

Countering the Australian 'ndrangheta.

The criminalisation of mafia behaviour in Australia between national and comparative criminal law

A final version of this paper is published as:

Sergi, A. (2016) "Countering the Australian 'ndrangheta. The criminalisation of mafia behaviour in Australia between national and comparative criminal law", *Australian & New Zealand Journal of Criminology*, Online First, doi: 10.1177/0004865816652367

Abstract

Mafia-type criminal groups belonging to, or originated from, the Calabrian 'ndrangheta from Southern Italy, have been object of recent academic research and media attention in Australia. The Australian 'ndrangheta, as qualified form of organised crime, poses new challenges for law enforcement in the country. This paper briefly looks at the strategies to fight organised crime in Australia, with specific focus on anti-association laws. By using a comparative approach, the paper will look at the criminalisation of mafias as qualified forms of organised crime in other two jurisdictions, Italy and the USA, to advocate for an effective mafia criminalisation in Australia. In conclusion this paper will argue that, in order to also fight mafia phenomena, criminal law in Australia should focus on *behaviours* of organised crime groups rather than only on the criminalisation of proscribed associations and their illegal activities.

Introduction

In recent years, both academic research (Sergi, 2012; Sergi, 2013; Sergi, 2015a; Spagnolo, 2010; Bennetts, 2016a) and media (McKenzie and Baker, 2009; Branley, 2015; McKenzie et al., 2015) have looked with concern at the apparent growth of influence and power of mafia groups, of Italian origins, in certain areas of Australia. The groups in question are clans belonging to – or modelled upon - the 'ndrangheta - a mafia-type criminal organisation from the toe of the Italian peninsula, in the region of Calabria. Thanks to an established migration from the Calabrian region to Australia since the early decades of the XX century, affiliates of this criminal group appear well established in Australia (Sergi, 2015a). It has been argued that the mafia-type clans collectively indicated as the 'ndrangheta (historically known as the Honoured Society), are not only "*rational criminal organisations*", but also involve "*a set of behaviours, a*

subculture, embedded in the local culture and kinship ties” (Sergi, 2015c: 43); the phenomenon, therefore, goes beyond criminal grounds and ‘organised crime’ labels and as such poses new problems to law enforcement.

This paper will firstly present a theoretical approach that sees mafia groups as both criminal organisations and “behavioural models” of deviance. Secondly, this paper will present the Calabrian ‘ndrangheta and the Australian ‘ndrangheta. The paper will then move towards an analysis of the criminalisation of organised crime in Australian jurisdictions. Afterwards, it will present responses to Italian mafias in two other jurisdictions: Italy – with its peculiar criminalisation of the Italian mafia phenomenon- and the USA - which criminalised illegal enterprises with specific references to Sicilian Cosa Nostra. This work advocates for a shift from an understanding of mafias (any mafia) as criminal organisations engaging in illegal conducts towards an understanding of mafias as “behavioural phenomena” criminal in nature, but also embedded in culture. Such a shift is beneficial also in Australia to use criminal law more effectively towards different types of organised crime groups, including ‘ndrangheta clans.

For a conceptualisation of the mafia behaviour: the Calabrian ‘ndrangheta

With the term ‘mafia’, scholars indicate a qualified form of organised crime. In addition to committing serious, violent and other “organised” criminal activities, mafia groups are also typically supported by social prestige and are accepted and/or tolerated by their own communities (Sciarrone and Storti, 2014). Certainly, mafia groups represent the prototypical criminal structure that from the illegal world steps into the legal world of politics and finance (Arlacchi, 1986; Von Lampe, 2008; Paoli, 2002). On the other side, and this is especially true for Italian criminal groups, mafia clans are also social forces, with the ability to handle social capital (Sciarrone, 2011) and realise strategic goals (Dalla Chiesa, 2010).

The conceptualisation of mafias is constantly evolving. Also in Italy, the current debate on the legal definition of mafias embraces contemporary manifestations of mafia power in other territories, far from Southern Italy (Dalla Chiesa, 2015; Sciarrone, 2014). We can identify three main aspects for a contemporary conceptualisation of mafias, particularly relevant also to the Australian scenario. Crucially, mafia groups, which exhibit these traits, do not necessarily have to be Italian. Arguably, any criminal group anywhere in the world can *behave* as a mafia group within this framework; culture, including criminal culture, does not have to be linked to ethnic traits (Christopher et al., 2014).

1. Mafias are considered as unlawful associations having their own criminal identity. Through this identity they seek to acquire power infiltrating the legal world.
2. The identity of mafias is based upon the *reputation* of clans and affiliates, which is based on the effective or potential use of intimidation and violence, the ability to engage with political and financial elites and the ability to effectively participate in criminal markets. Reputation is built and maintained through the exploitation of a *set of behaviours* of the culture of origin.
3. The more the clans enjoy the reputation of their '*brand*', the more the brand generates intimidation. By relying on the power of their brand, clans can establish themselves as "reliable" criminal players while at the same time instilling fear and *omertà* in the communities they live in.

The origins and the 'ndrangheta are lost in time in the history of Calabria, one of the poorest Italian regions. Today, the term 'ndrangheta has two meanings. The first meaning refers to the criminal organisation in the southern part of Calabria, in the province of Reggio Calabria. This criminal organisation has a unitary structure reinforced through both coordination mechanisms among family clans ('*ndrine*) and rankings of their members, as indicated by Operation Crimine in 2010¹. The extent to which this criminal organisation bases its power and influence upon the control of the territory in Calabria, both from a political and from a financial point of view, is the essence, the core and the strength of the group (Sciarrone, 2011; Forgione, 2008).

