

Supplementary Submission to the Senate Foreign Affairs, Defence and Trade Committee

Subject: Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

This supplementary submission from ACSI should be read in conjunction with ACSI's written submission to the Committee on Wednesday, 19 January 2011 and ACSI's appearance at the public hearing on 3 March 2011.

We refer to the "Responses of the Attorney-General's Department to questions in light of the evidence before the Senate Foreign Affairs, Defence and Trade Legislation Committee" and in particular note the following from paragraph 15 in the response, that summarises the Australian Government's response.

"In its report on the Convention, JSCOT recommended that the Government have regard to preventing investment by Australian entities in the development or production of cluster munitions, either directly, or through the provision of funds to companies that may develop or produce cluster munitions. As stated above, the Government has carefully considered the Committee's recommendations. The Bill gives effect to the Convention in Australian law, and is guided and limited by the contents of the Convention. As the Convention does not include a prohibition on investment in companies that develop or produce cluster munitions, the Bill similarly does not include an investment offence. However, some acts of investment will fall within the scope of the offences in the Bill, as described above. Importantly, the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence."

ACSI response with particular focus on the shortcomings of the Australian Government's position on indirect investment:

The above drafting implies that financial assistance is an offence only if it is provided for the purpose of cluster bomb production. In other words, whilst direct financial assistance for cluster bomb production may be deemed an offence, indirect financial assistance to a company that produces cluster bombs, will still be regarded as legal under this provision.

To the best of our knowledge, there are no publicly listed companies that are only in the business of producing cluster bombs. The seven publicly listed companies that produce cluster bombs are diversified conglomerates with interests in areas like aerospace, defence and electronics. To the best of our knowledge, they do not source direct finance solely for the production of cluster bombs. They raise money through corporate loans, syndicated loans, bond issues and share placements and ownership of shares, and they allocate this money to their operations as they see fit.

Their financing is indirect. Therefore no investments into these companies will not directly indicate that the financier or investor intended the funds to be used for the manufacture of cluster bombs.

Unless there is a mechanism to restrict such financing to those weapons producers, Australia will be facilitating the production of cluster bombs and will hence fail to comply with the spirit of the Convention. The "intentional" provision of financial assistance as it currently stands in the Bill, applies to a situation that in effect never eventuates due to the diversified structure of the companies that produce cluster bombs.

For the avoidance of doubt, the current drafting will have no practical effect on the financing of cluster bomb production. Defence companies will continue to raise finance for general corporate purposes, the market will continue to supply the funds and a proportion of these funds will continue to be used to produce cluster bombs.

To close this loophole, the drafting should specifically prohibit the direct and indirect financing by institutions regulated by ASIC or APRA, of companies involved in the production of cluster bombs, in line with the recommendation made by the Joint Standing Committee on Treaties in August 2009.

Yours sincerely

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