with that person: *ibid* 372–4.

48 Petrus C van Duyne, 'Money Laundering Policy: Fears and Facts' in Petrus C van Duyne, Klaus von Lampe and James L Newell (eds), *Criminal Finances and Organising Crime in Europe* (Wolf Legal Publishers, 2003) 67, 94.

49 See generally M R J Soudijn, 'Using Strangers for Money: A Discussion on Money-Launderers in Organized Crime' (2014) 17 *Trends in Organized Crime* 199.

50 Russell G Smith, 'Anti-money Laundering: The Accounting and Legal Professions' in David Chaikin (ed), *Financial Crime Risks, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 28, 29; David Middleton and Michael Levi, 'Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services' (2015) 55(4) *British Journal of Criminology* 647, 648–50.

51 M R J Soudijn, 'Using Strangers for Money: A Discussion on Money-Launderers in Organized Crime' (2014) 17 *Trends in Organized Crime* 199, 209–13.

52 Australian Transaction Reports and Analysis Centre, *Money Laundering in Australia 2011* (2011); Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 12–15.

53 See [6.72]–[6.89].

54 In this respect, Malm and Bichler's study may have failed to identify the role of professionals in what they describe as 'self-laundering'. For example, in that study, the buying, selling and development of real estate was identified as a technique used by self-launderers. Self-launderers were also described as using 'corporate layering' (complex chains of holding and subsidiary companies) to distance themselves from the entity through which the laundering occurred (such as a legitimate business). Each of these methods may require the participation of lawyers, accountants and/or real estate agents at some stage of the transaction or business arrangement. See Aili Malm and Gisela Bichler, 'Using Friends for Money: The Positional Importance of Money-launderers in Organized Crime' (2013) 16 *Trends in Organized Crime* 365, 374.

Assessing the vulnerability of professionals

- 3.50 Vulnerability should be assessed by examining the particular circumstances of professionals that may make them susceptible to use by organised crime groups; the instrumental reasons for which an organised crime group may seek the services of a professional; and any protective factors that may mitigate such use, such as the existence of effective regulatory regimes.
- 3.51 A professional may be susceptible to use by organised crime groups due to unpaid gambling debts or illicit drug use.⁵⁵ Business factors may also play a role. Professionals may be vulnerable to exploitation if they are struggling to attract or retain clients or face demands from senior management for increased revenue, particularly as markets for professional services become more competitive, as is the case with the legal services and real estate sectors.⁵⁶ Increased competition may mean that some firms or individuals may be less discerning in relation to the provision of services, while customers are afforded more of an opportunity to ‘shop around’ to obtain unlawful services.⁵⁷
- 3.52 Less lucrative business conditions may have a similar effect. In the AIC’s study, some real estate agents expected that the risks of fraud and unscrupulous activity (but not necessarily money laundering) would increase in the event of substantial falls in property prices, as ‘both agents and clients attempt to supplement their income levels and maintain existing lifestyles’. Conversely, some industry members anticipated that ‘any reduction in work volumes would allow agents more time to examine transactions more closely’.⁵⁸
- 3.53 Sales-driven remuneration measures may also increase the risk that a firm or individual will not properly enquire into the background of clients or requested services, or may willingly act for a spurious client.⁵⁹
- 3.54 Three professions that regularly appear in analyses of professional facilitators of organised crime are lawyers, accountants and real estate agents.⁶⁰ The reasons for which organised crime groups may seek the services of these professions are outlined below.

Lawyers and accountants

- 3.55 The primary potential form of organised crime infiltration of the legal and accounting professions is by operating through those professions—that is, seeking the services of those professions—rather than entering into them.
- 3.56 There is some overlap between the services that may be sought of lawyers and accountants, due to the use of trust accounts in both professions (noting that trust accounts are only used by solicitors, not barristers, within the legal profession), the expertise of both lawyers and accountants in relation to the establishment of business structures, and the potential involvement of each profession in the management of investments and the conduct of financial transactions.

55 See [8.16]–[8.17].

56 See generally David Middleton and Michael Levi, ‘Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services’ (2015) 55(4) *British Journal of Criminology* 647, 657–9, 661–3; Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 66. On the high level of competition in the legal services and real estate sectors see: IBISWorld Industry Report M6931, *Legal Services in Australia* (October 2015) 23; IBISWorld Industry Report L6720, *Real Estate Services in Australia* (August 2015) 20.

57 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 66.

58 *Ibid* 76.

59 World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers* (July 2012) 17.

60 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013); World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers* (July 2012); Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015); Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015); Financial Action Task Force, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013); Financial Action Task Force, *Money Laundering Using Trust and Company Service Providers* (October 2010); Financial Action Task Force, *Money Laundering and Terrorist Financing through the Real Estate Sector* (29 June 2007).

3.57 Organised crime groups may seek the services of accountants in relation to:

- the structuring of transactions so as to avoid reporting requirements under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) or the *Financial Transaction Reports Act 1988* (Cth) (FTR Act)
- the creation of business structures in order to conceal illicit transactions and involvement in legitimate businesses
- fraudulent tax arrangements, including tax evasion and the fraudulent claiming of tax concessions
- the misuse of trust accounts and the conduct of transactions involving illicit funds, particularly where this involves entities in high-risk jurisdictions.⁶¹

3.58 Organised crime groups may seek the services of lawyers in relation to:

- the structuring of transactions so as to avoid reporting requirements under the AML/CTF Act or the FTR Act⁶²
- advising on business structures⁶³
- the purchase and sale of real estate, where those transactions involve the proceeds of crime—this may involve not only the conduct of the transaction itself, but the falsification of documents (for example, buying property in a false name) or facilitating the transfer of ownership of property to nominees or third parties⁶⁴
- the misuse of trust accounts to launder the proceeds of crime (for example, the depositing of money into a trust account for the alleged purpose of purchasing property or other investments, the cessation of the transaction, and the disbursement of the trust funds to other parties)⁶⁵
- bogus debt recovery services for the purpose of moving illicit funds—this involves disguising illicit funds as ‘debts’ to be recovered, moving these funds through trust accounts, and returning the funds to the offender client⁶⁶
- the establishment and/or promotion of fraudulent investment schemes, such as land banking scams⁶⁷—groups involved in organised fraud may use a lawyer or well-regarded law firm to publicly endorse or ‘back’ an investment and thereby disarm investor scepticism⁶⁸
- fraudulent tax arrangements, including tax evasion and the fraudulent claiming of tax concessions.⁶⁹

61 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 54–6, 68–72; Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 65–6.

62 See generally Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015).

63 Submission 15 (Victorian Legal Services Board and Commissioner); see also Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 64; Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 24–7; *ibid* 12–13.

64 Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015) 11.

65 *Ibid* 8–9; see generally Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 64–5; David Middleton and Michael Levi, ‘Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services’ (2015) 55(4) *British Journal of Criminology* 647, 653–5.

66 Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015) 10.

67 Land banking is a type of investment scheme that involves buying undeveloped blocks of land (or options to purchase blocks of land) with the intention of selling the land for a profit once development approval has been given. Land banking is potentially unlawful where, for example, investors are misled about the likelihood of development approval, conditions on development (which may render the land less valuable) or the legal status of investments in the scheme: see Australian Securities and Investments Commission, *Investment Warnings – Land Banking* <<https://www.moneysmart.gov.au/investing/investment-warnings/land-banking>>; Australian Securities and Investments Commission, ‘ASIC Takes Action to Freeze Assets and Wind Up Companies Associated with Land Banking Schemes’ (Media Release, 18 December 2015) <<http://asic.gov.au/about-asic/media-centre/>>.

68 David Middleton and Michael Levi, ‘Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services’ (2015) 55(4) *British Journal of Criminology* 647, 651–2; see generally The Law Society of England and Wales, *Land Banking Schemes* (10 September 2008) <<https://www.lawsociety.org.uk/support-services/advice/articles/land-banking-schemes/>>.

69 Russell G Smith, ‘Anti-money Laundering: The Accounting and Legal Professions’ in David Chaikin (ed), *Financial Crime Risks, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 28, 33–4; Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015) 5; see generally Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 65–6.

3.59 Some professional associations have critiqued the assertion that professionals are enablers of organised crime. The Law Council of Australia (LCA) submitted to the Commission that ‘there is a dearth of empirical evidence available to support the contention that lawyers in Australia are systemically involved in money laundering’, and that these contentions tend to rely on outdated or overstated material, ‘lightly analysed lists of cases in multiple jurisdictions’ or material from confidential sources that cannot be tested.⁷⁰ The LCA’s initial submission was endorsed by the Law Institute of Victoria, which also identified the importance of ‘raising awareness within the legal community of the risks of unwitting involvement in money laundering and other criminal conduct’.⁷¹ The importance of professional ethics education and support is discussed at [8.4]–[8.19].

3.60 The LCA made a supplementary submission to the Commission following the publication of the report of the Queensland Organised Crime Commission of Inquiry (QOCC) in 2015. The LCA noted that the QOCC found no evidence that Queensland lawyers have knowingly facilitated organised crime in the forms suggested by the ACC to the QOCC, and the LCA contended that the QOCC had relied on the subjective views of the ACC, AUSTRAC and the Financial Action Task Force in reaching its conclusions. The LCA further stated that:

Despite this lack of evidence, the QOCC Report nevertheless concluded: ‘it is likely that lawyers in Queensland are facilitating organised crime in at least some of the ways outlined by the ACC’.

It is the Law Council’s submission [that] this conclusion can only be treated with such weight as the evidence which the QOCC Report had to sustain it. That is, the conclusion will bear no more or less weight than any other mere supposition as to matters that might or might not be the case. That the supposition is one that has been urged by law enforcement agencies such as the ACC does not give it any greater weight than any other supposition which is not based on objective evidence of substance.⁷²

3.61 In its supplementary submission, the LCA noted its commitment ‘to working with Australian legal practitioners to avoid or prevent their involvement in organised crime.’⁷³

3.62 The Victorian Bar in its submission noted that barristers in Victoria, unlike solicitors, do not operate trust accounts or hold or distribute client money. The Bar and the LCA emphasised the importance of legal professional privilege and its facilitative function in access to justice, and correctly pointed out that communications in furtherance of a crime or fraud are not privileged.⁷⁴

3.63 In its submission, the Victorian Legal Services Board and Commissioner, while emphasising that ‘the legal profession in Victoria has always been very highly regulated’, noted that:

Lawyers of course may be called upon to advise clients who themselves are involved in organised crime. This could involve the lawyer advising on business structures and financial arrangements that might be used by the client in pursuing their criminal interests, unbeknownst to the lawyer.⁷⁵

The submission stated that there have been a few individual lawyers who have engaged in criminal activity (case studies for which were provided to the Commission), but these are individuals rather than members of organised groups.

70 Submission 25 (Law Council of Australia).

71 Submission 27 (Law Institute of Victoria).

72 Submission 32 (Law Council of Australia (supplementary submission)).

73 Ibid.

74 Submissions 23 (The Victorian Bar Inc.), 25 (Law Council of Australia); *R v Cox and Railton* (1884) 14 QBD 153; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 513; *Grant v Downs* (1976) 135 CLR 674, 685.

75 Submission 15 (Victorian Legal Services Board and Commissioner).

The submission also stated that, while there are limited examples of lawyers who may have links with organised criminals (which links are being monitored by the Legal Services Commissioner), there appears to be no evidence of organised or group criminality among lawyers.

- 3.64 The legal profession is bound by a set of ethical duties designed to facilitate access to justice while keeping the lawyer at arm's-length from the client. A lawyer is generally bound to act on a client's factual instructions in court proceedings but is forbidden from conspiring with the client in relation to the content of those factual instructions. Barristers are bound by the 'cab-rank' principle, which in general obliges barristers to accept a brief in their field of practice.⁷⁶
- 3.65 The Commission notes the differing prevailing views as to the nature and extent of the use of lawyers and other professionals by organised crime groups. While it has not been appropriate in the course of this review for the Commission to conduct a factual investigation of this issue, good policy making should involve an awareness, and assessment, of the risks described in the materials reviewed above. Suggested strategies for addressing the potential use of professional facilitators are set out in Chapter 8.

Real estate agents

- 3.66 Money laundering appears to be the primary reason for which organised crime groups may seek the services of real estate agents. Real estate has been identified as one of the key destinations for illicit funds.⁷⁷ Money laundering may occur in collaboration with other professionals, such as lawyers and conveyancers, who are primarily responsible for the transactional aspects of the purchase and sale of property, and valuers, who may be involved in the corrupt undervaluing or overvaluing of property.⁷⁸ According to AUSTRAC, money laundering through real estate may be enabled by methods such as:
- the purchase of property in the name of a third party, or the use of complex corporate and trust structures to obfuscate beneficial ownership
 - the use of loans as laundering vehicles, with lump sum payments or smaller, structured cash amounts paid using illicit funds
 - the deliberate overvaluation of property, which allows a larger loan to be obtained for the purpose of laundering through loan repayments
 - the deliberate undervaluation of property, with the difference between the recorded contract price and the true price of the property paid secretly by the purchaser using illicit funds
 - the sale of property in quick succession and at higher values to other entities controlled by an offender or to third parties linked to the offender.⁷⁹

76 See G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 5th edition, 2013) [3.140], ch 4, [17.95]–[17.160].

77 The Australian Institute of Criminology estimated that real estate was the most common destination for laundered funds in Australia in 2004 (23% of an estimated \$2.8 billion in laundered proceeds of crime): John Stamp and John Walker, 'Money Laundering in and through Australia, 2004' *Trends & Issues in Crime and Criminal Justice* no. 342 (Australian Institute of Criminology, 2007) 3. See also Financial Action Task Force, *Money Laundering and Terrorist Financing through the Real Estate Sector* (29 June 2007); Hans Nelen, 'Real Estate and Serious Forms of Crime' (2008) 35(10) *International Journal of Social Economics* 751; Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 155.

78 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 73–6.

79 Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015).

- 3.67 Real estate may be an attractive site for money laundering for several reasons. Real estate agents are not subject to the AML/CTF Act, and are therefore not legally obliged to report suspicious transactions to AUSTRAC or conduct customer due diligence. However, real estate dealings may be subject to oversight when transactions such as loans, deposits and withdrawals take place through financial institutions, as they are subject to the AML/CTF Act.⁸⁰ Real estate may be particularly attractive for money laundering in booming property markets. European research indicates that organised crime groups were attracted to investment in the Irish, Spanish and United Kingdom real estate markets prior to the deflation of those markets in the late 2000s.⁸¹ In a booming market, the sale of property in quick succession and for higher value is less likely to arouse suspicion, particularly if speculative activity and short-term investment are common. A booming market may also enable a large amount of illicit funds to be 'legitimised' in one transaction.⁸² Further, corrupt overvaluation may be more difficult to detect if prices are rising rapidly, and the related acquisition of large loans for laundering purposes may be more feasible if abundant and cheap liquidity is available in a rising market.
- 3.68 In addition to its use as a laundering vehicle, the purchase of real estate may facilitate the commission of crime. Real estate agents may be witting or unwitting facilitators by supplying or managing properties used for cannabis cultivation or the housing of trafficked or exploited workers.⁸³

80 Ibid 6.

81 Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 155, 180–1, 204–5, 211.

82 See generally Solicitors Regulation Authority, *Cleaning Up: Law Firms and the Risk of Money Laundering* (November 2014) 11.

83 See generally Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015) 9; Ernesto U Savona and Michele Riccardi (eds), *From Illegal Markets to Legitimate Businesses: The Portfolio of Organised Crime in Europe*, Final Report of Project OCP—Organised Crime Portfolio (Transcrime, 2015) 211; Hans Nelen, 'Real Estate and Serious Forms of Crime' (2008) 35(10) *International Journal of Social Economics* 751, 757.

Specifying the desired objectives

4. Specifying the desired objectives

- 4.1 Policy makers should delineate clear policy objectives when designing a regulatory regime to help prevent organised crime infiltration of lawful occupations and industries.
- 4.2 Regulators need clear policy objectives to help guide them when exercising discretion, determining where to allocate resources and balancing competing priorities.
- 4.3 Following an inquiry into Victoria’s regulatory framework, the Victorian Competition and Efficiency Commission reported that:
- the capacity of regulators to implement good regulatory practices can be constrained by the regulatory framework they are required to implement. For example, whether they can access an appropriate range of enforcement tools or whether the objectives of their regulation are clear.¹
- 4.4 Preventing all organised crime infiltration is an unrealistic expectation. It would either be impossible to achieve or likely to require so many resources and have such a negative impact on legitimate occupation/industry members that the costs of achieving that goal would outweigh the benefits.
- 4.5 A preferable goal may be to reduce infiltration to a tolerable level.² What that means will vary according to the nature and characteristics of the occupation or industry, including:
- the harm that would result from infiltration
 - the resources required to address infiltration in a particular occupation or industry
 - whether actions to reduce infiltration will affect other policy goals such as ‘reducing red tape’ and encouraging competition.
- 4.6 It is likely to help if the policy goal is included in the objectives of the legislation that creates the regulatory regime. For example, the objectives of the *Gambling Regulation Act 2003* (Vic) include to ensure that the management of gambling is free from criminal influence and exploitation.³ The Commission was told that the inclusion of this objective in the Act means that achieving that policy goal is part of the mission and culture of the regulator (the Victorian Commission for Gambling and Liquor Regulation) and helps determine the regulator’s activities.⁴

1 Victorian Competition and Efficiency Commission, *Strengthening Foundations for the Next Decade: An Inquiry into Victoria’s Regulatory Framework*, Final Report (2011) xli.
2 Submission 17 (Darryl Annett).
3 *Gambling Regulation Act 2003* (Vic) sub-ss 1.1(2)(c)–(d).
4 Consultation 4 (Roundtable 3).

- 4.7 Further, including the objective in the relevant legislation may also help regulators withstand pressure from stakeholders to change their activities. For example, when regulators examine licence applicants to look for any connection to organised crime, the licensing process may take a considerable time. Regulators may be pressured to reduce the time taken. Such pressures may be appropriately withstood if the prevention of infiltration is an express regulatory objective.
- 4.8 If the objective is included in the legislation, it should be drafted with sufficient nuance so that it can complement rather than contradict other objectives.
- 4.9 In addition, there should be cohesiveness in regulatory objectives across an occupation or industry, where possible. In its submission on the second-hand/separated vehicle parts industry, the National Motor Vehicle Theft Reduction Council observed that:
- There is a discernible difference in emphasis between the regulatory objectives underlying the motor trader and vehicle repairer legislation (ie. consumer protection and market regulation) and those underlying the second hand dealer Acts (ie. crime prevention as well as consumer protection). That difference is potentially significant given ... that the trade in separated parts is, to different degrees (depending on the jurisdiction), subject to both.⁵
- 4.10 Where a regulatory regime comprises more than one piece of legislation that regulates the conduct of the same occupation/industry members, where appropriate, the regulatory objectives should be consistent across the different Acts.

PART TWO: STRATEGIES TO REDUCE THE RISK OF INFILTRATION

Assessing the existing regulatory regime

50 Introduction to Part Two

50 Assessing the existing regulatory regime

5. Assessing the existing regulatory regime

Introduction to Part Two

- 5.1 Based on its consultations, the Commission has identified four key strategies for reducing the risk of organised crime infiltration of lawful occupations and industries:
- assessing the existing regulatory regime and identifying and removing any barriers to the use of existing regulatory measures
 - restricting entry into an occupation or industry through a licensing scheme
 - regulating post-entry behaviour in an occupation or industry
 - addressing the use of professional facilitators.
- 5.2 Each of these strategies is discussed in Chapters 5–8.

Assessing the existing regulatory regime

- 5.3 If an ongoing risk of organised crime infiltration has been identified, policy makers should evaluate any existing regulatory regime to determine whether it is sufficient to address that risk. This accords with good policy-making practice. The Victorian Guide to Regulation notes that a regulatory problem may potentially be addressed by increasing the enforcement of existing legislative provisions, extending the coverage of existing provisions, or removing legislative impediments to the use of existing provisions.¹
- 5.4 Several consultation participants similarly emphasised the need for policy makers to examine the utility of existing regulatory regimes before introducing new regulatory measures, and to address any barriers to the use of existing measures.² Several such barriers were identified during the Commission’s consultations, which are discussed in further detail in Chapter 10. Regulators should be alert to these barriers and take steps to redress them, including the following:
- insufficient investigative expertise, which may require a regulator to work collaboratively with other, sufficiently skilled agencies to address organised crime infiltration³
 - confusion or disagreement among government agencies as to which agencies are responsible for the prevention of organised crime infiltration,⁴ which may require greater collaboration between regulatory and law enforcement agencies when identifying their respective objectives and responsibilities

1 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 20.

2 Submission 25 (Law Council of Australia); Consultations 3 (Roundtable 2), 11 (Victorian Automobile Chamber of Commerce).

3 Consultation 4 (Roundtable 3); Submission 17 (Darryl Annett).

4 Consultations 9 (Victoria Police), 4 (Roundtable 3).

- a lack of clarity about regulatory objectives, which may require amendment to the objectives of a regulator's governing legislation and the creation of appropriate key performance indicators
- the existence of an organisational culture that does not sufficiently prioritise the prevention of organised crime infiltration, or a regulator not being sufficiently equipped to address that goal, which may require, for example, the employment or secondment of staff with law enforcement skills⁵
- the existence of a risk-averse approach to enforcement action, which may require a regulator to reconsider its enforcement strategy (see [10.70]–[10.105]).⁶

5.5 Aside from these legislative and organisational barriers to the use of existing regulatory measures, the Australian Crime Commission (ACC) remarked that it may be necessary to observe the sustained use of a particular infiltration methodology by organised crime groups before any regulatory gap can be identified.⁷

5 Consultations 9 (Victoria Police), 13 (Scottish Environment Protection Agency). See Gayle Howard, 'World Wide Waste' (2015) 3(1) *Scottish Justice Matters* 15.

6 Tim Prenzler and Rick Sarre, 'Smart Regulation for the Security Industry' in Tim Prenzler (ed), *Professional Practice in Crime Prevention and Security Management* (Australian Academic Press, 2014) 175.

7 Consultation 6 (Australian Crime Commission).

Restricting entry into an occupation or industry

- 55** Is a licensing scheme appropriate?
- 62** Assessing probity and suitability
- 74** Investigating licence applicants
- 75** Renewal of licences
- 76** Restrictions on licence transfer and surrender

6. Restricting entry into an occupation or industry

- 6.1 In order to help prevent organised crime infiltration of an occupation or industry, policy makers should consider the use of a formal regulatory tool to restrict entry. In this regard, the Commission considered the merits of three tools:
- registration schemes
 - negative licensing schemes
 - positive licensing schemes.
- 6.2 Of those three, the Commission considers that only positive licensing should be considered as a tool for the restriction of entry to prevent organised crime infiltration. Registration schemes and negative licensing schemes are unlikely to be adequate for this purpose.
- 6.3 A registration scheme would usually require an individual or corporation to list their name and other information in an official register if they wish to participate in a particular occupation or industry. The information contained in a register may be open to the public or restricted to certain people. In his submission, Darryl Annett asserted that:
- Registration is merely a list. As a regulatory tool it is low cost and very light touch and as a mechanism to defend an occupation against infiltration it is ineffective.¹
- 6.4 Under a negative licensing scheme, no licence is required to enter an occupation or industry but certain classes of people may be prohibited from operating in the occupation or industry. In the Victorian debt collection industry (which adopted a negative licensing scheme in 2011), a prohibited person must seek the permission of the regulator to gain entry into the industry.²
- 6.5 Negative licensing has some general merit, including that, as no licence is required, legitimate entrants are able to avoid the costs of licensing processes.³ However, occupations/industries with negative licensing schemes may be highly susceptible to organised crime infiltration as the regulator has no opportunity to scrutinise would-be entrants prior to their entry into the occupation/industry.
- 6.6 In his submission, Darryl Annett argued that '[n]egative licensing relies for effectiveness upon an active monitoring (and compliance) program, or particular and significant market forces.⁴ Those market forces may be, for example, consumers who insist on dealing with legitimate operators, and who are capable of undertaking their own enquiries into the legitimacy of operators in the absence of a positive licensing scheme.

1 Submission 17 (Darryl Annett).
2 See, eg, *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 47(1), 48.
3 Submission 22 (Victorian Competition and Efficiency Commission).
4 Submission 17 (Darryl Annett).

- 6.7 In the Commission's view, a negative licensing scheme relies on thorough monitoring of the occupation/industry by the regulator, customers, and/or legitimate operators in order to ensure that prohibited people have not infiltrated the occupation or industry. Accordingly, a negative licensing scheme is not really a tool for restricting entry per se and should instead be regarded as part of a post-entry monitoring regime.
- 6.8 A number of consultation participants expressed support for the use of positive licensing schemes as a barrier to organised crime infiltration.⁵

Is a licensing scheme appropriate?

- 6.9 Set out below are the key issues that policy makers and regulators should consider when deciding whether a positive licensing scheme (referred to below as a 'licensing scheme') is appropriate for an occupation or industry at risk of infiltration, and in operating such a scheme for the purpose of preventing organised crime infiltration.

The form of infiltration

- 6.10 When deciding whether to introduce a licensing scheme, policy makers should consider the goals that would motivate an organised crime group to infiltrate the occupation or industry in question.
- 6.11 Those goals may make it likely that an organised crime group will seek to enter the occupation/industry, whether by owning or operating a business, or having its members obtain employment in a business. In those cases, a licensing scheme may be a useful measure to counter the risk of infiltration.
- 6.12 Where, however, the goals of organised crime may be achieved by operating through a particular occupation/industry, without actually entering into that occupation/industry (for example, by using a service provider or engaging a professional facilitator), a licensing scheme may be an ineffective barrier to infiltration.