The second meaning is more nuanced and refers to a "way of being" of clans across all Calabria, including those that are not included within the structure of the families of Reggio Calabria as described by Operation Crimine. What all clans share across the region is the structure of their basic unit, based on family lines and surnames rather than territories (Pignatone and Prestipino, 2013). They also all support their criminal activities through an exploitation of Calabria's shared cultural *mores* "*through the use of usurpation, arrogance, intimidation, violence, and subjection, while engaging in illegal activities for profit*" (Sergi, 2016a). In this second meaning, therefore, the word 'ndrangheta indicates the mafia *behaviour* from Calabria (also called '*ndranghetism*). For example, in Calabrian dialect, the verb '*ndranghitijàri* means to adopt a cocky behaviour, typical of a mafia affiliate. This is very similar to the process through which the word "mafia" came to indicate a set of behaviours of criminal groups in Sicily (Santino, 1995; Hess and Osers, 1998), which also led to the interpretation of Sicilian Cosa Nostra as a subculture. Differently from purely cultural approaches, however, we want to stress how not only the two meanings of the word 'ndrangheta go together, but certainly the

¹ Operation Crimine, No. 1389/08 R.G.R.N DDA, No. 3655/11 R.G. GIP/GUP, No. 106/12 Sentenza

spread and evolution of any mafia phenomenon also largely depends on structural failures and weaknesses of capitalist societies (Mattina, 2011; Varese, 2011).

Finally, global attention to the 'ndrangheta today (Caneppele and Sarno, 2013; Calderoni et al., 2015) has indeed consolidated what has been called a '*ndranghetisation* process (Sergi and Lavorgna, 2016; Sergi, 2016a). The presence of 'ndrangheta clans today has been ascertained and denounced in the North of Italy, in European countries as well as in the USA, Latin America and Canada (Calderoni et al., 2015; Sciarrone and Storti, 2014; Sergi and Lavorgna, 2016). The '*ndranghetisation* process is a process of convergence of behaviours observed for criminal groups that are either Calabrian or work with Calabrian associates. Outside of Calabria criminal groups with a Calabrian connection can benefit from the growing reputation of the 'ndrangheta (as a brand, as a label) in the oligopolistic control over the cocaine trade in Europe (DNA, 2015). This can be seen also Australia, where criminals of Calabrian origin can today rekindle new and old links with Calabrian '*ndrine* thanks to their blood ties with Calabrian migrants already in the country.

The Australian 'ndrangheta

According to the Italian National Antimafia Directorate (DNA, 2011), 'ndrangheta clans engage in two models of internationalisation: one is the *colonisation* model where the clans replicate their structure abroad. This is the case of Germany, where there is an established *settlement* of 'ndrangheta clans (Sciarrone and Storti, 2014), but also the case of Canada and Australia (Sergi, 2015a). These countries have historically received Calabrian migrants and today have *locali* (consortia) of '*ndrine* that systematically arrange criminal activities across the borders. The other model of internationalisation is the *delocalisation* model seen in countries where the Calabrian clans operate indirectly, through brokers (DNA, 2012; Sergi and Lavorgna, 2016). In countries like Bolivia, Peru' and some European states, such as Belgium or the Netherlands, 'ndrangheta brokers become partners in crime of more established local criminal groups.

On one side it can be argued that "*migration from territories of origin where there is a high proportion of mafiosi appears to carry the greatest threat of mafia transplantation*" (Varese, 2011: 16). On the other side, it can also be noted that "*the phenomenon of mafia colonisation*" so directly dependent on migration, "*is peculiar of the 'ndrangheta only, among the Italian mafias, because, even Sicilian Cosa Nostra did not operate at the same level of awareness when establishing its markets outside Italy*" (DNA, 2012: 108). As noticed by scholars (Sciarrone and Storti, 2014; Sciarrone, 2014; Lavorgna and Sergi, 2014), the conditions of today's mafia movements are certainly

much more complex than the two models described by the Antimafia. For example, mafia expansion can be conceptualised further as imitation (of clans from Calabria), infiltration (in the economy of arrival/destination), settlement (in the communities of arrival) and hybridisation (through mixture with local criminal groups), where settlement and hybridisation are more accentuated and advanced forms of penetration in new territories.

The extent of the presence of the ‘ndrangheta in Australia has been only recently object of scholarly research in English (Sergi, 2015a) but certainly has reached the wider public (not for the first time) in early July 2015 after an ABC Four Corners/Fairfax Media production (McKenzie et al., 2015) and since then remained in the news (Bucci et al., 2016; Mills, 2016). It appears that members of ‘ndrangheta clans in Australia can influence criminal markets, exercise violence, actual or threatened, but can also manipulate cultural codes of origin and their ethnic bonds to establish mutual exchanges in political and economic circles. However, the ‘ndrangheta is not a new phenomenon in Australia as maintained by some historical and journalistic works (Small and Gilling, 2016).

