

# Chapter 3

## Existing legislative approaches to combating organised crime in Australia<sup>1</sup>

### Introduction

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

### Types of legislation

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

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

3.3 During the inquiry, it became apparent that there are numerous other laws as well as administrative and policy arrangements which affect the ability of law enforcement to effectively respond to serious and organised crime. For example cooperation and information sharing arrangements between governments and police forces, and anti-corruption measures, both have a very strong influence on the success of attempts to combat organised crime. A summary of legislation in each Australian jurisdiction which contributes to the ability of law enforcement to combat serious and organised crime is set out in the table in Appendix 5.<sup>2</sup>

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

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

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

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

## **Commonwealth**

### *Constitutional powers*

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

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

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

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

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

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

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

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

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

3.10 Similarly, the ACC said:

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

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

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

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

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

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

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

### ***United Nations Convention against Transnational Organised Crime***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### ***Criminal laws***

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

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

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

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

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

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

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

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

offence,<sup>14</sup> that it is an offence to incite another person to commit an offence<sup>15</sup> and provides for the separate offence of conspiracy.<sup>16</sup>

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

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

### ***Proceeds of crime laws***

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

### ***Commonwealth law enforcement and intelligence agencies***

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

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

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

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14 *Criminal Code Act 1995*, section 11.2.

15 *Criminal Code Act 1995*, section 11.4.

16 *Criminal Code Act 1995*, section 11.5.

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need for significant reform to the legislative suite of powers available to the ACC.<sup>17</sup>

3.27 The Law Council of Australia agrees:

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

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

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

## New South Wales

### *Criminal laws*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Proceeds of crime laws*

3.39 NSW has proceeds of crime legislation<sup>30</sup> which is similar to the Commonwealth Act. The NSW Police told the committee that:

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

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

### *Investigative powers*

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

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

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

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

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

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

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

serious offences that are referred to it. The NSW Crime Commission has coercive questioning powers, which it has had since its inception in 1986.<sup>33</sup>

3.43 NSW also has laws permitting the use by law enforcement of search warrants,<sup>34</sup> telecommunications interception, controlled operations,<sup>35</sup> assumed identities and witness identity protection<sup>36</sup> and surveillance devices.<sup>37</sup>

## Victoria

### *Proceeds of crime laws*

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

### *Investigative powers*

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

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

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

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

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

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

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

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

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

37 *Surveillance Devices Act 2007* (NSW).

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

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

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

3.50 The applicant then applies to the Court for a witness summons, which requires a witness to attend an examination to give evidence or produce documents.<sup>41</sup> Examinations are conducted by examiners who are appointed by the Governor General, similarly to the ACC. Examiners are not bound by the rules of evidence and can conduct enquiries in any way they see fit. The privilege against self-incrimination does not apply, but there are restrictions on the use that can be made of evidence. Witnesses are entitled to representation<sup>42</sup> and Legal Professional Privilege applies. The Chief Examiner is also empowered to issue a witness summons on his or her own motion. It is an offence for a witness to fail to attend an examination, fail to produce documents or refuse to answer a question.

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

## Queensland

### *Proceeds of Crime laws*

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

### *Investigative powers*

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

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

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

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

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

43 *Surveillance Devices Act 1999 (Vic)*

with misconduct and integrity issues within the public sector. The CMC has the power to use and authorise the use of assumed identities,<sup>44</sup> search and seize,<sup>45</sup> use surveillance devices<sup>46</sup> and conduct controlled operations.<sup>47</sup> The CMC also has coercive investigative powers.<sup>48</sup>

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

## **Western Australia**

### ***Proceeds of crime laws***

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

### ***Investigative powers***

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

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

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

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

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

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

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

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

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

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

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

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

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

## South Australia

### *Criminal laws*

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

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

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

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

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

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

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

### *Proceeds of crime laws*

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

### *Investigative powers*

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

3.66 South Australian Police also have the power to intercept telecommunications and use surveillance devices<sup>55</sup> and conduct controlled operations.<sup>56</sup>

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

## **Tasmania**

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

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

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

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

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

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

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

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

### ***Proceeds of crime laws***

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

### ***Investigative powers***

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

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

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

## **Australian Capital Territory**

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

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

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

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

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

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

## **Northern Territory**

### ***Criminal laws***

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

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

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

### ***Proceeds of crime laws***

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

### ***Investigative powers***

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

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

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

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

66 *Surveillance Devices Act 2007* (NT).

67 *Police Administration Act* (NT).

## **Conclusion**

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

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

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