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Senate  
Standing Committee on Legal and Constitutional Affairs  
Mr Peter Callahan, Committee Secretary

Wednesday, October 07, 2009

*Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009*

Dear Mr Callahan

Dear Committee members

Thank you for the invitation to make a submission to the *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009* by your committee.

Please find below my observations and comments about the proposed legislation. Please note that my submission is limited to one single aspect of this Bill:

- new offences that would target persons involved in organised crime, (Schedule 4).

Please do not hesitate to contact me if you wish to discuss the proposed Bill or my submission further.

Yours sincerely

[submitted electronically without signature]

ANDREAS SCHLOENHARDT PhD (Law)

## Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009

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### 1. Introduction

On September 16, 2009, the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* was introduced into Federal Parliament by the Attorney-General, The Hon Robert McClelland. This Bill proposes a suite of legislative amendments to strengthen the Commonwealth criminal assets confiscation regime, provide greater witness protection, and enhance the ability of law enforcement agencies to investigate and prosecute federal money laundering offence.<sup>1</sup>

Importantly, the Bill also proposes the introduction of four offences for involvement in organised crime, proposed ss 390.3–390.6 *Criminal Code* (Cth). The term ‘criminal organisation’ is defined in proposed s 390.4(1)(c)–(e), 390.5(1)(c)–(e), (2)(c)–(e), and 390.6(1)(c)–(e), (2)(c)–(e) respectively. These offences adopt a system that is based on the Canadian organised crime offences<sup>2</sup> and thus follows recommendations made recently in the Parliamentary Joint Committee on the Australian Crime Commission’s *Inquiry into the*

<sup>1</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 2–3.

<sup>2</sup> See Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 68–75, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

*legislative arrangements to outlaw serious and organised crime groups*<sup>3</sup> and by the author of this submission.<sup>4</sup>

The *Explanatory Memorandum* to the Bill notes:

One of the primary reasons many jurisdictions have adopted specific organised crime offences is to enable differentiation between lower level and higher level participants. A sophisticated example of this is the Canadian Criminal Code, which provides separate offences to correspond with the offender's level of involvement in the criminal organisation.

Accordingly, the amendments in this Schedule will introduce several new offences criminalising varying levels of involvement in a criminal organisation, with penalties that reflect the spectrum of less to more serious involvement.<sup>5</sup>

It is significant that the Commonwealth proposal does not adopt the type of organised crime offence in operation in South Australia and New South Wales that is based on the prescription or declaration of individual groups. Instead, the federal offences 'will require a determination by the court on a case-by-case basis that the particular group is a criminal organisation. The offences are not based on involvement in particular declared or prescribed organisations.'<sup>6</sup>

## 2. Outline of the proposed criminal offences

The *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* introduces four new offences that criminalise different types of involvement in and association with organised crime:

- directing activities of a criminal organisation, proposed s 390.6 *Criminal Code* (Cth);
- committing an offence for the benefit of, or at the direction of, a criminal organisation, s 390.5;
- supporting a criminal organisation, s 390.4; and
- associating in support of serious organised criminal activity, s 390.3.

The design and elements of proposed ss 390.4–390.6 are in large parts identical to the offences in ss 467.11–467.13 *Criminal Code* (Canada), discussed in Section 4.3 of this study. The offence in proposed s 390.3 has no equivalent in Canada.

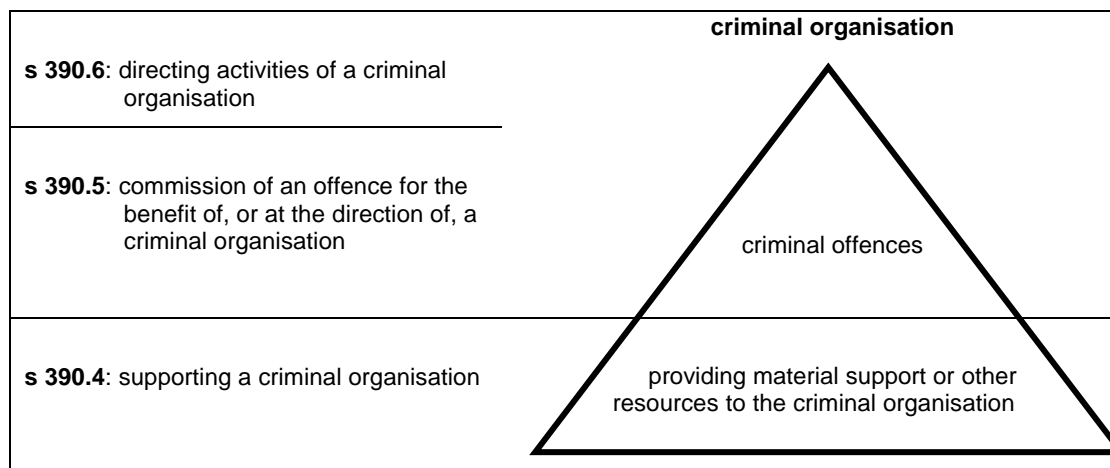
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<sup>3</sup> See further Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, report (2009) para 4.8.4, available at [www.aph.gov.au/Senate/committee/acc\\_ctte/laoscg/index.htm](http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/index.htm) (accessed 6 Oct 2009).

<sup>4</sup> See, for example, Andreas Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia' (2008) 19(3) *Current Issues in Criminal Justice* (University of Sydney) 259 at 280; Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 298, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>5</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 129.

<sup>6</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 129.

