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FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

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

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SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

Thursday, 3 March 2011

Members: Senator Bishop (Chair), Senator Trood (Deputy Chair) and Senators Forshaw, Hutchins, Kroger and Ludlam

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Johnston, Joyce, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Bishop, Kroger, Ludlam and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

WITNESSES

Committee met at 4.42 pm

DOCHERTY, Ms Bonnie, Senior Researcher, Human Rights Watch; and Lecturer on Law, International Human Rights Clinic, Harvard Law School, Harvard University

DURHAM, Dr Helen, Strategic Adviser, International Law, Australian Red Cross

OKOTEL, Mrs Karina, Member, Australian Lawyers for Human Rights

THOMAS, Mrs Lorel Margaret, Representative, Cluster Munition Coalition

Evidence from Ms Docherty was taken via teleconference—

CHAIR (Senator Mark Bishop)—I declare open this meeting of the Senate Standing Committee on Foreign Affairs, Defence and Trade. Today's public hearing is part of the committee's inquiry into the provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010. The committee is due to report to the Senate on 24 March 2011. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to the committee.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, be made at any other time.

I welcome representatives from the Australian Lawyers for Human Rights, the Australian Red Cross and the Cluster Munition Coalition. I also welcome via telephone conference the representative from Human Rights Watch and the International Human Rights Clinic of Harvard Law School. The committee has before it submission No. 19 from the Australian Lawyers for Human Rights, submission No. 21 from the Australian Red Cross, submission No. 22 from the Cluster Munition Coalition and submission No. 7 from Human Rights Watch and the International Human Rights Clinic of Harvard Law School. Does anybody wish to make any amendment to their submission? If not, I now invite you to make a brief opening statement and then we will proceed to questions.

Dr Durham—Australian Red Cross sincerely thanks the committee for allowing us to present to you today. As we are well aware, cluster munitions are a weapon that can be very offensive to basic principles of the laws of war, IHL, the principle of distinction, as found in article 48 of additional protocol I, and the principle of not using weapons that cause superfluous injury and unnecessary suffering. So at the heart of these weapons are those IHL principles.

Like any good IHL treaty, the cluster munitions convention is a careful balance between two competing priorities: military necessity, what the military needs to do to get its job done, and the principle of humanity, the consequences of often the use of particular weapons on civilians. From the Red Cross point of view, the cluster munitions convention very adequately balances these two competing things in a very delicate manner. However, as articulated in our submission and that of our colleagues in the ICRC, we have some concerns about the wording, particular the taking of article 21 and the application of it in the defences as found in section 72.41 and 72.42.

We understand deeply that the issue of interoperability was a deal breaker when it came to negotiating this convention. We think it is but part of that balance between these two issues. We also understand the need to provide adequate defences for Australian men and women serving in joint missions. However, the concept of interoperability is not a new concept for Australia to deal with. On a daily basis we deal with coalition partners across the world who have not signed up to a raft of IHL treaties—basic ones like the additional protocols down to weapon conventions, such as the land mine treaty. So we do not believe this is a situation that is beyond the realms of the capacity to be dealt with outside the legal regime.

We are concerned about the legal precedent that it may set if the Australian parliament chooses to not have a narrow interpretation of these defences and the unintended consequences of states being able to sign up to a treaty which in the end does not change the way they behave at all. So, on that basis, we urge the Australian parliament to look to a narrow definition of the defences found in the proposed bill.

Mrs Thomas—The Cluster Munition Coalition Australia thanks you for the opportunity to address this hearing. With regard to the draft cluster munitions prohibition bill, one question prevails for us: what is the government's intention with this legislation? There is no such thing as an objective interpretation. All interpretations are subjective, reflecting a certain point of view, certain interests and certain bias. It is our opinion that in the drafting of this legislation the government is allowing a clear bias towards the appeasement of our military allies to prevail over humanitarian ends and the alleviation of suffering.

