Crime and Corruption Commission
QUEENSLAND

November 2015

Review of the Criminal Organisation Act 2009

Submission by the
Crime and Corruption Commission

IN-CONFIDENCE

Introduction

This submission is provided in response to a call for submissions as part of the statutorily mandated review of the *Criminal Organisations Act 2009* ("the Act"), being undertaken by a Taskforce led by the Honourable Alan Wilson SC, that is due to report to the Attorney-General by 15 December 2015.

The CCC position, stated shortly, is that the Act has been eclipsed by subsequent legislative developments, which may be better adapted to addressing the threat of criminal organisations in Queensland. The CCC submits that the significant resources which are required to bring proceedings under the Act would be better directed to detecting, investigating and prosecuting organised crime.

The CCC's involvement with the Act

The CCC has had limited interaction with this Act. An application was brought in 2012 on behalf of the Commissioner of Police. As the Taskforce would be well aware, this application involved an enormous volume of material that was tendered. Some 155 affidavits were tendered in the proceedings.

The then CMC, through its Manager, Intelligence, provided one of these affidavits. This affidavit included information regarding the CMC's intelligence holdings regarding the Finks OMCG, as was relevant to the application.

Otherwise the CCC has had no involvement in the administration of the Act.

As the Taskforce is aware, amendments to the *Crime and Corruption Act 2001* in 2013 gave the CCC power to undertake coercive hearings in support of its intelligence function. No doubt any future applications under the Act may seek to utilise information gathered through these intelligence hearings. Any release of CCC intelligence hearings-derived information would be subject to ss57, 60, 62, and 202 of the Act. Any reception of this information by the Court would be subject to rules of admissibility.

In that context, a question may arise as to whether such compulsorily acquired information could be used in a proceeding under the Act. It is not clear whether evidence compulsorily obtained from a member of an organisation in respect of which a declaration was sought could properly be used against him, when the consequences of a declaration may include a substantial curtailment of that person's own rights, liberties and freedoms.

Operation of the legislation

The first observation that should be made about the legislation is that only one application has been brought since its inception in 2009, and that application was discontinued before judgment was delivered.[1]

As the Taskforce is no doubt aware, *Pompano* was an application to have the Finks Gold Coast chapter declared a criminal organisation. After proceedings were commenced the matter was removed to the High Court for consideration of whether aspects of the legislation were constitutionally invalid. The High Court upheld the constitutionality of the provisions of the Act, delivering judgment on March 14, 2013.[2] The matter was then returned to the Supreme Court for consideration of the substantive proceedings.

The matter was listed for a four-week trial in the Supreme Court, to commence on 18 November 2013. Before the commencement of the trial, three important events occurred. The first was the 'Broadbeach riot' – a brawl involving OMCG members on 27 September 2013. The second was that the Finks 'patched over' to the Mongols

1 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd & another* (BS4872/12)

2 *Assistant Commissioner Condon v Pompano Pty Ltd & another* (2013) 252 CLR 38

on about 8 October 2013. The third was that the Government introduced (on 17 October 2013) a number of legislative changes aimed at tackling particularly OMCG activity ('the 2013 amendments').

As mentioned above, the application was discontinued before the matter went to trial.

The application relied on an enormous amount of material. As mentioned previously, more than 150 affidavits were tendered in the proceedings. A large number of these were declared 'criminal intelligence' by the procedure provided for in the Act.

It is trite to observe that the material put forward in those proceedings would represent an enormous amount of work, and a significant allocation of resources. That is not, of itself, undesirable. A court charged with responsibility for making orders that can have significant impacts on the lives of many people should do so on substantial and credible evidence. However, given that the application appears to have been defeated (or at least, seriously impaired) by a change in the name of the organisation (and little else) a question must arise as to the efficacy of the regime.

Moreover, the dearth of applications (let alone successful applications) under this scheme reflects the unwieldy and impractical nature of the scheme.

Subsequent developments

As observed above, subsequent legislative developments seem now to have overtaken the regime under the Act. As the Taskforce is aware, by reason of the 2013 amendments, the Attorney-General was given the power to recommend a declaration of his or her own motion.[3]

The validity of, and limitations on, this provision were matters considered by the High Court in *Kuczborski*,[4] but not ultimately decided. It was acknowledged that a narrow and a wide interpretation of the power conferred by section 708A were available. The obiter in *Kuczborski* implies that the narrower view of the declaration power, at least, would be relatively unimpeachable.

The fact of a declaration of a criminal organisation is not something which dictates that certain action must be taken by the Supreme Court consequent upon the declaration having been made. In this regard the scheme was distinguishable from that successfully challenged in *Totani*.[5] The High Court held in *Pompano* that a declaration of a group as a criminal organisation "creates a factum, which has consequences provided by law".[6]

There is no equivalent provision for the making of, for example, control orders, to regulate the actions of members of criminal organisations under the regulations as under the Act. As the capacity to declare an entity by regulation is a purely executive decision the reasons for this may be obvious.