Figure 1 Criminal organisation offences, proposed ss 390.4–390.6 *Criminal Code* (Cth)<sup>7</sup>

The three main offences are set out in a hierarchy depending on the accused's level of involvement in the criminal organisation. At the bottom of this hierarchy is a 'supporter' offence which creates liability for providing material support or resources to a criminal organisation, s 309.4. This offence is punishable by five years imprisonment.<sup>8</sup> This is followed by the more serious offence in s 350.5, punishable by seven years imprisonment,<sup>9</sup> which criminalises the commission of an offence for a criminal organisation. Section 390.6 creates the most serious offence, punishable by up to 15 years imprisonment,<sup>10</sup> for directing the activities of a criminal organisation.

Extended geographical jurisdiction (category C) applies to all four proposed offences.<sup>11</sup> Accordingly, it is immaterial whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct constituting the alleged offence occurs in Australia, unless the conduct constituting the alleged offence occurs wholly in a foreign country (but not on board an Australian aircraft or an Australian ship), s 15.3 *Criminal Code* (Cth). This means that liability under the offences extends to conduct by Australian citizens and corporations abroad and also to conduct by Australian residents and foreign nationals abroad where there is an equivalent offence in the law of the local jurisdiction.<sup>12</sup> The *Explanatory Memorandum* further notes that:

The application of extended geographical jurisdiction (category C) reflects the increasingly transnational nature of organised crime, which often involves multiple participants in multiple countries. [...] The application of extraterritorial jurisdiction to the offences will enhance the ability of Australian law enforcement agencies to collaborate with offshore partners in pursuance of a "top down" strategy for dismantling [...] transnational [...] syndicates.<sup>13</sup>

<sup>7</sup> See also Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 68, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>8</sup> Proposed s 390.4(1) *Criminal Code* (Cth).

<sup>9</sup> Proposed s 390.5(1), (2) *Criminal Code* (Cth).

<sup>10</sup> Proposed s 390.6(1), (2) *Criminal Code* (Cth).

<sup>11</sup> Proposed s 390.7 *Criminal Code* (Cth).

<sup>12</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 151.

<sup>13</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 151.

## 2.1 Proposed s 390.6 Criminal Code (Cth): Directing activities of a criminal organisation.

Section 390.6 makes specific provisions for key leaders who direct the activities of a criminal organisation.

The purpose of this section is to criminalise the conduct of those high up in the criminal organisation in positions of authority, who direct the activities of the organisation. It recognises the particular seriousness of directing behaviour in relation to organised crime groups.<sup>14</sup>

The section differentiates between two separate offences depending on whether the activities of the criminal organisation are a criminal offence (s 390.6(2)) or whether they aid or may aid the commission of criminal offence (s 390.6(1)). Examples for the two types of offences have been set out in the *Explanatory Memorandum*:

An example [for an offence under s 390.6(1)] is as follows. Persons A, B, C, and D are all members of a criminal organisation. Person A asks persons B, C, and D to purchase various pieces of equipment that are necessary to cultivate commercial quantities of controlled plants. The purchase of the equipment aids the organisation to engage in the cultivation of commercial quantities of controlled plants (an offence against section 303.4 of the Criminal Code, punishable by imprisonment for up to 10 years). [...]

An example [for an offence under s 390.6(2)] is as follows. Persons A, B, C, and D are all members of a criminal organisation. Person A asks persons B, C, and D to engage in the cultivation of commercial quantities of controlled plants. The cultivation of commercial quantities of controlled plants is an offence under section 303.4 of the Criminal Code, punishable by imprisonment for up to 10 years.

Figure 2 Elements of proposed s 390.6 *Criminal Code* (Cth)<sup>15</sup>

S 390.6	Physical elements	Fault elements
1	<ul style="list-style-type: none"> <li>directing one or more activities of an organisation, s 390.6(1)(a), (2)(a);</li> </ul>	<ul style="list-style-type: none"> <li>intention, s 5.6</li> </ul>
2	<ul style="list-style-type: none"> <li>the activity/activities aid or may aid the organisation to commit a criminal offence, s 390.6(1)(b);</li> <li>or</li> <li>the activity/activities constitute a criminal offence, s 390.6(2)(b);</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> </ul>
3	<ul style="list-style-type: none"> <li>the criminal offence attracts a minimum punishment of one year imprisonment, s 390.6(1)(f), (2)(f).</li> </ul>	<ul style="list-style-type: none"> <li>absolute liability, ss 390.6(3), 6.2</li> </ul>
4	<ul style="list-style-type: none"> <li>organisation is a criminal organisation, s 390.6(1)(c)–(e), (2)(c)–(e).</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> <li>absolute liability for s 390.6(1)(e), (2)(e), (3)</li> </ul>
<b>Penalty</b>	10 years, s 390.6(1)/15 years, s 390.6(2)	

The offence under s 390.6 requires the conduct of ‘directing one or more activities’ of a criminal organisation. The terms ‘directing’ and ‘activity’ are not further defined. It is suggested that the ‘directing’ requires a hierarchy between the accused who directs and another person who is directed.<sup>16</sup> While there is no requirement that the directions by the

<sup>14</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 147.

<sup>15</sup> Cf *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 148–149.

<sup>16</sup> Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 91, 93 per Holmes J; Freedman, ‘The

accused specify a particular offence, it is necessary that the activities either risk, aid, or constitute a criminal offence, punishable by at least 12 months imprisonment.<sup>17</sup> For s 390.6(1) it is irrelevant whether or not the activities directed by the accused actually aid the criminal organisation in carrying out criminal offences.<sup>18</sup>

The mental elements of this offence require proof that the accused intended to give the requisite directions and is at least reckless about the nature and purpose of the instruction and the nature and purpose of the organisation. It is not necessary to prove that the accused knows the identity of the persons constituting the criminal organisation. Absolute liability applies to those elements that relate to the quality of the criminal offences envisaged by the direction and committed or planned by the criminal group.

## 2.2 Proposed s 390.5 Criminal Code (Cth): Committing an offence for the benefit of, or at the direction of, a criminal organisation.