Australia is either genuinely committed to the eradication of cluster munitions or it is not. Our legislation must be ethical as well as legal. It must abide by the spirit and intent of the convention and it must unequivocally abide by its obligations. A serious commitment to the eradication of cluster munitions cannot claim, as the Attorney-General has just done, that propose defences in the cluster munitions prohibition bill will apply in all circumstances unless otherwise specified. If they are otherwise specified, then they do not apply under all circumstances—they sometimes apply and they sometimes do not. Our legislation is thus both a weak interpretation of the convention and not fulfilling our mandated obligations.

A state party is also obliged to promote the norms established by the convention and to discourage states not party from using cluster munitions. Allowing stockpiling and transit of foreign owned cluster munitions seems a strange way to fulfil this obligation. This is particularly glaring when we observe that we are the only country to have specifically allowed transit in our legislation.

A genuinely committed government also would not consider it necessary to acquire live cluster bombs for any purpose, particularly with no safeguards as to maximum numbers or specified reporting procedures. Should the government's weak interpretation of interoperability be allowed to stand, then in future conflicts where we participate with non-signatory allies Australian soldiers may be helping to cause the trauma and death of innocent civilians, many of whom we know will be children. We sincerely hope that the committee will take our concerns seriously and will recommend key changes to the legislation, thus ensuring a strong and unequivocal interpretation of the convention. The Convention on Cluster Munitions clearly bans this weapon, both by language and intent. The proposed Australian legislation does not. The bill as it stands needs drastic amendment.

CHAIR—Thank you. Mrs Okotel, would you like to make an opening statement?

Mrs Okotel—Thank you for the opportunity to appear before the committee today. Australia was amongst the first signatories to the Convention on Cluster Munitions in 2008, which demonstrates our determination, without qualification or reservation, to put an end for all time to the suffering and casualties caused by cluster munitions. Consistent with the object of universal eradication and article 21 of the convention, our legislation should place a burden on those who continue to see some use for these weapons to change their attitudes and practices. The proposed legislation being considered by the committee is inconsistent with the purpose of the convention, reading our obligations so narrowly as to undermine its objective of universal eradication. International humanitarian law treaties are to be interpreted consistently with principles of humanity. Restrictive interpretation of prohibitions protecting human life must be rejected. Where there is any doubt, an interpretation that protects human life and dignity is to be applied.

We submit that the committee should interpret our obligations in line with other states that have sought to give effect to the convention in the strictest sense in their domestic legislation. Not to do so throws into question the genuineness of Australia's commitment to act as a good international citizen, an example for the global community. In particular, this legislation may position Australia as setting a precedent for narrow and inconsistent interpretation of the convention. No other country provides expressly for a blanket exemption regardless of circumstances and without any executive oversight of control for the use of its territory by allies for the transit and stockpiling of cluster munitions. Furthermore, the proposed legislation allows Australian soldiers to assist nonparties in their use of cluster munitions during joint military operations.

Maintaining a prohibition on assisting other states during joint operations need not interfere with military readiness or effectiveness or jeopardise our strategic relationship with nonparties to the convention, such as the US. Other countries, including NATO members, have stronger legislative and policy initiatives on relationships with nonparties which retain cluster munitions. For example, Austrian and German law expressly prohibits transit of cluster munitions. The UK has committed to removing foreign stockpiles from UK territories within an eight-year period. Furthermore, in the UK the standard for a defence to offences outlined is that of recklessness rather than intention. In a commentary attached to its implementing legislation, Norway explains that article 21 does not authorise a state party to engage in prohibited activities during joint military operations.

As we approach the meeting of state parties in Beirut this September, the world's eyes will be on Australia as the next country to implement legislation to give effect to its obligations under the convention. The narrow interpretation being taken by Australia that is also inconsistent with the interpretation of other states will be a vast step back in achieving the eradication of cluster munitions. Once again, we appreciate the committee's efforts to engage with civil society in the course of its deliberations. We would be pleased to have the opportunity for civil society to engage with government in a collaborative way to strengthen the proposed legislation and to benefit both Australia's national interests and the interests of civilian populations around the world who might otherwise continue to suffer through the use of cluster munitions. Thank you.