Infiltration by owning/operating a business

- 6.13 If the risk of infiltration exists at the business owner/operator level, it may be that not all owners/operators need to be licensed or, if licensed, need to be subjected to the same degree of scrutiny. As recommended by the Victorian Guide to Regulation:
- Given the limited resources of government and/or the potential costs of regulation, action should be proportionate and targeted on those risks or hazards that are significant and/or have significant consequences.⁶
- 6.14 When considering which types of owners/operators should be licensed, policy makers should again have regard to the purpose of infiltration. The Australian Collectors & Debt Buyers Association (ACDBA) and the Institute of Mercantile Agents (IMA) both suggested to the Commission that the regulatory regime that governs the debt collection industry should differentiate between debt collectors who have face-to-face contact with debtors and those who do not (namely, call centre-based operators). The ACDBA and IMA suggested that in the first case, a positive licensing regime with a rigorous fit and proper person test would be appropriate because of the greater inherent risk involved in face-to-face contact, whereas a registration and/or negative licensing regime would suffice in the second case.⁷

5 Submissions 6 (JobWatch Inc), 11 (Australian Security Industry Association Limited), 17 (Darryl Annett), 2 (Professor Rick Sarre); Consultation 7 (Australian Federal Police).

6 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 14.

7 Submissions 20 (Australian Collectors & Debt Buyers Association), 21 (Institute of Mercantile Agents); Consultation 2 (Roundtable 1).

- 6.15 However, care should be taken in differentiating licensing requirements among business owners/operators. In the private security industry, for example, gaps in licensing requirements are allegedly creating vulnerabilities to infiltration.⁸
- 6.16 Policy makers should ensure that it is clear which activities require a licence. A lack of clarity can lead to inadvertent non-compliance or be used as an excuse for deliberate non-compliance.⁹
- 6.17 The licensing of business owners/operators also needs to be supported by disincentives for organised crime groups to operate on an unlicensed basis.

Infiltration by gaining employment

- 6.18 Infiltration at the level of business ownership/operation may bring the most scrutiny to an organised crime group. The relevant legislation may impose disclosure and record-keeping obligations and give regulators and/or police officers the right to inspect business premises.¹⁰ As an alternative, an organised crime group may seek to infiltrate an occupation or industry by having its members gain employment in a business, or by corrupting existing employees of a business. That may still enable the group to achieve its goals; for example, employees of a private security company working at a port may be able to assist in the importation of illicit drugs.
- 6.19 A licensing scheme may help prevent infiltration via employees, by requiring:
- employees—including managers—to be licensed¹¹
 - that a licence to operate a business not be issued unless the regulator is satisfied that the people the applicant is proposing to employ in the relevant business are fit and proper.¹²
- 6.20 Scrutinising employees may help prevent members of organised crime groups from infiltrating an occupation/industry. It may also restrict the employment of people who are more likely to be susceptible to corruption (a licensing process can be used to detect indicators of potential corruption, such as a history of dishonesty offences).
- 6.21 Restrictions on employees may have positive and negative outcomes for employers. Where employers would like their prospective employees to be vetted, regulators may be able to do that more thoroughly and more cost-effectively than employers. However, licensing requirements may limit the pool of employment candidates where prospective employees cannot afford to wait to start work while the licensing process is completed.¹³ Overly restrictive employee licensing requirements may also limit the pool of otherwise suitable employment candidates, such as where the relevance of a person's criminal history is not properly assessed and that person is unduly excluded from an occupation or industry.¹⁴

8 Submission 11 (Australian Security Industry Association Limited).

9 See *ibid.*

10 See, eg, *Sex Work Act 1994* (Vic) s 61C; *Firearms Act 1996* (Vic) s 87.

11 See, eg, *Sex Work Act 1994* (Vic) ss 49, 50 (a person cannot manage a brothel unless they have received approval to do so from the Business Licensing Authority); *Gambling Regulation Act 2003* (Vic) ss 9A.1.2, 9A.1.3(1) (a gaming industry employee's licence is required if the prospective employee will be performing specified functions, such as those that pose an inherent risk to the integrity of gaming).

12 See, eg, *Firearms Act 1996* (Vic) s 61(1)(c)(i)(A).

13 Consultation 2 (Roundtable 1); Submission 20 (Australian Collectors & Debt Buyers Association).

14 Consultation 4 (Roundtable 3); see also Submission 13 (National Heavy Vehicle Regulator).

Infiltration via vulnerabilities in the supply chain

- 6.22 The supply chain comprises the steps taken to get a good or service from the supplier to the customer, such as production, distribution and retailing. For example, there are often numerous steps involved in the transportation of waste, with different intermediaries at each step, including consignors who organise the management of waste by a third party, and subcontractors who dispose of the waste. Intermediaries such as consignors also operate in the trucking and heavy haulage industry.¹⁵
- 6.23 Where licensing requirements are absent at some points in the supply chain, this may create a vulnerability that can be exploited by organised crime groups as either business owners/operators or employees of businesses. Policy makers should therefore consider the entire supply chain related to the occupation/industry in developing a licensing scheme. The complexity of the supply chain may mean that it is practically impossible to impose licensing requirements on all relevant occupation/industry members, in which case licensing may need to be imposed only at the most vulnerable points in the supply chain for organised crime infiltration. Alternatively, the regulator may need to shift its focus to the post-entry regulation of supply chain members (see Chapter 7).

Capacity and ability to conduct a rigorous examination of licence applicants

- 6.24 In seeking to prevent organised crime infiltration, the main benefit of a licensing scheme is that it allows the regulator to screen prospective occupation/industry members for any connections to organised crime.¹⁶ Organised crime groups may try to hide those connections, including through the use of ‘cleanskins’ or complex business structures. Uncovering those connections may require considerable resources and the assistance of law enforcement agencies. Policy makers should therefore consider whether the regulator will have the capacity and ability to conduct rigorous examinations of licence applicants, and whether law enforcement agencies have the capacity to assist with these examinations.
- 6.25 A regulator may be able to target its efforts by only conducting rigorous examinations of applicants who, on an initial review, appear suspicious. For example, an applicant for a business operator’s licence with no previous experience in the relevant industry may be worthy of closer examination.¹⁷ Regulators should work with law enforcement agencies and other government agencies to determine relevant ‘red flags’ for their occupations/industries.
- 6.26 It is unlikely that a licensing scheme will prevent all instances of infiltration by organised crime groups. However, by conducting a rigorous examination of licence applicants, a regulator may better deter infiltration by exposing organised crime groups to a greater risk of detection. Further, a licensing scheme may have a broader disruptive effect on organised crime by requiring time and resources to be spent on attempts to evade detection through the licensing process that would otherwise be expended on illicit activities.

Capacity and ability to monitor the occupation/industry

- 6.27 The use of a licensing scheme that involves a rigorous examination of applicants may reduce the need to monitor an occupation/industry, as it should be strengthened against the risk of infiltration.¹⁸
- 6.28 However, a licensing scheme does not obviate the need for ongoing monitoring of occupation/industry members. A regulator should therefore have the capacity and ability to conduct such monitoring (see [7.11]–[7.21]).

15 Submission 13 (National Heavy Vehicle Regulator).
 16 Submission 20 (Australian Collectors & Debt Buyers Association).
 17 Consultation 9 (Victoria Police).
 18 Submission 17 (Darryl Annett).

- 6.29 First, even the most rigorous of examinations may be unable to discover a ‘cleanskin’ applicant’s links to an organised crime group.
- 6.30 In addition, initially law-abiding licensed operators may become corrupted by organised crime groups. Professor Michael Levi told the Commission that one of the paradoxes of licensing and other authorisation regimes is that a licensed operator could be blackmailed (by being threatened with exposure of drug use or sex worker use, or compelled to provide services due to outstanding debts) and plausibly threatened with the loss of licence and livelihood. In other words, licensing and strict entry requirements may make a licensee more vulnerable to blackmail by giving her/him more to lose.¹⁹ Further, a licensee may become susceptible to involvement with organised crime because of associations that develop after the licence is obtained or because the licensed business is in financial difficulty.²⁰

Capacity and ability to prevent unlicensed activity

- 6.31 A key message from the Commission’s consultations was that any licensing scheme needs to be supported by stringent controls on unlicensed businesses.²¹ A regulator should therefore have the capacity and ability to monitor for unlicensed activity and take enforcement action against unlicensed operators. As the Victorian Guide to Regulation recommends, only regulation ‘that can be realistically enforced should be put in place’.²²
- 6.32 If an organised crime group can achieve its goals by engaging in the regulated conduct without a licence, then it will have an incentive to do so and bypass the regulatory regime altogether. Indeed, a licensing regime that involves a rigorous examination of applicants may motivate people to operate without a licence,²³ at least where there is a viable market for unlicensed operators.
- 6.33 The Commission received feedback from a number of industry representatives who are concerned about the number of unlicensed operators in their occupations/industries and a perceived lack of enforcement action in response to this activity.²⁴
- 6.34 A particular concern of legitimate operators is that unlicensed operators can operate below cost and thereby undercut legitimate operators.²⁵ Unlicensed activity may therefore be particularly attractive to organised crime groups.²⁶
- 6.35 Faced with these pressures, legitimate operators may exit the occupation/industry²⁷ or may be tempted to reduce their compliance with the regulatory regime.²⁸

Measures to detect unlicensed activity

- 6.36 Policy makers should consider whether the regulator and/or Victoria Police have sufficient powers to enable them to discover and prosecute unlicensed operators. Under existing regulatory regimes, there may be insufficient power to enter unlicensed premises without a warrant, and it may be inordinately difficult to gather enough evidence to obtain a warrant and to prosecute unlicensed trading.²⁹

19 Consultation 1 (Professor Michael Levi).

20 Consultation 3 (Roundtable 2).

21 Consultations 3 (Roundtable 2), 11 (Victorian Automobile Chamber of Commerce); Submissions 11 (Australian Security Industry Association Limited), 24 (Victorian Automobile Chamber of Commerce). See also Submission 29 (Australian Metal Recycling Industry Association).

22 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 45.

23 Consultation 10 (Victorian Automobile Chamber of Commerce).

24 Consultations 3 (Roundtable 2), 11 (Victorian Automobile Chamber of Commerce); Submissions 24 (Victorian Automobile Chamber of Commerce), 29 (Australian Metal Recycling Industry Association).

25 Submissions 24 (Victorian Automobile Chamber of Commerce), 29 (Australian Metal Recycling Industry Association); Consultations 2 (Roundtable 1), 11 (Victorian Automobile Chamber of Commerce).

26 Consultation 5 (Professional Tattooing Association of Australia); Submission 24 (Victorian Automobile Chamber of Commerce).

27 Consultation 5 (Professional Tattooing Association of Australia).

28 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria’s Separated Parts and Scrap Metal Industries* (2014) 35; Consultation 11 (Victorian Automobile Chamber of Commerce).

29 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria’s Separated Parts and Scrap Metal Industries* (2014) 33.

- 6.37 Whichever agency is responsible for the investigation of unlicensed activity, it may benefit from working with industry and supporting industry members in the reporting of infiltration. The Commission was told that legitimate business operators often have valuable intelligence about unlicensed operators.³⁰
- 6.38 Unlicensed activity may also be detected and disrupted through collaboration and information sharing with other government agencies. Individuals/entities engaged in unlicensed activity in one industry may be doing so in several industries,³¹ and may be contravening multiple laws in the process. In the auto-wrecking/recycling and scrap metal industry, unlicensed participants are suspected of contravening environmental and occupational health and safety laws.³²
- 6.39 A regulatory regime may further deter unlicensed activity by prohibiting consumers from patronising unlicensed businesses.³³

Impact on legitimate applicants

- 6.40 It is in the regulator's interests that members of the occupation/industry are supportive of the regulatory regime, as they are likely to be a key source of information about organised crime infiltration. Accordingly, policy makers should be mindful of minimising the negative impacts of licensing, and maximising the positive impacts of licensing, for legitimate operators.³⁴
- 6.41 If all applicants are subjected to rigorous examination, this is likely to impose significant costs and delays on applicants. If regulators seek full recovery of administrative costs from occupation/industry members, then licence fees are likely to be considerable. This may be mitigated by tailoring fees according to the time and cost of investigating each applicant. This may also help prevent infiltration by favouring applicants whose affairs are transparent; for example, there would likely be an increased licence fee for applicants who use complex and opaque corporate/trust structures.
- 6.42 However, licence fees need to be carefully set in this respect. Very high licence fees may provide a perverse incentive to organised crime groups to enter the occupation/industry on an unlicensed basis and operate below cost (in turn, organised crime groups may offer a lower cost product/service to customers).³⁵
- 6.43 A licensing scheme designed to prevent organised crime infiltration may provide benefits to legitimate operators by raising standards of integrity and professional conduct in the occupation/industry.
- 6.44 Further, if the licensing scheme is effective in reducing organised crime infiltration, legitimate operators may benefit from fairer business conditions, since organised crime groups may exercise a competitive advantage as business owners/operators by:
- operating at a loss when using a business to launder money from criminal activities
 - using a business as a vehicle for criminal activity and thereby supplementing legitimate income with revenue from illicit activities
 - avoiding the standard costs of business through non-compliance with the regulatory regime and other laws, such as taxation and employment laws
 - using violence and intimidation to gain market share.

30 Consultations 2 (Roundtable 1), 11 (Victorian Automobile Chamber of Commerce).

31 Consultation 4 (Roundtable 3).

32 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014) 5.

33 See, eg, *Sex Work Act 1994* (Vic) s 15.

34 See generally Submission 12 (Scarlet Alliance, Australian Sex Workers Association).

35 Consumer Affairs Victoria, 'Stopping Rogue Traders' (Research Paper No 11, November 2006) 8.

- 6.45 While a licensing scheme that focuses on preventing infiltration may bring the benefits described above, legitimate occupation/industry members may be more supportive of a licensing scheme that serves additional purposes, including ensuring that all licensees have the necessary skills to perform the work involved and maintain appropriate business standards.³⁶ Further, if a licensing scheme does not address these matters, consumers may mistakenly assume that a licensee has been approved in terms of competency, safety and other professional standards and so not conduct their own due diligence before engaging the licensee's services.³⁷ Accordingly, it may be preferable for a licensing scheme to fulfil those expectations on the part of consumers.
- 6.46 Policy makers should consult with industry when considering criteria for obtaining a licence. This will help ensure that appropriate criteria are used and that industry is supportive of the licensing scheme.

Potential for anti-competitive effects

- 6.47 Licensing schemes have the potential to restrict or encourage competition.
- 6.48 On the one hand, a licensing scheme may have anti-competitive effects by creating a barrier to entry of an occupation or industry.³⁸ As stated in the Final Report of the Competition Policy Review:
- Licensing that restricts who can provide services in the marketplace can prevent new and innovative businesses from entering the market. It can also limit the scope of existing businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand.³⁹
- 6.49 Given this potential for anti-competitive effects, the Victorian Guide to Regulation states that:
- Governments should only intervene in the market when it is considered to be absolutely necessary. Any regulatory proposal needs to be scrutinised carefully to assess whether it is having an adverse impact on the ability of firms or individuals to enter and participate in the market.⁴⁰
- 6.50 Using a licensing scheme to prevent organised crime infiltration may pose a particular barrier to entry, because of the costs and delays caused by a rigorous examination of licence applicants. In addition, the criteria for entry under a licensing scheme may create a greater barrier to entry. In particular, if an overly broad approach is taken to the exclusion of applicants on the basis of criminal offending histories, the barrier to entry may be great.
- 6.51 On the other hand, a licensing scheme that is effective in preventing infiltration may improve the standing of an occupation or industry and protect legitimate business operators from being unfairly undercut by organised crime groups. This may encourage more legitimate entrants, thus improving competition.

36 Submission 10 (Australian Tattooists Guild).

37 Consultation 2 (Roundtable 1).

38 Allen Consulting Group, 'A Framework for Considering the Use of Occupational Licensing' (Report to Consumer Affairs Victoria, April 2007) 2.

39 Professor Ian Harper et al, *Competition Policy Review: Final Report* (March 2015) 140.

40 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 28.

Resourcing of good administrative decision making

- 6.52 As discussed in Chapter 2, regulatory regimes should be designed and implemented in a way that promotes good administrative decision making. This is particularly necessary where a licensing scheme is used. A regulator should be willing and able to sufficiently resource good administrative decision making.
- 6.53 Resources will be required to mitigate any risk of regulatory staff being corrupted, and to educate and support staff in any discretionary decision making when assessing the probity and suitability of licence applicants.
- 6.54 In addition to the cost of examining licence applicants, if a regulator refuses a licence application its decision may be reviewed. The cost of defending such reviews may be a significant imposition on a regulator's resources.⁴¹ If regulators are not adequately resourced to defend reviews of their decisions, they may be more reluctant to refuse licence applications in the first instance.

Risk of infiltration and the degree of harm

- 6.55 When deciding whether to use a licensing scheme to help prevent organised crime infiltration of an occupation/industry, policy makers should consider whether a net social and economic benefit will be created for Victoria; that is, whether the costs of imposing the scheme will be outweighed by the benefits gained by the reduced risk of infiltration (and other benefits that may accrue).⁴²
- 6.56 It is clear from the above discussion that using a licensing scheme to help prevent infiltration may require significant regulatory resources, place a burden on law-abiding applicants and potentially have anti-competitive effects. Nonetheless, when policy makers estimate the likely risk of infiltration and the degree of harm that may be caused to the industry and to the community in general by infiltration, an effective licensing scheme may yield a net benefit.
- 6.57 Victoria has a stringent regime for the licensing of brothels, which requires the Business Licensing Authority to investigate whether a licence applicant has any associations with organised crime. This requires significant resources and is the main reason it reportedly takes approximately one year to obtain a brothel licence.⁴³ However, this timeframe is not necessarily indicative of the time it would take for licence applications to be assessed in other occupations or industries where a regulator is screening for potential organised crime involvement.
- 6.58 Such a rigorous licensing process can be undertaken in relation to brothels in Victoria because there is a relatively small regulated group and there is government support for the licensing process to take as long as necessary because of a concern that brothels will be used as fronts for criminal activities.⁴⁴

41 Consultations 9 (Victoria Police), 4 (Roundtable 3).

42 Submission 22 (Victorian Competition and Efficiency Commission); see also Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 21–2, 28.

43 Information provided to the Commission by Consumer Affairs Victoria (31 August 2015).

44 Ibid.

Assessing probity and suitability

- 6.59 Where a licensing scheme is adopted to address organised crime infiltration, a key measure—and a key challenge—is the effective assessment of licence applicants' probity and suitability. This presents regulators with an opportunity to scrutinise applicants for any links to organised crime (and, perhaps, for characteristics that may make them susceptible to an approach from an organised crime group once established in an occupation or industry).
- 6.60 To demonstrate probity and suitability, licensing schemes typically require applicants to satisfy a number of preconditions in order to be eligible for a licence. Those preconditions may comprise:
- objective preconditions—these are criteria which either must or must not be present in order for a licence to be granted (for example, a licensing scheme may provide that a licence is not to be granted to an applicant who has been convicted of certain offences), and/or
 - subjective preconditions—these require the regulator to exercise a discretion about whether the licence should be granted or not, on the basis of certain criteria, including assessing whether the licence applicant is a fit and proper person.
- 6.61 An assessment of whether an applicant is fit and proper will enable the regulator to closely scrutinise the applicant including, where appropriate, considering relevant criminal intelligence.
- 6.62 Policy makers should consider whether certain objective preconditions will help prevent infiltration of a particular occupation/industry, and whether the regulator has sufficient resources to properly exercise its discretion, including in relation to an applicant's fit and proper person status.
- 6.63 When seeking to prevent the entry of organised crime, regulators should consider the factors set out below in assessing the probity and suitability of licence applicants. This list of factors arises from the Commission's consultations and research and is non-exhaustive. Inevitably, there will be occupation/industry-specific factors that are relevant to the probity and suitability of licence applicants in this context.

Proof of identity

- 6.64 Most licensing schemes require applicants to prove their identity. This is particularly relevant to preventing infiltration by members of organised crime groups, who may use a fraudulent identity to gain entry into an occupation or industry.
- 6.65 Proof of identity measures may include fingerprinting and verification of identity by a referee.⁴⁵
- 6.66 The nature and rigour of the method of proof varies among existing regulatory regimes. Where there is a high risk of infiltration by organised crime groups, a more rigorous method of verifying an applicant's identity may be justified; however, greater rigour may cause additional costs and delays for regulators and applicants.
- 6.67 Legitimate applicants may have a number of objections to proof of identity requirements which may undermine their support for a regulatory regime.

- 6.68 Legitimate applicants may consider that being required to provide finger/palm prints has no relevance to whether or not they are fit to hold a licence. This requirement may negatively affect the morale of legitimate applicants by making them feel as though they are being treated with undue suspicion. Legitimate applicants may also have concerns about whether the collection of finger/palm prints will be used for collateral purposes such as law enforcement investigations.⁴⁶
- 6.69 Applicants may also be frustrated by delays when they attend to provide finger/palm prints. One industry association reported that when trying to provide prints in accordance with licensing regimes in other states, its members were unable to book a time at their local police station and often had to wait for several hours.⁴⁷
- 6.70 Legitimate applicants and occupation/industry stakeholders may also perceive the requirement to be a waste of police resources.⁴⁸
- 6.71 A regulatory regime may either prescribe the method by which an applicant's identity is to be proved,⁴⁹ or the method may be within the regulator's discretion.⁵⁰ Having a discretion will allow a regulator to determine how to best allocate its resources and avoid imposing an undue burden on legitimate applicants by, for example, only requiring people whose applications arouse suspicion of a connection to organised crime to provide finger and palm prints.

Corporate licence applicants

- 6.72 Companies are often permitted to apply for a licence to operate in an occupation or industry. Corporate applicants present a challenge for regulators, because an enquiry will need to be made into the natural persons that sit behind the company—the shareholders, the directors, and potentially other officers⁵¹—in order to determine whether the company itself should be granted a licence.⁵²
- 6.73 While an organised crime group may seek to conceal its involvement in a company through the use of third-party shareholders such as relatives, European research indicates that members of organised crime groups are themselves often shareholders in companies that are used to infiltrate legitimate businesses. In one study, 55.5 per cent of 299 companies that had been infiltrated by an organised crime group had at least one group member among its shareholders (the greatest proportion (74 per cent) was found in the United Kingdom). According to the authors of the study, this suggested 'a certain propensity of OCGs [organised crime groups] to maintain direct control over infiltrated companies'.⁵³

46 Submission 10 (Australian Tattooists Guild).

47 Ibid.

48 Ibid.

49 *Private Security Act 2004* (Vic) s 17(2)(a)(i)(A).

50 *Gambling Regulation Act 2003* (Vic) ss 10.4.3(1), 10.4.3(2); *Estate Agents Act 1980* (Vic) s 92B.

51 An officer of a corporation includes a director, company secretary, people who make decisions that affect the whole or a substantial part of the company's business, people who have the capacity to significantly affect the company's financial standing, receivers, administrators, and liquidators: *Corporations Act 2001* (Cth) s 9 (definition of 'officer of a corporation').

52 See, eg, *Private Security Act 2004* (Vic) ss 20, 21, 26.

53 Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 94.

- 6.74 It appears that complex corporate structures are increasingly used by organised crime groups to conceal beneficial ownership for the purpose of illicit financial transactions and the operation of ostensibly legitimate businesses.⁵⁴ The natural persons who ultimately own or control the company (the beneficial owners)⁵⁵ may do so directly through personal shareholdings in the company or indirectly through other persons (such as nominees),⁵⁶ intermediary companies or trusts. Sometimes there are several intermediate structures between the company and the beneficial owner.
- 6.75 Under the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)* (Cth), beneficial ownership is defined as:
- direct or indirect ownership of 25 per cent or more of the shares in a company, or
 - control of a company by means including trusts, agreements, arrangements, understandings and practices, in particular where there is capacity to control the company's financial and operating decisions.⁵⁷
- 6.76 Smaller shareholdings may be deliberately used to conceal ownership, and may therefore require investigation.⁵⁸
- 6.77 In their submission, Professor Louis de Koker and Kayne Harwood contended that '[t]he effectiveness of licensing and registration regimes depends on the ability of the regulator to identify the individuals who actually control or benefit from the entity, whether directly or indirectly'.⁵⁹ In the context of a licensing scheme, a regulator should at least seek to identify the natural persons who ultimately own the shares in a company, as well as the directors, officers and any other people who appear to have day-to-day control of the company, and assess their probity and suitability.
- 6.78 A regulator should require a corporate applicant to provide information about beneficial ownership, such as a certificate of incorporation and the most recent annual statement lodged with the Australian Securities and Investments Commission (ASIC), which will contain information about office holders, shareholders and any ultimate holding company (a holding company owns the shares of other companies in a corporate group).
- 6.79 In some cases, it will be straightforward to determine beneficial ownership; a company search may reveal that the corporate applicant has only a limited number of shareholders and does not involve the use of holding companies. In other cases, the determination of beneficial ownership will be more difficult, requiring a detailed investigation of a complex corporate structure that includes the use of multiple holding companies, nominees and/or trusts. The use of trusts presents particular difficulties, because the identity of the beneficial owners of a trust may be impossible to ascertain without the provision of information by the applicant, such as the trust deed. Similarly, the use of offshore entities in the corporate structure is also problematic because some jurisdictions do not require the disclosure of beneficial ownership and directorships, or make it difficult to obtain such information.⁶⁰
- 6.80 Three strategies have the potential to address the concealment of beneficial ownership by organised crime groups for the purpose of obtaining a licence.

54 Consultation 6 (Australian Crime Commission); Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 23–7; Financial Action Task Force and Asia/Pacific Group on Money Laundering, *Anti-money Laundering and Counter-terrorist Financing Measures—Australia, Fourth Round Mutual Evaluation Report* (April 2015) 108, 112; *ibid* 99–101.

55 There is a distinction to be drawn between 'ownership' (legal title to the shares in a company) and 'control' (the capacity to determine the outcome of the company's decisions or actions); however, the two often coincide and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)* (Cth) para 1.2.1 defines 'beneficial owner' as someone who either owns or controls an entity.

56 A nominee is a natural person or company that holds shares on behalf of another person.

57 *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1)* (Cth) para 1.2.1 (definition of 'beneficial owner').

58 Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 90–3.

59 Submission 5 (Professor Louis de Koker and Kayne Harwood).

60 Financial Action Task Force, *FATF Guidance: Transparency and Beneficial Ownership* (October 2014) 6–7; Financial Action Task Force and Asia/Pacific Group on Money Laundering, *Anti-money Laundering and Counter-terrorist Financing Measures—Australia, Fourth Round Mutual Evaluation Report* (April 2015) 108; Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 100–101.