Section 390.5, if enacted, introduces a criminal offence for commit an offence for a criminal organisation.<sup>19</sup> Unlike proposed ss 390.4 and 390.6(1), this offence is designed to capture people who actually commit criminal offences for a criminal organisation (the so-called 'soldier' offence).<sup>20</sup> Accordingly, this offence creates further criminal liability and, potentially, additional punishment to a predicate offence (referred to as the 'underlying offence'<sup>21</sup>), even if the person has not been convicted for the underlying offence.<sup>22</sup> Unlike the other proposed offences, s 390.5, does not create or expand liability for conduct that would not otherwise be criminal.

The purpose and effect of this section is to aggravate liability for an underlying offence committed by the accused if this offence was committed in some connection to a criminal organisation. The rules against double jeopardy under s 4C *Crimes Act 1914* (Cth) apply to the offences in s 390.5. Thus a person cannot be punished under an offence in s 390.5 and under the Commonwealth, State or Territory law creating the underlying offence, for the same conduct.<sup>23</sup> If liability under s 390.5 can be established separately, this may result in an additional penalty. It is not clear whether the sentence for an offence under s 390.5 runs consecutively to that of the underlying offence.

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New Law on Criminal Organizations in Canada', at 216. See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 73–76, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>17</sup> Proposed s 390.6(1)(b), (f); (2)(b), (f) *Criminal Code* (Cth).

<sup>18</sup> Proposed s 390.6(4) *Criminal Code* (Cth).

<sup>19</sup> Cf s 467.12 *Criminal Code* (Canada); see further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>20</sup> Cf Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009); *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 143.

<sup>21</sup> Proposed ss 390.5(1)(a), (2)(a) *Criminal Code* (Cth).

<sup>22</sup> Also, the prosecution is not required to prove that the accused has been convicted (or an order made discharging the orders without proceeding to conviction) of the underlying offence, proposed s 390.5(5); but see subs (6) for offences against foreign countries.

<sup>23</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 147.

Figure 3 Elements of proposed s 390.5 *Criminal Code* (Cth)<sup>24</sup>

<b>S 390.5</b>	<b>Physical elements</b>	<b>Fault elements</b>
1	<ul style="list-style-type: none"> <li>committing an underlying offence, s 390.5(1)(a), (2)(a)</li> </ul>	<ul style="list-style-type: none"> <li>fault elements of underlying offence, s 390.5(3)</li> </ul>
2	<ul style="list-style-type: none"> <li>underlying offence attracts a minimum punishment of one year imprisonment, s 390.5(1)(f), (2)(f)</li> </ul>	<ul style="list-style-type: none"> <li>absolute liability, ss 390.5(4), 6.2</li> </ul>
3	<ul style="list-style-type: none"> <li>underlying offence is for the benefit of an organisation, s 390.5(1)(b) or</li> <li>underlying offence is committed at the direction of an organisation or a member of an organisation, s 390.5(2)(b)</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> </ul>
4	<ul style="list-style-type: none"> <li>organisation is a criminal organisation, s 390.5(1)(c)–(e), (2)(c)–(e).</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> <li>absolute liability for s 390.5(1)(e), (2)(e), (4)</li> </ul>
<b>Penalty</b>	7 years imprisonment, s 390.5(1), (2)	

The first physical element of s 390.5 requires that the accused has committed an underlying offence — another offence within this offence. This may be any offence punishable by 12 months imprisonment or more. Thus, s 390.5(1)(a), (2)(a) require proof of the physical elements of that offence. Unless the elements of the underlying offence can be established, there will be no liability under s 390.5.<sup>25</sup>

Next, it is necessary to establish a nexus between the underlying offence committed by the accused and a criminal organisation. Section 390.5(1) requires that the accused committed the underlying offence ‘for the benefit of’ a criminal organisation. This offence is designed capture the following example:

Person A engages in trafficking commercial quantities of controlled drugs (an offence under section 302.2 of the Criminal Code, punishable by imprisonment for life). The profits received from the trafficking of the drugs go to the criminal organisation, or members of the criminal organisation.<sup>26</sup>

Under proposed subs (2) the underlying offence has to be committed ‘at the direction of an organisation or of a member of a criminal organisation’:

An example of this kind of offence is as follows. Person A engages in the trafficking of illegal firearms across State and Territory borders (an offence under section 360.3 of the Criminal Code, punishable by up to 10 years imprisonment). Person A engaged in the trafficking of the firearms at the direction of person B, who is a member of a criminal organisation.<sup>27</sup>

The offence under proposed s 390.5 thus applies to persons who receive encouragement by the organisation or its members to carry out criminal activities. It is not ‘necessary to prove that the organisation (or member of the organisation) has specifically instructed that the

<sup>24</sup> Cf *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 144.

<sup>25</sup> Cf the Canadian case of *R v Giles* [2008] BCSC 367 at para [236] per MacKenzie J; see further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>26</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 143.

<sup>27</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 144.

person commit the underlying offence. It will be sufficient to prove that the organisation or member of the organisation encouraged, in any way, the commission of the underlying offence.<sup>28</sup>

There appears to be no separate requirement that the direction is given on behalf of the group, if it is given by individual members.<sup>29</sup> It is not necessary that the accused himself or herself is a member of the organisation;<sup>30</sup> it is left to the courts to determine the precise nature and parameters of the relationship between the accused and the criminal organisation.<sup>31</sup>

The fault element of the offence in proposed s 390.5 requires an intention to commit the offence for the benefit of, or at the direction of an organisation (or its members) being reckless about the involvement of the criminal organisation. There is no separate requirement to show that the accused knew the identity of any of the persons who constitute the criminal organisation.