However, as was made clear in *Kuczborksi*, certain limitations on the actions of classes of persons may flow from a declaration, and this is (within limits) constitutionally permissible.

If it is considered necessary or desirable to disrupt the activities of organisations engaged in criminal activity by restricting their actions (and potentially by attaching aggravated consequences for proven crimes) then the declaration mechanism is clearly more efficient.

Rationale for declaring criminal organisations

The objects of the Act are set out in section 3. They are to "disrupt and restrict" the activities of organisations involved in serious criminal activities, their members and associates.

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3 Section 708A *Criminal Code*

4 *Kuczborski v Queensland* [2014] HCA 46

5 *South Australia v Totani* [2010] HCA 39

6 *Kuckzborski* per French CJ at [40]

Disruption of organised crime groups, and restriction on the activities of members of those groups, are indisputably worthwhile purposes. Against that, detection, investigation and prosecution of organised are more crucial tasks for law enforcement.

A difficulty with this legislation is that it is really only apt to target high-profile, public, structured criminal organisations. The most obvious example in a Queensland context is OMCGs. These are organisations that have distinct 'branding', formal membership processes, and clear identification of participants. The appellation "organisation" is applied easily to such groups. The *Organised Crime Commission of Inquiry Report* records that in the 21 months from the 'crackdown' on bikies to the handing down of the report, OMCG members represented only 0.52 per cent of the persons charged with criminal offences throughout Queensland (of course, OMCG members represent less than 0.05% of the population, so the representation of OMCG members charged with criminal offences is disproportionately high). Nevertheless, such groups represent the public face of organised crime.

Steps must be taken, and be seen to be taken, to curb the threat posed by groups with a recognisable public profile. Public confidence is shaken when a government appears impotent to control the threat posed by overt criminal groups. The spectacle of the Sergeant-At-Arms of the Bandidos declaring on the front page of the *Gold Coast Bulletin* that "We run this town" does much to undermine confidence in law enforcement. And such organised crime groups thrive on promoting a culture of fear which deters complaints from victims, and allows them to exert dominance in criminal markets.

Declaring a group which undertakes serious crime to be a 'criminal organisation', with concomitant restrictions on the liberties of those who align themselves with such groups, is one means by which this can be achieved. But it can only represent a relatively small part of the law enforcement response to organised crime, whose primary focus must be on detection, investigation and prosecution of offenders.

It is other criminal groups which are not so overt in their branding where the declaration regime (whether by regulation or under the Act) is not so easy to apply. Given the relatively small number of persons to which the Act may usefully be applied, a question must arise as to whether the resources required to support applications under the Act are justified.

In such circumstances, the capacity for a declaration of a criminal group by regulation is certainly a more efficient way of addressing this problem. The consequences which attach to a declaration are relatively slight, unless a participant commits an offence.

Other options

If the scheme available under the Act is to be discontinued, there may still be useful mechanisms available to target organised crime.

The Taskforce is presently charged with responsibility for identifying elements, evidentiary provisions and defences for a new 'serious organised crime' offence. The CCC has previously made submissions regarding this Inquiry area.

The CCC notes that in 2011, when amendments were being debated to the Act to address matters raised in the *Totani* and *Wainohu* challenges, the Bar Association and Law Society made a joint submission to the PCMC, which was considering the amendments. That submission observed (in principle objecting to the entirety of the Act) that, as an alternative, consideration should be given to introducing legislation modelled on the United States' RICO laws. It was submitted that the RICO regime was 'tough but fair'. It was submitted that the regime was preferable as it maintained the process of trial and proof, but still empowered police to deal effectively with organised crime groups.

The proposed 'serious organised crime' offence, one would hope, should act as a serious deterrent to organised crime. Deterrence is, of course, most effective where there are successful prosecutions of offenders, which make clear that such conduct is likely to be detected, and prosecutions are likely to succeed. This is best

achieved with properly resourced law enforcement, whose resources are not diverted to legislative mechanisms with limited scope and potential benefit.

Conclusion

For the reasons stated above, the CCC respectfully submits that the continued operation of the Act would not serve the public interest.

Crime and Corruption Commission
QUEENSLAND

Crime and Corruption Commission
GPO Box 3123, Brisbane QLD 4001

Level 2, North Tower Green Square
515 St Pauls Terrace,
Fortitude Valley QLD 4006

Phone: 07 3360 6060
(toll-free outside Brisbane: 1800 061 611)
Fax: 07 3360 6333
Email: mailbox@ccc.qld.gov.au

www.ccc.qld.gov.au

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