Refusal of a licence where beneficial ownership not established

- 6.81 First, consideration should be given to permitting the refusal of a licence where the regulator is not positively satisfied that beneficial ownership of a corporate applicant has been established, either on the information provided by the applicant or as a result of the regulator's own enquiries.
- 6.82 The ability to refuse a licence in such circumstances was endorsed by Racing Victoria, which observed that it can be difficult to establish the beneficial ownership of companies that seek licences and other forms of authorisation under the Racing Victoria regulatory regime.⁶¹
- 6.83 The refusal of a licence due to uncertain beneficial ownership would be consistent with anti-money laundering initiatives, which recognise that a failure or an inability to ascertain beneficial ownership risks enabling illicit transactions.⁶² While commercial institutions may decide to refrain from starting a relationship, or may terminate a relationship, where the beneficial ownership of a customer cannot be identified and verified, it seems rare for regulators to take a similar approach in determining the probity and suitability of corporate licence applicants. This would appear to be an unjustified anomaly given the potential for both money laundering and other unlawful conduct in the operation of a business.

Beneficial ownership register

- 6.84 The identification of beneficial ownership would be assisted by the development of a centralised beneficial ownership register, which contains ownership details in respect of both companies and trusts. Such a register would enable more efficient and less resource-intensive investigations of corporate licence applicants and may ultimately deter the abuse of corporate structures by organised crime groups by bringing greater transparency to the ultimate ownership of companies and trusts.
- 6.85 Although a beneficial ownership register is primarily intended to be of use to authorities and institutions that are engaged in anti-money laundering initiatives (including customer due diligence measures), such a register could equally be used by government agencies for the purpose of investigating corporate licence applicants. Professor Louis de Koker and Kayne Harwood argued that:
- The ability of regulators to keep organised crime out of lawful occupations and industries would be much strengthened by requiring the public registration of trusts and the establishment of public registers of beneficial ownership interests in businesses and entities.⁶³
- 6.86 The Financial Action Task Force (FATF),⁶⁴ an international, intergovernmental body that provides guidance about anti-money laundering policies, has recommended that government agencies ensure that there is accurate, adequate and timely information available on the beneficial ownership of companies and trusts. In the view of the FATF, there are insufficient mechanisms in Australia allowing access to beneficial ownership information, particularly in respect of trust entities.⁶⁵

61 Consultation 2 (Roundtable 1).

62 Financial Action Task Force, *FATF Guidance: Transparency and Beneficial Ownership* (October 2014) 3–7.

63 Submission 5 (Professor Louis de Koker and Kayne Harwood).

64 Australia is a member of the FATF.

65 Financial Action Task Force, *FATF Guidance: Transparency and Beneficial Ownership* (October 2014) 10–18; Financial Action Task Force and Asia/Pacific Group on Money Laundering, *Anti-money Laundering and Counter-terrorist Financing Measures—Australia, Fourth Round Mutual Evaluation Report* (April 2015) ch 7.

- 6.87 The FATF's recommendation has been endorsed, in broad terms, by the G20 network of countries (including Australia).⁶⁶ The World Economic Forum has advocated a similar beneficial ownership register, noting that, along with the use of professional advisors, the concealment of beneficial ownership is one of the key enablers of money laundering and a priority issue for government agencies internationally in addressing organised crime.⁶⁷
- 6.88 In some countries, beneficial ownership registries will soon be in operation. From 2016, a centralised open register of beneficial ownership (capturing ultimate owners and controllers) will be available in the United Kingdom.⁶⁸ Further, the European Union (EU) has passed a directive requiring EU member states to create centralised beneficial ownership registries, with companies and other legal entities incorporated in EU member states obliged to obtain and hold beneficial ownership information.⁶⁹

Identification of changes to beneficial ownership

- 6.89 Once the beneficial owners of a corporate licence applicant have been established and their probity assessed, it may be necessary to tie the grant of any corporate licence to the current beneficial owners of the corporate entity and/or require that any changes to beneficial ownership during the period of a licence be reported to the regulator. This may make it more difficult for organised crime groups to become the beneficial owners of existing corporate licence holders. This would also allow a regulator to pursue a corporate licence holder for non-compliant conduct where changes to beneficial ownership have not been reported under the terms of the regulatory regime.

Corporate history and financial capacity

- 6.90 In addition to the identification of beneficial ownership, a regulator should enquire into the corporate history of a company or natural person where the applicant seeks a licence to operate a business.
- 6.91 Where the applicant is a company, the history of the company and its directors and owners should be searched through the ASIC register of companies. Where the applicant is a natural person, a search should be conducted to determine any current or former directorships or shareholdings.
- 6.92 These searches may help to reveal prior phoenix activity. Phoenix activity involves closing down a company to avoid creditors and then resuming substantially the same business through a different company. A company/director search may show that one or more companies of which the applicant was a director or owner were deregistered, and new companies registered within a short space of time. Phoenix entities may share directors, owners, registered or business addresses, and company or business names with the entities they replace. Liaison with other government agencies, particularly ASIC, the Australian Taxation Office (ATO) and the Fair Work Ombudsman, may establish that the applicant (or its directors or owners) have been suspected of engaging in phoenix activity.
- 6.93 Phoenix activity is associated with organised crime, and may be one of the reasons for attempted infiltration of an occupation or industry.⁷⁰ Phoenix activity is attractive to organised crime groups because it allows the maximisation of profits; upon deregistration of a company, the company can avoid the payment of outstanding liabilities to government agencies (such as the ATO), employees, trade creditors, and other creditors.⁷¹

66 See G20, *High-level Principles on Beneficial Ownership Transparency* (2014) <http://www.g20australia.org/official_resources/g20_high_level_principles_beneficial_ownership_transparency>.

67 World Economic Forum, Global Agenda Council on Organized Crime, *Organized Crime Enablers* (July 2012) ch 2.

68 United Kingdom Department for Business, Innovation & Skills, The Rt Hon Dr Vince Cable and Companies House, 'Tough Action Promised on Hidden Company Owners' (Press Release, 21 April 2014) <<https://www.gov.uk/government/news/tough-action-promised-on-hidden-company-owners>>.

69 Council Directive 2015/849 of 20 May 2015 on The Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing [2015] OJ L 141/73, art 14 to 18.

70 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 25–6, 66.

71 Ibid 66.

- 6.94 The Australian Crime Commission (ACC) reports that there is increasing evidence of organised crime involvement in industries susceptible to phoenix activity, such as the labour hire industry, the private security industry, and the building and construction industry (particularly property development).⁷² During the Commission's consultations, industry representatives concurred that phoenix activity was apparent in the private security and labour hire industries.⁷³
- 6.95 It may be difficult to distinguish between phoenix activity and ordinary company failure. However, even if a regulator can only determine that there is a substantial and recent history of prior company failure, this fact may be relevant to an assessment of probity.
- 6.96 As the Australian Security Industry Association Limited (ASIAL) noted, phoenix activity may also allow a disreputable operator to start again in an industry under the guise of a new company and obtain a licence to operate.⁷⁴ This could be prevented if a search were conducted of the applicant company's corporate history, in order to determine a) whether the directors/owners of that company are the current or former directors/owners of any other company and b) whether any such companies have been refused a relevant licence or had a licence suspended or cancelled.
- 6.97 In addition to a review of the applicant's corporate history, it may be necessary to enquire into the applicant's financial capacity to operate the business for which a licence is sought. An undercapitalised applicant may suggest a lack of bona fides and an intention to enter an industry for illegitimate purposes.
- 6.98 Further, an undercapitalised applicant may be prone to corruption or influence by organised crime.⁷⁵ For this reason, applicants for a Queensland brothel licence must establish the financial viability of the proposed brothel. The Queensland Prostitution Licensing Authority suggested that financially vulnerable licensees may be more susceptible to influence by organised crime groups, which can lead to participation in money laundering, illicit drug trafficking, or the trafficking of women.⁷⁶

Criminal intelligence

- 6.99 Regulators often rely on criminal intelligence held by law enforcement agencies (primarily, Victoria Police) in determining whether a licence applicant has any connections to organised crime groups.⁷⁷ Criminal intelligence comprises information about suspected, rather than proven, criminal activity.
- 6.100 The use of criminal intelligence in licensing decisions raises a number of issues that may need to be addressed if reliance is to be placed on this source of information in assessing the probity and suitability of a licence applicant.
- 6.101 First, law enforcement agencies may be reluctant to share confidential information with the regulator responsible for a licensing decision. This may be addressed through the implementation of appropriate governance arrangements and information-sharing mechanisms, as discussed in Chapter 2.
- 6.102 Second, criminal intelligence may need to be kept confidential from the licence applicant. This will, however, undermine the applicant's ability to comment on adverse information that is taken into account when the licence application is determined. A regulatory regime may need to make provision for regulators to seek the protection of criminal intelligence, while allowing the value of that intelligence to be assessed by a court or tribunal on any review of a licensing decision, as discussed in Chapter 2.

72 Ibid 25.

73 Consultation 2 (Roundtable 1).

74 Ibid.

75 Ernesto U Savona and Giulia Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries*, Final Report of Project Ariel (Transcrime, 2015) 86–7.

76 Submission 26 (Prostitution Licensing Authority (Queensland)).

77 Consultations 4 (Roundtable 3), 7 (Australian Federal Police), 9 (Victoria Police).

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- 6.103 Third, some regulators may not have the necessary expertise to assess criminal intelligence. Where a regulator seeks to have regard to criminal intelligence in decision making, it should be equipped with staff that are appropriately trained to analyse the intelligence received and assess its proper weight. Alternatively, a lack of skills in criminal intelligence analysis may be mitigated by giving Victoria Police a role in assessing licence applicants, or a power of veto over licence applicants in high-risk occupations/industries.
- 6.104 Under some existing regulatory regimes, a regulator is able, or required, to seek the advice of Victoria Police about a licence applicant, but the regulator retains the authority to grant or refuse a licence.⁷⁸
- 6.105 A different approach is used in respect of applications for poppy cultivation licences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), where Victoria Police has an ultimate power of veto. Upon receipt of a licence application, the regulator must carry out the investigations it considers necessary to determine the application and provide a copy of the application to Victoria Police.⁷⁹ Victoria Police must make the appropriate inquiries and report to the regulator.⁸⁰ The regulator must determine the application but must not issue a licence if Victoria Police opposes it.⁸¹
- 6.106 Fourth, a reliance on criminal intelligence in licensing decisions places pressure on the resources of Victoria Police. Given the number of licensing regimes in Victoria which allow or require a regulator to seek input from Victoria Police, there is the potential for Victoria Police to be unable to meet the demand for its assistance.⁸²
- 6.107 That demand may be reduced if regulators only seek assistance from Victoria Police after conducting their own inquiries, including into other matters relevant to probity and suitability such as an applicant's prior business experience, financial capacity to conduct the licensed business, and any history of non-compliance with other regulatory regimes. This may require regulators to liaise with non-law enforcement agencies. It may be appropriate for a regulator to only seek Victoria Police's assistance if an applicant raises certain red flags (such as where a licence applicant seeks to operate a business in an occupation/industry in which she/he has no prior experience).
- 6.108 However, for occupations/industries at the highest risk of infiltration and/or where infiltration has the potential to cause the most harm, a greater level of assistance from Victoria Police may be justified.
- 6.109 The regulation of an occupation/industry should be considered in the context of the relative needs of other occupations/industries so that Victoria Police's resources are used where they are most needed.

78 *Estate Agents Act 1980* (Vic) s 20.

79 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 690A(1)(a), 690A(2).

80 *Ibid* s 690A(3).

81 *Ibid* ss 690A(4), 690B.

82 Consultation 9 (Victoria Police).

Prior criminal offending

- 6.110 An applicant's criminal history may reveal several matters relevant to probity:
- prior involvement in organised crime, including the trafficking of illicit commodities or organised economic crime such as fraud
 - prior criminal conduct that could indicate that a business owner or employee may be vulnerable to influence by organised crime groups once established in an occupation or industry—an enquiry into the circumstances of prior fraud or corruption offences may indicate that a person is susceptible to the influence of others for improper purposes
 - prior infiltration of a lawful occupation or industry as part of an organised crime group—this may be revealed by the commission of offences under the regulatory regime of another occupation or industry, or the commission of money laundering, taxation, customs or other relevant offences.
- 6.111 A licensing scheme may require an applicant to disclose all prior criminal offences, which are then reviewed for their relevance to the licence application. Alternatively, an applicant may be required to disclose only certain types of offence; where this approach is followed, the specified offences should seek to capture the three forms of prior conduct identified above.

Mandatory or discretionary licence refusal

- 6.112 A licensing scheme may mandate the refusal of a licence where a person has previously committed certain types of offence. Alternatively, a regulator may have a discretion as to whether a licence is refused on this basis.
- 6.113 Careful consideration should be given to whether it is appropriate to mandate the refusal of a licence on the basis of an applicant's criminal history. The Commission heard from several industry representatives that legitimate applicants can be unfairly excluded from an occupation or industry where the regulator does not enquire into the relevance of a prior offence. Representatives of the tattoo industry noted that many individuals within that industry have criminal records (including for historical offences) that may or may not be relevant to probity.⁸³ Vixen Collective stated that regulators should take into account whether any previous offences relate to conduct that was previously criminalised but where this is no longer the case, and may therefore be irrelevant to an applicant's probity.⁸⁴ JobWatch more broadly contended that people with a criminal record should be given the opportunity to explain the circumstances of their offending.⁸⁵ These are important considerations.
- 6.114 The mandated refusal of a licence on the basis of criminal history can reduce competition by raising barriers to the entry of new business operators, disadvantage employers by restricting the pool of employment candidates, compromise broader public policy objectives in relation to offender rehabilitation, and compel people with criminal histories to seek illegitimate work⁸⁶ (including, potentially, with businesses linked to organised crime).

83 Submission 10 (Australian Tattooists Guild); Consultation 5 (Professional Tattooing Association of Australia).

84 Consultation 2 (Roundtable 1).

85 Submission 6 (JobWatch Inc).

86 Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171, 188–91; Bronwyn Naylor, 'Living Down the Past: Why a Criminal Record Should Not be a Barrier to Successful Employment' (2012) 18(8) *Employment Law Bulletin* 115.

- 6.115 While Victorian law does not prohibit discrimination in employment on the basis of criminal record, the federal *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act) does contain such a prohibition.⁸⁷ However, discrimination is not constituted where a person's criminal record means that he or she is unable to perform the inherent requirements of a particular job.⁸⁸ The Australian Human Rights Commission (AHRC) has stated that a licensing agency may potentially contravene the AHRC Act by making a distinction that has the effect of impairing employment opportunities on the basis of criminal record.⁸⁹ The AHRC recommends that licensing agencies ensure there is an opportunity for an individual assessment of a person's criminal record, in order to determine whether that record is relevant to the inherent requirements of the role of a licensee.⁹⁰
- 6.116 The Australian Health Practitioner Regulation Agency (AHPRA) has developed a registration standard to determine whether an applicant's criminal history is relevant to the practice of a health practitioner. While the particular factors reviewed will vary by occupation or industry, the AHPRA standard may provide guidance to other regulators about the factors to consider in determining the relevance of criminal history, such as:
- the nature and gravity of the offence and its relevance to the role for which the licence is being sought
 - the period of time since the applicant committed the offence
 - the sentence imposed for the offence, and the sentencing remarks made (including discussion of mitigating factors and prospects of rehabilitation)
 - the age of the applicant at the time of the offence
 - whether or not the conduct that constituted the offence has since been decriminalised
 - the applicant's behaviour since they committed the offence
 - any information given by the applicant.⁹¹
- 6.117 The Commission considers that these criteria are generally appropriate, and constitute fair and proper practice.
- 6.118 An individualised assessment of an applicant's criminal history will require more resources than the mandatory refusal of licences on the basis of specified offences, particularly in respect of staff training and the oversight of discretionary decision making. However, regulators should consider whether a net benefit may be realised through an individualised assessment of an applicant's criminal history, from both a human rights perspective (by not unduly restricting access to employment) and a business perspective (by fostering competition where a person is applying to operate a business, and allowing access to a wider pool of employment candidates where an employee's licence is sought).

Prior civil contraventions and adverse administrative decisions

- 6.119 An applicant may be required to disclose previous civil contraventions or adverse administrative decisions either under a provision that expressly requires the production of such information, or under a general power of a licensing agency to request prescribed information from an applicant.⁹²

87 *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination', sub-para (b)(ii)); *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii).

88 *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination', sub-para (c)).

89 Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012) 32. Discrimination is defined to include any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and has been declared by the Regulations to constitute discrimination for the purposes of the Act (discrimination on the basis of criminal record has been so declared): *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination', sub-para (b)); *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii).

90 Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012) 32.

91 Australian Health Practitioner Regulation Agency, *Registration Standard: Criminal History—For Registered Health Practitioners* (1 July 2015) <<http://www.ahpra.gov.au/Registration/Registration-Standards/Criminal-history.aspx>>.

92 See, eg, *Private Security Act 2004* (Vic) s 16.

- 6.120 A review of prior non-criminal conduct is likely to be just as important as a review of prior criminal conduct, since it may reveal:
- adverse administrative decisions, including licence refusals or cancellations, in other occupations or industries (for example, an applicant for entry into the waste management industry may have previously been refused entry into the private security industry because of their association with an organised crime group)
 - prior civil contraventions in another occupation or industry that may require further investigation (for example, an applicant for entry into the commercial fishing industry may have previously contravened regulatory obligations in other occupations/ industries)
 - prior civil contraventions in other areas of law, such as employment law, taxation law, and local planning law, where the contravention has occurred as part of organised crime activity (for example, non-compliance with employer obligations may have occurred as part of previous infiltration of the private security industry).
- 6.121 It will be particularly necessary to review previous civil contraventions as law enforcement agencies and regulators increasingly adopt a multi-disciplinary approach to enforcement which addresses organised crime activity by drawing on the enforcement options available across several areas of criminal and civil law (see [10.70]–[10.77]).

Professional competency

- 6.122 ‘Professional competency’ refers to the knowledge, technical skills and aptitude required to fulfil a particular function or role. Many licensing schemes will require an applicant to establish professional competency.
- 6.123 A close review of professional competency may deter the attempted entry of organised crime. The Victorian Automobile Chamber of Commerce (VACC) said that the unlicensed sector of the auto-wrecking/recycling industry attracts unqualified and unscrupulous operators who would not withstand a review of professional competency as part of the licensing process.⁹³
- 6.124 An insistence on professional competency can render an occupation or industry less attractive to organised crime groups by marginalising low-standard/illegitimate operators. The Australian Tattooists Guild noted that the majority of professional tattooists do not want to work in organised crime-affiliated studios, and instead seek employment at studios ‘where owners/operators have a sincere and vested interest in the art form itself’.⁹⁴ Victoria Police stated that professionalisation plays an important role in reducing the risk of infiltration in the tattoo industry.⁹⁵
- 6.125 Where entry is attempted, a lack of professional competency may suggest that an applicant seeks entry for illegitimate purposes. An organised crime group that infiltrates multiple industries, or shifts between industries as opportunities and vulnerabilities arise, is unlikely to have the requisite professional competencies for each of these industries.
- 6.126 A lack of professional competency may also signal the possible use of a ‘cleanskin’ applicant. Victoria Police explained that where an applicant for a private security licence lacks sufficient skills and prior industry experience, this can raise a ‘red flag’ that prompts the further investigation of the applicant, in order to determine whether the use of a ‘cleanskin’ front for an organised crime group has been attempted.⁹⁶

93 Consultation 11 (Victorian Automobile Chamber of Commerce).

94 Consultation 2 (Roundtable 1); Submission 10 (Australian Tattooists Guild).

95 Consultation 9 (Victoria Police).

96 Ibid.

- 6.127 It may be necessary to consult with industry in order to establish procedures for determining professional competency. The VACC suggested that industry representatives could play a role in the assessment of licence applications with regulatory officers. Industry members, the VACC noted, are attuned to whether an applicant is legitimate or not. Any such role would have to be carefully managed to avoid conflicts of interest, such as where licensing objectives conflict with industry demands for limits on new entrants.⁹⁷

Associates of applicants

- 6.128 Regulators should examine a licence applicant's 'associates' (also referred to as 'close associates' under some current regulatory regimes) when considering the applicant's probity and suitability, at least in respect of high-risk occupations/industries.
- 6.129 Associates are people connected to the applicant, including in social, familial and business contexts. An investigation of an applicant's associates may raise several concerns. If the applicant has associates who are members of an organised crime group, that may raise a concern that the group will be able to influence the applicant in the conduct of the business. An examination of associates may also reveal that the applicant is a 'cleanskin'—that is, the applicant has applied for a licence on behalf of an organised crime group that will remain in the shadows while using the applicant to infiltrate the occupation/industry.
- 6.130 Investigating associates typically involves examining people connected to the applicant (the relevant legislation may describe specific categories of people to be examined) in order to determine:
- whether any associate would be able to influence the operation of the applicant's business to be conducted under the licence
 - if so, whether that associate meets probity and suitability requirements under the licensing scheme.⁹⁸
- 6.131 The examination may result in a refusal of the licence.⁹⁹
- 6.132 The investigation of an applicant's associates is likely to require significant regulatory resources. A heavy burden is likely to fall on law enforcement agencies as the investigation of associates could well rely on the use of criminal intelligence.¹⁰⁰
- 6.133 The investigation of associates also creates a burden for legitimate applicants, particularly because it will probably mean that applications take longer to process.
- 6.134 Given this burden, policy makers may be tempted to use a 'bright line' test for the examination of associates. That is, the test could simply be that if an applicant has any associates who are members of or are connected to organised crime groups, then that alone may justify licence refusal.
- 6.135 The Commission considers that it would be unjust to refuse a licence because of this relationship alone. An associate should have an ability to influence the business of the applicant in order to be relevant to the licensing decision, as is the case under most of the associate tests that the Commission has examined.¹⁰¹ If a 'business influence' requirement is not applied, a legitimate applicant could be excluded due to a mere relationship with an organised crime group member that has no relevance to the conduct of the licensed business.

97 Consultation 11 (Victorian Automobile Chamber of Commerce).

98 See, eg, *Private Security Act 2004* (Vic) s 26; *Sex Work Act 1994* (Vic) s 37; *Firearms Act 1996* (Vic) s 61; but see *Gambling Regulation Act 2003* (Vic) ss 1.4, 3.4.11 regarding a broader meaning of associates that includes relatives without requiring them to have any influence over the business of the applicant.

99 See, eg, *Gambling Regulation Act 2003* (Vic) s 3.4.11.

100 Consultation 4 (Roundtable 3).

101 See, eg, *Private Security Act 2004* (Vic) s 3 (definition of 'close associate'); *Sex Work Act 1994* (Vic) sub-ss 37(2)–(3); *Firearms Act 1996* (Vic) s 3(1) (definition of 'close associate'); *Liquor Control Reform Act 1998* (Vic) s 3AC.

- 6.136 It is noted that the examination of the probity and suitability of associates is separate to the examination of any direct connections a licence applicant may have with an organised crime group. For example, it may be appropriate to refuse a licence if a person is a member of or closely associated with an organised crime group and this renders the person unsuitable to hold a licence within the context of a particular occupation or industry.
- 6.137 The definition of ‘close associate’ in the *Private Security Act 2004* (Vic) provides an example of how influence over the conduct of a business may be assessed. Under that regime, Victoria Police (which is the regulator of the private security industry) must not grant a private security business licence if it is not satisfied that each close associate of the applicant is fit and proper.¹⁰² Close associates are people who are able to exercise a significant influence over the conduct of the business proposed to be operated under the licence, because they:
- hold an interest in the capital or assets of that business or are entitled to receive any income derived from that business
 - hold any power to participate in any managerial decision in that business or appoint any person to a position of management in that business
 - participate in the management of the licensed business.¹⁰³
- 6.138 It will require significant resources to identify potential associates, determine whether each associate is able to exercise influence over the business of the applicant, and assess any such associate’s probity. Policy makers should consider whether the risk of infiltration is sufficiently high to justify the resources required for such an investigation, or whether associate testing can be confined to applicants that raise particular suspicions.

Mandatory group-based exclusions

- 6.139 Under some regulatory regimes, members of certain groups—particularly those groups declared at law as ‘criminal organisations’—are excluded, on a mandatory basis, from seeking licences and other forms of authorisation to work in certain occupations and industries. A feature of group-based exclusion schemes is that people are excluded from entering an occupation or industry based on their membership of a particular group and not because of their individual characteristics, including whether or not they have a relevant criminal record.
- 6.140 In New South Wales, a ‘controlled member of a declared organisation’ is prohibited from applying for any authorisation (such as a licence) to carry on a prescribed activity so long as she or he is subject to a control order.¹⁰⁴ The prescribed activities include private security services, pawnbroking, the operation of tow-trucks, and motor-dealing, repairing or recycling.¹⁰⁵
- 6.141 Under the *Firearms Act 1996* (Vic), if a person is a ‘declared organisation member’ under the terms of the *Criminal Organisations Control Act 2012* (Vic), that person is presumed not to be a fit and proper person for the purpose of a firearm dealers licence, but that presumption may be rebutted.¹⁰⁶
- 6.142 The Commission received limited feedback from consultation participants about mandatory group-based licence exclusions.

102 *Private Security Act 2004* (Vic) s 26.

103 *Ibid* s 3 (definition of ‘close associate’).

104 *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 27(4). A declared organisation is an organisation subject to a current declaration by the Supreme Court of New South Wales that the organisation is a criminal organisation for the purposes of the Act: *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 3(1).

105 *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 27(6).

106 *Firearms Act 1996* (Vic) ss 3(1) (definition of ‘prohibited person’), 61(1)(a), 61(3).