In Australia, the existence of mafia groups has been suspected and investigated for decades, while Italian authorities have often called for a more incisive partnership with Australia (Macri and Ciconte, 2009). As said, with Operation Crimine in 2010, the District Antimafia prosecutors in Reggio Calabria have been able to confirm the existence of unitary coordination structures of the ‘ndrangheta clans in the area around Reggio Calabria. The same operation has also confirmed the settlement of these clans in Australia, Canada, Germany and Switzerland (Caneppele and Sarno, 2013; Sergi, 2016a). Nevertheless, the phenomenon has been largely underestimated in Australia, most likely because too difficult to fit within the accepted rhetoric of organised crime strategies and criminal policies in the country (Bennetts, 2016b). This does not surprise when looking at the difficulties many countries encounter today when dealing with mafia mobility (Campana, 2013; Morselli et al., 2011). As noticed (Morselli et al., 2011: 185) “*the principal mistake that any policymaker or law-enforcement agent could do is to ignore a serious problem for an extended period*”. Arguably, next to legal challenges, the ignorance of serious problems for an extended period of time is often linked to the *perception* of the mafia phenomenon abroad (Allum, 2013; Sarno, 2014; Neubacher, 2013). In other words, on one side there is still a perpetuation of the ‘mafia myth’: Italian mafias are still perceived as foreign, ethnic-centred phenomena, in between stereotyped images of the Godfather and of Italian migrants. At the same time, however, there is a tendency to dismiss the mafia myth as a popular and mediatic representation of organised crime, not applicable to the majority of countries today. In Australia, despite the media and popular attention to mafias, including the ‘ndrangheta, “*data suggests that organised crime groups have developed a criminal network structure (i.e., highly flexible and mo-*

bile groups of known associates) and that shared ethnicity has become less of a barrier in creating criminal alliances” (Leiva and Bright, 2015: 2). Leiva and Bright (2015) have demonstrated through a media analysis how the mafia myth in Australia still intrigues, in a journalistic sense, but remains anchored in popular perceptions and not into policy-making.

From a policing perspective, the Australian authorities have detected the presence of the Calabrian mafia in the country in many occasions. First and foremost, in drugs operations, like the one that led to the seizure of 4.4 tonnes of MDMA in Melbourne in 2008. This was not an isolated business. Italian authorities had already been able to investigate drug trafficking networks operating across the globe, between Calabria and Australia, transiting African countries and/or North America (mainly Canada) and using the ports in Adelaide and in Melbourne (Sergi, 2012). Furthermore, the involvement of mafia families in cannabis plantations in New South Wales in the 1970s-1980s (Small and Gilling, 2016; Forgione, 2008; Macri and Ciconte, 2009) has been public knowledge for a while. What is probably less known is that Australian federal authorities have been carrying out thorough assessments and evaluations of mafia families with Calabrian connections since the 1960s. In a file in the National Archives in Canberra we find a report from J. Cusack, seconded from the FBI to investigate a series of murders in Melbourne in 1964. This report is particularly interesting as it shows a very deep understanding of the phenomenon of the ‘ndrangheta when even Italy did not understand it properly (Paoli, 1994). Indeed, Australians have known about the ‘ndrangheta decades before Italy properly tackled the phenomenon at regional and national levels. According to Cusack²:

“The Calabrian L’Onorata Società is well entrenched in Australia [...] Within the next twenty-five years if unchecked, the Society is capable of diversification into all facets of organised crime and legitimate business. This could very well include narcotics [...]. Their large cash resources and strong-arm tactics will eventually enable them to develop monopolies and large profit in [...] labour racketeering [...] distribution of Italian food, [...] monopolistic ownership of night clubs, building and road construction companies”.

In Australia - and only in Australia as far as we know - the mafia conceptualisation, in popular perspectives as well as in institutional ones, has always been linked to the ‘ndrangheta and the Calabrian community exclusively. Certainly, there have been a number of resonant cases, especially murders, that have involved Calabrian criminals in Australia and have more than once questioned the influence of criminal groups of Calabrian origin in the country. Some of these cases have never actually proved the involvement of any ‘ndrangheta member, but the police have raised doubts in connections

² Italian Criminal Society – complicity in the distribution of forged currency, National Archives, A432, Barcode 3190972, page 23

to Calabrian clans in all of these cases. These include, for example, the murder of Donald MacKay, member of the Liberal Party, killed in 1977 in Griffith, because of its harsh campaign against drug productions (Spagnolo, 2010). Also, there was the murder of Colin Winchester, Deputy Chief of the Australian Federal Police, killed in 1989 in Canberra (Campbell et al., 1992), whose case has been subjected to an enquiry in 2012 reinforcing the idea of mafia involvement (Knaus, 2015), which was however never proved. In 1994 the murder of Geoffrey Bowen, National Crime Authority detective, killed in Adelaide, was object of growing public interest also because of a mafia connection (Madigan, 2013). Recently, in March 2016, a lawyer of Calabrian origin and with alleged mafia families in his client list, was shot in Melbourne; journalists have raised doubts about his cooperation with authorities against the 'ndrangheta (Bucci et al., 2016; Bachelard, 2016) in a very controversial case of the recent years (Bachelard et al., 2015; McKenzie and Baker, 2009). An inquiry in 2009, which followed yet another journalistic effort (Murphy et al., 2008; McKenzie and Baker, 2009) has found that a number of donations to the Liberal Party had been made by Calabrian crime families in Melbourne (Bennetts and Sergi, 2015). These donations were supported by members of the Calabrian community in order to prevent the expulsion of a Calabrian-born individual after his visa application had been rejected in various occasions and before he was sentenced for drug trafficking in 2014 (McKenzie et al., 2015; Sergi, 2015a).