CHAIR—Thank you, Mrs Okotel. Ms Docherty, would you care to make an opening statement?

Ms Docherty—Yes. Thank you to you, Chair, and to the rest of the committee for allowing me to participate today. I welcome the opportunity to speak to you on behalf of both Human Rights Watch and Harvard Law School's International Human Rights Clinic. We agree with the government on multiple points: the Convention on Cluster Munitions allows participation in joint military operations with states not party, implementation legislation should not punish inadvertent assistance and legislation should be consistent with the convention's object and purpose. The current bill, however, goes beyond what Australia needs to participate in joint operations and to protect its troops from liability. It is also inconsistent with the convention's object and purpose to eliminate cluster munitions and the harm they cause.

The government submission lays out several scenarios it believes article 21 and thus section 72.41 allow, and each of them flouts the prohibition on assistance. According to the government, the ADF could help plan and provide logistical support for the use of cluster munitions. Such actions facilitate the use rather than the elimination of these weapons. Section 72.41 should be amended to clarify that joint military operations are permitted but that the absolute prohibition on assistance applies even during such operations.

Section 72.42 condones actions the convention implicitly prohibits. It exempts from prosecution foreign military personnel who transit cluster munitions through or stockpile the weapons on Australian territory. This section runs counter to the convention's purpose and to article 9. At the same time it does not advance the goals of the Australian government. It protects foreign troops and not Australian ones from liability, and its exemptions are unnecessary for participation on joint operations. We urge Australia to delete this section and replace it with explicit prohibitions on transit and foreign stockpiling.

The government also notes that the bill prohibits only intentional acts. There is a large gap, however, between the mental states required for an intentional act and an excusable accident. We encourage adoption of a recklessness standard which holds accountable individuals who knew or should have known they were committing a prohibited act. This approach protects unwitting actors while requiring increased care by those with reason to know they may be assisting with prohibited actions. I am happy to address other issues during the question and answer session. Thank you very much.

CHAIR—Thank you, Ms Docherty. For the benefit of all concerned, what I intend to do is ask questions that are relevant to individual groups for something in the order of five or 10 minutes and then I will hand over to each of my colleagues from the other parties sequentially. We do have a fair amount time up our sleeve and I think it has been clear from the outset that those matters which are in dispute or are the subject of differing interpretation are relatively limited. There seem to be precisely some four or five matters, so we might just go through them.

Ms Docherty, I might start with you seeing as your comments were addressed to section 72. Firstly, as you are aware, the government of Australia's position is that the effect of article 21(3) is that certain acts are permitted in the context of military cooperation with states not party even though such acts could ultimately assist these parties to engage in conduct prohibited in article 1. My understanding is that you hold a somewhat different interpretation. If sections 72.41 and 72.42 are to remain as drafted, and that is the indication of the government to date in this country, can you suggest other ways that particularly address your concerns?

Ms Docherty—I think that, as you mentioned, we have a different interpretation of article 21(3). Just to mention it briefly, we believe that states can participate in joint operations—that is something I think everyone in this room can agree on—but that article 21(3) does not allow them to violate the convention during that participation. We would argue that 72.42 should be deleted altogether and ideally replaced with prohibitions on transit and stockpiling. We believe that article 72.41 could easily be amended to incorporate the idea that mere participation is not an offence without creating a blanket defence for all acts that occur during joint operations. I might point you to New Zealand as a good example of this. In its implementation legislation it

establishes that mere participation in joint operations is not an offence, but it does not create this blanket defence for all acts during joint operations.

CHAIR—Do any of the other three groups at the table have a comment on the question?