- 6.143 The National Heavy Vehicle Regulator (NHVR) expressed some support for exclusions linked to criminal organisation control laws, but cautioned that any group-based exclusion may restrict the employee pool for the trucking and heavy haulage industry.¹⁰⁷
- 6.144 Julie Ayling argued that an individualised assessment of licence applicants would be ‘both fairer and more effective at excluding seriously dangerous individuals than any group-based exclusion’. In respect of exclusions linked to criminal organisation control laws, Ms Ayling noted that members of declared criminal organisations are likely to have varying levels of criminality, which suggests that all members of a declared organisation should not be treated in the same manner for the purpose of a licence application. Ms Ayling also observed that criminal organisation control laws may only capture a limited class of organised crime groups, namely those that self-identify, such as outlaw motorcycle gangs. Criminal organisation control laws are less able to be applied to secretive, fluid networks that are engaged in organised crime, because the identity and boundaries of those networks are unclear and shift regularly.¹⁰⁸
- 6.145 The Commission considers that the use of mandatory group-based exclusions requires further review if their use is contemplated by government in respect of a particular occupation or industry. The Commission notes that in the absence of such mandatory exclusions, an applicant’s group memberships may still be taken into account in an individualised assessment of probity and suitability, by examining whether:
- by virtue of the group membership, the person is not suitable to hold the licence (for example, where an applicant is applying for a private security licence, a regulator may consider it appropriate to refuse the licence if there is a risk that the applicant would use the licence to facilitate unlawful conduct by a criminal organisation of which he or she is a member, such as the trafficking of illicit commodities)
 - certain members of the group would be able to exercise influence over the business of the licence applicant, and whether those people have the requisite probity and suitability.

Investigating licence applicants

- 6.146 In assessing a licence applicant’s probity and suitability, a regulator may need to draw on certain investigative powers, particularly where any links with organised crime may be difficult to detect.
- 6.147 While a regulator’s investigative powers should be proportionate to the risk of infiltration and the harm likely to be caused by infiltration, a regulator should be provided with a range of tools for the investigation of licence applicants, such as powers to:
- compel the production of documents or information by the applicant or the applicant’s associates¹⁰⁹
 - require other government agencies and private entities (such as banks and other lenders) to provide information about the applicant or the applicant’s associates
 - interview applicants on a routine or optional basis (see, for example, the practices with regard to applicants for commercial fishing licences and applicants for sex work service providers’ licences).¹¹⁰

107 Submission 13 (National Heavy Vehicle Regulator).

108 Submission 4 (Julie Ayling).

109 See, eg, *Gambling Regulation Act 2003* (Vic) s 10.4.5(1).

110 Department of Economic Development, Jobs, Transport and Resources, *Forms—Licences, Permits, Boats* (17 November 2015) <<http://agriculture.vic.gov.au/fisheries/commercial-fishing/forms-licences-permits-boats>>; Consumer Affairs Victoria, *Apply for a Sex Work Service Provider’s Licence* (2015) <<https://www.consumer.vic.gov.au/businesses/licensed-businesses/sex-work-service-providers/licensing/apply-for-a-licence>>.

- 6.148 Investigating applicants may require significant resources and impact on licence applicants by prolonging the processing of applications and increasing licence fees, if the costs of investigations are recovered through fees. Regulators therefore need the discretion to determine which tools to use in each case. Ideally, applicants should be investigated with varying degrees of intensity depending on the level of risk they present. In a particular industry, the greatest risk of infiltration may lie with applicants who use complex business structures, or with applicants who appear to have little industry experience.
- 6.149 Regulators may need to develop new skills in order to investigate applicants (including skills in analysing complex business structures to determine the beneficial owners of corporate licence applicants) and address any other barriers that prevent them from exercising investigative powers (see [10.53]–[10.69]).
- 6.150 In its submission, Vixen Collective noted that the investigation of sex work licence applicants ‘may be affected by entrenched discriminatory attitudes ... towards sex workers’.¹¹¹ Regulators (or any other agency involved in investigating licence applicants) should be sensitive to such concerns. More broadly, regulators should ensure that licence investigations are not tainted by any unjustified beliefs about the likelihood of occupation/industry members being connected to organised crime.

Renewal of licences

- 6.151 For a range of reasons, regulators will need to conduct ongoing monitoring of an occupation or industry as an adjunct to any licensing scheme (see [7.11]–[7.21]).
- 6.152 Licences typically run for a finite period, with licensees able to seek renewal of their licences towards the end of that period. The renewal process provides an opportunity to re-examine licensees and determine whether they remain suitable occupation/industry members. Several industry representatives expressed support for the use of licence renewal processes as an opportunity to examine the ongoing suitability of licensees.¹¹²
- 6.153 However, if all licensees in an occupation/industry were to be re-examined upon renewal, the burdens on the regulator, law enforcement agencies and legitimate licensees would be significant.¹¹³
- 6.154 In order to reduce these burdens, one option is to extend licence periods to allow for fewer, but thorough, re-examinations of licensees at the time of licence renewal. A number of industry associations commented on the burden created by short licence periods.¹¹⁴ Other forms of ongoing monitoring would still be required during a longer licence period, as an organised crime group would likely have more opportunity to infiltrate and exit within that period.
- 6.155 Another option is to rely on monitoring tools (which may include thorough examination upon renewal of licences) that are more targeted—that is, that focus on particular high-risk licensees or categories of licensees. However, a regulator should retain the right to thoroughly re-examine any licensee at any time and cancel its licence if there are grounds to believe that the licensee is involved with organised crime or is, for any other reason, no longer suitable to hold a licence.

111 Submission 19 (Vixen Collective).

112 Consultations 2 (Roundtable 1), 3 (Roundtable 2).

113 Consultation 4 (Roundtable 3).

114 Submissions 10 (Australian Tattooists Guild), 19 (Vixen Collective). See also Submission 11 (Australian Security Industry Association Limited).

Restrictions on licence transfer and surrender

- 6.156 In order to help prevent organised crime infiltration, regulatory regimes should restrict the transfer and surrender of licences.
- 6.157 An organised crime group may seek to infiltrate an occupation or industry by acquiring a licence from an existing licensee. One solution is for licences to be personal to the licence holder and non-transferable.¹¹⁵ If licence transfers are permitted, the transferee should be subjected to an examination in the same manner as any new applicant for a licence, as the Victorian Automobile Chamber of Commerce (VACC) submitted.¹¹⁶
- 6.158 Policy makers should also consider whether a regulatory regime should impose restrictions on the surrender of licences. Such restrictions may make an occupation or industry less attractive to organised crime groups. Ease of surrender may be appealing to organised crime groups, should they wish to quickly exit an occupation or industry if there is a risk that unlawful conduct will be detected. The VACC suggested that the surrender of a licence should:
- trigger the regulator’s interest as to why the [licence] is being given back, and that surrender should not be automatically accepted without consideration as to whether conditions of surrender should be placed on the [licence].¹¹⁷
- 6.159 Accordingly, it may be necessary to permit restrictions on licence surrender where a regulatory or law enforcement agency has decided to conduct an inquiry into the licensee or its actions,¹¹⁸ and permit a regulator to investigate the activities of a former licensee.¹¹⁹

115 *Gambling Regulation Act 2003* (Vic) s 3.4.15; *Sex Work Act 1994* (Vic) s 39(4); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 69OD.

116 Submission 24 (Victorian Automobile Chamber of Commerce).

117 *Ibid.*

118 *Sex Work Act 1994* (Vic) s 40A.

119 See, eg, *ibid* ss 61A (definition of ‘licensee’), 61D(1), 61E.

Regulating post-entry behaviour

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7. Regulating post-entry behaviour

- 7.1 This chapter presents several options for the post-entry regulation of occupation or industry members in order to deter or detect organised crime infiltration. These options reflect the Commission's research and the key observations made by consultation participants, and are not intended to be exhaustive. The options are:
- ongoing monitoring of the probity and suitability of occupation or industry members
 - customer and supplier due diligence measures
 - record-keeping requirements
 - restrictions on cash-based transactions
 - controls on coercive conduct.

The role of post-entry regulation

- 7.2 In order to address organised crime infiltration, it will be necessary to regulate behaviour within an occupation or industry as either an adjunct or alternative to restrictions on entry.

Adjunct to restrictions on entry

- 7.3 Where policy makers decide that entry should be restricted through a licensing scheme, some degree of ongoing regulation will be necessary in order to maintain the standards imposed through that scheme, and to detect organised crime groups that have managed to subvert a licensing process or corrupt or acquire an established business.
- 7.4 While some consultation participants cautioned that ongoing regulation should be appropriately targeted and not unduly burdensome,¹ there was also strong support for post-entry regulation, particularly where significant costs are incurred in complying with rigorous entry standards and maintaining high standards of conduct.² In addition, the regulation of behaviour within an occupation or industry was regarded as creating commercial benefits. Racing Victoria emphasised that 'clean' industries and the maintenance of high standards foster consumer confidence in an industry and in turn support spending.³

1 Consultation 2 (Roundtable 1); Submissions 20 (Australian Collectors & Debt Buyers Association), 21 (Institute of Mercantile Agents).
2 Consultations 2 (Roundtable 1), 4 (Roundtable 3); Submissions 11 (Australian Security Industry Association Limited), 17 (Darryl Annett), 24 (Victorian Automobile Chamber of Commerce), 29 (Australian Metal Recycling Industry Association).
3 Consultation 2 (Roundtable 1).

Alternative to restrictions on entry

- 7.5 Policy makers may decide that restrictions on entry are not an appropriate response to organised crime infiltration, such as where:
- the particular form of infiltration does not require entry, or is unlikely to be addressed by restrictions on entry (particularly where organised crime groups use a legitimate business to obtain goods or services for illicit purposes but generally do not seek to own or operate such a business)
 - a regulator is not equipped or adequately resourced to conduct a forensic examination of licence applicants in order to prevent organised crime infiltration, including through the use of ‘cleanskins’
 - legitimate operators would be unduly burdened by requirements at the point of entry that are designed to prevent organised crime infiltration
 - the breadth and complexity of the occupation or industry makes it effectively impossible or excessively costly to regulate the entry of all occupation or industry members.
- 7.6 In such circumstances, the response to infiltration will rely on post-entry regulation.

Widening the regulatory gaze

- 7.7 Regardless of whether post-entry regulation occurs as an adjunct or alternative to restrictions on entry, a regulator should consider widening the regulatory gaze by harnessing the capacity of third parties to participate in regulation. Third parties include occupation and industry members, consumers, employees, and service providers with whom businesses interact, such as commercial landlords and professional advisors (lawyers, accountants, and so on). The use of third parties for crime prevention purposes is increasingly being adopted as a regulatory strategy in areas such as environmental crime, crime in waterfront settings, and illicit drug crime.⁴
- 7.8 Through routine commercial dealings, third parties are uniquely placed to deter or detect organised crime infiltration. Widening the regulatory gaze may reduce financial burdens on government, reduce reporting and disclosure burdens on legitimate business operators, and improve the flow of information to regulators.
- 7.9 Third parties may have a commercial incentive to actively participate in regulation. As Braithwaite observes, regulation should aim to transform ‘markets for vice’ into ‘markets for virtue’ by taking advantage of commercial incentives for virtuous business behaviour.⁵ Regulators should identify where commercial and regulatory objectives align and exploit these opportunities. A business may wish to be educated about the risks of unwittingly enabling organised crime in order to prevent reputational and other commercial damage; a business may independently pursue high standards of conduct in order to differentiate itself in the marketplace; or a business may be motivated to engage in supplier or customer due diligence in order to mitigate transactional risks.
- 7.10 Third parties can be enlisted in three key regulatory activities in this context: the ongoing monitoring of probity and suitability; customer and supplier due diligence measures; and record-keeping requirements, as relevant to the needs of the particular occupation or industry in preventing infiltration.

4 Julie Ayling, ‘Harnessing Third Parties for Transnational Environmental Crime Prevention’ (2013) 2(2) *Transnational Environmental Law* 339; Russell Brewer, *Policing the Waterfront: Networks, Partnerships, and the Governance of Port Security* (Oxford University Press, 2014) 49–58, 94–8, 115–33, 149–70; Adrian Cherney, Juani O’Reilly and Peter Grabosky, ‘Networks and Meta-regulation: Strategies Aimed at Governing Illicit Synthetic Drugs’ (2006) 16(4) *Policing and Society* 370.

5 John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 50–61.

Monitoring of probity and suitability

- 7.11 The ongoing monitoring of probity and suitability may enable the discovery of organised crime groups that have:
- evaded detection during any licensing process
 - corrupted or acquired a legitimate business
 - exploited a lack of restrictions on entry.
- 7.12 Where restrictions on entry operate, the Australian Federal Police (AFP) observed that any probity testing at the point of entry into an occupation or industry needs to be supplemented by ongoing monitoring of a person's probity and suitability. Ongoing monitoring may reveal the use of a 'cleanskin' in an application for a licence or other form of authorisation.⁶ As previously noted, it can be very difficult to detect the use of 'cleanskins' at the point of entry. It may be more feasible to detect the actual owners or operators once a business has begun trading and is exposing itself to scrutiny through interactions with customers, suppliers, competitors, government agencies and other parties. As Darryl Annett observed, hidden control is:

difficult to detect as it is usually dealing with a scenario where there is no apparent link between the licensee and the shadow [controller]. It is particularly challenging because the shadow is likely to have no role at the time of licence application, and to become involved after the licence is in place.⁷

Monitoring methods

- 7.13 Broadly speaking, a regulator may engage in two forms of monitoring: reactive monitoring and proactive monitoring.
- 7.14 Reactive monitoring may be prompted by complaints, 'tip-offs' and other information received by the regulator. While police are likely to be a primary source of information about organised crime,⁸ a regulator should facilitate the provision of information by a broad range of sources, including government agencies, occupation and industry members, consumers, employees and other workers, commercial landlords, and the general public (see [10.28]–[10.52]).
- 7.15 Proactive monitoring may be performed by conducting periodic business inspections and audits, and/or requiring occupation and industry members to report or disclose information in relation to their probity and suitability to operate (such as any changes in business ownership or operation, the commission of unlawful conduct, changes in financial status, and so on). Continuous disclosure obligations⁹ or periodic reporting obligations¹⁰ are commonly used for this purpose. The information acquired is then audited for the purpose of targeted surveillance and investigation of particular sectors, entities or types of conduct within an occupation or industry.
- 7.16 While some consultation participants saw benefits in reporting and disclosure requirements,¹¹ they may offer a relatively limited way of detecting infiltration, since organised crime groups will almost certainly refrain from disclosing adverse information and are unlikely to voluntarily comply with reporting obligations.¹² However, a careful auditing process may identify any deficiencies or unusual gaps in reporting as 'red flags' that require further investigation.

6 Consultation 7 (Australian Federal Police).

7 Submission 17 (Darryl Annett).

8 Consultation 4 (Roundtable 3).

9 See, eg, *Private Security Act 2004* (Vic) ss 174–6; *Sex Work Act 1994* (Vic) s 46.

10 See, eg, *Prostitution Act 1999* (Qld) ss 19, 44.

11 Submissions 10 (Australian Tattooists Guild), 13 (National Heavy Vehicle Regulator).

12 Submission 13 (National Heavy Vehicle Regulator).

- 7.17 In order to better target surveillance and investigations, it may be useful to offer incentives for compliance with disclosure, reporting and other obligations. The Victorian Commission for Gambling and Liquor Regulation operates a ‘star system’ that rewards liquor licensees for compliance by reducing regulatory fees.¹³ In a similar vein, the National Heavy Vehicle Regulator (NHVR) is considering the introduction of an operator registration scheme that will provide indicators for identifying trusted operators and reward operators who meet high standards. The aim of the scheme would be to create an ‘inner circle of respected companies’.¹⁴ By identifying reputable operators, incentive measures narrow the field of outlier operators for the purpose of surveillance and investigations.

Costs and benefits

- 7.18 A regulator will need to consider the most appropriate balance between proactive and reactive measures in seeking to detect organised crime infiltration.
- 7.19 At a minimum, any regulatory regime should include a capacity for reactive monitoring. Given the clandestine nature of organised crime infiltration, there may be a greater need to facilitate the provision of information by third party sources than in other areas of regulation.
- 7.20 Proactive monitoring through activities such as surveillance, audits and inspections was encouraged by representatives of the auto-wrecking/recycling and scrap metal dealing industry and the private security industry.¹⁵ Several regulators emphasised the importance of these forms of field-based regulation, and the reputation this builds about regulatory agencies among occupation or industry members.¹⁶
- 7.21 Proactive monitoring, however, has the potential to be overly broad and mistargeted. Consequently, regulatory agencies in Australia are often encouraged to follow a risk-based approach to compliance and enforcement, including monitoring activities.¹⁷ The challenge for regulators lies in determining where risks of organised crime infiltration are concentrated in a particular occupation or industry. This process may be assisted by conducting vulnerability studies, facilitating comprehensive information gathering from third parties, and taking steps to improve information sharing among government agencies. Where appropriate to the form of infiltration faced by an occupation or industry, customer and supplier due diligence programs, and record-keeping requirements, may also help to build a valuable body of information that can then be analysed for the purpose of further, targeted investigations.

Customer and supplier due diligence

- 7.22 Customer and supplier due diligence programs harness the particular ability of third parties—such as public and private procurers of services, and occupation and industry members—to identify suspicious features in a customer or supplier. In some cases, these parties may be better placed than regulatory or law enforcement agencies to detect spurious operators or unusual transactions. Due diligence may deter or detect:
- the ownership/operation of a business by organised crime (for example, by conducting due diligence on bidders for private security or waste management services)
 - the distribution of illicit goods through a legitimate business (for example, by conducting due diligence on sellers of vehicles to an auto-wrecker/recycler)

13 Consultation 4 (Roundtable 3).

14 Ibid.

15 Submissions 11 (Australian Security Industry Association Limited), 24 (Victorian Automobile Chamber of Commerce), 29 (Australian Metal Recycling Industry Association).

16 Consultation 4 (Roundtable 3).

17 Australian Government, *Regulator Performance Framework* (October 2014) 22; Victorian Competition and Efficiency Commission, *Smart Regulation: Grappling with Risk*, Guidance Note Version 1 (April 2015) 43–8.

- the diversion of licit goods from a legitimate business for unlawful use (for example, by conducting due diligence on customers of precursor manufacturers and suppliers).
- 7.23 The Commission was told that customer due diligence is useful in reducing the risk of infiltration.¹⁸ For example, customer due diligence is carried out in the chemicals industry under the National Code of Practice for Chemicals of Security Concern, a voluntary initiative developed by Australian governments in partnership with the chemical industry (while the Code is more directly applicable to the prevention of terrorist acts than organised crime, it provides an example of a regulatory approach that may be applied in the context of organised crime).¹⁹ The Code provides guidance to industry members on the detection of illegitimate customers. The Plastics and Chemicals Industries Association (PACIA) praised the Code for fully engaging industry members in the task of identifying suspicious customers.²⁰
- 7.24 The Commission was also told that supplier due diligence—by both the private and public sectors—has significant potential to hinder or expose organised crime infiltration.
- 7.25 A study of procurement practices across key government agencies by de Koker and Harwood suggests that such practices are currently under-utilised as a means of detecting organised crime infiltration in the course of public procurement.²¹ In their submission, de Koker and Harwood stated that:
- Taking actions that strengthen the effectiveness of existing regulatory regimes designed to combat organised crime, such as increasing supplier integrity due diligence in public procurement, would seem to be a low cost way to reduce the risk of organised criminal groups entering into lawful occupations and industries. Organised criminals wishing to operate in the legitimate economy will find it harder to do so if AML/CTF-regulated institutions and government agencies have access to reliable beneficial ownership data ... and apply appropriate due diligence measures consistently.²²
- 7.26 In respect of the private security industry, Professor Rick Sarre recommended that government agencies and the private sector insist on 'gold standard' practices among private security firms tendering for high-value contracts. This, he submitted, would help to drive corrupt operators from the market.²³
- 7.27 Research has found that organised crime infiltration of private security firms can give rise to multiple forms of unlawful conduct, such as fraud and employment law contraventions.²⁴ Supplier due diligence measures could be an appropriate response to this type of problem.

18 Consultation 3 (Roundtable 2); Submission 8 (Philip Morris Limited).

19 Australian Government, *National Code of Practice for Chemicals of Security Concern* (2013) <http://www.nationalsecurity.gov.au/ChemicalSecurity/Pages/NationalCodeofPracticeforChemicalsofSecurityConcern.aspx#_code>.

20 Consultation 3 (Roundtable 2).

21 Louis de Koker and Kayne Harwood, 'Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia' (2015) 37(2) *Sydney Law Review* 217.

22 Submission 5 (Professor Louis de Koker and Kayne Harwood).

23 Submission 2 (Professor Rick Sarre).

24 Tim Prenzler and Rick Sarre, 'Developing a Risk Profile and Model Regulatory System for the Security Industry' (2008) 21(4) *Security Journal* 264; Australian Crime Commission, *Criminal Infiltration in the Private Security Industry* (July 2013) <<https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/criminal-infiltration-private-security>>.

25 Fair Work Ombudsman, *Local Government Procurement Initiative* <<http://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/local-government-procurement-initiative>>.

Example

The Australian Security Industry Association Limited (ASIAL) and the Fair Work Ombudsman (FWO) have recently developed a 'Local Government Procurement Initiative' that aims to strengthen the security procurement practices of local councils. The FWO advises local councils to consider factors other than price—such as quality and performance—in making procurement decisions. A low-cost quote may signal unlawful or unscrupulous conduct by the service provider. Local councils are advised to assess whether quotes are consistent with the true costs of service provision, such as wage costs.²⁵

- 7.28 The Environment Protection Authority Victoria (EPA) similarly noted that government procurement processes, particularly in the construction sector, have the potential to disrupt organised illegal waste dumping operations, by establishing the legitimacy of suppliers and enshrining proper practices among suppliers.²⁶ The Scottish Environment Protection Agency (SEPA) has produced a good practice guide for waste service procurement that helps public sector bodies detect possible criminal enterprises.²⁷ SEPA noted that this guide has potential application to other industries that may be at risk of organised crime infiltration, due to the similarities in methodologies and indicators of criminal activity across industries.²⁸
- 7.29 Supplier due diligence measures are a key part of regulatory regimes in New York City that seek to address longstanding organised crime infiltration of industries such as construction and waste management. In New York City, 'Independent Private Sector Inspector Generals' (IPSIGs) audit private contractors in order to ensure that they are not linked to organised crime groups, concealing criminality, or being corrupted by racketeers or public officials. IPSIGs are used by both regulatory agencies (such as the New York City School Construction Authority) and private businesses in order to establish probity for the purpose of procurement processes. Jacobs describes the IPSIG scheme as:
- one of the great contemporary innovations in organized-crime control. It has spawned the formation and growth of private-sector investigation firms run and staffed by former prosecutors, forensic accountants, analysts, and detectives. These firms provide monitoring services for companies that wish to assure clients and government regulators that they are complying with all the laws and regulations.²⁹

26 Consultation 4 (Roundtable 3).

27 Scottish Environment Protection Agency, *Guidance on Procuring Waste Services for Public Bodies and their Contractors: Good Practice Guidance to Prevent Crime* (July 2015) <<http://www.zerowastescotland.org.uk/content/good-practice-guidance-prevent-waste-crime-0>>.

28 Consultation 13 (Scottish Environment Protection Agency).

29 James B Jacobs, *Gotham Unbound: How New York City Was Liberated from the Grip of Organized Crime* (New York University Press, 1999) 227–9.

Developing due diligence requirements

- 7.30 Customer and supplier due diligence programs are often termed 'know your customer' (KYC) and 'know your supplier' (KYS) programs. The specific elements of a KYC or KYS program will vary by occupation or industry.
- 7.31 Broadly, under a KYC program a business will seek to:
- establish the legitimacy of the proposed customer
 - establish the legitimacy of the proposed transaction
 - verify the customer's identity using proof of identity requirements appropriate to either natural or corporate persons.
- 7.32 The first and second steps involve some overlap. Within the context of organised crime infiltration, these steps may require an enquiry into whether:
- the intended use of goods or services has been identified, and whether that intended use is consistent with the usual practice of customers of a similar size and type
 - the quantity of goods or services is consistent with the usual practice of customers of a similar size and type
 - the customer has the technical capacity or is otherwise suitably equipped to use the goods or services
 - an inflated price is being offered for the goods or services
 - the customer's preferred payment method is consistent with wider industry practice (for example, does the customer insist on cash payment in an industry dominated by electronic payments, or is a payment being made through an unusual source?)
 - the customer is acting on their own behalf or on behalf of another person.³⁰
- 7.33 Under a KYS program, a business or government agency will seek to establish the integrity of the proposed supplier. To some extent, this process may mirror the probity enquiries that are conducted by a regulator in assessing a business licence application. Within the context of organised crime infiltration, a KYS program may require an enquiry into whether the supplier:
- is suitably qualified to supply the goods or services
 - has sufficient experience in supplying the goods or services
 - has suitable financial standing (which may be ascertained by requesting recent audited accounts)
 - has established beneficial ownership of any corporate or trust entity through which it operates
 - has a history of unlawful conduct or appears on an informal or formal 'blacklist' of suppliers
 - is proposing to supply the goods or services in a lawful and ethical manner (this may involve comparing the quote with the true costs of lawful service provision)
 - is prepared to submit to regular monitoring during the term of a contract.³¹

30 See, eg, Australian Government, *National Code of Practice for Chemicals of Security Concern* (2013) <http://www.nationalsecurity.gov.au/ChemicalSecurity/Pages/NationalCodeofPracticeforChemicalsofSecurityConcern.aspx#_code>.

31 See, eg, Scottish Environment Protection Agency, *Guidance on Procuring Waste Services for Public Bodies and their Contractors: Good Practice Guidance to Prevent Crime* (July 2015) <<http://www.zerowastescotland.org.uk/content/good-practice-guidance-prevent-waste-crime-0>>; Louis de Koker and Kayne Harwood, 'Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia' (2015) 37(2) *Sydney Law Review* 217; Fair Work Ombudsman, *Local Government Procurement Initiative* <<http://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/local-government-procurement-initiative>>.

- 7.34 Customer and supplier due diligence may be voluntarily adopted through measures such as an industry code of practice, or mandated under legislation. For example, under Commonwealth anti-money laundering legislation, reporting entities (such as financial service providers, gambling service providers, and money service providers) are obliged to conduct customer due diligence.³²
- 7.35 Any requirements for supplier due diligence should take account of the supply chain in the occupation or industry. Some occupations and industries have a straightforward supply chain between the supplier and the customer with no or few intermediaries in between. It is increasingly typical, however, for a supply chain to involve multiple intermediaries and third parties. In the labour hire industry there may be four to five intermediaries involved before the labour reaches the purchaser.³³ This fragmentation of the supply chain may be exploited by organised crime groups—a gap in due diligence measures at a key point in the chain may enable infiltration.
- 7.36 It may therefore be necessary to require due diligence at all, or the most critical, points in the supply chain. Such requirements could be enacted under legislation pertaining to a particular occupation or industry, or incorporated into the contractual arrangements between members of the supply chain. For example, a contract between a manufacturer and a distributor may require that any sub-contracting of distribution be subject to due diligence being conducted on third-party distributors.