Today, the 'ndrangheta in Australia is not just Calabrian but also Australian. According to the Italian authorities, individuals of the 'ndrangheta from the area of Reggio Calabria are in all the major Australian cities; they appear well connected among themselves, wealthy and most of all hidden and protected by ethnic solidarity (Calderoni et al., 2015; Sergi and Lavorgna, 2016; DNA, 2011). Furthermore, there have been claims of 'ndrangheta affiliates working with local criminal groups, such as Outlaw Motorcycle Gangs (OMGs), for the street distribution of drugs (Bachelard et al., 2015).

Crucially, the various manifestations of the Calabrian clans in Australia might have been favoured by the large migration fluxes from Calabria to Australia. The peculiar preservation of Calabrian values, cultural codes, rituals and traditions in certain parts of Australia - notwithstanding generational evolution (Marino and Chiro, 2014) - has dissimulated the growth of mafia families within the Calabrian community. The exploitation of shared cultural codes is typical of mafia behaviour. This also makes the relationship between Calabrian criminals and the Calabrian communities very problematic (Bennetts, 2016a) and difficult to understand outside the Calabrian community. While it is necessary to understand that blood and family ties are the cement of the clans as they guarantee trust, longevity, resilience and endurance of the group, ethnic stereotypes must be avoided.

The Australian ‘ndrangheta is an unusual type of organised crime phenomenon compared to what Australia is used to, as we will see in the next sections. As the Calabrian clans do not present themselves as “outlaw” – often not even in their manifestations, usually under the radar – anti-association laws and control orders – the most common response to organised crime in Australia – are difficult to apply. As they are not only drug traffickers, but in Australia they seem able to carry out a range of different activities including political infiltration and certainly money laundering, they are not solely a target for drugs laws. Indeed, the problem is that we do not know who ‘they’ are and how (much) they are organised in Australia. We cannot yet say for sure whether there are clans and individuals from the ‘ndrangheta in Calabria rekindling contacts with those family members that once moved to Australia or whether there are local criminal groups in Australia modelled on the Calabrian ‘ndrangheta clans. More research is indeed needed. It is likely that, in terms of mafia expansion (Sciarrone and Storti, 2014), the Australian-Calabrian clans might be today at the *hybridisation* stage after a period of *settlement*. In the 1980s the Australian Bureau of Criminal Intelligence had mapped the known family clans through family trees³³. These family clans were fully part of the Italian and Calabrian migrant communities, but are now, 30 years later, certainly Australian as well. As they shared the cultural codes of migrant communities, they have grown protected and hidden within families, exploiting the values of endogenous marriages and friendships based on similar social and cultural values – exploiting the normal life of Calabrian migrants in different parts of Australia. In addition, these criminal structures and their members have today the possibility to benefit from the increased reputation and expansion of the ‘ndrangheta clans worldwide, through the on-going process of *‘ndranghetisation*. To criminalise their *behaviours* is therefore, the challenge of today’s law enforcement in the country within and beyond the remit of the criminalisation of organised crime.

The criminalisation of organised crime in Australia

As reminded by Ayling (2014) the political arrangements of Australia - a federation consisting of nine jurisdictions, of which six states, two territories and the Commonwealth - do not facilitate institutional arrangements in the fight against organised crime, especially in terms of criminal law and procedure. In fact, the impossibility for the federal parliament to enact criminal laws promotes considerable diversity across Australian states; in this sense we can talk about different Australian systems of criminal law, albeit within a shared Model Criminal Code. The Commonwealth, however, can enact laws for customs, external affairs, and protection of the financial interests of Australia and its

³³ The Author has the files related to these family trees.

citizens. These powers - together with those of the Australian Federal Police (AFP) and the Australian Crime Commission (ACC), and the ultimate function of the High Court in the harmonisation of criminal law across states - have often resulted in the Commonwealth having a say in matters generally related to the policing of organised crimes as cross-border crimes (Bronitt, 2011).

On a preliminary note, organised crime in Australia, like in many other countries (Carrapico, 2014) is classified as a threat to national security (Australian Government, 2015), but is criminalised at the national level. Moreover, as noticed, organised crime is, in Australia, a very public matter: *“for Australian public, incidents of public violence are the most forceful reminder that organised crime exists”* (Ayling, 2014: 84). In order to fight the visible dimension of organised crime, policies against organised crime have been developing around key targets emerging from criminal trends; crucially, from the assessment of *trends* in criminal markets intelligence agencies can identify different threats, organised in clusters (such as “different illicit markets” or “key emerging threats”) (ACC, 2015).

This tendency is noticeable in the well-known deployment of legal weapons against Outlaw Motorcycle Gangs (OMGs), which have been the main focus/trend of criminal policy across jurisdictions in Australia, even when officially the emphasis was on general anti-organised crime issues (Gray, 2009; Ayling, 2011b; Ayling, 2014; Ayling, 2011a). The criminalisation of organised crime in Australia in the past years has been fundamentally enacted at the national level as it could not be otherwise, but state law in this field has been highly influenced by the Commonwealth call for securitisation (Morgan et al., 2010).

State legislations for the control of organised crime in Australia are anti-association laws punishing the membership to proscribed unlawful organisations. Anti-association laws represent the core of the legislative approach against organised crime. Versions of these laws exist today in all Australian jurisdictions, with the exceptions of Tasmania and the Australian Capital Territory. More specifically, these are: the Criminal Organisations Act 2009 (and the Criminal Law (Criminal Organisation Disruption) Amendment Act 2013) in Queensland; the Serious and Organised Crime (Control) Act 2008, for South Australia; the Crimes (Criminal Organisations Control) Act 2009 in New South Wales; the Criminal Organisations Control Act 2012 in Western Australia; the Criminal Organisations Control Act 2012 in Victoria; Serious Crime Control Act 2009 in the Northern Territory. Even though authors generally agree that the focus of these anti-associations laws are OMGs (Lauchs et al., 2015; Ayling, 2011a; Martin, 2014), *“the legislation itself almost never refers specifically to such organisations and usually applies generally to any person or group that can be shown to meet the definitions”* (NSW Parliamentary Research Service, 2013: 2).