Dr Durham—Yes, on your first question in relation to how clause 72.41 could potentially be amended if it is going to stay in there. As I said at the start, the whole treaty is a balancing act between those two principles. If you look at article 21, you will see it is a balancing act. It has four elements, two which remind state parties of the overall meta-obligation and two which allow for practical activities which you need to keep going in a military operation. One of the ideas that certainly our colleagues in the ICRC have articulated is that, if it is deemed by the Australian government to be a requirement to have such a broad definition in 72.41, there should be some mention of the first two paragraphs of article 21. We are aware that governments try to make streamlined and nicely succinct legislation—we appreciate that. But there should be something that requires the defendant to demonstrate their best efforts have been made to discourage the state not a party; something that takes that very complex provision—many of us in this room were involved in the negotiations—takes those two basic elements and makes them deemed to be looked at holistically rather than picking out the bit that is seen as most important.

Mrs Thomas—I would like to make it very clear that the Cluster Munition Coalition realises that joint operations are a fact. We are going to work with our military allies—we are not trying to fight against that; we are not trying to say that these joint operation should not occur. We also agree with the government that, during joint operations, any Australian personnel that are inadvertently caught up in cluster munition use should be protected. However, we do not believe that deliberate and willing cooperation by Australian personnel in prohibited acts is acceptable.

Senator TROOD—Can I stop you there? Why would Australian military personnel, who are subject to military law and direct oversight and command by senior officers, engage in—what was the phrase?—willing and deliberate prohibited acts? Why would they do that?

Mrs Thomas—That is an excellent question. That is why I question why those particular points have been included in the legislation. Article 21 of the Convention on Cluster Munitions is a clarification of article 1 on offences. It clarifies that, even though state party personnel are not allowed to engage in certain acts, they may work with other parties—we accept that. That is already established under the convention; we can work with our military allies. Why, then, do we need to specifically include that we are able to do specific things such as refuelling aircraft that are carrying cluster munitions? Why does the explanatory memorandum say that article 21 qualifies article 1? We do not believe that it does qualify it; we believe that the prohibition under any circumstances applies at all times. We believe that article 21 clarifies what we may do. Therefore, I question why the Australian government has included specific allowances for transit, for stockpiling and for allowing Australian government personnel to be able to do everything other than basically press the button.

CHAIR—I do not speak for the government, but I suspect that the answer is relatively clear: that if Australian military personnel, pursuant to direct lawful command, are going to be engaged in activities with non-state actors that necessarily use these types of weapons, it would be the position of the Australian government that they should be protected legally in any and all circumstances. I presume that we will ask that of Defence, but without me putting—

Mrs Thomas—Words in their mouths.

CHAIR—the position incorrectly. It is an obvious conclusion, but we will ask Defence.

Mrs Thomas—I would say that in the recent joint submission by the Attorney-General and the ministers for defence and foreign affairs they stated quite clearly that the terms ‘use’ and ‘assistance’ and other terms are to be read in their ordinary accepted use. A very quick perusal of any definitions of these terms comes up with things like ‘acting as a subordinate’, ‘acting in an assisting or helping capacity.’ It seems very clear that activities such as refuelling aircraft carrying cluster munitions are subordinate activities, and therefore could be included under the definition of ‘assist’ and thus be a prohibited activity.

CHAIR—I am not so sure I share the argument that acting in compliance with an ally, according to a treaty or government-to-government agreement, is properly characterised as acting in a subordinate capacity, but we will check that with Defence. Mrs Okotel, do you have anything on this particular point?

Mrs Okotel—In acting in joint operations, as has been outlined in a number of the written submissions, it is important to recognise that unlawful actions under the convention—if they are carried out with intent or

recklessly—should be deemed unlawful, as the convention specifies; therefore, parties committing those unlawful acts should be seen as committing an offence and should be appropriately dealt with.

CHAIR—I will start with you, Ms Docherty. Some submitters argue that section 72.42 violates or undermines aspects of the convention. How do you respond to the suggestion that military personnel of a country that is not party to the convention are not required to comply with the convention?