Costs and benefits

- 7.37 Due diligence measures potentially offer a cost-effective form of regulation by co-opting occupation and industry members in the task of regulation, and aligning regulatory measures with initiatives that may be undertaken in the public and private sectors independently of any need to prevent organised crime infiltration. There may be strong commercial and organisational reasons to engage in due diligence, including the need to prevent:
- reputational damage in acquiring a customer, or engaging a supplier, who is linked to organised crime
 - a contract potentially being unenforceable where it has an unlawful purpose
 - difficulties in recovering payment from illegitimate customers
 - inadequate service provision from illegitimate suppliers
 - accessorial liability (or similar) for the acts of suppliers (for example, non-compliance with the *Fair Work Act 2009* (Cth) by a supplier of private security or other services may expose the purchaser of those services to accessorial liability under that Act).³⁴
- 7.38 Some allowance needs to be made for the capacity of organised crime groups to subvert customer and supplier due diligence processes. An organised crime group may engage in identity fraud, or establish a business front that provides a veneer of legitimacy in purchasing certain goods. On the whole, however, customer and supplier due diligence is likely to make organised crime infiltration more difficult by increasing the effort and risk of conducting illicit transactions through a legitimate business, or operating a business for unlawful purposes.

32 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) pt 2.
 33 Consultation 2 (Roundtable 1).
 34 *Fair Work Act 2009* (Cth) s 550.

Record-keeping requirements

- 7.39 As Cherney, O'Reilly and Grabosky observe, 'record keeping and disclosure have an important regulatory function by subjecting records to possible public scrutiny and enhancing vigilance on the part of third parties.'³⁵ A similar view was expressed during the Commission's consultations, with the Victorian Automobile Chamber of Commerce (VACC) remarking that organised crime is attracted to industries with lax internal controls in relation to record keeping.³⁶
- 7.40 Maintaining records about the provision of goods and services creates an audit trail. An audit trail may deter or enable the detection of the distribution of illicit goods through a legitimate business, or the diversion of licit goods from a legitimate business for unlawful use. Potentially, an audit trail may also deter or enable the detection of the provision of unlawful services by a business that is owned or operated by organised crime (such as unlawful debt collection services).
- 7.41 Record-keeping requirements will often accompany any customer or supplier due diligence programs, or may operate in the absence of such programs.
- 7.42 The Commission was told of several industries where high-quality record keeping helps to deter infiltration and, conversely, where poor record keeping helps to facilitate infiltration.
- 7.43 In the experience of the Australian Crime Commission (ACC) and Victoria Police, record keeping measures help to deter the diversion of legitimate chemicals and pharmaceuticals for illicit drug manufacturing.³⁷ First, the state and territory precursor control regimes help to curb precursor diversion from legitimate chemical manufacturers and suppliers. Precursor chemicals are chemicals that can be used to make other chemicals, such as illicit drugs.

Example

The Victorian precursor control regime requires that a receiver of precursor chemicals cannot be supplied with chemicals unless they provide sufficient proof of identity to the supplier, have an account with the supplier, and give the supplier an end-user declaration that records the receiver's personal details, the name and quantity of the chemical, the proposed date of supply, and the intended use of the chemical.³⁸

35 Adrian Cherney, Juani O'Reilly and Peter Grabosky, 'Networks and Meta-regulation: Strategies Aimed at Governing Illicit Synthetic Drugs' (2006) 16(4) *Policing and Society* 370, 376.

36 Consultation 11 (Victorian Automobile Chamber of Commerce).

37 Consultations 6 (Australian Crime Commission), 9 (Victoria Police).

38 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 4(1) (definitions of 'end-user declaration' and 'sufficient proof of identity of receiver'), 80J(1), 80K, 80N(1), 80O; *Drugs, Poisons and Controlled Substances (Precursor Supply) Regulations 2010* (Vic) reg 8(1).

- 7.44 Second, precursor diversion from community pharmacies is addressed through initiatives such as the 'Project Stop' scheme.³⁹

Example

Under Project Stop, pharmacists record details of the supply of pseudoephedrine-based products (including the customer's identification details and the name and quantity of the product). This information is recorded in a central, real-time database and shared with police. The database helps a pharmacist determine whether a pseudoephedrine-based product is needed for therapeutic purposes, or whether it is being purchased for illicit activity (for example, multiple recent purchases by the same person may suggest it is being diverted for illicit drug manufacturing).⁴⁰

- 7.45 The Commission also heard that record-keeping practices in the Victorian second-hand dealing industry have helped to deter organised crime infiltration of that industry. According to Cash Converters Australia and the Victorian Independent Pawnbrokers Association (VIPA), second-hand dealers maintain detailed records of transactions (consistent with their statutory obligations),⁴¹ and require customers to provide proof of identity (including photographs) when transacting. This information is voluntarily provided to Victoria Police. The VIPA stated that the quality of the data, and its provision to the police, limits the use of second-hand dealers for criminal purposes. There is apparently widespread awareness among customers that transactional data are recorded and shared, which has a deterrent effect.⁴²
- 7.46 A different experience was reported in relation to the auto-wrecking/recycling and scrap metal industry. The 2013–14 'Task Force Discover' investigation found widespread non-compliance with record-keeping obligations throughout the industry. Seventy per cent of businesses audited by the taskforce were assessed as either not holding the required authorisation to trade, or as being non-compliant with the conditions of their authorisation. Non-compliance included incomplete record keeping in relation to customer identities and vehicle identifiers, and failures to make notifications to the Written-Off Vehicles Register. In the opinion of the taskforce, these record-keeping deficiencies enable 'vehicle thieves to launder stolen vehicles through motor wreckers or scrap metal dealers with little or no risk their personal details will be retained'.⁴³ Similar views were expressed by the VACC.⁴⁴

Developing record-keeping requirements

- 7.47 The particular details to be collected under a record-keeping scheme will vary by occupation or industry. Broadly speaking, record-keeping requirements should enable the creation of an audit trail that identifies the supplier and purchaser of goods or services, and the relevant characteristics of the goods or services for the purpose of deterring or detecting infiltration. For example, in the area of hydroponic equipment supply, it may be relevant to record the intended use of the product and the quantity of the product.
- 7.48 Record-keeping requirements may be mandated under legislation (such as the precursor control regime) or voluntarily pursued by business operators as part of an industry-led initiative (such as Project Stop).

39 Queensland, Organised Crime Commission of Inquiry, *Report* (October 2015) 232.

40 See Pharmacy Guild of Australia and Attorney-General's Department, *Project Stop* <<http://projectstop.com/>>.

41 *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 20; *Second-Hand Dealers and Pawnbrokers Regulations 2008* (Vic) reg 9.

42 Consultation 3 (Roundtable 2).

43 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014) 4.

44 Consultations 3 (Roundtable 2), 11 (Victorian Automobile Chamber of Commerce).

- 7.49 Legislated record-keeping requirements are typically accompanied by powers for authorised officers (such as a police officer or the officer of a regulatory agency) to compel production and inspection of records.⁴⁵ It may also be necessary to consider whether a more onerous obligation should be placed on business operators to supply data to a regulatory agency or police on a regular basis.⁴⁶ Victoria Police commented that the lack of such an obligation is a weakness of the precursor control regime in Victoria. Nevertheless, Victoria Police acknowledged that the recording and retention of precursor supply information have a deterrent effect in themselves.⁴⁷
- 7.50 Record-keeping requirements should comply with the *Privacy and Data Protection Act 2014* (Vic). Further, even where compliance is established, regard should be had to any adverse effects on consumers arising from the collection of personal information. For example, the Pharmacy Guild of Australia noted that there was some concern among customers of community pharmacies about the retention of confidential information under Project Stop (although it seems community pharmacies have addressed those concerns).⁴⁸
- 7.51 Record-keeping requirements may be supplemented by restrictions on cash-based transactions, as discussed below at [7.59]–[7.68], which may further assist in the creation of an audit trail.
- 7.52 Finally, a record-keeping scheme should take account of the supply chain in the occupation or industry. The elements of the supply chain are addressed to some extent in the regulatory response to precursor diversion, which seeks to curb diversion at both the wholesale stage (through the precursor control regimes) and the retail stage (through Project Stop). However, gaps remain; third-party trucking companies are not subject to any record-keeping obligations and may therefore provide an avenue for diversion in the delivery of wholesale products.⁴⁹
- 7.53 Following an examination of the supply chain, it may be necessary to impose record-keeping requirements at all points in the supply chain, or only at the points of greatest vulnerability to infiltration.

Costs and benefits

- 7.54 Maintaining records about the provision of goods and services brings transparency to transactions, which may deter organised crime infiltration. Equally, high-quality record keeping may allow infiltration to be detected—the very availability of such information creates an incentive for police and regulators to maintain oversight of an occupation or industry. Cash Converters Australia stated that due to the availability of comprehensive records in the second-hand dealing industry, police have a strong incentive to monitor the industry and draw on those resources for investigations.⁵⁰
- 7.55 The record-keeping initiatives discussed in this section seek to counteract the distribution of illicit goods through a legitimate business, or the diversion of licit goods from a legitimate business for unlawful use. Beyond this, record keeping may reveal unlawful activity in a business owned or operated by organised crime. Philip Morris Limited suggested that transaction records could be used to establish evidence of illicit trade, or lack of proof of legitimate trade, as a basis for action under anti-money laundering laws, asset forfeiture/confiscation or unexplained wealth laws, or taxation laws.⁵¹

45 See, eg, *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 80R; *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) ss 25, 26C.
46 See, eg, *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s 79; *Pawnbrokers and Second-hand Dealers Regulations 1996* (WA) reg 15.
47 Consultation 9 (Victoria Police).
48 Consultation 3 (Roundtable 2).
49 Consultation 9 (Victoria Police).
50 Consultation 3 (Roundtable 2).
51 Submission 8 (Philip Morris Limited).

- 7.56 Record keeping is only likely to be effective if it is backed by robust enforcement or a strong commitment by industry members to the task of maintaining detailed records. The apparent success of the precursor control regime in Australia is partly attributed to the enthusiasm of industry members to participate in the regime.⁵² In this respect, PACIA noted that its members are in part motivated by the need to avoid the reputational damage that would arise from the diversion of their products for unlawful use.⁵³ Accordingly, commercial motivations may compel compliance with record-keeping obligations as much as enforcement by regulators.
- 7.57 In the absence of commercial motivations or a culture of compliance, a regulator will need to enforce legislated record-keeping obligations. A lack of enforcement action may encourage otherwise compliant industry members to neglect record keeping, particularly where the costs of record keeping place them at a competitive disadvantage in relation to non-compliant industry members. A robust enforcement response to non-compliance should serve as the quid pro quo for the effort and cost of maintaining detailed records.
- 7.58 Victoria Police noted that the success of record-keeping requirements may also rely on a regulator or the police being appropriately resourced to analyse the information it receives.⁵⁴

Restrictions on cash-based transactions

- 7.59 Restrictions on cash-based transactions may deter or detect infiltration in a similar way to record-keeping requirements. Unlike cash payments, electronic payments establish an audit trail that identifies the supplier and purchaser of goods or services and certain details of the transaction, such as location and date.
- 7.60 During the Commission's consultations, several industry representatives observed that cash-based transactions are used to conceal unlawful dealings in the auto-wrecking/recycling and scrap metal dealing industry and the second-hand dealing industry.⁵⁵ Cash-based transactions are also vulnerable to abuse in the commercial fishing industry (to supply unlawfully caught fish) and in the waste management industry (for example, to illegally dump hazardous waste at landfill sites).⁵⁶
- 7.61 In addition, a cash-intensive business may facilitate money laundering by allowing the proceeds of unlawful conduct to be intermingled with revenue from legitimate business activities. In the absence of an audit trail, the source of cash payments may be unknowable.⁵⁷

Example

In England and Wales, scrap metal dealers are prohibited from paying for scrap metal in cash; a scrap metal dealer is only permitted to pay for scrap metal by cheque or electronic transfer. It is an offence to pay for scrap metal by other payment methods, with liability for the offence extending to the scrap metal dealer, a person who makes the payment acting for the dealer, and the site manager.⁵⁸ These measures were introduced in order to counteract the disposal of stolen metal through legitimate dealers.⁵⁹

52 Consultation 6 (Australian Crime Commission).

53 Consultation 3 (Roundtable 2).

54 Consultation 9 (Victoria Police).

55 Consultation 3 (Roundtable 2); Submission 29 (Australian Metal Recycling Industry Association).

56 Judy Putt and Katherine Anderson, *A National Study of Crime in the Australian Fishing Industry*, Research and Public Policy Series no. 76 (Australian Institute of Criminology, 2007) 21; Rob White and Diane Heckenberg, 'Key Vulnerabilities and Limitations in the Management of Hazardous Waste and its Disposal: A Checklist Assessment Tool' (2011) 2 *Journal of Environmental Protection* 1257.

57 See Nicholas Gilmour and Nick Ridley, 'Everyday Vulnerabilities: Money Laundering through Cash Intensive Businesses' (2015) 18(3) *Journal of Money Laundering Control* 293.

58 *Scrap Metal Dealers Act 2013* (UK) c 10, s 12.

59 Explanatory Notes to the *Scrap Metal Dealers Act 2013* (UK).

- 7.62 Victoria Police, the VACC and Sims Metal Management expressed support for these measures in England and Wales, and suggested that similar measures could be introduced in Victoria to help prevent the disposal of stolen vehicles and vehicle parts through auto-wreckers/recyclers and scrap metal dealers.⁶⁰
- 7.63 Restrictions on cash-based transactions could involve an outright prohibition on cash payments, or the more moderate option of limits on the quantum of cash payments (for example, a requirement that amounts over \$500 cannot be paid in cash). Limits on the quantum of cash payments increase the effort and risk of conducting a transaction for unlawful purposes. For example, where an organised crime group wished to purchase legitimate chemicals for illicit drug manufacturing or other unlawful conduct, a limitation on the quantum of cash payments would force the purchaser to structure its payments over several transactions, possibly at several locations, thereby increasing the risk of detection. Multiple transactions over a short period of time may alert a business operator to suspicious conduct.
- 7.64 Restrictions on cash payments could be imposed voluntarily by individual business operators or mandated under legislation.⁶¹

Costs and benefits

- 7.65 Restrictions on cash payments—and attendant requirements for electronic payments—create an audit trail that may prevent or expose organised crime infiltration. More broadly, such restrictions may assist the enforcement of taxation laws—an obligation to use electronic payments would make it more difficult to conceal business income.
- 7.66 Industry members should be consulted before any restrictions on cash-based transactions are introduced. Electronic payment systems may bring additional costs for business operators, such as merchant fees, which may then be passed on to customers. Further, business operators may be concerned about the impairment of trade where their customer base includes groups—such as older and/or low-income consumers—who predominantly, and legitimately, pay in cash.⁶² Some customers may also legitimately prefer cash-based transactions in order to maintain privacy over personal information that would otherwise be collected through electronic transactions (that is, information collected for marketing purposes and not law enforcement/regulatory purposes).
- 7.67 Alternatively, industry members may have a preference for electronic payments. The VACC remarked that legitimate operators in the auto-wrecking/recycling industry rarely use cash payments because it is more efficient to use electronic payments. The VACC suggested that members of that industry would be likely to support restrictions on cash-based transactions.⁶³
- 7.68 While cash remains the most frequently used form of payment in Australia, research by the Reserve Bank of Australia (RBA) shows that the use of cash has declined consistently since 2007, falling from a share of 69 per cent of all payments in 2007 to 47 per cent of all payments in 2013, among the population studied by the RBA.⁶⁴ Accordingly, any restrictions on cash-based transactions may simply hasten a shift in consumer and business behaviour that is already well advanced.

60 Consultation 9 (Victoria Police); Submissions 24 (Victorian Automobile Chamber of Commerce), 30 (Sims Metal Management).

61 See, eg, *Gambling Regulation Act 2003* (Vic) s 3.5.33.

62 Crystal Ossolinski, Tai Lam and David Emery, 'The Changing Way We Pay: Trends in Consumer Payments' (Research Discussion Paper, Reserve Bank of Australia, June 2014) 42.

63 Consultation 11 (Victorian Automobile Chamber of Commerce).

64 Crystal Ossolinski, Tai Lam and David Emery, 'The Changing Way We Pay: Trends in Consumer Payments' (Research Discussion Paper, Reserve Bank of Australia, June 2014) 11.

Controls on coercive conduct

- 7.69 Organised crime groups have the potential to use physical force, harassment, intimidation, or other coercive conduct in order to carry out business or repel competitors.⁶⁵
- 7.70 A regulatory regime may seek to address such conduct, separately to any action that may be taken under other laws, such as the *Summary Offences Act 1966* (Vic) or the *Crimes Act 1958* (Vic).
- 7.71 First, certain practices may be prohibited under a regulatory regime, regardless of whether there are restrictions on entry into the occupation or industry. In the Victorian debt collection industry (which operates under a negative licensing scheme), a debt collector is prohibited from using physical force, undue harassment or coercion, or doing, or threatening to do, any act that may intimidate a person or a member of that person's family. Such conduct may result in exclusion from the industry.⁶⁶
- 7.72 Where a positive licensing scheme operates, coercive conduct may be a ground for the suspension or cancellation of a licence. Under the *Private Security Act 2004* (Vic), disciplinary action (such as licence cancellation) may be taken by the Chief Commissioner of Police where the holder of a private security licence has engaged in unfair, dishonest or discreditable conduct in carrying on the licensed activity.⁶⁷ Further, it is conceivable that coercive conduct may trigger a loss of fit and proper person status and resulting licence suspension or cancellation.
- 7.73 A second and potentially more severe means of addressing coercive conduct is to impose wider controls on the operation of the occupation or industry. The regulatory regime for the Victorian tow-truck industry provides a case study. Operators who hold licences for the towing of motor vehicles are only permitted to operate either within or outside designated 'controlled areas'. VicRoads allocates licensees to specific accident scenes within a controlled area.⁶⁸ These restrictions are intended, in part, to counteract the previous acts of violence between rival tow-truck operators and the harassment of drivers at accident scenes in order to secure business.⁶⁹ Such measures have reportedly been effective in reducing coercive conduct,⁷⁰ but restrict competition within the industry (they are, in effect, a lawful form of market-sharing). At the time of delivery of this report, the regulatory regime for accident towing was under review by the Essential Services Commission.

Costs and benefits

- 7.74 An occupation or industry may broadly benefit where coercive conduct is prohibited, or triggers the suspension or cancellation of a licence. In the Victorian debt collection industry, the prohibited practices regime is said to be an important influence on good industry practice, and provides an avenue through which consumers may seek compensation for humiliation or distress when a debt collector engages in prohibited practices.⁷¹

65 Submission 13 (National Heavy Vehicle Regulator); Consultation 3 (Roundtable 2).

66 *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 45, 47(1)(a)(vii), 47(1)(b)(vii).

67 *Private Security Act 2004* (Vic) ss 50(c), 56.

68 *Accident Towing Services Act 2007* (Vic) ss 42, 46.

69 *Western Truck Towing Pty Ltd v Douglas* [2014] VSC 159 (10 April 2014) [8]–[15].

70 Consultation 10 (Victorian Automobile Chamber of Commerce).

71 Anteris Consulting Pty Ltd (for the Australian Competition and Consumer Commission), *Research into the Australian Debt Collection Industry* (May 2015) 82.

- 7.75 However, in the case of organised crime infiltration, enforcement difficulties will likely constrain any attempts to address coercive conduct through the prohibition of certain practices or similar measures. Unlike regulatory contraventions (such as record-keeping or due diligence deficiencies) that may be detected through auditing and largely proved through documentary evidence, enforcement action in response to coercive conduct will more often rely on competitors, consumers and other witnesses making complaints to regulators and being prepared to give evidence. Witnesses may be reluctant to take these steps where organised crime involvement is known or suspected.
- 7.76 The Australian Tattooists Guild commented that '[p]rohibiting practices such as the use of coercion, physical force and undue harassment [is] in theory beneficial. We do however concur strongly that enforcement may be difficult.'⁷² The National Heavy Vehicle Regulator similarly contended that prohibitions on certain conduct would be 'extremely difficult to enforce/control in the heavy vehicle industry, and would likely rely upon an investigation or whistleblower'.⁷³
- 7.77 In relation to the Queensland tattoo industry, the Queensland Crime and Corruption Commission has found that legitimate business operators are often unwilling to report acts of intimidation and extortion by 'criminal motorcycle gangs' to the police, for fear of repercussions such as assault and damage to property.⁷⁴
- 7.78 These limitations should be borne in mind in developing a regulatory response to organised crime infiltration. While measures to address coercive conduct may be justified for other policy reasons (for example, consumer protection), additional regulatory measures may be required to deter or detect organised crime infiltration.

72 Submission 10 (Australian Tattooists Guild).

73 Submission 13 (National Heavy Vehicle Regulator).

74 Information provided to the Commission by the Crime and Corruption Commission (Queensland) (5 August 2015).

Addressing the use of professional facilitators

95 Professional ethics education and support

98 Customer due diligence

100 Accessorial liability

8. Addressing the use of professional facilitators

- 8.1 Professionals may perform a key enabling role in organised crime activity, as discussed in Chapter 3. Three regulatory measures may reduce the risk of professionals either wittingly or unwittingly performing such a role:
- professional ethics education and support
 - customer due diligence measures
 - accessorial liability provisions.
- 8.2 Where professionals do assist organised crime groups, their behaviour is likely to sit on a continuum, ranging from unwitting facilitators of unlawful conduct, through to wilfully blind facilitators and, at its highest, active facilitators of unlawful conduct.¹ In respect of money laundering, Smith suggests that the conduct of a professional will fall somewhere along the following continuum:
- being an unwitting participant in a client’s unlawful activity, which may involve genuine misunderstandings about the appropriateness of certain services, inadequate professional standards, and/or complete ignorance of a client’s unlawful activity
 - suspecting that a client might be acting unlawfully, which may involve a reckless disregard of risks, wilful blindness and omissions, and/or negligent investigation of a client’s proposals
 - having actual knowledge of unlawful activity, which may involve organised criminality in concert with the client, practitioner-instigated unlawful conduct by the client, and/or direct facilitation or acquiescence in unlawful conduct.²
- 8.3 A regulatory response to the use of professional facilitators should take into account these varying degrees of culpability, whether this conduct relates to money laundering or other activity that enables organised crime (such as services that enable organised investment fraud). The measures outlined below reflect this continuum of culpability, ranging from educative measures that seek to improve risk awareness among professionals who may be unwitting facilitators of organised crime activity, through to accessorial liability measures that address the direct, knowing facilitation of unlawful conduct.

1 David Middleton and Michael Levi, ‘Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services’ (2015) 55(4) *British Journal of Criminology* 647; Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 50–2; Russell G Smith, ‘Anti-money Laundering: The Accounting and Legal Professions’ in David Chaikin (ed), *Financial Crime Risks, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 28, 37–9.

2 Russell G Smith, ‘Anti-money Laundering: The Accounting and Legal Professions’ in David Chaikin (ed), *Financial Crime Risks, Globalisation and the Professions* (Australian Scholarly Publishing, 2013) 28, 37–9.

Professional ethics education and support

- 8.4 As discussed in Chapter 3, there is debate about whether, and the extent to which, professionals such as lawyers, accountants and real estate agents facilitate the activities of organised crime groups. During the Commission’s consultations, there was a recognition on the part of professional bodies that professional ethics measures are a useful means of countering the risk of such conduct, particularly on an unwitting basis. In the view of both the Law Institute of Victoria (LIV) and the Victorian Legal Services Board and Commissioner (LSBC), educative programs are a key measure in guarding against improper conduct by lawyers in this context.³ Chartered Accountants Australia and New Zealand also emphasised the importance of professional ethics measures in mitigating such risks in the accounting profession.⁴
- 8.5 Any enabling role played by a professional may not necessarily constitute an offence in itself, such as a money laundering offence under Victorian or Commonwealth law.⁵ However, it may involve behaviour that potentially breaches standards of professional conduct and exposes an individual to disciplinary action.⁶
- 8.6 The Australian Institute of Criminology (AIC) has conducted qualitative research with lawyers, accountants and real estate agents on the risk of participation in money laundering activity. The AIC concluded that while the incidence of reported cases of money laundering in these occupations is low, ‘[w]hat is needed is for the risk environment in which professionals practice to be publicised and for the dangers of involvement in money laundering to be illuminated and explained’.⁷
- 8.7 In a 2014 evaluation of Australian anti-money laundering measures, the Financial Action Task Force (FATF) reported that:
- Most designated non-financial business and profession sectors [including lawyers and real estate agents] are not subject to AML/CTF requirements, and did not demonstrate an adequate understanding of their [money laundering and terrorist financing] risks or have measures to mitigate them effectively. This includes real estate agents and lawyers, both of which have been identified to be of high [money laundering] risk in Australia’s National Threat Assessment.⁸
- 8.8 In its consultation with the Commission, the Australian Crime Commission (ACC) suggested that there is a significant gap in professional ethics education about the risks of facilitating organised crime activity, including money laundering.⁹

3 Consultations 3 (Roundtable 2), 4 (Roundtable 3).

4 Consultation 3 (Roundtable 2).

5 *Crimes Act 1958* (Vic) ss 194, 195; *Criminal Code Act 1995* (Cth) sch (The Criminal Code) ch 10 pt 10.2.