### 2.3 Proposed s 390.4 Criminal Code (Cth): Supporting a criminal organisation

Proposed s 390.4 makes it an offence to provide material support or resources to a criminal organisation or one of its members. This offence — which may be referred to as the ‘supporter’ or ‘financier’ offence — is loosely based on the offence under s 467.11 *Criminal Code* (Canada).<sup>32</sup> Its stated purpose ‘is to criminalise the provision of support or resources to a criminal organisation, in order to help the organisation commit criminal activity.’<sup>33</sup>

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<sup>28</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 145.

<sup>29</sup> See, in contrast, *R v Leclerc* [2001] J Q No 426; Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 384. See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>30</sup> Cf *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA. See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>31</sup> Cf *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at para 59 per Fuerst J; see further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 71–73, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>32</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 69–71, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>33</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 140.



Figure 4 Elements of proposed s 390.4 *Criminal Code* (Cth)<sup>34</sup>

S 390.4	Physical elements	Fault elements
1	<ul style="list-style-type: none"> <li>providing material support or resources to an organisation or a member of an organisation, s 390.4(1)(a)</li> </ul>	<ul style="list-style-type: none"> <li>intention, s 5.6</li> </ul>
2	<ul style="list-style-type: none"> <li>support or resources aid/may aid the organisation to commit a criminal offence., s 390.4(1)(b)</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> </ul>
3	<ul style="list-style-type: none"> <li>criminal offence under s 390.4(1)(b) attracts a minimum punishment of one year imprisonment, s 390.4(1)(f), (2)(f)</li> </ul>	<ul style="list-style-type: none"> <li>absolute liability, ss 390.4(2), 6.2</li> </ul>
4	<ul style="list-style-type: none"> <li>organisation is a criminal organisation, s 390.4(1)(c)–(e).</li> </ul>	<ul style="list-style-type: none"> <li>recklessness, s 5.6</li> <li>absolute liability for s 390.4(1)(e), (2)</li> </ul>
<b>Penalty</b>	5 years imprisonment, s 390.4(1)	

The physical elements of proposed s 390.4 require that the accused provides material support or resources to a criminal organisation or one of its members. The terms used in offence definition are not further defined in the legislation.<sup>35</sup> The offence is designed to capture persons who — in one way or another, and without actually carrying out any criminal offences (cf proposed s 390.5) or directing them (s 390.6) — enhance the ability of a criminal organisation to carry out criminal activities. Liability under s 390.4 may thus involve persons outside the criminal organisation who have some interaction with the group even if they are not a part of the group.

While proposed s 390.4 does not require that the accused participates in or contributes to actual criminal activities, it is necessary to show that the support or resources aid or may aid the organisation to engage in criminal activities, s 390.4(1)(b).<sup>36</sup> 'there must be a sufficiently strong link between the provision of the support or resources, and the commission of the offence by the organisation.'<sup>37</sup> Whether or not the support or resources actually aid the organisation is immaterial.<sup>38</sup>

The offence requires proof of several fault elements: (1) an intention to provide the support or resources, (2) recklessness that the support or resources aid or may aid the organisation to engage in criminal conduct, and (3) recklessness about the nature of the organisation. These requirements address some of the criticism in judicial decisions and by academic scholars about the low threshold of the equivalent offence in Canada.<sup>39</sup>

Proposed s 390.4, if enacted, enables the criminalisation of persons that may otherwise not be liable under complicity or conspiracy provisions:<sup>40</sup> 'This offence differs from traditional

<sup>34</sup> Cf *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 140–141.

<sup>35</sup> 'It is intended that "member" will take the ordinary common meaning': *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 141.

<sup>36</sup> But see proposed s 390.4(3) *Criminal Code* (Cth).

<sup>37</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 141–142.

<sup>38</sup> Proposed s 390.4(3) *Criminal Code* (Cth).

<sup>39</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 69–71, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>40</sup> See Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia*

aiding and abetting type offences, in that it is not a requirement that the offence which the support or resources helps the organisation to commit actually be committed.<sup>41</sup> The legislator designed the offence to capture those who support criminal organisations, however minor or rudimentary that support might be. For example, a person who knowingly lets premises to a biker gang not just to collect rent but also to enable the group to carry out their criminal activities would be liable under proposed s 390.4. A person making a purchase or frequent visits to a shop run by a criminal organisation, knowing the nature of the group, would also be liable under this provision. Another example is set out in the *Explanatory Memorandum*:

Person A is a financial expert. Persons B, C, and D are members of a criminal organisation. Person A provides significant advice and training to persons B, C, and D on how they might go about engaging in the money laundering of specific illicit profits of crime (in breach of an offence in section 400.4 of the Criminal Code of dealing in proceeds of crime etc – money or property worth \$100,000 or more, which carries penalties of up to 20 years imprisonment).<sup>42</sup>

#### **2.4 Proposed s 390.3 Criminal Code (Cth): Associating in support of serious organised criminal activity**

The fourth and final proposed offence does not require proof of a criminal organisation and instead focuses on associations between two or more persons that may result in criminal activity. The stated purpose of this section 'is to deter persons from supporting organised criminal activity by criminalising their association with other persons involved in organised criminal activity.'<sup>43</sup> Special provisions for repeat offenders are set out in proposed s 390.3(2). The origins of this offence are not clear and it has no counterpart in the Canadian *Criminal Code*.

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*Pacific Region* (2009) 29–33, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>41</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 140.

<sup>42</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 140.

<sup>43</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 134.