What all anti-association laws have in common is that they are based on individual prosecutions for participation in criminal organisations, which have been previously declared unlawful because they engage in serious criminal activities. These unlawful associations and their members are afterwards placed under scrutiny via control orders. These laws have been harshly criticised on the basis that they “*penalise identity rather than behaviour*” (Ayling, 2014: 98). Other criticisms have been expressed at the judicial level. For example, the Rule of Law Institute of Australia (2014: 6) sustains that “*law reform and government should focus on ways to support the police prosecuting members of criminal organisations for criminal offences, not an offence which relies on criminalising association*”. Similarly, the High Court declared these provisions invalid in various occasions because they exceeded the powers of the courts in making a declaration about a criminal organisation without requiring appropriate reasons⁴. However, in 2013, in ‘Pampano’⁵, the High Court considered valid the provisions in the Criminal Organisation Act 2009 (Queensland) and endorsed the use of ‘secret criminal intelligence’ to declare an organisation unlawful. Notwithstanding the criticisms to this judgement (Martin, 2014), in Pampano the High Court confirms what already clear to scholars (McGarrity, 2012; Lynch et al., 2010): control orders against criminal organisations (with OMGs in mind) are of the same nature of anti-terrorism laws, they require the same steps (declaration of the organisation followed by a control order) and they can use the same type of (secret) intelligence. This essentially confirms the Commonwealth security connotation of organised crime via endorsement of state criminal law.

Together with anti-association laws and control orders, many Australian jurisdictions rely on other fortification orders, removal orders, restriction orders and consorting offences⁶ also within the common law doctrine of ‘common purpose’ and ‘complicity’. As we will see later in this paper the scope of these norms is frustrated when combined to the anti-association laws, especially but not only, for targeting mafia behaviours.

If it is true that the Australian criminalisation of organised crime follows *visible trends*, which then are targeted by criminal law, then - should the crisis linked to the Australian ‘ndrangheta clans *visibly* grow - mafia criminalisation might be an expected outcome. However, within the more general approach against organised crime as seen across Australian jurisdictions, the only way to actually criminalise mafias would be by

⁴ See for example, *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) and *South Australia v Totani* (2010) 242 CLR 1.

⁵ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 676 [133] (Hayne, Crennan, Kiefel and Bell JJ) (‘Pompano’).

⁶ See for example the *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* with insertion of section 49F in the *Summary Offences Act 1966* in Western Australia. This section provides: (1) A person must not, without reasonable excuse, habitually *consort* with a person who has been found guilty of, or who is reasonably suspected of having committed, an organised crime offence (as further defined).

adding the ‘ndrangheta to the list of proscribed criminal associations. This, however, is bound to be a very unpopular choice: first, because it would carry the risk of criminalising ethnic connotations (the Calabrian element of the ‘ndrangheta) and second, as said, because we do not actually know how *formal* is the organisational structure of the Calabrian clans in Australia. The risk would be, once again, to target (ethnic) identities and not (mafia) behaviours, which the ‘ndrangheta exhibits also in Australia. By looking at comparative examples from Italy and the USA for their responses against mafia-type groups we can initiate a discussion on the criminalisation of *behaviours* of organised crime in Australia.

Criminal Enterprises, Unlawful Associations and the Criminalisation of Mafia Behaviours in Italy and in the USA

The literature on the criminalisation of organised crime and mafias in USA and in Italy also looks at the difficulties of transferring these policies to other countries (Schloenhardt, 2010; Calderoni, 2010; Ayling, 2011a; Obokata, 2010). Certainly, experiences in Italy and in the USA (at the federal level) are relevant to the Australian discourse for various reasons. Notwithstanding the differences in legal systems, both Italy and the USA have found *ad hoc* solutions to incorporate the fight against mafia-type groups within a more general criminalisation of organised crime in line with their own legal traditions.

In the USA the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970 was designed to fight what was enemy no.1, Sicilian mafia families. However, (La) Cosa Nostra (known as LCN) was never mentioned formally in the law (Lynch, 1987; Jacobs et al., 1994). As summarised (Blakey and Goldstock, 1980: 348):

RICO states that if a person commits two of these offences he is guilty of “racketeering activity” and is therefore subject to additional penalties. The umbrella effect of the RICO statute adds the concept of “enterprise” to a criminal prosecution, requiring additional proof of a “pattern” of racketeering activity and its relationship to an “enterprise” in addition to that required to prove the individual crimes alleged.

In RICO, the criminal enterprise - especially when it is of mafia-type, as clear from the supporting papers to the Act (Lynch, 1987; Blakey, 1990) and in the Manual to Federal Prosecutors (DOJ, 2009) - multiplies the danger of a conspiracy because of the continuity of crimes committed in a *pattern*. The simple sum of different criminal activities is not as dangerous as a criminal plan formulated by a resilient criminal group over a certain period of time. The threat targeted by RICO is the *continuity* of the *pattern* of criminal activities, the resilience of the criminal plan committed by individuals in *rela-*

tionship with each other. The reference to mafia groups in this conceptualisation of organised crime(s) is clear. However, RICO would “*apply not only to La Cosa Nostra, but to any group of individuals banded together into an "association in fact" to commit any of the wide range of crimes defined as "typical of organized crime"*” (Lynch, 1987: 684). Mafia groups represent ‘associations in fact’ and, as such, they can be prosecuted and have indeed been prosecuted as (criminal) enterprises in some of the most successful applications of RICO.