6 Victorian solicitors are required to comply with principles of professional conduct established at common law and under the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015*, which are made by the Legal Services Council. The Legal Services Council and the Commissioner for Uniform Legal Services Regulation oversee the implementation of the Legal Profession Uniform Law Scheme, which applies in Victoria and New South Wales. A breach of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct: *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 298(b). Accountants are subject to codes of professional conduct and professional disciplinary regimes that are administered through the principal professional associations—Chartered Accountants Australia and New Zealand, Certified Practising Accountants Australia and the Institute of Public Accountants. The main code of professional conduct is the Code of Ethics for Professional Accountants, developed by the Accounting Professional and Ethical Standards Board. Victorian real estate agents are required to act in accordance with the *Estate Agents (Professional Conduct) Regulations 2008* (Vic).

7 Julie Walters et al, *Industry Perspectives on Money Laundering and Financing of Terrorism Risks in Non-financial Sector Businesses and Professions*, Research and Public Policy Series no. 122 part 2 (Australian Institute of Criminology, 2013) 52.

8 Financial Action Task Force and Asia/Pacific Group on Money Laundering, *Anti-money Laundering and Counter-terrorist Financing Measures—Australia, Fourth Round Mutual Evaluation Report* (April 2015) 6.

9 Consultation 6 (Australian Crime Commission).

- 8.9 Professionals themselves may appreciate improved guidance on the risks to which they may be exposed. In an AIC study of lawyers' perceptions of money laundering risks, the participating lawyers expressed a need for more frequent distribution of typologies and case studies to improve their understanding of money laundering risks.¹⁰ In this respect, the Australian Transaction Reports and Analysis Centre (AUSTRAC) has recently published two strategic analysis briefs that identify methods of money laundering through both the legal profession and the real estate sector.¹¹
- 8.10 Professional associations, and the regulators of individual professions, may also need to provide such guidance.

Example

The Law Council of Australia has published an anti-money laundering guide for legal practitioners that includes information about possible indicators of money laundering.¹² In England and Wales, the Solicitors Regulation Authority (SRA) has published a guide that identifies methods of money laundering through law firms,¹³ while the SRA's overview of its priority risks for 2015–16 regards money laundering as one of eight priority risks for the legal services market.¹⁴

- 8.11 It is important that any such guidance alert professionals to the broad range of organised crime activity that they may be at risk of facilitating. While the desire for money laundering is likely to be a key reason for which organised crime groups engage professionals, services may also be sought in relation to:
- the implementation of business structures that conceal or obfuscate beneficial ownership of corporate entities, including for the purpose of licence applications¹⁵
 - organised investment fraud, such as advice about the establishment of such schemes or promotion of the schemes to other clients
 - fraudulent tax arrangements.¹⁶
- 8.12 Further, it may be necessary to provide guidance about the particular circumstances in which professionals may be at risk of misuse or corruption by organised crime groups. The Commission heard that organised crime groups can exploit the relationship of confidence that has developed between a lawyer and their client in the provision of otherwise legitimate services, including services relating to the defence of criminal proceedings.¹⁷ The LIV remarked that ambiguous professional relationships can develop between lawyers and clients where advice is provided on an ongoing basis, such that a lawyer may feel trapped by the relationship or be motivated by altruistic motives to assist the client in respect of potentially improper or unlawful conduct.¹⁸ The LSBC similarly observed that there is a risk of some lawyers becoming too close to clients and of 'professional line blurring'.¹⁹

10 Kim-Kwang Raymond Choo et al, *Perceptions of Money Laundering and Financing of Terrorism in a Sample of the Australian Legal Profession in 2008–09*, Research and Public Policy Series no. 122 part 1 (Australian Institute of Criminology, 2013) 43.

11 Australian Transaction Reports and Analysis Centre, *Money Laundering through Legal Practitioners—Strategic Analysis Brief* (2015); Australian Transaction Reports and Analysis Centre, *Money Laundering through Real Estate—Strategic Analysis Brief* (2015).

12 Law Council of Australia, *Anti-money Laundering Guide for Legal Practitioners* (December 2009).

13 Solicitors Regulation Authority, *Cleaning Up: Law Firms and the Risk of Money Laundering* (November 2014).

14 Solicitors Regulation Authority, *Risk Outlook 2015/16: An Overview of our Priority Risks* (July 2015).

15 See [6.72]–[6.89].

16 See [3.55]–[3.58].

17 Consultation 3 (Roundtable 2).

18 Ibid.

19 Consultation 4 (Roundtable 3).

- 8.13 These types of risk are expressly acknowledged in the accounting profession. Under the Code of Ethics for Professional Accountants, an accountant to whom the Code applies is required to identify threats to compliance with fundamental principles of conduct, including a ‘familiarity threat’ (the threat that due to a long or close relationship with a client, an accountant will be too sympathetic to their interests or too accepting of their work) and an ‘intimidation threat’ (the threat that an accountant will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence).²⁰
- 8.14 As an adjunct to educative strategies, the Commission’s consultations suggest that confidential ethics advice services and other support services are particularly important, in the event that a person needs to resolve ambiguities in a professional relationship or exit a compromised relationship.²¹
- 8.15 In relation to the accounting profession, Chartered Accountants Australia and New Zealand pointed to the Chartered Accountants Advisory Group, which comprises a panel of senior practitioners who provide confidential counselling and support to members of the association who are ‘faced with undesirable ethical or professional circumstances’.²² The LIV similarly noted the importance of its ethics advice service in assisting lawyers who are in compromised relationships, such as those involving blackmail.²³
- 8.16 In order to further mitigate risks in this area, professional associations and regulatory agencies may need to consider the intersection between health and welfare measures and the potential exploitation of professionals by organised crime groups. In a 2015 report on organised crime group cultivation of public sector employees, the Independent Broad-based Anti-corruption Commission stated that:
- Many of the issues that heighten employees’ susceptibility to organised crime cultivation can also have adverse impacts upon their welfare. Organisational responses to illicit drug use, problem gambling and relationship breakdowns must account for the welfare of the individual as well as any impact upon the security of the public body.²⁴
- 8.17 Health and welfare services—such as the LIV’s Vic Lawyers’ Health initiative—may therefore provide a suitable avenue for supplying information about the risk of professionals being corrupted due to illicit drug use or gambling debts, and the support measures available in these circumstances.
- 8.18 One of the chief obstacles to improved educative and supportive measures is likely to be the lack of consensus about the nature and extent of the risks to which professionals are exposed in this context.²⁵ In these circumstances, firms and professional associations may be unsure how to frame educative measures, and may question whether there is a justification for resourcing such initiatives.
- 8.19 However, there are good commercial reasons to implement professional ethics measures in this area. Where a professional is implicated in conduct that has facilitated organised crime, this may damage the reputation of a firm or an individual practitioner, result in a loss of clients and/or difficulties in retaining new clients, impose costs on a firm where internal reviews or regulatory investigations are required, and expose a firm or an individual practitioner to higher insurance costs. Such conduct may therefore cause significant harm to an individual career, the commercial viability of a firm, or the standing of a particular profession.

20 Accounting Professional and Ethical Standards Board, *APES 110 Code of Ethics for Professional Accountants* (December 2010) sections 100.2 and 100.12.

21 Consultation 1 (Professor Michael Levi).

22 See Chartered Accountants Australia and New Zealand, *Chartered Accountants Advisory Group (CAAG)* <<http://www.charteredaccountants.com.au/advisorygroup>>.

23 Consultation 3 (Roundtable 2).

24 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 11.

25 See [3.35]–[3.68].

Customer due diligence

- 8.20 Customer due diligence (CDD) measures may assist in deterring or detecting the use of professionals by organised crime groups. The Commission's consultations also revealed that CDD (and supplier due diligence) measures offer potential in other occupations and industries in this respect (see [7.22]–[7.38]). CDD measures fit with a growing recognition in crime prevention studies that industry and occupation members and other third parties are well placed to detect unscrupulous or potentially unlawful activity in the course of legitimate business.²⁶
- 8.21 Occupations/industries that are already subject to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) (banks and other lenders, non-bank financial service providers, gambling and bullion service providers, and money service providers) are required to undertake CDD under the requirements of that Act.²⁷ Any suspicious activity detected through this process must be reported to AUSTRAC.²⁸ CDD measures also allow an entity to identify and mitigate money laundering risks by terminating a commercial relationship as a result of a CDD process, if this is considered appropriate.
- 8.22 Lawyers, accountants and real estate agents are generally not subject to the AML/CTF Act, so are therefore not legally obliged to carry out CDD under the terms of that Act. As at the time of delivery of this report, the extension of the AML/CTF Act to lawyers, accountants and real estate agents was under consideration by AUSTRAC and the Commonwealth Attorney-General's Department.²⁹ Independently of any amendments to the AML/CTF Act, it may be necessary to consider whether CDD measures should nonetheless be pursued in these professions on either a voluntary basis (as part of a 'best practice' policy, for example), or on a compulsory basis (for example, CDD measures could be expressly incorporated into enforceable professional conduct rules).
- 8.23 CDD measures are perhaps under-utilised among professions that are not subject to the AML/CTF Act. In a study of 440 lawyers in 2008–09, the AIC found that 60 per cent of lawyers who responded to the survey stated that their practice did not use any CDD measures, although many respondents did not practise in areas that entailed money laundering risks. Nonetheless, relatively low levels of CDD were found in at-risk areas of practice involving the buying and selling of real estate, and the buying and selling of business entities.³⁰
- 8.24 The FATF publishes recommended CDD measures for the prevention of money laundering.³¹ These recommendations may provide some insight into the areas of professional practice for which CDD may be desirable, and the types of enquiries that should be made of customers. The FATF recommends that CDD measures should apply to real estate agents when they are involved in transactions concerning the buying and selling of real estate, and to lawyers and accountants when they are involved in transactions concerning:

26 See generally Julie Ayling, 'Harnessing Third Parties for Transnational Environmental Crime Prevention' (2013) 2(2) *Transnational Environmental Law* 339.

27 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 36.

28 *Ibid* pt 3 div 2.

29 See Attorney-General's Department, *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006* <<https://www.ag.gov.au/consultations/pages/StatReviewAntiMoneyLaunderingCounterTerrorismFinActCth2006.aspx>>.

30 Kim-Kwang Raymond Choo et al, *Perceptions of Money Laundering and Financing of Terrorism in a Sample of the Australian Legal Profession in 2008–09*, Research and Public Policy Series no. 122 part 1 (Australian Institute of Criminology, 2013) 24, 29.

31 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (February 2012) recommendation 10.

- buying and selling real estate
- management of client money, securities or other assets
- management of bank, savings or securities accounts
- organisation of contributions for the creation, operation or management of companies
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.³²

8.25 The FATF suggests that CDD measures should involve:

- identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information
- identifying the beneficial owner and taking reasonable measures to verify their identity, including acquiring an understanding of the ownership and control structure of a corporate customer
- understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship
- conducting ongoing due diligence on the business relationship and scrutinising transactions throughout the course of the relationship in order to ensure that the transactions are consistent with the service provider's knowledge of the customer, their business and their risk profile.³³

8.26 As with the use of CDD measures in other occupations and industries, there may be good commercial reasons for professionals to pursue CDD measures. For example, CDD can assist in reducing the risk of financial crime and identity-related fraud and promote good governance practices.³⁴ In respect of the proposed application of the AML/CTF Act to lawyers, the Law Council of Australia (LCA) noted in 2009 that:

The introduction of client due diligence requirements is likely to contribute significantly to the general risk management strategies of legal practitioners. Data from legal insurers shows that higher percentages of claims and complaints could have been avoided if practitioners engaged in more robust client selection and acceptance policies. In addition to conflict of interest considerations, a number of claims arise out of failing to adequately define the [identity] of the client, and from failing to identify the risks associated with specific clients and transactions.³⁵

8.27 As this statement intimates, CDD measures are likely to align with any existing requirements for professionals to determine whether a conflict of interest exists before accepting a client. For example, it is expected that the beneficial ownership of a corporate client would have to be established in the course of a conflict of interest determination.

8.28 In order to manage the financial costs of CDD measures, it may be necessary to permit an individual firm or practitioner some scope in calibrating CDD measures with the level of risk attached to the firm/the practitioner's areas of practice, and the nature of their client base. In some sectors this may be less warranted; for example, among real estate agents there is relatively little variation in the nature of services provided. In other sectors, there is considerable variation; for example, one legal firm may engage in areas of practice that carry little risk of facilitating money laundering or other organised crime activity, while another firm may practice in relatively high-risk areas, such as property law.

32 Ibid recommendation 22.

33 Ibid recommendation 10.

34 Kim-Kwang Raymond Choo et al, *Perceptions of Money Laundering and Financing of Terrorism in a Sample of the Australian Legal Profession in 2008–09*, Research and Public Policy Series no. 122 part 1 (Australian Institute of Criminology, 2013) 31.

35 Law Council of Australia, *Anti-money Laundering Guide for Legal Practitioners* (December 2009) 17.

- 8.29 The management of CDD costs would also be assisted by the development of a public beneficial ownership register that reduces the burden on both the private and public sectors in ascertaining beneficial ownership of corporate entities and trusts (see [6.84]–[6.88]).

Accessorial liability

- 8.30 Noting the continuum of professional culpability described at [8.2]–[8.3], policy makers should consider whether a third party—such as a professional—should be held to account under a regulatory regime for knowingly facilitating organised crime activity. Such provisions would operate separately to prohibitions at criminal law on aiding and abetting the commission of an offence by another person.³⁶
- 8.31 Accessorial liability provisions already operate in some areas of the law in which professionals may be providing services to organised crime groups. Under certain sections of the *Corporations Act 2001* (Cth) (including some of those relating to directors’, officers’ and employees’ duties, which have the potential to capture unlawful phoenix activity),³⁷ a person who is ‘involved’ in a contravention of the section has themselves committed a contravention.³⁸ A person is ‘involved’ in the contravention if, among other things, they have aided or abetted the contravention, or been knowingly concerned in the contravention.³⁹ These provisions have potential application to professionals who are knowingly advising organised crime groups in the conduct of unlawful phoenix activity. According to the ACC, there is increasing evidence of organised crime involvement in industries that are susceptible to phoenix activity.⁴⁰ Accessorial liability provisions also operate under the *Fair Work Act 2009* (Cth), in almost identical terms to those under the *Corporations Act*.⁴¹
- 8.32 Within the context of an occupation/industry-specific regulatory regime, accessorial liability provisions could be connected to provisions that require, for example:
- licence applicants to not provide false or misleading information in relation to a licence application⁴²
 - licence holders to notify the regulator of changes to information provided in a licence application⁴³
 - licence holders to comply with the conditions imposed on a licence.⁴⁴
- 8.33 That is, accessorial liability provisions would make professional advisors liable for being involved in the contravention of these ‘primary’ provisions, along with the licence applicant/licence holder.

36 *Criminal Code Act 1995* (Cth) sch (The Criminal Code) s 11.2; *Crimes Act 1958* (Vic) ss 323–324.

37 Phoenix activity can constitute a civil penalties breach of ss 181(1), 182(1) and 183(1) of the *Corporations Act 2001* (Cth): see *Australian Securities and Investments Commission v Sommerville* (2009) 77 NSWLR 110. It can also constitute a criminal offence under s 184 of the *Corporations Act 2001* (Cth).

38 See *Corporations Act 2001* (Cth) ss 181(2), 182(2), 183(2) (accessorial liability for civil penalties contraventions of ss 181(1), 182(1) and 183(1)).

39 *Ibid* s 79.

40 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 25–6, 66.

41 *Fair Work Act 2009* (Cth) s 550.

42 See, eg, *Sex Work Act 1994* (Vic) s 45.

43 See, eg, *ibid* s 46.

44 See, eg, *Private Security Act 2004* (Vic) s 32.

- 8.34 Writing extra-curially, Justice Black of the Supreme Court of New South Wales has commented on the value of accessorial liability in the context of the Corporations Act:

Accessorial liability should tend to encourage persons within its reach to seek to identify and prevent any breach of the Corporations Act. To the extent that accessorial liability creates an incentive for other parties to withhold assistance to contravening conduct, it presumably reduces the likelihood of that conduct. There is an overlap between accessorial liability and a focus on the role of ‘gatekeepers’, both within the corporation and outside it, such as directors and officers, legal representatives, investment bankers and auditors, which has received particular emphasis in the enforcement strategy of the Australian Securities and Investments Commission. The ‘gatekeeper’ theory suggests that the extent of contraventions of the Corporations Act is likely to be reduced if company directors and officers (and professionals who provide services to companies) are placed under threat of accessorial liability if they fail to take steps (in the case of directors and officers) to avoid or (in the case of professionals) withdraw their services in respect of contraventions by companies.⁴⁵

- 8.35 The same analysis could be applied to contraventions of regulatory regimes governing occupations and industries, where professionals are involved in those contraventions.
- 8.36 Anderson and Haller argue that phoenix activity may be better deterred by more frequently pursuing professionals—such as lawyers, accountants and insolvency practitioners—who assist directors in devising and implementing transactions that constitute unlawful phoenix activity under the Corporations Act, or contraventions of the Fair Work Act (for example, in relation to the non-payment of employee entitlements).⁴⁶ A similar observation can be made about the provision of advice by professionals in respect of organised crime activity. The pursuit of accessorial liability would likely compel greater discussion within the relevant professions of the boundary between legitimate and illegitimate advice, which may then be used as an educative tool by professional bodies and as a basis for disciplinary action under the regulatory regime of a particular profession.⁴⁷

45 Justice Ashley Black, ‘Directors’ Statutory and General Law Accessory Liability for Corporate Wrongdoing’ (2013) 31 *Company and Securities Law Journal* 511, 511–12.

46 See Helen Anderson and Linda Haller, ‘Phoenix Activity and the Liability of the Advisor’ (2014) 36(3) *Sydney Law Review* 471.

47 See generally *ibid* 491.

Considering the effect of the preferred strategies: will they create perverse incentives?

104 Fees, levies and other charges

105 Restrictions on competition

9. Considering the effect of the preferred strategies: will they create perverse incentives?

- 9.1 As the Victorian Guide to Regulation notes, it is important to consider how a preferred regulatory strategy will operate in practice.¹ In seeking to address organised crime infiltration of an occupation or industry, one of the key matters that should be considered is whether a regulatory strategy may, in practice, create a perverse incentive for such infiltration. A regulatory strategy should not necessarily be rejected where such an incentive may exist. However, the strategy may require adjustment in order to reduce the incentive for infiltration, and/or regulators may need to monitor the occupation or industry for the exploitation of these incentives by organised crime groups.

Fees, levies and other charges

- 9.2 A regulatory regime may impose fees, levies and other charges in connection with licences and the business practices of occupation/industry members (for example, in the waste management industry, levies must be paid when disposing of hazardous waste).²
- 9.3 These types of charges must be carefully managed so as not to create an incentive for organised crime infiltration. Significant regulatory charges may encourage organised crime groups to infiltrate an occupation or industry and unfairly undercut market prices through regulatory non-compliance. For example, in the waste management industry, people may seek to evade paying the charges associated with lawful waste disposal by dumping material in unauthorised places. This would allow such operators to offer less expensive waste management services than legitimate operators.³
- 9.4 Significant regulatory charges may also have the effect of making legitimate business operators and employees more vulnerable to corruption or exploitation by organised crime groups. Where the profitability of an occupation or industry is not sufficient to absorb significant regulatory charges, business operators may be more willing to participate in unscrupulous or unlawful activity in order to improve the profitability of a business.⁴
- 9.5 At the same time, setting regulatory charges at a relatively high level may reduce the risk of organised crime infiltration, by increasing barriers to entry. The Commission was told that in several industries, low barriers to entry create a vulnerability to organised crime infiltration.⁵ Conceivably, significant regulatory charges and other financial commitments may also deter an existing business operator from allowing organised crime infiltration of their business, if there is a risk that these financial investments will be lost if infiltration is detected.

1 Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014) 30.
2 *Environment Protection Act 1970* (Vic) s 50S, sch E.
3 Consultation 2 (Roundtable 1).
4 *Ibid.*
5 *Ibid.*

- 9.6 Accordingly, in setting regulatory charges, policy makers should seek to limit perverse incentives for organised crime infiltration.

Restrictions on competition

- 9.7 Any restrictions on competition under a regulatory regime should also be carefully managed in order to avoid or reduce incentives for organised crime infiltration.
- 9.8 A regulatory strategy may inadvertently encourage infiltration if competition is unduly restricted. For example, a licensing scheme may allow only a limited number of licences to be issued, or may involve imprecise assessments of probity and suitability that result in the exclusion of legitimate applicants. Organised crime groups may be attracted to occupations and industries with relatively little competition due to the potential for higher profits in markets with few competitors. In addition, a low level of competition may make it easier for organised crime groups to extort or intimidate existing occupation/industry participants in order to increase market share or even obtain control over a market.⁶
- 9.9 An unduly restrictive licensing scheme may also compel otherwise lawful business operators and employees to enter the unlicensed sector of an occupation or industry.⁷ In turn, this may create conditions that facilitate organised crime infiltration, because unlicensed operators/employees may be reluctant to report any suspicions they have about organised crime infiltration for fear of bringing themselves to the regulator's attention. For example, Vixen Collective noted that sex workers who are not compliant with the regulatory regime for the sex work industry are reluctant to report instances of organised crime infiltration to authorities for fear of legal action.⁸
- 9.10 Further, if entry into an occupation or industry is unduly restricted by a licensing scheme, it may be difficult to sell an existing business to a legitimate operator. The Professional Tattooing Association of Australia (PTAA) stated that licensing requirements and costs in New South Wales and Queensland have made it difficult to sell existing tattoo businesses.⁹ In these circumstances, a financially strained business owner may be tempted to sell to an unscrupulous operator who is prepared to operate without a licence.
- 9.11 Any restrictions on competition under a regulatory regime may be justified for policy reasons other than the prevention of organised crime infiltration. For example, it may be necessary to restrict the number of licences issued in an occupation or industry in order to maintain the viability of natural resources (restrictions on commercial fishing licences appear to be a particular example of this). Where restrictions on competition are justified for these other policy reasons but may nonetheless create an incentive for organised crime infiltration, regulators should be alert to the possibility of such infiltration and monitor the occupation/industry accordingly.

6 Consultation 10 (Victorian Automobile Chamber of Commerce).
 7 Consultation 2 (Roundtable 1).
 8 Submission 19 (Vixen Collective).
 9 Consultation 5 (Professional Tattooing Association of Australia).

PART THREE: IMPLEMENTATION OF A REGULATORY RESPONSE

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10. Developing an implementation plan for the preferred strategies

10.1 As the Victorian Guide to Regulation notes, consideration of how to achieve the effective implementation of regulation will be crucial to its success.¹ In developing an implementation plan for a regulatory response to organised crime infiltration, a regulator should consider:

- the most appropriate agency, or agencies, to implement the regulatory response
- the need to gather information from a broad range of sources, including third parties
- the investigative powers that will be required
- the most suitable enforcement measures.

Choice of regulatory agency

10.2 There is no single, optimal agency to implement regulatory responses to organised crime infiltration. There was a consensus among consultation participants that choice of regulator/s will vary by occupation or industry.

10.3 Ideally, the regulator/s should be chosen after identification of the particular problem or issue, and the appropriate strategies for responding to that problem or issue. If regulatory responsibilities are allocated prior to the completion of these steps, there is a danger that the regulatory response will be largely determined by the objectives, skills and resources of any existing regulator. Such an approach may lead to constrained policy making, a poorly targeted regulatory response that has little impact on infiltration, or a misallocation of resources to an inappropriate regulator.

10.4 Regulatory roles may be assigned to:

- an occupation or industry regulator (such as the Business Licensing Authority/ Consumer Affairs Victoria, Fisheries Victoria, and the Victorian Commission for Gambling and Liquor Regulation)
- a law enforcement agency, namely Victoria Police (which currently regulates the firearm dealing and private security industries)
- an inter-agency group comprising occupation/industry regulators, law enforcement agencies, and other government agencies as appropriate.

- 10.5 The Commission frequently heard that inter-agency collaboration is the preferable model for responding to organised crime infiltration.² An inter-agency approach is increasingly taken to organised crime activity more broadly. The Melbourne waterfront ‘Trident Taskforce’ involves an inter-agency partnership between Victoria Police, the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Crime Commission (ACC), the Australian Taxation Office (ATO), and the Australian Border Force (similar taskforces operate on the New South Wales and Brisbane waterfronts). The Project Wickenby taskforce—which investigates and prosecutes organised tax fraud—is led by the ATO in collaboration with seven other Commonwealth agencies.³ Ayling notes that inter-agency approaches are also becoming a common feature of the response to transnational organised crime.⁴
- 10.6 Following its consultations, the Commission considers that inter-agency approaches are more advanced at the Commonwealth level than at the Victorian level. The same view was articulated by Victoria Police.⁵ A relatively rare example of a Victorian inter-agency approach is the regulatory model for the Victorian sex work industry, under which the Business Licensing Authority/Consumer Affairs Victoria (CAV) has responsibility for the licensing of sex work service providers, and Victoria Police has primary responsibility for the enforcement of the *Sex Work Act 1994* (Vic), with some enforcement functions carried out by CAV and local councils. CAV also works with the AFP and the Department of Immigration and Border Protection to investigate human trafficking.⁶
- 10.7 Collaboration is discussed further in Chapter 2.
- 10.8 The following factors should be considered in choosing the most appropriate regulator/s to implement the regulatory response, including the choice of agencies for any inter-agency partnership.

The scope of infiltration

- 10.9 Organised crime groups may infiltrate several occupations and industries in order to commit a particular crime, conceal or launder the proceeds of crime, or engage in other unlawful activity. Further, organised crime groups may be displaced from one industry to another as a result of regulatory action, or change infiltration strategies in response to opportunities that emerge in other industries. This may require an inter-agency approach that can deter or disrupt infiltration across several occupations and industries, or respond to the dynamic, evolving nature of infiltration as regulatory action is applied, through the addition or withdrawal of particular government agencies to a regulatory partnership. For example, preventing the diversion of precursor chemicals may require collaboration between agencies that oversee key industries in the supply chain that may be vulnerable to infiltration, such as chemical manufacturing, trucking and heavy haulage, and the retail supply of chemicals and pharmaceuticals.

2 Consultations 4 (Roundtable 3), 7 (Australian Federal Police); Submissions 8 (Philip Morris Limited), 20 (Australian Collectors & Debt Buyers Association), 24 (Victorian Automobile Chamber of Commerce).