Figure 5 Elements of proposed s 390.3(1) *Criminal Code* (Cth)<sup>44</sup>

<b>S 390.3</b>	<b>Physical elements</b>	<b>Fault elements</b>
1	<ul style="list-style-type: none"> <li>• associating on two or more occasions with a second person, s 390.3(1)(a)</li> </ul>	<ul style="list-style-type: none"> <li>• intention, s 5.6</li> </ul>
2	<ul style="list-style-type: none"> <li>• second person engages or proposes to engage in a criminal offence, s 390.3(1)(b)</li> </ul>	<ul style="list-style-type: none"> <li>• knowledge, s 390.4(3)</li> </ul>
3	<ul style="list-style-type: none"> <li>• association between first and second person facilitates the (proposed) engagement by the second person in a criminal offence, s 390.3(1)(c)</li> </ul>	<ul style="list-style-type: none"> <li>• recklessness, s 5.6</li> </ul>
4	<ul style="list-style-type: none"> <li>• criminal offence under s 390.3(1)(b) involves 2 or more persons, s 390.3(1)(d)</li> </ul>	<ul style="list-style-type: none"> <li>• recklessness, s 5.6</li> </ul>
5	<ul style="list-style-type: none"> <li>• criminal offence under s 390.3(1)(b) attracts a minimum punishment of three years imprisonment, s 390.3(1)(e)</li> </ul>	<ul style="list-style-type: none"> <li>• absolute liability for s 390.3(1)(e), (4)</li> </ul>
<b>Defences</b>	<ul style="list-style-type: none"> <li>• offence does not apply to certain associations, s 390.3(6)</li> </ul>	
<b>Penalty</b>	3 years imprisonment, s 390.3(1), (2)	

Under proposed s 390.3(1) it is an offence to associate on two or more occasions with another person, where this association facilitates the engagement by the other person in serious and organised criminal activity. The term ‘associating’ is further defined in proposed s 390.1 to include any meeting or communication between persons; be it in person or by electronic means.

The offence in proposed s 390.3(1) is not a model of clarity and the elements are expressed in a very cumbersome way. From the legislative material it appears that this offence will only apply in very unique circumstances. An example for the application of the offence is set out in the *Explanatory Memorandum*:

Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs (which is an offence under section 307.1 of the *Criminal Code* punishable by imprisonment for life). Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A’s meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.<sup>45</sup>

### 3. Proposed definition of criminal organisation

The offences in proposed ss 390.4, 390.5, and 390.6 *Criminal Code* (Cth) incorporate a definition of criminal organisation that shares many similarities with the definition in art 2(a) of the *Convention against Transnational Organised Crime* and s 467.1 *Criminal Code* (Cth).<sup>46</sup> The proposed definition in proposed ss 390.4(1)(c)–(e), 390.5(1)(c)–(e), 2(c)–(e),

<sup>44</sup> Cf *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 135.

<sup>45</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 135.

<sup>46</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 44–49, 63–68, available at

and 390.6(1)(c)–(e), (2)(c)–(e) combines a basic structural element with criteria that relate to the purpose and/or activities of the group. The definition is set out separately in each offence but its elements and relevant terms are identical.

The decision whether the offences under proposed ss 390.4, 390.5, and 390.6 involve a criminal organisation is made on a case by case basis; it is only binding for the parties to the case and there is no continuing labelling of any one group and no formal listing of criminal organisations.<sup>47</sup>

Figure 6 'Criminal organisation', proposed ss 390.4(1)(c)–(e), 390.5(1)(c)–(e), 2(c)–(e), and 390.6(1)(c)–(e), (2)(c)–(e) *Criminal Code* (Cth)

Terminology	Organised Criminal Group
Elements	
<b>Structure</b>	<ul style="list-style-type: none"> <li>• 2 or more persons, para (c).</li> </ul>
<b>Activities or objectives</b>	<ul style="list-style-type: none"> <li>• aims or activities of the organisation include facilitating the engagement in conduct or engaging in a criminal offence punishable by imprisonment for at least 3 years, para (d);</li> <li>• if committed, the offence would be for the benefit of the organisation, para (d).</li> </ul>

The first element of the definition relates to the constitution of the criminal organisation. The group must comprise at least two people.<sup>48</sup> There is no further requirement of any formal or ongoing association between them. The definition would therefore also capture random and ad hoc associations for single criminal enterprises. The structural element of this definition is deliberately loose to allow wide application of the term to various types of criminal organisations:

While traditionally organised crime groups have been tightly structured, hierarchical groups, modern organised crime groups are increasingly loose, fluid networks who work together in order to exploit new market opportunities. Given this trend towards looser, more transient networks, it can be difficult to declare or proscribe criminal groups with any degree of certainty.<sup>49</sup>

The second element of the definition in proposed ss 390.4(1)(d), 390.5(1)(d), 2(d), and 390.6(1)(d), (2)(d) relates to the purpose and activities of the criminal organisation.<sup>50</sup> This element is in large parts identical to s 467.1(1) *Criminal Code* (Canada). The group must have as one of its purposes or activities the facilitation of (serious) criminal offences that attract a minimum punishment of three years imprisonment. This second element of the definition characterises the nature of criminal organisations and the activities and purposes that set them apart from other legal enterprises.<sup>51</sup> From the wording of this element it appears, however, that the facilitation of serious offences can be one of several purposes of the criminal organisation, it need not be the sole one. It is required that the offence is punishable by at least three years imprisonment, thus limiting the application to organisations planning to undertake more serious offences.<sup>52</sup>

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<sup>47</sup> [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).  
<sup>48</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 129.  
<sup>49</sup> This requirement is consistent with s 4(1) *Australian Crime Commission Act 2002* (Cth).  
<sup>50</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 129.  
<sup>51</sup> See further *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 142, 145–146, 149–150.  
<sup>52</sup> Cf Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures*, (2005) 8, with reference to *Re Lindsay & Bonner v R* (2004) 182 C.C.C. (3d) 301.  
<sup>52</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory

The nature of the offences engaged in or facilitated by the criminal organisation are not limited in any way. The third element of the definition, however, requires that the offence, if committed, would be ‘for the benefit of the organisation’.<sup>53</sup> This phrase, which draws on art 2(a) *Palermo Convention*,<sup>54</sup> is further defined in proposed s 390.1 *Criminal Code* (Cth) to include any offence ‘that results or is likely to result in’ the organisation or at least one of its member receiving directly or indirectly a significant benefit of any kind. It is thus necessary to show that the organisation or one of its members was or would somehow be advantaged by the commission of criminal offences. The definition is not limited to situations where an actual benefit is received. The *Explanatory Memorandum* to the legislation notes:

The purpose of this definition is to recognise the profit-oriented business dimension of organised crime, but also the non-economic benefits which may result from organised criminal activity. Examples of a significant benefit may include, but are not limited to, direct benefits such as financial benefits or profits from the trafficking and sale of drugs, or more indirect benefits such as instances where a criminal organisation provides protection or security for illegal activities such as illegal gambling or illegal brothels.<sup>55</sup>

Nothing in this definition in proposed s 390.1, however, limits the term ‘benefits’ to material or financial benefits. Thus sexual or other advantages can, in theory, also constitute a benefit. Accordingly, a gang involved in (serial) rapes can fall within the definition of criminal organisation.

‘Where it is a particular member of the organisation receiving the benefit’, notes the *Explanatory Memorandum*, ‘the member must receive the benefit in his or her capacity as such a member’ and not ‘in his or her personal capacity, where there is no link at all with the organisation.’<sup>56</sup>

## 4. Further Remarks

### 4.1 The Need and Rationale of Organised Crime Offences

The subject of Schedule 4 of the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth) — offences designed to penalise criminal organisations — is the most recent and perhaps most ambitious strategy to fight organised crime. Many countries in the Asia Pacific region and around the world have introduced specific offences designed to sanction the involvement in criminal organisations. While different models have been adopted around the region and around Australia, the common feature of these offences is that they are designed to target the structure, organisation, members, and associates of organised crime groups. Unlike substantive offences such as drug trafficking, migrant smuggling, trafficking in persons, arms smuggling and the like, the proposed offences are not concerned with the actual activities that are generally attributed to

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Memorandum, 132. This limitation is also in line with similar qualifications in the *Australian Crime Commission Act 2002* (Cth) and the *Crimes Act 1914* (Cth).

<sup>53</sup> Proposed ss 390.4(1)(d), 390.5(1)(d), 2(d), and 390.6(1)(d), (2)(d) *Criminal Code* (Cth).

<sup>54</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 47–49, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009). Cf *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 132.

<sup>55</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 132.

<sup>56</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth), Explanatory Memorandum, 132.

organised crime, but with the organisational functions and purposes of criminal organisations.

The shared rationale of organised crime offences is the realisation that disrupting criminal activities and arresting individual offenders does not dismantle the criminal organisations that stand behind these illegal activities. ‘As the law stands now’, remarks Michael Moon ‘the Crown may prosecute and eliminate individual members, but the organisation continues; new people move into the vacated spot, and the enterprise carries on.’<sup>57</sup> It is now widely accepted ‘that previous efforts against organised crime have failed because the focus has been on individual prosecutions rather than on organisational foundations.’<sup>58</sup>

The proposed offences are prophylactic. It has been argued that these provisions directly target the criminal network and that any disruption to the network may, in turn, prevent and suppress its criminal activities and deter existing and potential associates.<sup>59</sup> The penalisation of the criminal organisation has been justified on the basis of crime prevention: it reduces the risk that the organisation will engage in criminal activity. It allows law enforcement agencies to intervene earlier, long before a criminal group commits specific offences. ‘From the perspective of crime prevention’, notes Estelle Baker,

logic suggests that an approach aimed at the level of the organisation is likely to produce greater crime reduction dividends than one which requires dissipated law enforcement efforts across a spectrum of individual end behaviour offences.<sup>60</sup>

The proposed offences are aimed at criminalising persons who are deliberately directing, engaging in, or otherwise supporting groups that pursue criminal objectives. These persons are seen as blameworthy because they possess the intention to inflict harm, be it directly or indirectly, even if the desired harm never materialises.<sup>61</sup>

## 4.2 Definition of organised crime

In the definition of criminal organisation in proposed ss 390.4, 390.5, and 390.6 *Criminal Code* (Cth) there is no requirement whatsoever of any formal structure of the criminal group. In contrast, the term ‘structured group’ in art 2(a) *Convention against Transnational Organised Crime*, for instance, is designed to capture ‘groups with hierarchical or other elaborate structures and non-hierarchical groups where the role of members of the group need not be formally defined.’<sup>62</sup>

<sup>57</sup> Michael A Moon, ‘Outlawing the Outlaws: Importing R.I.C.O.’s Notion of “Criminal Enterprise” into Canada to Combat Organized Crime’ (1999) 24 *Queen’s Law Journal* 451 at 459.

<sup>58</sup> Michael Goldsmith, ‘RICO and Enterprise Criminality’ (1982) 88 *Columbia Law Review* 774 at 775.

<sup>59</sup> Cf Eduard Wise, ‘RICO and its Analogues’ (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 304, citing James Jacobs

<sup>60</sup> Estelle Baker, ‘The legal regulation of transnational organised crime’, in Adam Edward & Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (2003) 183 at 187.