Similarly to RICO, but with a more blatant national character, the Italian Anti-mafia law derives from violent attacks to the state connected to Cosa Nostra in Sicily (Nanula, 1999). A simple unlawful association offence already criminalised organised crime in Italy (article 416 Penal Code). The mafia-type unlawful association offence, which was introduced in 1982 (article 416-bis Penal Code) is meant to protect the public from criminal groups - mafia groups - that not only reject the exclusivity of state sovereignty, but also alter democratic processes and economic competition (Ardizzone, 2002). It has been argued (Fiore, 1988; Maiello and Fiandaca, 2014) that the mafia-type unlawful association law in Italy has been more a socio-anthropological response to an emergency situation than a rational legal step. While we agree that the criminalisation of the mafia phenomenon in Italy is certainly linked to Sicilian Cosa Nostra, like in RICO, the Italian offence has stretched throughout the years to include other mafia-types groups, including the ‘ndrangheta (Dalla Chiesa, 2010). Mafias, for the purposes of Penal Code (article 416-bis), manifest through the following: the existence of associative bonds that intimidate the community; the condition of subjection of both associates and non associates to the group and their ‘*omertà*’ (voluntary silence, non-cooperation with authorities); the commission of criminal activities by the group as a whole to directly or indirectly acquire control of business activities, authorisations, licences, contracts, public services or other gain or benefit; the ability to influence and/or alter political elections.

Both Italian and US legislations accept the criminalisation of an enterprise/association engaged in criminal activities, which has an impact on politics and social relationships. Both countries have first attempted to deal with mafias as criminal entities, by making it an offence to be a member of unlawful associations/criminal enterprises and anticipate criminal liability to the membership stage (Sergi, 2014). Afterwards, both countries have targeted the legitimate faces of mafia groups, the US by clarifying how “enterprises” can be both “associations in fact” and “associations in law”⁷ entirely criminal in nature (Neuenschwander, 1981), Italy mostly by targeting the poli-

⁷ In particular in *United States v Turkette* (101 S. Ct. 2524 (1981)) the Supreme Court resolved the conflict over the scope of the term "enterprise" by including also “associations in fact”, as wholly illegitimate enterprises, 10 years after the introduction of RICO.

tics-mafia nexus and the infiltration in public services, which are part of the definition of mafias in the Penal Code.

There are differences between the Italian offence of mafia-type unlawful association and the US offence of criminal enterprise due to the countries' legal traditions. Both systems certainly criminalise the *entity* – association or enterprise – and *aggregate* various individual penal responsibilities under the same indictment. The Italian offence criminalises the affiliation to a mafia-type organisation and in doing so, it essentially qualifies the unlawfulness of the association. Being “mafia-type” is a criminal offence in itself; this is a *primary* crime, it does not need any crime to be committed first (Mantovani, 2007). In the USA, the criminalisation of the enterprise as “association in fact” engaged in a pattern of racketeering activities, makes the RICO offences *derivative* crimes (Anderson and Jackson, 2004): the racketeering activities reveal the criminal plan of an enterprise and make it unlawful. The difference between the two formulas is subtle but substantial. The Italian offence of mafia-type unlawful association criminalises a mafia *behavioural* model of being criminal – by defining its traits in the law – its way of *being*. Notably, instead of simply criminalising the participation to *one* mafia (as a proscribed criminal organisation), the law leaves the definition open to *any* mafia, to allow a net-widening effect. In the USA, RICO offences do not define the behaviours of criminal enterprise *a priori*, but rather its behaviours when *in action*: it is the pattern of racketeering activities (as defined in section 1961(1) of RICO) over a set period of time that defines the enterprise, any enterprise, as criminal.

Both laws in Italy and in the USA target *behaviours* and do not just criminalise associations or organisations. This is clear also when looking at investigations and prosecutions of individuals (such as politicians for example), who support mafia's political choices - the so called ‘grey area’, the facilitators (Maiello and Fiandaca, 2014; Fiandaca, 2010). In Italy, there is an offence – “*concorso esterno in associazione mafiosa*” (external participation in mafia association) – which is still centred around the unlawful association and not the single individual participation. As specified by the Italian Supreme Court⁸:

“To qualify the ‘*concorso esterno*’ as the contribution of a single participant and not by referring to the overall criminal organisation, risks to reduce this offence to mere conspiracy (...) It is instead the material conduct within the unlawful association of the subject, as manifested by a reciprocal, enduring and lasting commitment, functionally oriented to support the activities and the structure of the criminal association”.

⁸ Corte di Cassazione, Sezione Penale, Sezioni Unite, Sentence 22327/2002, known as “Sentenza Carnevale”, translated from Italian.

The external participation in mafia association is an offence that is peculiar to Italy and its history of corruption at the highest levels of government (Paoli, 2007). However, political corruption, as an endemic characteristic of mafia groups, and especially at the local level, is not alien to mafia clans in the US as well (Finckenauer, 2001). RICO as well has also been used to tackle the mafia (organised crime) - politics nexus, often by using corruption as a predicate offence (racketeering activity). Also, specifically section 1962(c) of RICO makes it unlawful for any person, including a public official to conduct or participate in the conduct of a criminal enterprise, in law or in fact.