3 Those agencies are the Australian Crime Commission, the Australian Federal Police, the Australian Securities and Investments Commission, the Attorney-General’s Department, the Australian Transaction Reports and Analysis Centre, the Australian Government Solicitor, and the Commonwealth Director of Public Prosecutions.

4 Julie Ayling, ‘Harnessing Third Parties for Transnational Environmental Crime Prevention’ (2013) 2(2) *Transnational Environmental Law* 339, 344.

5 Consultation 9 (Victoria Police).

6 But see [10.21].

Risk of infiltration and degree of harm

- 10.10 Choice of regulator/s should also be guided by the risk of organised crime infiltration in an occupation or industry, and the degree of harm likely to arise from infiltration. The Environment Protection Authority Victoria (EPA) suggested that it may be disproportionate for it to invest significantly in criminally trained staff, and that the use of inter-agency partnerships may be preferable for addressing organised crime infiltration.⁷
- 10.11 Where serious public harm is likely to arise from organised crime infiltration, it may be necessary for a law enforcement agency to have a key role in regulation. Each of the industries currently regulated by Victoria Police—the private security industry and the firearm dealing industry—would appear to be suitable for police regulation because of the potential for significant public harm as a result of criminal infiltration in either industry. Both industries provide access to weapons, while the private security industry additionally provides access to secure property and confidential information about security systems and routines, and permits some degree of force and control to be exercised over members of the public.
- 10.12 Each occupation or industry should be assessed individually to determine whether the involvement of law enforcement agencies in their regulation is desirable.

Skills and powers of agency

- 10.13 An occupation or industry regulator may have powers and expertise that are sufficient for investigating organised crime infiltration. In these circumstances, collaboration with other agencies (particularly law enforcement agencies) may not be necessary, or may play a relatively limited role. Fisheries Victoria has dual roles as a regulator that undertakes the licensing of commercial fishing operators and as a law enforcement agency that draws on police-like powers to investigate criminal activity in the commercial fishing industry.⁸
- 10.14 Alternatively, an occupation or industry regulator may lack sufficient powers and expertise to investigate organised crime infiltration. That agency will need to determine whether the retention of new powers and skills is appropriate or whether collaboration with other, appropriately skilled agencies is the most preferable course, as suggested by Consumer Affairs Victoria (see [10.53]–[10.69]).⁹

Ability to assess probity and suitability

- 10.15 The chosen regulator/s should be well placed to assess whether a candidate for entry, or an existing member of an occupation or industry, is competent to perform a particular role or function. An assessment of competency may help to deter or detect organised crime infiltration, as discussed at [6.122]–[6.127].
- 10.16 In addition, the regulation of an occupation or industry is likely to have objectives other than preventing organised crime infiltration, including maintaining certain standards of conduct or expertise, and promoting the general integrity of an occupation or industry. In this regard, the Victorian Automobile Chamber of Commerce (VACC) argued that specialists with in-depth industry knowledge should be responsible for regulation of the auto-wrecking/recycling and spare parts industry, and that the police are unlikely to be a suitable regulator for that reason.¹⁰

7 Consultation 4 (Roundtable 3).
8 Ibid.
9 Ibid.
10 Consultation 3 (Roundtable 2).

- 10.17 Similarly, the Australian Tattooists Guild (ATG) stated that the regulatory needs of the tattoo industry require an inter-agency approach involving the Business Licensing Authority/Consumer Affairs Victoria, the Department of Health and Human Services, local councils and, if necessary, Victoria Police. The ATG perceived the police as having limited ability to administer the full suite of policy needs for the tattoo industry (in relation to technical skills, hygiene standards, and so on).¹¹
- 10.18 The chosen regulator/s should also have an ability to investigate corporate and trust structures and prior business histories, given the potential for organised crime groups to hide ultimate ownership through complex business structures and engage in phoenix activity. The Australian Collectors & Debt Buyers Association suggested that this type of role may be better suited to a non-law enforcement agency.¹² However, the Commission notes that law enforcement agencies increasingly have strong forensic accounting and commercial fraud skill-sets, which have the potential to be utilised by occupation/industry regulators (for example, through staff secondments and training).

Capacity to collaborate with the private sector and other third parties

- 10.19 Consultation participants commonly emphasised the need for collaboration with the private sector, particularly occupation and industry members. This view was expressed by both regulatory and law enforcement agencies¹³ and industry representatives.¹⁴ Industry collaboration could involve information sharing for the purpose of industry-led risk education, overseeing customer and supplier due diligence programs, or developing industry codes of conduct. The choice of regulator/s should also take into account the need to harness other third parties—such as customers and workers—in detecting organised crime infiltration. The choice of regulator/s should foster, and not hinder, this engagement.
- 10.20 First, an agency with specialist industry knowledge may be better placed to collaborate with the private sector than an agency that lacks such knowledge. Any inter-agency partnership should include some degree of specialist industry knowledge.
- 10.21 Second, particular care should be taken in the choice of regulator/s where workers or industry/occupation members may be vulnerable to exploitative business practices, or distrustful of government agencies due to a history of negative experiences with authority, particularly law enforcement agencies. In the sex work industry, Vixen Collective stated that Victoria Police's role as the primary enforcement agency is a barrier to the reporting of organised crime infiltration, due to ongoing mistrust of police among sex workers, and fear of regulatory action for engaging in unlicensed sex work or prosecution for street-based sex work (which remains criminalised in Victoria).¹⁵ The Australian Security Industry Association Limited (ASIAL) reported that some private security providers are reluctant to engage with Victoria Police for fear of exposing themselves to scrutiny, and instead channel information about suspicious operators through the industry association (that is, ASIAL).¹⁶

11 Consultation 2 (Roundtable 1); Submission 10 (Australian Tattooists Guild).

12 Submission 20 (Australian Collectors & Debt Buyers Association).

13 Consultations 6 (Australian Crime Commission), 7 (Australian Federal Police), 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department).

14 Consultations 2 (Roundtable 1), 3 (Roundtable 2); Submissions 10 (Australian Tattooists Guild), 11 (Australian Security Industry Association Limited).

15 Submission 19 (Vixen Collective). A similar point was made in Submission 12 (Scarlet Alliance, Australian Sex Workers Association). Vixen Collective also stated that because Victoria Police is the primary agency for the enforcement of the *Sex Work Act 1994* (Vic), sex workers who work outside the licensing system or are otherwise non-compliant with the regulatory regime face difficulties in reporting crimes against sex workers, such as sexual offences.

16 Consultation 2 (Roundtable 1).

Corruption risks

- 10.22 The choice of regulator/s should also guard against the risk of corruption of decision makers.
- 10.23 Liberty Victoria cautioned that:
- the current engagement of Victoria Police in the firearms and security sphere has come about in part through historical evolution but Liberty considers it desirable to provide a buffer from the further expansion of police power into regulation of other areas traditionally regarded as areas of vice and corruption.
- The 1979 Beach Inquiry in Victoria, the Fitzgerald Inquiry in Queensland and evidence produced by more recent interstate and federal crime commissions give rise to the legitimate concern that there are significant risks attached to investing too much power and control in the hands of policing agencies and too little oversight in the hands of independent industry specific regulators or independent anti-corruption agencies.¹⁷
- 10.24 Liberty Victoria further warned that ‘[t]he risk of bribery and corruption may be greater where the monitoring, compliance, licensing and regulatory agency also has power to investigate and prosecute alleged breaches’.¹⁸
- 10.25 Corruption risks may be present in both law enforcement and non-law enforcement agencies. The Independent Broad-based Anti-corruption Commission (IBAC) has found that regulatory bodies may be at risk of corruption—or ‘cultivation’—by organised crime groups where they have access to law enforcement information and make decisions about licensing and other regulatory matters. The construction, planning, development, sex work, gaming and liquor industries may be at particular risk in this respect.¹⁹
- 10.26 Further, a risk of corruption may arise where a government agency has a proven history of corruption in relation to a particular industry. In the Queensland sex work industry, the police have a ‘quarantined’ role in the regulation of the industry, with limits placed on the power of police to enter brothels (this follows the findings of the Fitzgerald Inquiry, which found links between sex work, organised crime and police corruption in Queensland).²⁰
- 10.27 Accordingly, both law enforcement and non-law enforcement agencies may be exposed to the risk of corruption in implementing a regulatory response to organised crime infiltration. IBAC’s September 2015 report—*Organised Crime Group Cultivation of Public Sector Employees*—explains the potential targets of organised crime groups in government agencies, cultivation/corruption strategies, and prevention and detection measures that an agency may put in place.²¹

17 Submission 9 (Liberty Victoria).

18 Ibid.

19 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015) 1.

20 Submission 26 (Prostitution Licensing Authority (Queensland)); *Prostitution Act 1999* (Qld) ss 59, 101. See also Crime and Misconduct Commission, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999* (Qld) (2004) ch 1.

21 Independent Broad-based Anti-corruption Commission, *Organised Crime Group Cultivation of Public Sector Employees*, Intelligence Report No 1 (2015).

Information gathering

- 10.28 A regulator should seek information from a broad range of sources, including third parties (that is, parties other than government agencies). Regulators and other government agencies are increasingly harnessing the insights acquired by third parties in the course of routine activities.²² The conscription of third parties in an information-gathering role may help to relieve resourcing pressures on regulatory agencies and provide a greater breadth and depth of knowledge about infiltration.
- 10.29 Before proceeding with any initiative to gather information from a particular source, it is important for a regulator to consider whether it is sufficiently resourced (in terms of both funding and analytical capabilities) to interrogate the information it receives, and harness its value in tailoring investigative and enforcement action.
- 10.30 Government agencies in general have been criticised for insufficiently analysing their own data holdings. The National Commission of Audit, conducted by the Federal Government in 2013, stated that there is: a focus on collecting data for filing rather than for use; a lack of data-sharing both among government agencies and outside government (on an anonymised basis for the purpose of policy development); and a lack of data analysis skills within government agencies.²³
- 10.31 In this respect, Victoria Police noted that while the Project Stop initiative and the legislated precursor control regimes produce a significant amount of valuable information for both industry and law enforcement agencies, they also add to the workload of Victoria Police.²⁴
- 10.32 It is equally important that regulators explain to their information sources—particularly occupation and industry members, customers, and employees—how the information is used by the agency. In the Commission’s consultations, some industry representatives stated that there can be a lack of investigative and enforcement action following the provision of industry information, or communication about how the information is being used.²⁵ Communication will therefore be required, at least in general terms, about how regulators identify issues of systemic concern and prioritise regulatory action in response to the provision of information. In appropriate industries, regulators may also need to engage in reciprocal information sharing with the private sector in order to incentivise the flow of information. For example, AUSTRAC shares information with the private sector about money laundering risks so that businesses can make more informed decisions about these risks.²⁶ Failing such initiatives, information sources may be unwilling to engage with regulators.
- 10.33 A range of parties have the potential to be fruitful sources of information, beginning with government agencies and occupation/industry members. While these sources may be adequately utilised in other policy areas, it appears from the Commission’s consultations that their full potential in relation to organised crime infiltration is yet to be realised.

22 Julie Ayling, ‘Harnessing Third Parties for Transnational Environmental Crime Prevention’ (2013) 2(2) *Transnational Environmental Law* 339; Adrian Cherney, Juani O’Reilly and Peter Grabosky, ‘Networks and Meta-regulation: Strategies Aimed at Governing Illicit Synthetic Drugs’ (2006) 16(4) *Policing and Society* 370.

23 Australian Government, *Towards Responsible Government: The Report of the National Commission of Audit—Phase One* (February 2014) 233–6.

24 Consultation 9 (Victoria Police).

25 Consultation 2 (Roundtable 1); Submissions 8 (Philip Morris Limited), 24 (Victorian Automobile Chamber of Commerce).

26 Consultation 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General’s Department).

Government agencies

10.34 As discussed throughout the report, a regulator will often need to liaise with numerous regulatory and law enforcement agencies in order to address organised crime infiltration, whether at the point of entry into an occupation or industry, or once an entity is established in an occupation or industry. The Commission's consultations indicate that organised crime infiltration of an occupation or industry may result in multiple forms of unlawful behaviour or adverse administrative decisions (such as licence refusal or cancellation), such that liaison with the following agencies should be considered, as relevant:

- law enforcement agencies—Victoria Police, other state and territory police forces, the Australian Federal Police (AFP), and the Australian Crime Commission
- occupation/industry-specific regulators, such as the Business Licensing Authority/ Consumer Affairs Victoria, Fisheries Victoria and the Victorian Commission for Gambling and Liquor Regulation
- AUSTRAC (money laundering)
- the Australian Taxation Office (taxation fraud, phoenix activity)
- the Australian Securities and Investments Commission (phoenix activity, insolvent trading, investment fraud)
- WorkSafe Victoria (occupational health and safety offences)
- the Fair Work Ombudsman (employment law contraventions)
- the EPA (environmental offences on commercial premises)
- local councils (breaches of local government laws, including planning and permit restrictions over commercial premises).

Occupation and industry members

10.35 As actors who will likely engage (at some point) with organised crime-linked competitors, suppliers or customers, occupation and industry members will be key sources of information. Information may be acquired through procedures such as customer due diligence, supplier due diligence, record keeping in relation to the provision of goods and services, and other routine commercial interactions.

10.36 This information may be particularly important in illuminating the supply chain in an occupation or industry. The EPA suggested that acquiring information about the various intermediaries in complex supply chains would significantly assist with regulation, and may be more important than granting additional investigative powers to regulators.²⁷

10.37 The Commission heard that industry-led communication can be fostered through the use of reciprocal information-sharing arrangements between government agencies and industry, or other measures that help to create a relationship of trust and cooperation.²⁸ These measures could include skills exchange and staff secondments between government agencies and industry.

10.38 Further, a regulator may foster industry-led communication by enforcing high standards of conduct and promoting professionalisation within an occupation or industry. In these circumstances, occupation and industry members may be particularly motivated to defend the industry from infiltration and protect the investment they have made in professional standards and regulatory compliance. In this respect, Victoria Police remarked on the commercial motivations of legitimate private security providers and commercial fishing operators to keep their industry clean and report suspicious operators.²⁹

- 10.39 Industry associations are likely to be a key channel in the provision of information to government agencies. Among the regulators who attended the Commission’s roundtable of regulatory agencies, there were mixed views about the value of industry associations as a communication channel. Some regulators spoke highly of the benefits of reciprocal information exchange with industry associations; other regulators were sceptical, noting that, in their experience, industry associations were reluctant to report to regulators due to a fear of licence restrictions or additional regulation being imposed.³⁰ While the value of industry associations will vary by occupation or industry, the Commission considers that regulators may need to reconsider any previous opposition to engagement with industry associations, given that occupation and industry members are uniquely placed—through frequent, routine commercial interactions—to acquire information about organised crime infiltration.

Customers

- 10.40 Similar to occupation and industry members, customers are frontline actors who have the potential to engage directly with a business owned or operated by organised crime, and therefore have a capacity to detect and report suspicious activity. These customers may be substantial government or private sector entities, or individual consumers.
- 10.41 Government agencies and the private sector may perform an information-gathering and reporting role by conducting due diligence on service providers in the course of procurement and reporting suspicions to regulators.
- 10.42 Individuals also play an important role, whether on an ad hoc basis or through consumer awareness campaigns that educate consumers about illegitimate operators.³¹ Scarlet Alliance and the AFP observed that clients of sex workers have previously been an important source of information about human trafficking.³²
- 10.43 Customers may be a particularly important conduit between workers and government agencies where the industry contains a significant proportion of vulnerable workers who may be fearful of reporting organised crime infiltration.

Employees and other workers

- 10.44 Employees and other workers (such as independent contractors) potentially have the most direct relationship with organised crime groups that own or operate a business. Unions and employee associations may act as important conduits for the supply of information to government agencies, particularly in an anonymised form that identifies systemic problems within an occupation or industry in relation to organised crime infiltration.
- 10.45 In some industries it may be difficult to acquire information from workers. An organised crime group may have entered an occupation or industry in order to exploit workers or engage in labour trafficking, whether this is through the private security industry, the labour hire industry, the lawful sex work industry, or another occupation or industry.³³

30 Consultation 4 (Roundtable 3).

31 Submission 11 (Australian Security Industry Association Limited).

32 Submission 12 (Scarlet Alliance, Australian Sex Workers Association); Consultation 7 (Australian Federal Police).

33 Australian Crime Commission, *Organised Crime in Australia 2015* (2015) 77–8; Rochelle Ball, Laura Beacroft and Jade Lindley, ‘Australia’s Pacific Seasonal Worker Pilot Scheme: Managing Vulnerabilities to Exploitation’ *Trends & Issues in Crime and Criminal Justice* no. 432 (Australian Institute of Criminology, 2011) 6; Tim Prenzler and Rick Sarre, ‘Developing a Risk Profile and Model Regulatory System for the Security Industry’ (2008) 21(4) *Security Journal* 264.

- 10.46 The particular circumstances of some workers are likely to hinder engagement with government agencies. For example, some sex workers may operate outside the relevant regulatory framework in order to avoid prohibitive regulatory fees or aspects of the regulation they find intrusive, and because of concerns around the disclosure of sex worker status to government agencies. Vixen Collective submitted that '[s]ex workers working in the non compliant sector of the sex industry are less likely/able to report any instances of infiltration to authorities'.³⁴ Vulnerable migrant workers (regardless of industry) may fear job loss, deportation or other legal action if they report their concerns about infiltration.³⁵
- 10.47 JobWatch observed that these vulnerabilities may discourage the reporting of organised crime infiltration, and recommended that Victorian whistleblower laws need to be amended to provide for protected disclosures by labour hire workers and sex workers about private sector employers and entities.³⁶ At present, the *Protected Disclosure Act 2012* (Vic) only protects disclosures about the improper conduct of public bodies and public officers. While this proposed reform is beyond the scope of the report, the Commission notes that a lack of whistleblower protections may help to insulate organised crime groups from scrutiny in industries with vulnerable workers.
- 10.48 Regulators that oversee industries with vulnerable workers may need to consider other means of obtaining information held by workers, including liaising with community legal centres and other community-based or peer support services in order to receive general, possibly anonymised information about organised crime infiltration.

Property owners and landlords

- 10.49 Both commercial and residential landlords have recently begun to be used as a source of information about organised crime activity, including organised crime infiltration of legitimate businesses.³⁷ Police Scotland is educating residential landlords about the indicators of human trafficking activity and cannabis cultivation.³⁸ International law enforcement agencies are engaging with commercial landlords in order to prevent the use of legitimate commercial premises for organised trade in counterfeit goods.³⁹
- 10.50 The provision of information by landlords may be facilitated by:
- educating landlords about the risk of leasing property to organised crime groups, such as potential liability to prosecution, the loss of property value if premises are damaged, loss of rental income due to law enforcement disruption, and expenses arising from dealing with unreliable/unscrupulous tenants
 - encouraging landlords to conduct due diligence on potential tenants, including requiring adequate forms of identification, verifying these identities, and checking for potential indicators of criminal intent such as a willingness to pay rent months in advance (particularly in cash)
 - educating landlords about the indicators of relevant organised crime activity and encouraging regular inspections of tenanted premises in order to check for these indicators.⁴⁰

34 Submission 19 (Vixen Collective).

35 Submission 6 (JobWatch Inc).

36 Ibid.

37 Submission 4 (Julie Ayling).

38 Police Scotland, *Cannabis Cultivation: What Should I Know as a Landlord?* <<http://www.scotland.police.uk/keep-safe/home-and-personal-property/advice-for-landlords-and-tenant/>>.

39 International Chamber of Commerce and Business Action to Stop Counterfeiting and Piracy, *Roles and Responsibilities of Intermediaries: Fighting Counterfeiting and Piracy in the Supply Chain* (March 2015) 45–6.

40 Ibid; Police Scotland, *Cannabis Cultivation: What Should I Know as a Landlord?* <<http://www.scotland.police.uk/keep-safe/home-and-personal-property/advice-for-landlords-and-tenant/>>.

General public

- 10.51 Some regulators particularly encouraged the use of hotlines that can be used with relative ease and capture all potential sources of information.
- 10.52 Fisheries Victoria commented that its public hotline is a vital source of high-quality information, providing 25 per cent of total intelligence. The Racing Integrity Commissioner was similarly enthusiastic about the value of hotlines in the racing industry.⁴¹

Investigative powers

- 10.53 Any regulatory regime will include a suite of investigative powers. When considering the investigative powers that will be required in order to address organised crime infiltration, regulators should have regard to the following factors.

Risk of infiltration and degree of harm

- 10.54 Investigative powers should be proportionate to the risk of infiltration, and the degree of harm likely to result from infiltration.
- 10.55 Extensive investigative powers may be justified where there is a substantial history and ongoing risk of infiltration (such as in the racing industry) and/or significant harm results from infiltration (such as the unlawful depletion of scarce fish stocks in the commercial fishing industry). The regulatory regimes for the racing industry and the commercial fishing industry are distinguished by the availability of police-like powers⁴² that may or may not be warranted in other occupations and industries.
- 10.56 In addition, investigative powers should be responsive to the particular opportunities exploited by organised crime in an occupation or industry. For example, where organised crime groups rarely infiltrate an industry through ownership or operation of a business, there is likely to be little need for powers that are directed to the investigation of ownership, management and effective control.

Scope and utility of existing powers

- 10.57 In the case of existing regulatory regimes, the scope and utility of existing powers should be audited before any new powers are considered. The EPA emphasised that a key challenge for regulators lies in better using existing powers.⁴³ A regulator should consider the extent to which existing powers have been used and tested, and address any barriers to better use, including:
- inadequate training of staff in the use of existing powers or inadequate employment of staff with relevant skills
 - the existence of a regulatory culture that discourages the use of certain investigative powers or enforcement actions
 - confusion among government agencies as to their respective investigative and enforcement responsibilities within a particular occupation or industry
 - ambiguity as to the lawful use of existing powers, which may need to be resolved through legal advice, determination by the courts or legislative amendment.

41 Consultation 4 (Roundtable 3).

42 For example, under the Racing Victoria Rules of Racing, stewards have broad powers to inquire into officials and licensed persons and other people connected with racing, compel production and take possession of documents and property, and enter and search the premises of licensed persons (Rules of Racing of Racing Victoria, 1 December 2015, AR8, AR8B). Under the *Fisheries Act 1995* (Vic), authorised officers have powers of arrest, powers to search people, powers to enter and inspect premises, and powers of seizure and forfeiture (*Fisheries Act 1995* (Vic) ss 101B, 101G, 102, 105, 106).

43 Consultation 4 (Roundtable 3).

- 10.58 For the purpose of any audit, the Commission's consultations suggested that certain investigative powers may be necessary in order to respond to organised crime infiltration, being powers to:
- conduct on-site inspections without unduly disrupting a business or further marginalising vulnerable workers⁴⁴
 - investigate unlicensed businesses, given the potential for significant unlicensed sectors to attract organised crime groups to otherwise lawful occupations and industries⁴⁵
 - compel the production of information and documents by business owners/operators.

Skills and capabilities of the regulator

- 10.59 It is counterproductive to grant investigative powers to a regulatory agency that is not sufficiently skilled, or willing, to exercise those powers. This may lead to a regulatory 'grey zone', whereby the powers remain unused but an investigatory role is not assumed by other agencies.
- 10.60 The investigation of organised crime infiltration will require training and skills in:
- the forensic analysis of business records and corporate structures
 - detecting the indicators of organised crime activity, as relevant to the occupation or industry (such as labour trafficking, illicit drug trafficking, stolen goods distribution, fraud and so on)
 - the proper conduct of investigations, particularly evidence gathering and the preparation of evidence for civil or criminal proceedings
 - police-like personal protection measures, where a regulatory officer is required to attend on-site inspections, investigate unlicensed businesses, or otherwise make direct contact with occupation or industry members in potentially dangerous scenarios.
- 10.61 A regulator may determine that these investigative functions are best performed by other agencies and seek to partner with these agencies, as discussed below. Alternatively, a regulator may consider that it is well placed to perform these functions (or at least some of these functions) due to its detailed knowledge of an occupation or industry, well-established relationships with information sources, and other factors. In such circumstances, the ACC suggested that an agency 'start small' and slowly build a capacity to perform intelligence gathering roles; a response to organised crime infiltration does not necessarily require the resourcing of a large team and the acquisition of a broad range of new powers from the outset. As an example of this approach, the ACC pointed to the establishment of integrity units within sports governing bodies, which have gradually and successfully built a response to organised crime infiltration of professional sport.⁴⁶

44 Consultations 3 (Roundtable 2), 4 (Roundtable 3); Submissions 8 (Philip Morris Limited), 11 (Australian Security Industry Association Limited), 24 (Victorian Automobile Chamber of Commerce).

45 Submissions 11 (Australian Security Industry Association Limited), 24 (Victorian Automobile Chamber of Commerce); Consultation 11 (Victorian Automobile Chamber of Commerce).

46 Consultation 6 (Australian Crime Commission).

Powers of other agencies

- 10.62 Under a model of collaborative regulation, it may be most appropriate to harness the investigative powers of other agencies in an inter-agency partnership.
- 10.63 First, the risk of infiltration, and the degree of harm likely to result from infiltration, may not warrant an occupation or industry regulator being vested with a suite of police-like investigative powers. While an occupation or industry regulator may play a key role in detecting organised crime infiltration, the further investigation of the matter may be more suited to law enforcement agencies, as some regulators suggested to the Commission.⁴⁷ Liberty Victoria noted that Victoria Police are already invested with significant coercive powers to investigate organised crime under the *Major Crime (Investigative Powers) Act 2004* (Vic), including the investigation of links between organised crime activity and lawful occupations and industries.⁴⁸
- 10.64 Second, there are likely to be instances where the most beneficial avenues for disrupting organised crime infiltration lie outside the regulatory regime of an occupation or industry, in which case the investigative powers of another government agency (such as the Australian Taxation Office or the Fair Work Ombudsman) will be used. For example, the Task Force Discover investigation used the powers of Victoria Police, the EPA, and the Victorian WorkCover Authority to conduct a thorough audit of the auto-wrecking/ recycling and scrap metal industry. This audit produced a rich picture of the vulnerabilities exploited by organised crime in that industry and the various forms of unlawful behaviour in which they are allegedly engaged.⁴⁹

Potential for business disruption

- 10.65 Any regulatory regime should guard against undue disruption to business in the course of investigations.
- 10.66 Members of the tattoo industry were critical of the regulatory regimes in Queensland and New South Wales that permit police to enter licensed tattoo studios with sniffer dogs without notification to licensees.⁵⁰ This reportedly results in the disruption of existing business, contamination of studios and subsequent closure for decontamination over several days, and the potential loss of clients due to reputational damage.⁵¹
- 10.67 Any costs associated with business disruption are unlikely to be able to be recovered and may expose a business to higher insurance premiums or difficulties in obtaining insurance.
- 10.68 Undue disruption to business may also cause occupation or industry members to become distrustful of regulators and law enforcement agencies and disengage from regulation. Vixen Collective stated that investigative powers over and above police powers (such as powers of business entry without warrant) exacerbate barriers between sex workers and government agencies.⁵² Legitimate members of the tattoo industry in Queensland and New South Wales have reportedly been intimidated by police powers of entry into studios; this, and other aspects of the regulatory regime in those states, have caused industry members to feel victimised and unduly scrutinised.⁵³ The alienation of legitimate industry members will compromise the ability of regulators to enlist and engage industry members as key information sources about organised crime infiltration.