Ms Docherty—I think 72.42 raises concerns on a couple of levels. First, by creating an exemption that allows foreign military personnel to do acts that would otherwise be prohibited it undermines the purpose of the treaty, which is to eliminate cluster munitions. It actually facilitates the use, production, stockpiling and transfer of cluster munitions. Second, it is inconsistent with paragraph 2 of article 21 which requires parties to discourage use and to promote the norms of the treaty. It is inconsistent because it wants to discourage use and then to allow assistance. By creating this exemption, in a sense you are assisting foreign military powers—your allies—in committing prohibited acts.

Third, it is important to compare it to article 9, the national implementation measures. Article 9 states that parties must create penal sanctions that cover acts that involve people or are on territory belonging to the state party. But section 72.42 creates an explicit exemption for persons on the territory of Australia. So we see it as very problematic and in our mind it violates article 9. I know the government, in one of its submissions, said that article 9 needs to be read in conjunction with article 21 but I think in this case there is no cross-reference between the two articles. I think article 9 is more of an overarching article that requires all aspects of the convention to be implemented, including articles 1 and 21. There is not a specific relationship between those two articles.

Dr Durham—Just to confirm that, we in the Red Cross feel very much that allowing foreign stockpiling and transit of these weapons in our territory really does not go to the spirit of the convention, which is found articulated in a number of provisions, particularly articles 21 and 1. To us it is something that goes against the idea of trying to encourage other countries not to do it but allowing them to do it on our soil, understanding some of the military requirements.

Mrs Thomas—I think it is a reiteration of the same argument that, if we are going to discourage other parties, we cannot really then encourage them to use our soil to stockpile cluster munitions.

CHAIR—I take that point. There is clearly a conflict here, is there not, between two important sets of competing obligations. One is the obligations freely entered into by this country under the terms of the Convention on Cluster Munitions. The other is the obligations, also freely entered into, that derive from the nature of our alliances and military arrangements with the United States and others. They are two arguably conflicting but equal principles. Does anyone have a comment on that?

Ms Docherty—I would say I do not necessarily see them as conflicting. I think that, as other states have shown, you can have legislation that allows for participation and supports your military arrangements with the US and other countries while still upholding the obligations of the Convention on Cluster Munitions. I think there are two obligations that need to be reconciled, but I do not see them as necessarily conflicting.

CHAIR—Thank you.

Senator TROOD—There seems to be a lot of criticism in many of the submissions that we have received about the way in which the Australian government overall has responded to the implementation need. Dr Durham, in the Red Cross's submission you make the observation that some other common law countries have done it better than this. I would be grateful if each of you would tell me which country you think has the best implementation legislation—or perhaps just provide one good example and why you think that is a particularly virtuous example of how to implement the treaty.

Dr Durham—Perhaps we will choose the New Zealand example. I have a copy here of their specific provision if you want copies of it later.

Senator TROOD—I do not want you to go through the whole thing; perhaps you could just identify the key issues that we are dealing with and why it is a good example.

Dr Durham—Certainly. To clarify our submission, the Australian Red Cross was delighted with the strong role Australia played at the negotiations, particularly on the victim assistance provisions, which are really outstanding. Our concerns, as our submission articulated, are really related to two particular interpretations. On the whole it is an excellent job of looking at this treaty.

In relation to the Australian bill's section 72.41, the New Zealand equivalent is very limited and succinct, which I know would interest government lawyers. They like to get the legislation down to a manageable side! Section 11(6) says:

A member of the Armed Forces does not commit an offence against section 10(1) merely by engaging, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that has the capability to engage in conduct prohibited by section 10(1).

While our section 72.41 is quite long, this is a succinct one that talks about 'merely engaging', which is very consistent with the wording in article 21 of the convention itself, which says in article 21.3:

Notwithstanding the provisions of Article 1—

which we have all spoken about today—

… in accordance with international law … military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention …

They have taken very succinctly the words articulated in article 21 and applied it in their domestic legislation, whereas our legislation is quite a wider definition, we would argue, in relation to how this interaction can occur.

Senator TROOD—Does anybody else have a view on this? Ms Docherty, do you have a view on the matter of exemplar legislation in relation to implementation of the treaty?