In conclusion, by avoiding the criminalisation of named and proscribed formal groups (as mafia does not only mean Sicilian Cosa Nostra or the Calabrian 'ndrangheta neither in the Italian Penal Code nor in RICO's interpretation), both legislations, with due differences, target a *criminal behavioural model* that can be exhibited by various criminal groups. In Italy this model is called 'mafia', in an attempt to stigmatise the prevalence and the symbolic meaning of the phenomenon in the country (Sergi, 2015b). In the USA, the mafia label was intended but has been dropped (Blakey, 1990), *de facto* allowing the use of RICO much beyond its initial interpretation. In particular, dropping the mafia label has also allowed the USA not to incur in the criminalisation of the ethnic dimension associated, especially at the time RICO was passed, with (Italian) mafias (Goodwin, 2002; Jacobs, 2006).

Towards a criminalisation of mafia and organised crime behaviours in Australia

By looking at both the Italian and the US experiences, we can draw preliminary considerations on the Australian context towards a revision of the criminalisation of organised crime groups. This revision could lead to more homogenous strategies at the federal level, and would also include a more efficient way to deal with mafia-type behaviours of Calabrian-Australian 'ndrangheta clans.

In Australia there seems to be a mismatch between the intelligence focus of Commonwealth agencies to target organised crime groups' activities and the impossibility to enact a federal offence against them. Drug trafficking offences as well as counter-terrorism offences have been federalised through the principles in section 51 of the Commonwealth Constitution (Powers of the Parliament) related to customs, influx of criminals, external affairs (Bronitt, 2011). The national security classification of organised crime and the mandate of the Australian Crime Commission, the Australian Federal Police and the Attorney's General Department could drive legislation within the same frameworks of counter-terrorism. As noticed (Connery, 2013: 13):

“The Commonwealth also has critical responsibilities for crime prevention and prosecution. They include responsibility for banking, telecommunications and border security, (...) general constitutional responsibilities under the Commonwealth’s executive and foreign affairs powers. There’s a significant external dimension to organised crime too: foreign states can be sources of illegal goods and bases for crime perpetrated in Australia. Links between domestic and overseas criminal groups add to that dimension”.

When it comes to the Australian ‘ndrangheta clans, but without limiting the reasoning to mafia-type groups, the links with overseas criminal networks are part of the alarm raised by Italian and European authorities (Sergi, 2015a). Furthermore, their criminal activities can amount to an interference with the political and financial well-being of Australia.

At the Commonwealth level a criminalisation of organised crime as criminal enterprise - to include mafia-type groups - should not endorse current approaches at state level, such as the contested criminalisation of proscribed associations. The criminalisation of a *set of behaviours* of criminal groups (in lieu of the criminalisation of proscribed associations) can be agreed upon Australian conceptualisations of criminal phenomena as well as federal requirements. In other words, once established that the criminalisation of organised crime can indeed fit within the Constitutional principles of the Commonwealth, a federal offence against organised crime can define which *behaviours* best describe unlawful associations and/or criminal enterprises in the country. This can include the behaviours of the Australian ‘ndrangheta clans as well as those of other groups, such as OMGs,

As previously seen, the main difference between the US strategy against criminal enterprises and the Italian strategy against mafia-type unlawful association is in the *qualification* of the enemy tackled. A criminal enterprise remains an *anonymous* enemy (notwithstanding what we know about the birth of RICO), while mafia-type unlawful associations are *qualified* and *non-anonymous* enemies in the Italian symbolic stand against its own national mafia groups (Sergi, 2015b). The US choice relates to political fairness: a “mafia” label could lead or endorse a cultural bias towards Italian (Sicilian) migrants.

In the Australian experience we have seen how the intended “enemy” of the organised crime strategy has more or less implicitly been identified with motorcycle gangs as non-exclusive targets. Without advocating for the introduction of a mafia label - as the mafia phenomenon remains in Australia one of many other criminal issues - it appears more appropriate to follow RICO’s example and maintain the enemy *anonymous*. As in RICO, however, an organised crime offence should be looking at what organised crime groups *do* and *how* they do it in the country of reference rather than how they are. In other words, Australia seems more suited for a *dynamic* approach to tackle organised

crime groups' behaviours, on the model of RICO, rather than adopting an explicit label against mafia. This is, again, in consideration of the possible bias attached to mafias in Australia with its specific reference to Italian (Calabrian) migrants and their descendants. Conversely, the criminalisation of the *behaviours* typical of the 'ndrangheta (i.e. the exploitation of shared cultural and family values from Calabria) within a more general criminalisation of a set of behaviours of organised crime groups or criminal enterprises would certainly be beneficial for investigations and evidence gathering.