<sup>61</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 26–34, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>62</sup> UN General Assembly, *Interpretative notes for the official records (Travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 [hereinafter *Travaux Préparatoires*] para 4. See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 49, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

A further characteristic of organised crime overlooked in the proposed definition is the ongoing, sustained basis of criminal organisations and their operations. ‘The notion of “organisation”’, notes Estelle Baker, ‘conjures up a sense of stability over time and of coherence of membership, both in terms of being criteria by which those who belong can be distinguished from those who do not and some kind of longevity.’<sup>63</sup> The continued existence of large criminal organisations is largely independent from individual members; their operations generally continue after individuals are arrested, die, or otherwise leave the organisation.<sup>64</sup> Accordingly, the definition of organised crime group in the *Palermo Convention* also requires that the group ‘exists for a period of time’.<sup>65</sup>

### 4.3 Limits of Criminal Liability

The provisions proposed in Schedule 4 *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth) arose out of the frustration over the established limitations of criminal liability. Baker notes:

The criminal law copes badly when harm amounting to a criminal act takes place as a result of the collective actions or omissions of a group of individuals or of an organisation, especially where the blame for their occurrence is widely diffused among a body of actors.<sup>66</sup>

The experience of most jurisdictions has been that the requirements of inchoate and secondary liability frequently frustrate prosecutions of persons involved in organised crime. Many directors, members, associates, and other supporters of criminal organisations cannot be held criminally responsible for their role or activities within parameters of traditional concepts of criminal liability. Accordingly, the organised crime offences are designed to extend criminal responsibility beyond the usual boundaries.

This extension is also the principal point of contention. Edward Wise finds that:

In all countries, even in those that do not formally accept the concept, there has been similar internal debate about the desirability and the contours of a crime based on membership in a criminal association. Concern has been expressed about the compatibility of such a crime with [...] traditional principles of criminal law which are supposed to require focusing attention on the concrete specific act of a specific individual at a specific moment in time and on that individual’s own personal guilt, not on that of his associates. [...] Every system of law has had to grapple with the problem of defining the appropriate limits to doing so which derive from a common fund of basic ideas about what is entailed in designating conduct as criminal — the requirements of an act, of harm, of personal individual culpability.<sup>67</sup>

The common feature of the proposed offences is the fact that they step outside the usual paradigm of criminal responsibility. This enables the criminalisation of persons more distantly connected to a criminal offence. The proposed offences extend the spectrum of criminal liability in two ways:

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<sup>63</sup> Estelle Baker, ‘The legal regulation of transnational organised crime’, in Adam Edward & Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (2003) 183 at 188.

<sup>64</sup> See further Bassiouni, ‘Organized Crime and Terrorist Criminal Activities’, at 11; McClean, *Transnational Organized Crime*, 41; Hill, *The Japanese Mafia*, 149.

<sup>65</sup> Article 2(a) *Convention against Transnational Organised Crime*; see further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 44–49, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>66</sup> Estelle Baker, ‘The legal regulation of transnational organised crime’, in Adam Edward & Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (2003) 183 at 185.

<sup>67</sup> Edward Wise, ‘RICO and its Analogues’ (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 321.

- First, they can attach criminal responsibility to events that occur well before the preparation (and sometimes before the planning) of specific individual offences.
- Second, they can create liability for participants that are more remotely connected to individual offences than those persons currently liable under existing models of secondary liability.

In essence, these extensions are achieved by reducing the requirements that relate to the physical involvement in a criminal offence. For the most parts, the proposed offences (with the exception of s 390.5) do not require proof of any actual criminal activity. Liability arises on the basis of loose associations and intentions, rather than on the basis of proven physical results or harmful conduct. These offences, notes Frank Verbruggen,

break with the classical theory that states should not intervene in human relations with a blunt instrument like criminal law unless damage has been done to a specific “legally proscribed interest”, “a common good” like property, sexual integrity or life and limb. [...] The Convention [against Transnational Organised Crime] confirms unambiguously that those classical theories no longer apply. [...] Instead, criminal law becomes a tool to prevent the damage from ever happening, by making endangerment the threshold for intervention and sanctioning.<sup>68</sup>

Concerns over exceeding the limits of criminal liability are probably most justified in relation to proposed s 390.3 *Criminal Code* (Cth). The design of this offence is rather poor as it risks creating guilt by association without requiring some type or degree of involvement an accused has in the criminal organisation. An offences based on mere association with ‘a second person’ does not articulate clear boundaries of criminal liability and does not conclusively answer the question as to how remotely a person can be connected to a criminal group and still be liable for participation. Neither the offence description nor the legislative material conclusively explains where association begins and ends. Moreover, nothing in the Bill suggests that it is not possible to charge a person with attempted association, thus creating liability for acts even further removed from any actual criminal activity, any actual harm, or any potential social danger. ‘This “remoteness of social danger”’, notes Timothy Mullins,

can undermine the justification for criminal liability to apply. Dawkins specifically regards attempts to aid as too remote to warrant a criminal sanction. [...] In a properly minimalist system of criminal law, conduct that is too remote from social harm should not be criminalised.<sup>69</sup>

It is instead more sensible to differentiate the various roles and duties a person may occupy in a criminal organisation and also recognise any special knowledge or intention that person may have — as has been done in proposed ss 390.4–390.6 *Criminal Code* (Cth). These provisions provide specific offences which criminalise selected key functions within the organisation. Simultaneously, they exclude from liability those types of associations that are seen as too rudimentary to warrant criminalisation. By avoiding the use of broad and uncertain terms, these offences may also escape criticism of vagueness and overbreadth and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges.

These offences may also serve as a model to criminalise other situations and other types of conduct usually connected with organised crime. It is, for example, conceivable to create new offences such as ‘trafficking in persons on behalf of a criminal organisation’, ‘money laundering for the benefit of a criminal organisation’, ‘operating an illegal brothel in association with a criminal organisation’, and the like. These provisions operate within the

<sup>68</sup> Frank Verbruggen, ‘On Containing Organised Crime Using “Container Offences”’, in HJ Albrecht & C Fijnaut (eds), *The Containment of Transnational Organised Crime* (2002) 113 at 130 [emphasis added].