Ms Docherty—I actually very much concur with the Red Cross on this one. I think New Zealand is probably the best model for Australia that both allows for mere participation and does not overreach and allow more activities than need be. One other model I would look to, not so much for the legislation but for the commentary associated with the legislation, is Norway. Norway's law is very short and includes the prohibitions. It does not explicitly implement article 21, but it includes a lengthy commentary. In that commentary it makes several statements on interoperability, including the fact that allowing for participation in joint operations does not exempt state parties from their other obligations under the treaty—for example, those prohibitions under article 1, including that of assistance. I would supplement the Red Cross's statement with that, but I concur that New Zealand would probably be the best model for language.

Mrs Thomas—I am only speaking in regard to one particular aspect, and that is that the Norwegian legislation has definitely outlawed retention of cluster munitions.

CHAIR—No, we are talking about this point in section 72.41.

Mrs Thomas—I beg your pardon. I was just going to speak about an exemplar legislation, but that can certainly wait until you finish this point.

Senator TROOD—Okay. Ms Okotel, do you have anything to say on this?

Mrs Okotel—Not beyond that we endorse the views of the Red Cross.

Senator TROOD—Okay. Moving on to a different topic, there is the question of intent, with which some exception has been taken. The Australian Attorney's position, as I understand it, is that when we create criminal offences in this country the elemental part of the criminal offence is an intention to commit the offence. That is why that particular element of the offence is incorporated in the legislation. In other words, it is entirely consistent with Australian jurisprudence that we ought to rely upon intent. There have been suggestions of wider tests of recklessness et cetera. I would be grateful if you could address the problem as to why we should not follow Australian jurisprudence in this matter and we should adopt a different test.

Mrs Thomas—Is this a question to me? Because I would prefer the legal minds to answer it.

Senator TROOD—It is to anyone. I am happy for anybody to address that question if they choose to do so.

CHAIR—Ms Docherty, do you have a view on the question raised by Senator Trood?

Ms Docherty—Yes, I can offer initial comments. As I mentioned, I think there is a long way between an intentional act and an accidental act. What the Australian government in its submissions has said is that it wants to protect troops from being punished for accidental acts. That said, as I read one of the government submissions—I think it was the one from the Attorney-General's office—it said that it uses the standard of intent unless there is reason to depart from it. I would argue in this case that there is because doing otherwise would undermine the purpose of the treaty by creating too big of an exception—making it too hard to find someone in violation of the treaty. I am not an Australian lawyer, so I cannot speak in detail about the mental state required in Australian law, but I am sure there are some statutes in the Australian code that do have other

standards than intent. I think it would be informative to look at some of those laws and see when there have been other cases where a reason was found to use something other than intent.

Senator TROOD—There may be, but certainly the orthodox approach to creating criminal offences is that one intends to create the offence. I am just exploring this idea; I am not necessarily agreeing with it. That is the Attorney's position as I understand it. It has at least a superficial plausibility in the context of Australian jurisprudence. But it seems to me that perhaps we are trying to have it both ways here. On the one hand, Dr Durham, you are arguing that we ought to follow common-law countries. We are obviously a common-law country and we are following what is essentially the jurisprudence of a common-law country. But you are arguing—you may not be but Ms Docherty is arguing—for a different test in relation to the matter of intent. Do you share her views on that?

Dr Durham—Our concerns are exclusively in relation to 72.41 and .42. But I am sure my colleagues have got something to say on this.

Senator TROOD—Ms Okotel?

Ms Okotel—There is nothing to prevent a standard of recklessness relating to criminal offences. We can point to the example of a common-law jurisdiction, the UK, where in their legislation they have taken the standard of recklessness going beyond intent. That more appropriately aligns with the purposes and objects of the convention.

Senator TROOD—We do not have the advantage of the UK legislation before us, but is it just recklessness or is it intent and recklessness?

Ms Okotel—I might defer to Ms Docherty on this point.