Furthermore, a dynamic approach that criminalises *behaviours* of organised crime groups, could also target the supporters of these groups, those facilitators who are in between the under-world and the upper-world, the in-betweeners (Sergi, 2016b). Australian consorting laws come to mind. For instance, under section 35(1) of South Australia's Serious and Organised Crime (Control) Act 2008, it is an offence to consort 6 or more times in 12 months with a person who is a member of a declared organisation or subject to a control order. Consorting laws – where consorting can happen by any means – are still dependent on anti-association offences and have been opposed by both jurisprudence and academia (NSW Parliamentary Research Service, 2013; Ayling and Broadhurst, 2014). Moreover, as the use of anti-association laws is not homogeneous across Australian jurisdictions, so is the use of consorting laws. While they constitute an extreme example of 'guilt by association' offences, problematic to justify under the rule of law (Rule of Law Institute of Australia, 2014), the success of these laws in catching supporters of mafia-type or other criminal groups is bound to be low. Indeed, as organisations have to be declared unlawful before any consorting law can be used, the focus shifts on the proximity of an individual to a criminal group, rather than on his/her substantial contribution to the activities of that group. As reminded in the Italian experience, the goal is not to target the occasional conspiracy or proximity, which common law principles already do, but to capture in criminal law the substantial, enduring and lasting bonds among individuals because they increase the risks posed by criminal associations and reinforce the groups' (criminal) reputation (Fiandaca, 2010). While the requirements of consorting 6 or more times in 12 months is a start towards establishing an offence based on the *continuity* of criminal bonds, the focus of these offences still remains on the individual. This does not allow a more sophisticated and long-term understanding of the way criminal networks - including, but not limited to, mafia-type ones - work in the country over stretched periods of time.

Conclusion

This article has argued that the main challenge to effectively criminalise organised crime groups in Australia, to also include the Australian 'ndrangheta clans, is to recog-

nise, as done in the USA and in Italy, that a legal response can be based on targeting mafia *behaviours* rather than mafia *organisations*, singled out through labels and names.

As mafia groups are both cultural and structural phenomena also linked to failures of capitalist society (Mattina, 2011), countering strategies against mafia groups have to consider both the cultural elements of these phenomena and the structural weaknesses of the territories they exploit. In the case of the Australian 'ndrangheta, this peculiar combination of cultural and structural elements has to be approached without generating a *moral panic* or making a new (or actually old – see Harvey (1948)) *folk devil* of the Italian, and specifically, Calabrian migrants in the country. Indeed, understanding the cultural elements of the 'ndrangheta does not mean labelling Calabrian culture, but rather studying mafia mobility and groups' social behaviours with a critical cultural awareness (Christopher et al., 2014). The *behaviours* of 'ndrangheta's affiliates – their rituals, the use of the Calabrian dialect, the importance of family-based ties and endogenous marriages - are rooted in Calabrian customs, values and traditions. However, at the same time, these behaviours could not mature or grow without the ability to exploit institutions, opportunities and structural weaknesses of the Australian territories the clans live in. The Australian 'ndrangheta is indeed a *hybrid* model of mafia mobility (Sciarrone and Storti, 2014) based on opportunity-seeking on one side and a powerful (criminal) brand on the other. In Australia, the reputation of the Calabrian 'ndrangheta – its *criminal behavioural model* known around world through the on-going '*ndrangheta* – *sation* process – ensures support and subjection to the clans. The Australian 'ndrangheta's *criminal behavioural model* is made of their established (criminal) reputation - which is based on their “way of doing business” - together with their hiding behind Calabrian cultural codes. Through criminal reputation and cultural disguise, the clans can commit small or large scale criminal offences and manage or control political and economic activities. It seems clear that their *modus agendi* does not fit within current criminalisation of criminal groups in the country and needs to target both criminal behaviours and social ones.

The criminalisation of organised crime in Australia is left to national states and targets individual participation to proscribed associations. Throughout this paper we have reminded the benefits of a criminal law offence that, instead of targeting the *identity* of associations, targets their *behaviours* as enterprises. When looking at comparative experiences we have found that both the Italian unlawful association offences and the concept of criminal enterprises in the USA are good practices. As specified, both countries chose to criminalise behaviours of organised crime groups, either *a priori* (Italian mafia offences) or *a posteriori* (US RICO offences). Also, both countries built a strategy against mafia groups: Italy officially used the word “mafia” while the USA chose a more (politically) neutral terminology (criminal enterprise).

Despite the wealth of information on effective organised crime and mafia legislations, Australian jurisdictions have so far refrained from introducing these policies. Arguably, the impediments are in the way federal law works. In addition, the problematic, fragmented, and often obsolete conceptualisation of mafias in the country has delayed appropriate responses in the law. Effective laws should aim at reducing the possibilities of mobility of criminal groups and the exploitation of the reputation of a brand name. As noticed in the literature *“increased law-enforcement results in more decentralised criminal markets and, thus, greater competition between criminal groups”* (Morselli et al., 2011: 185)-.

Certainly the criminalisation of unlawful associations and criminal enterprises in Australia would also imply a better understanding of mafia-type organised crime in the country. The criminalisation of mafia behaviours can and has to be distinguished from the everyday popular meaning of “the mafia” – the traditional image of a patronage-based group operating mostly in the south of Italy or in the USA. It is the everyday meaning that creates ethnic bias and not a legal conceptualisation of criminal behaviours of mafia groups. The criminalisation of organised crime and mafia groups can be more effective by moving away from the focus on individual crimes and proscribed organisations towards a criminalisation of behaviours of enterprises or unlawful associations. These behaviours, obviously adopted by individuals, are the manifestations of mafia clans’ influence and reputation and result in conditions of intimidation, submission and silence among affiliates and non-affiliates.

It is a long way to go. However, as argued throughout this paper, the main step is a cultural shift before any legal reform can actually be meaningful in Australia. Indeed, simply providing joinders of defendants, multi-conspiracy charges or new offences of criminal enterprise might be pointless unless the whole system recognises the reasoning behind such initiatives and fully embraces the conceptualisations of criminal behavioural models of organised crime and mafia groups under criminal law.

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