<sup>69</sup> Timothy Mullins, ‘Broader Liability for Gang Accomplices: Participating in a Criminal Gang’ (1996-99) 8 *Auckland University Law Review* 832 at 852.



established boundaries of criminal liability. They connect recognised criminal offences with added elements that reflect the connection with a criminal organisation. The higher penalties recognise the nature and dangers associated with organised crime and may deter some persons from committing offences on behalf of a criminal organisation. Michael Moon, also supportive of this approach, notes that

the fundamental prerequisite of an enterprise crime prosecution is the commission of certain, clearly specified predicate acts, each of which carries its own mental and act requirements. [These offences] do not allow for a conviction based on an individual's thought or character alone. The proposed legislation does not punish merely because one has a criminal character: it punishes because one has a criminal character and has committed crimes.<sup>70</sup>

#### 4.4 Enforcement

The enforcement of the offences discussed in this study can potentially be extremely expensive. The implementation of the offences creates new and large pools of offenders, especially if the offences apply to low ranking members and loose associates of criminal organisations. Some police agencies may not have the capacity to thoroughly investigate and arrest the great number of people that have some affiliation with criminal organisations. The criminal justice and prison systems are also ill-equipped to efficiently deal with hundreds or thousands of new defendants. 'Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?' asks Peter Hill.<sup>71</sup>

The complexity of investigations, prosecutions, and trials under the organised crime laws further adds to the costs. Police investigations and the preparation of prosecutions of organised crime are usually very extensive, lengthy, and often extremely expensive. Trials are generally long and complicated, especially if multiple defendants are involved. The costs and difficulties of mega-trials have also been highlighted elsewhere.<sup>72</sup>

#### 4.5 International cooperation

The effectiveness of the proposed offences is further limited by the diversity and discrepancy of approaches to organised crime around Australia and across the world. While the *Convention against Transnational Organised Crime* seeks to harmonise and standardise organised crime offences around the world, few countries have adopted provisions that are compatible with the international model and some jurisdictions fail or refuse to adopt the Convention altogether.

Furthermore, there is no regional or international forum to coordinate anti-organised crime policies, legislation, and their enforcement. Jennifer Smith also notes that because the *Palermo Convention* lacks any measure to guarantee that parties fully implement its provisions or penalise violations, parties may disregard their obligations without repercussions from other parties or from an international body.<sup>73</sup> The United Nations and, in particular, the UN Office on Drugs and Crime (UNODC) in Vienna, and its Regional Centre for East Asia and the Pacific in Bangkok, are chief advocates for the *Palermo Convention*

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<sup>70</sup> Michael A Moon, 'Outlawing the Outlaws: Importing R.I.C.O.'s Notion of "Criminal Enterprise" into Canada to Combat Organized Crime' (1999) 24 *Queen's Law Journal* 451 at 499.

<sup>71</sup> Peter Hill, *The Japanese Mafia* (2003) 174.

<sup>72</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 77–80, 238–241, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>73</sup> Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1119.

and assist countries in the implementation of the Convention and its three supplementing Protocols. But UNODC has no power to compel countries to adhere to the principles of international criminal law. The organisation is also not equipped to assist countries in the day-to-day prevention and suppression of organised crime and the practical bilateral and multilateral cooperation needed to investigate and prosecute individual cases. The Interpol organisation in Lyon, France and its databases have some role to play in this context, but Interpol also has no authority to compel individual countries and their agencies to adhere to international best practice.

## 5. Concluding Remarks

The offences proposed in the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth) do not address the causes of organised crime and it is difficult to say with certainty that organised crime will be reduced even if law enforcement and prosecutions are swift and penalties harsh. It is more likely that any success in arrests and convictions may be offset by other suspects and organisations going deeper underground. This may also reduce any chance of cooperation between gang members and police and make the infiltration of these groups and the use of informants considerably harder.

It is, however, too short-sighted and simplistic to view the proposed offences as the ultimate weapon and expect immediate solutions to a phenomenon that has emerged in diverse places and circumstances, and that has reached global dimensions. It would be naïve to expect that the introduction of these offences will immediately cause criminal organisations to ‘drive apart’ and ‘make it impossible for them to continue as a group’ so that the ‘gangs will simmer out’.<sup>74</sup> The uptake of these offences will naturally be very slow as police and prosecutors are cautious when using new laws as they do not want to jeopardise their cases. This has been the experience in the United States, where the first significant cases went before the courts ten years after the introduction of the *RICO Act*.<sup>75</sup> The experiences in Canada and New Zealand have been similar.<sup>76</sup>

There is also the question about how success of the proposed offences can be measured in the future. Interdictions, seizures, and forfeitures are not tangible proof of progress as they may equally be (1) the result of increased law enforcement activity or (2) the consequence of greater levels of organised crime. Furthermore, the relationship, if any, between high level convictions and community safety has yet to be established empirically.

The proposed offences are, at best, a new tool to prevent and suppress organised crime in innovative ways. They seek to criminalise persons that have thus far been immune from prosecutions despite the persons’ intimate involvement in very serious offences. The proposed legislation has the purpose, if not the duty, to enable the prosecution of organised crime in new and meaningful ways. If applied carefully the proposed offences can create an avenue to hold key directors, managers, and financiers of criminal organisations responsible. After almost a century of failed investigations and frustrated prosecutions, these laws constitute an opportunity to bring the Al Capones, Pablo Escobars, and Nicolo Rizzutos of

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<sup>74</sup> NSW Premier M Rees cited in Lisa Carty, ‘No second chances as NSW gets tough for bikies on gangs’ (30 Mar 2009) *Sydney Morning Herald*, see further Section 6.2.2 above.

<sup>75</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 238–241, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

<sup>76</sup> See further Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 77–80, 89–90, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).

the world to justice.<sup>77</sup> This, in turn, may destroy the larger criminal enterprises these leaders control.

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<sup>77</sup> See Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (2009) 34–36, available at [www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html](http://www.unodc.org/eastasiaandpacific/en/2009/08/Palermo/story.html) (accessed 6 Oct 2009).