Ms Docherty—When you have a level or standard of recklessness it encompasses intent. The idea would be language something like that someone knows or should have known that there is a violation. So by including a recklessness standard it does encompass intent.

Senator LUDLAM—I might start with some of the big picture issues. A question I am going to put to the department when we have them a little later tonight is why this has been brought forward as an amendment to the Criminal Code rather than as a stand-alone act. Do you have a view on what the department might tell us when I ask them that? And what consequences flow from doing it that way?

Mrs Thomas—We would have preferred the legislation to be a stand-alone bill, the same as the landmine bill. One specific reason that we would like that is because it allows for the inclusion of our positive obligations. This legislation covers the things that we should not do. If you have stand-alone legislation, it covers the things that you should do and I might say it covers the things that we actually are doing. The Australian government is actually very good and I commend them on their landmine action. In the convention we have obligations to land clearance, victim assistance, all these sorts of things, and I do think it is a shame that that is not included. It could have been included in a stand-alone convention. One thing perhaps that could be included if it remains as an amendment to the Criminal Code is to ask for a note from the minister in regard to our positive obligations.

Senator LUDLAM—That is something that could be included in the explanatory memorandum, I suppose, for example. A couple of people have referred to the way that this bill is drafted violating the spirit of the treaty, if you will. It is a bit difficult to isolate a clause where the spirit is specified, but what you think is meant by that exactly?

Mrs Thomas—I would say that we come back again to the very thorny question of article 1. As I said in my opening statement, every country interprets the convention in their own way. Article 1 has been interpreted in various ways and it has been argued about in various ways, and it probably still will be argued about in various ways after today. We believe that article 21 clarifies article 1. It does not provide exemptions and we believe that the spirit and intent of the convention is to eradicate cluster munition is. It is not to restrict their use, it is not to limit their use; it is to eradicate them. If you are going to eradicate them then you need to be straight down the line with your legislation and you need to be true to the spirit and intent of the convention.

The Cluster Munition Coalition and its member organisation were centrally involved in all aspects of the Oslo process leading up to the convention on cluster munitions. We believe that we do understand the intent of article 21. We do believe that, in order to abide by the intent of the treaty, you need to abide by article 1, which forbids certain things under any circumstances.

Ms Docherty—If I could chime in here for a quick comment, to me the object, purpose and intention of the convention are best articulated in the second paragraph of the preamble, which says the states parties are:

Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

I think that emphasises this being the end for all time—this is an absolute ban; this is not a regulation but a ban—and the focus on civilians and the humanitarian purpose behind the treaty. That should guide our interpretation of all the provisions that are open to interpretation.

CHAIR—I want to jump in on this point. If the argument of Mrs Thomas is correct, that eradication is a cover-all, total synonym for elimination and nothing else, first of all that is only binding on those parties who choose to sign up to the convention—and we all know there are significant states parties who are not parties to the convention. The convention also provides, as far as Australia is concerned, the ability to lawfully engage in limited circumstances in the use of cluster munitions: transport, storage and those sorts of things. So it strikes me as being passing difficult to argue that the treaty is totally about eradication or elimination when there are particular limited exclusions that authorise the use of such weapons in particular circumstances. Mrs Thomas, would you address that? Then we will have Ms Docherty.

Mrs Thomas—I do not believe that there are exclusions. I believe that article 1 says a state party shall never under any circumstances undertake this. As I have said, I believe that article 21 clarifies that to allow joint operations. It does not allow a state party to engage in any of the prohibited activities. I do not think there are exceptions or exclusions or qualifications.

CHAIR—Thank you, Mrs Thomas. We will go to Ms Docherty.

Ms Docherty—I would add briefly that I concur with Mrs Thomas that elimination is the key goal behind this treaty. You mentioned the exception for retention of certain stockpiles of small numbers of cluster munitions and submunitions. I have two points on that. Firstly, the Cluster Munition Coalition as well as my organisations argue very strongly against having a provision for retention. We still think it is unnecessary. But, that said, the argument for it was that states were allowed to keep some submunitions in order to train—for example, for clearance activities. Clearance activities are contributing to the eradication of cluster munitions. So if states are retaining cluster munitions for the reasons they profess, then indeed that is contributing to the larger goal of eradication.