47 Consultation 4 (Roundtable 3).

48 Submission 9 (Liberty Victoria).

49 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014).

50 *Tattoo Parlours Act 2012* (NSW) s 31; *Police Powers and Responsibilities Act 2000* (Qld) pt 3.

51 Submission 10 (Australian Tattooists Guild); Consultation 5 (Professional Tattooing Association of Australia).

52 Submission 19 (Vixen Collective). See also Submission 12 (Scarlet Alliance, Australian Sex Workers Association).

53 Consultation 5 (Professional Tattooing Association of Australia).

- 10.69 The potential for business disruption may be limited by appropriate training and the exercise of discretion in the use of intrusive investigative powers. The Victorian Independent Pawnbrokers Association observed that police have the power to enter and search second-hand goods businesses without warrant but do not take unreasonable advantage of this power.⁵⁴

Enforcement measures

- 10.70 Any occupation or industry regulatory regime will include enforcement measures for non-compliant conduct. A wide range of potential enforcement measures also exist outside these regulatory regimes. A clear lesson from the Commission's consultations is that the full suite of enforcement measures—both outside and within occupation/industry regulatory regimes—should be considered in the implementation of a regulatory response to organised crime infiltration.

Enforcement measures outside the regulatory regime

- 10.71 Victoria Police, the ACC, the AFP, AUSTRAC, and the Commonwealth Attorney-General's Department each referred to the value of a multi-disciplinary enforcement approach that considers the use of enforcement measures from a range of legal and policy areas.⁵⁵
- 10.72 At the federal level, this approach is reflected in the Commonwealth Organised Crime Compendium, which guides government agencies on the enforcement options available across a number of areas of the law in order to address organised crime.⁵⁶ A similar compendium was developed by the former Serious Organised Crime Agency (SOCA) in the United Kingdom,⁵⁷ which sets out a range of enforcement options from criminal justice and non-criminal justice contexts that may be used to disrupt organised crime, including the enforcement measures available to taxation, customs, and immigration agencies.⁵⁸ Victorian regulators and law enforcement agencies should give consideration to the establishment of a similar compendium at the state level.
- 10.73 In responding to a particular regulatory problem, there are a number of benefits to considering a broad suite of enforcement options under state and federal laws.
- 10.74 An enforcement measure outside the regulatory regime may be the most effective way of addressing organised crime infiltration, due to the available evidence (for example, there may be evidence to warrant taxation-related action but insufficient evidence to cancel a licence), the speed with which the measure can be imposed, and the cost effectiveness of the measure relative to its disruptive effect (for example, a relatively low-cost action by local government in response to planning or permit violations may have a more disruptive effect on a business than a relatively high-cost civil penalty or criminal proceeding).

54 Consultation 3 (Roundtable 2).

55 Consultations 6 (Australian Crime Commission), 7 (Australian Federal Police), 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department), 9 (Victoria Police).

56 The Organised Crime Compendium is not available to the public.

57 The United Kingdom Serious Organised Crime Agency has been replaced by the National Crime Agency.

58 Council of the European Union, Note from Eurojust to the Standing Committee on Operational Co-operation on Internal Security, 'A Multidisciplinary Approach to Organised Crime: Administrative Measures, Judicial Follow-up, and the Role of Eurojust', Outcome Report (14 June 2012) 6 <<http://www.eurojust.europa.eu/Practitioners/operational/strategic-seminars-meetings/Pages/topical-events-reports.aspx>>.

- 10.75 By taking enforcement action outside their regulatory regimes, agencies may be able to better address the systematic infiltration of several industries by a single organised crime group, and the particular purpose of that infiltration. Where, for example, an organised crime group has infiltrated several industries for the purpose of concealing or laundering the proceeds of crime, the most appropriate enforcement option may involve the prosecution of money laundering offences under state or federal law, and/or the recovery of criminal assets under forfeiture and confiscation laws (including unexplained wealth laws). To take another example, where an organised crime group has infiltrated several industries for the purpose of labour exploitation or trafficking, it may be most effective to enforce occupational health and safety, employment and/or anti-trafficking laws in relation to conduct across these industries, rather than seeking to deal with the problems in each industry separately.
- 10.76 The Commission's consultations indicated that organised crime infiltration may require enforcement action in response to non-compliance with:
- 'traditional' criminal laws (that is, criminal laws relating to offences such as illicit drug trafficking, firearm trafficking and crimes against the person, separately to any criminal offences under an occupation or industry regulatory regime)
 - anti-money laundering laws
 - criminal asset forfeiture/confiscation laws
 - taxation laws (for example, in relation to taxation fraud and undeclared business income)⁵⁹
 - employment and occupational health and safety laws (for example, in the sex work, labour hire, and auto-wrecking/recycling and scrap metal dealing industries)⁶⁰
 - corporations laws (for example, in relation to phoenix activity and investment fraud)
 - customs and quarantine laws (for example, in infiltrating industries such as private security and trucking and heavy haulage in order to import illicit goods)
 - migration laws (for example, in the labour hire industry)
 - environmental protection laws (for example, in the auto-wrecking/recycling and scrap metal industry,⁶¹ the waste management industry, and the commercial fishing industry)
 - local government and planning and permit laws.
- 10.77 Several recent operations have used a multi-disciplinary enforcement approach. 'Project Tricord' involved the investigation of a high-threat organised crime syndicate for involvement in illegal labour hire activity and other unlawful conduct. This resulted in the seizure of property and the charging of syndicate members with money laundering offences and offences under the *Migration Act 1958* (Cth).⁶² As part of another operation ('Operation Morpheus'), businesses and individuals with links to outlaw motorcycle gangs are being investigated for non-compliance with taxation laws. Operation Morpheus is a collaboration between the ACC, the Australian Taxation Office, state and federal police, and other agencies.⁶³

59 Submission 3 (National Motor Vehicle Theft Reduction Council).

60 Submissions 6 (JobWatch Inc), 12 (Scarlet Alliance, Australian Sex Workers Association); Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014) 3–5, 27–9, 35.

61 Victoria Police, *Task Force Discover: Addressing Profit-motivated Vehicle Theft in Victoria's Separated Parts and Scrap Metal Industries* (2014) 3–5, 27–9, 35.

62 Australian Crime Commission, *Annual Report 2013–14* (2014) 51.

63 Australian Federal Police, 'Outlaw Motorcycle Gang Members Targeted to Pay their Fair Share of Tax' (Media Release, 2 November 2015) <<http://www.afp.gov.au/media-centre/news/afp/2015/november/media-release-outlaw-motorcycle-gang-members-targeted-to-pay-their-fair-share-of-tax>>.

Enforcement measures inside the regulatory regime

- 10.78 Alongside a multi-disciplinary enforcement approach, a regulator will have regard to enforcement measures within an occupation/industry regulatory regime. In addressing organised crime infiltration, particular consideration should be given to:
- the value of a responsive regulation approach
 - enforcement measures that neutralise commercial benefits obtained through infiltration
 - enforcement measures that disrupt infiltrated businesses.

A responsive regulation approach

- 10.79 Consultation participants remarked on the utility of a ‘responsive regulation’ approach to enforcement, which begins with a consideration of low-end enforcement measures and escalates to more severe measures in response to ongoing non-compliance or unlawful activities.⁶⁴ The concept of responsive regulation was developed by Ayres and Braithwaite in the early 1990s, and is now widely adopted by regulators in Australia and the United Kingdom.⁶⁵
- 10.80 In approximate order of the least to the most severe enforcement measures, a responsive regulation model may involve some or all of the following types of measures:
- warnings, cautions and show cause notices
 - enforceable undertakings
 - infringement notices and financial penalties imposed by government agencies (otherwise known as administrative penalties)
 - court-imposed fines
 - licence suspension and cancellation
 - banning and prohibition orders
 - imprisonment.
- 10.81 A responsive regulation approach is available under the *Private Security Act 2004* (Vic). Where a licence holder has engaged in unfair, dishonest or discreditable conduct, a range of low- to high-end measures may be used by Victoria Police, including taking no further action, reprimanding the licence holder, imposing or varying a licence condition, or suspending or cancelling the licence.⁶⁶
- 10.82 In the context of organised crime infiltration, a responsive regulation model may have particular utility.
- 10.83 First, this approach may improve the effectiveness of the regulatory regime by allowing a regulator to tailor the enforcement response to the purpose of a particular regulatory obligation. For example, where an obligation is designed to assist the regulator in detecting infiltration (such as record-keeping and due diligence obligations), the most appropriate response in some cases may be to assist the industry member in that very process by using persuasive or educative strategies. A misdirected or disproportionate response risks alienating legitimate industry members and closing off an important source of information.⁶⁷ Where necessary, the enforcement response can be escalated if non-compliance continues.

64 Consultations 8 (Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General’s Department), 3 (Roundtable 2), 4 (Roundtable 3).

65 See generally Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 88–94; Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59, 62, 65.

66 *Private Security Act 2004* (Vic) s 56.

67 Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59, 76.

- 10.84 Second, a responsive regulation model allows a regulator to respond relatively quickly and regularly to non-compliance through the use of less costly and more immediate enforcement measures such as infringement notices, administrative penalties and enforceable undertakings. Timely and regular enforcement responses may help to build a narrative about the capacity of the regulator to detect non-compliance and take enforcement action. This is important from a deterrence perspective; empirical studies have consistently shown that the certainty of apprehension and punishment has a more significant deterrent effect than the severity of the punishment.⁶⁸
- 10.85 Third, a responsive regulation model permits the use of high-end measures in the first instance, but encourages regulators to first consider less severe responses and properly justify immediate escalation.⁶⁹ Immediate escalation may be justified by the degree of risk or harm associated with the particular act of non-compliance, a lack of time, resources or opportunities for a step-by-step escalation of the enforcement response, or a lack of industry support for a less severe enforcement response (among industry members, disillusionment with the enforcement response may encourage non-compliance or disengagement from regulators).
- 10.86 The proportionate and otherwise appropriate use of high-end measures is likely to strengthen the credibility of the regulatory regime in the view of occupation and industry members, and therefore encourage engagement with the regime through processes such as disclosure and reporting, customer and supplier due diligence, record keeping and information sharing.
- 10.87 The Commission's consultations revealed that two particular types of enforcement measures require consideration in developing a regulatory regime that aims to prevent organised crime infiltration: measures that neutralise the commercial benefits of infiltration, and measures that disrupt infiltrated businesses.

Measures that neutralise commercial benefits

- 10.88 A regulator should consider the use of measures that neutralise the commercial benefits obtained through infiltration of an occupation or industry.

Financial penalties

- 10.89 Financial penalties are one measure that may be used for this purpose, whether these penalties are in the form of administrative penalties (that is, penalties imposed by government agencies), or court-imposed penalties for civil contraventions or criminal offences.
- 10.90 Some consultation participants said that maximum financial penalties in their respective industries are not commensurate with the commercial benefits of infiltration and therefore have a limited deterrent effect.⁷⁰ Philip Morris Limited contended that the penalties for illicit tobacco trading should reflect the value of the products traded and that the current maximum penalties are insufficient in this regard. Philip Morris Limited stated that insufficient penalties encourage organised crime groups to shift from the trafficking of other illicit goods to the trading of illicit tobacco and the infiltration of the legitimate tobacco industry for that purpose.⁷¹

68 Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, 2011).

69 John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 90. The responsive regulation model appears sufficiently flexible to address the problems raised by Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 62–4.

70 Submissions 3 (National Motor Vehicle Theft Reduction Council), 8 (Philip Morris Limited); Information provided to the Commission by the Environment Protection Authority Victoria (3 August 2015).

71 Submission 8 (Philip Morris Limited).

- 10.91 In other areas of the law, it is increasingly typical for financial penalty provisions to allow for the quantum of the penalty to be calculated by reference to the value of the contravening or offending conduct. This may neutralise—or at least diminish—the commercial benefits arising from that conduct.
- 10.92 Under federal competition law, where a corporation has breached a restrictive trade practices provision (such as a cartel conduct provision), the court may impose a maximum penalty that is the greatest of: \$10 million; or three times the value of the benefits obtained from the conduct; or, if the court cannot determine the value of the benefits, 10 per cent of annual corporate turnover during the 12 months ending at the end of the month in which the relevant conduct occurred.⁷²
- 10.93 The National Motor Vehicle Theft Reduction Council drew attention to the use of commercial benefits penalty orders under the *Transport (Compliance and Miscellaneous) Act 1983* (Vic), which, among other things, regulates the taxi industry. A commercial benefits penalty order requires a person to pay a fine not exceeding three times the amount of gross commercial benefit obtained, or obtainable, from the commission of the offence.⁷³
- 10.94 Penalty provisions of this nature appear to be less common among the regulatory regimes of occupations and industries that may be vulnerable to organised crime infiltration. The adoption of such provisions should be considered in order to allow the imposition of proportionate penalties that reflect the commercial benefits obtained from non-compliant conduct and thereby reduce the rewards of infiltration. A less proportionate penalty may be easily absorbed as a ‘cost of doing business’ and incentivise non-compliance.

Preventing the recovery or retention of commercial rewards

- 10.95 Consideration should also be given to enforcement measures that prevent a person from recovering or retaining rewards that have been obtained through non-compliant conduct, including unlicensed activity. For example, the *Private Security Act* prevents a person from suing for, recovering or retaining any commission, fee, gain or reward for carrying on unlicensed security services.⁷⁴
- 10.96 Such measures provide a further means of neutralising the commercial benefits obtained through infiltration of a legitimate business.

Measures that disrupt business

- 10.97 In occupations and industries where entry is restricted, a regulatory regime will commonly include a power to remove an occupation or industry participant by suspending or cancelling a licence or other form of authorisation. Several consultation participants considered that powers of licence suspension and cancellation were one of the most beneficial measures for dealing with organised crime infiltration; industry representatives remarked that the prospect of the loss of livelihood, and the loss of significant business investments, has a strong deterrent effect.⁷⁵
- 10.98 Powers of removal may be particularly necessary in occupations and industries where entry is unrestricted. In these circumstances, a regulatory regime may need to permit the making of banning or disqualification orders that prevent a person from participating in the occupation or industry either on a permanent basis or for a specified period.⁷⁶

72 *Competition and Consumer Act 2010* (Cth) s 76.

73 *Transport (Compliance and Miscellaneous) Act 1983* (Vic) s 230B.

74 *Private Security Act 2004* (Vic) s 127.

75 Submission 10 (Australian Tattooists Guild); Consultation 3 (Roundtable 2).

76 Equivalent orders exist in other areas of the law where certain professionals or occupation/industry participants are not subject to licensing or other authorisation regimes: see, eg, *Corporations Act 2001* (Cth) s 206F (disqualification from managing a corporation).

- 10.99 Despite the value of powers of removal, the Commission was told that there are barriers to the use of such powers.
- 10.100 One barrier is a lack of information sharing between government agencies, which prevents relevant criminal intelligence and other information from coming to the attention of regulators.⁷⁷ Where information sharing is inadequate, there may be insufficient information on which to base administrative decisions to suspend or cancel licences or bring legal proceedings for similar relief. In Chapter 2, the Commission suggested ways in which information sharing may be improved.
- 10.101 Another barrier is a reluctance by regulatory and law enforcement agencies to risk the disclosure of criminal intelligence or other sensitive information to third parties in the course of administrative decision making or legal proceedings.⁷⁸ As discussed in Chapter 2, policy makers should consider how sensitive information can best be protected under a regulatory regime in order to facilitate enforcement action such as licence suspension/cancellation, while balancing the need for oversight of such decision making.
- 10.102 Even where criminal intelligence is available to regulators and appropriately protected, there will be limits on the extent to which criminal intelligence can be used as a basis for licence suspension/cancellation or other form of removal. In some cases, this information will not provide an adequate basis for enforcement action. A regulator will therefore need to consider the full suite of enforcement measures available, both inside and outside the regulatory regime that applies to a particular occupation or industry. This should include a consideration of measures that enable greater reliance to be placed on documentary evidence rather than criminal intelligence, such as proceedings for non-compliance with record-keeping obligations.
- 10.103 Another potential barrier to the use of powers of removal is a reluctance, or a perceived inability, on the part of a regulator to devote resources to legal proceedings, including any appeal proceedings or reviews of administrative decisions; in particular, a regulatory or law enforcement agency may lack confidence that licence cancellation, or another substantial penalty, will be imposed by a court or tribunal for non-compliant conduct.⁷⁹
- 10.104 It is a strategic matter for regulators to assess whether the non-compliant conduct justifies enforcement action and the expenditure of resources on legal proceedings. In making this assessment, regulators should consider:
- The nature of the non-compliant conduct—egregious conduct may compel enforcement action in order to deter similar behaviour by other occupation/industry members
 - The systemic effect of the non-compliant conduct on the occupation or industry—the conduct of an organised crime group may encourage wider non-compliance among occupation/industry members (such as where an organised crime group substantially undercuts market prices through non-compliance with regulatory obligations)
 - Whether a lack of enforcement action will harm the integrity and standing of the occupation or industry, which may result in additional costs or burdens for legitimate members (such as insurance costs), the exit of legitimate members, and/or the creation of an environment that is more conducive to organised crime infiltration because fewer ‘guardians’ exist in the occupation or industry
 - Whether contentious investigative powers or enforcement measures need to be tested in the courts, in order to better enable future enforcement action and minimise the costs of such action (where judicial clarification has been provided, appeals may be less likely on certain points).

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Consultation 4 (Roundtable 3).
Consultations 4 (Roundtable 3), 9 (Victoria Police).
Consultations 4 (Roundtable 3), 9 (Victoria Police).

10.105 Accordingly, the taking of enforcement action may produce a net benefit for regulators where such action has a deterrent effect, reduces future regulatory costs, and/or strengthens the integrity of an occupation or industry.

Detailing the evaluation strategy

11. Detailing the evaluation strategy

- 11.1 Any regulatory response to organised crime infiltration should be periodically evaluated to determine whether the nature and extent of the risk factors for infiltration have changed, and whether the regulatory objectives are being achieved. A regulatory response may require modification in response to this evaluation.
- 11.2 As the Victorian Guide to Regulation observes, an evaluation strategy should be designed at the outset of a regulatory response so that appropriate data can be collected during the implementation phase for the purpose of evaluation.¹
- 11.3 Consultation with occupation and industry members should be a priority for any evaluation strategy. Just as industry collaboration is important when developing a regulatory response, it is equally important that industry contribute to the evaluation of that response. Occupation/industry members may have unique insights into the operation of regulatory strategies in practice (including the existence of any perverse incentives for organised crime infiltration), barriers to the engagement of occupation/industry members in regulation, the utility and scope of enforcement action, and the degree to which organised crime infiltration has receded or increased following the implementation of the regulatory response.
- 11.4 An evaluation strategy should also involve inter-agency consultation to determine whether organised crime groups have been displaced to other occupations or industries within Victoria, or to other states or territories. Where displacement has occurred, consideration should be given to whether the level of regulatory intervention needs to be reduced in one industry and increased in another.
- 11.5 In addition, the evaluation of a regulatory regime should seek to ascertain the extent to which an occupation or industry has matured and engages in self-regulation. Less regulatory intervention may be warranted where occupation/industry members are acting as effective 'guardians' against organised crime infiltration (through, for example, a strong professional association), or where the occupation/industry has become more profitable and members are less susceptible to corruption by organised crime groups.

Conclusion

12. Conclusion

- 12.1 Consistently with the terms of reference, in this report the term ‘infiltration’ means both entering into and operating through lawful occupations and industries.
- 12.2 Organised crime groups will often seek to infiltrate lawful occupations and industries to support their existing, illicit activities and to provide new opportunities for profit and influence. Consequently, the regulatory regimes that govern occupations and industries of interest to organised crime groups have the potential to play a significant role in disrupting their activities.
- 12.3 However, as when creating any regulation, policy makers should be mindful of the burden that the use of regulatory regimes for this purpose is likely to place on regulators, law enforcement agencies and legitimate occupation and industry members.
- 12.4 It is clear that the nature and extent of the risk of infiltration will vary from industry to industry and that regulators are currently at different stages in the development of awareness of that risk and the development of responses to it.
- 12.5 For these reasons, the Commission’s report emphasises that there is no ‘one size fits all’ approach. Regulatory responses to risks of infiltration must be considered on an industry-by-industry basis.
- 12.6 The Commission’s consultations provided many reasons for optimism. There is a growing body of experience in Australia and internationally of the use of regulatory regimes to thwart the intentions of organised crime groups.
- 12.7 The Commission expresses its warm appreciation of the substantial contribution to this report made by persons and bodies who have made submissions and taken part in consultations.
- 12.8 The Commission is pleased to have had the opportunity to contribute to efforts to protect Victoria’s lawful occupations and industries and society in general from the threat posed by organised crime. It is hoped that the insights and proposals contained in this report will assist policy makers in developing and refining regulatory regimes to combat that threat.
- 12.9 The Commission recommends that the report be read in conjunction with the Victorian Guide to Regulation and used by policy makers in assessing the risks of organised crime infiltration of lawful occupations and industries and in developing regulatory responses to those risks.¹
- 12.10 The Commission commends this report to you.

Appendices

Appendix A: Advisory committee

Purpose

The Commission established an advisory committee comprising individuals with expertise in areas relevant to the reference. The role of the advisory committee was to provide technical advice about the issues raised by the reference.

Members

The members of the advisory committee were:

- Julie Ayling, Australian National University
- Professor John Braithwaite, Australian National University
- Dr Matthew Butlin, Chair, Victorian Competition and Efficiency Commission
- Assistant Commissioner Stephen Fontana, Victoria Police
- Emeritus Professor Arie Freiberg, Monash University
- Dr Elizabeth Lanyon, Director, Regulation and Policy, Consumer Affairs Victoria
- Gail Owen, Deputy Chair, Victorian Commission for Gambling and Liquor Regulation
- Dr Russell Smith, Principal Criminologist and Manager, Transnational, Organised and Cyber Crime Program, Australian Institute of Criminology.

Appendix B: Submissions

1	Confidential
2	Professor Rick Sarre
3	National Motor Vehicle Theft Reduction Council
4	Julie Ayling
5	Professor Louis de Koker and Kayne Harwood
6	JobWatch Inc.
7	Confidential
8	Philip Morris Limited
9	Liberty Victoria
10	Australian Tattooists Guild
11	Australian Security Industry Association Limited
12	Scarlet Alliance, Australian Sex Workers Association
13	National Heavy Vehicle Regulator
14	Australian Adult Entertainment Industry Inc.
15	Victorian Legal Services Board and Commissioner
16	EROS Association
17	Darryl Annett
18	Australian Securities and Investments Commission
19	Vixen Collective
20	Australian Collectors & Debt Buyers Association
21	Institute of Mercantile Agents
22	Victorian Competition and Efficiency Commission
23	The Victorian Bar Inc.
24	Victorian Automobile Chamber of Commerce
25	Law Council of Australia
26	Prostitution Licensing Authority (Queensland)
27	Law Institute of Victoria
28	Office of Liquor and Gaming Regulation (Queensland)
29	Australian Metal Recycling Industry Association
30	Sims Metal Management
31	Confidential
32	Law Council of Australia (supplementary submission)

Appendix C: Consultations

Discussions about the questions raised in the consultation paper were held with the people and organisations listed below in chronological order.

- 1 Professor Michael Levi, Cardiff University
- 2 Roundtable 1. Attended by: Australian Collectors & Debt Buyers Association; Australian Hotels Association; Australian Security Industry Association Limited; Australian Tattooists Guild; Community Clubs Victoria; Fitness Australia; Institute of Mercantile Agents; Racing Victoria; Recruitment and Consulting Services Association; Scarlet Alliance, Australian Sex Workers Association; Seafood Industry Victoria; Victorian Transport Association; Victorian Waste Management Association; Vixen Collective.
- 3 Roundtable 2. Attended by: Cash Converters; Chartered Accountants Australia and New Zealand; Firearm Traders Association of Victoria; Law Institute of Victoria; Pharmacy Guild of Australia, Victorian Branch; Plastics and Chemicals Industries Association; Victorian Automobile Chamber of Commerce; Victorian Independent Pawnbrokers Association.
- 4 Roundtable 3. Attended by: Australian Securities and Investments Commission; Consumer Affairs Victoria; Environment Protection Authority Victoria; Fisheries Victoria; National Heavy Vehicle Regulator; Professional Boxing and Combat Sports Board; Racing Integrity Commissioner; VicRoads; Victorian Commission for Gambling and Liquor Regulation; Victorian Legal Services Board and Commissioner.
- 5 Professional Tattooing Association of Australia
- 6 Australian Crime Commission
- 7 Australian Federal Police
- 8 Australian Transaction Reports and Analysis Centre and Commonwealth Attorney-General's Department
- 9 Victoria Police
- 10 Victorian Automobile Chamber of Commerce (1)
- 11 Victorian Automobile Chamber of Commerce (2)
- 12 Independent Broad-based Anti-corruption Commission
- 13 Scottish Environment Protection Agency



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Victorian
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**Use of Regulatory Regimes
in Preventing the Infiltration
of Organised Crime into Lawful
Occupations and Industries**

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