CHAIR—Thank you, Ms Docherty. We will go to Senator Ludlam.

Senator LUDLAM—I am wondering, with the lawyers in the room, what happens when we sign a treaty and then, in the process of bringing it into domestic law, we do something that goes arguably against the objects of the treaty. We could kindly say that there is ambiguity here or we could cut to the chase and say that actually we are no longer within the spirit of what we signed. What does it mean in international law if we have signed a ratifying instrument, we bring it into our domestic legislation and cut across what its objects are? What does that expose us to?

Senator TROOD—Do you mean in relation to retention?

Senator LUDLAM—No. I would not mind addressing retention as a separate issue. I mean more in terms of this. We are meant to be eliminating these things but we are okay to be marching side-by-side with people who may well be deploying them. We seem to have gone out of our way—or at least more so than other peer nations that we have considered this afternoon—to allow that to happen. I suppose I am after the larger question: you can argue that by enacting this into domestic law we have cut across the objects of the treaty but will that expose us to sanction or what exactly?

CHAIR—Who wants to lead off in response?

Mrs Thomas—Unusually, I have nothing to say because I am not one of the lawyers.

CHAIR—Ms Docherty, do you have a response?

Ms Docherty—It is always tricky in international law because there are few courts, though some, in international law and enforcement always becomes an issue. There are a few implications of going against the spirit of the treaty. One is that it undermines the treaty not just within a certain country but it decreases the stigma that the treaty can create which also contributes to non-state parties being inconsistent with the obligations of the treaty. It is bad faith and it is also politically bad as a policy argument as well as a legal argument. No-one is going to go to jail for violating the object and purpose, but it is not in good faith. I think

that can set a poor precedent for the implementation of this treaty and presumably the state party who is involved would want to keep up its reputation as being a very good member of the international community.

Dr Durham—On the treaty about treaties—international law 101, the Vienna law of treaties—I will take that question on notice and give you a succinct paragraph once I get that treaty out.

Senator LUDLAM—Thanks, I would appreciate that.

Mrs Okotel—There is concern that it would set a precedent for states yet to ratify the convention. Also, Australia may be held up to scrutiny at the meeting of state parties. I reiterate our submission that it would be helpful to include an objects clause in the legislation to outline the objectives of the convention so that that better helps to frame the legislation and highlight the purpose of the convention.

Senator LUDLAM—I think that is an interesting prospect and maybe it can be used to frame in the positive rather than as with Criminal Code framing in the negative. There is serious debate underway in Australia about interoperability around maybe increased deployments of US military forces in Australia or at least increased stockpiles. It is a bit vague, but it is a live issue at the moment. I presume we are not having this discussion in the abstract. Are cluster munitions stored in Australia at the moment? Do we know that they are being transported through Australian waters or airspace? How real is this issue?

CHAIR—That might be a question better put to the people who store them—Defence.

Senator LUDLAM—Defence will tell me they cannot possibly give us that information in an open hearing. How abstract is this concern to you?

Mrs Thomas—The concern of Australian forces working with US forces who may use cluster munitions is certainly not an abstract issue. It was stated in the joint submission from the Attorney-General and the minister, I think, that the US does have cluster munitions and is likely to use them. Given that we are going to work with the US forces, this whole issue of interoperability is certainly a practical issue and not a theoretical one. As to whether there are any cluster munitions stored on our soil at the moment or whether they are being or have been transited across our soil, I would have to take that question on advisement because I certainly do not know the answer.

Mrs Okotel—It is a very important question and that is why, in our submission and in other submissions, we call for greater transparency and account for what is occurring with cluster munitions so that we are able to comply with our obligations under the convention.

Senator LUDLAM—Is there anything in the bill that provides for that at the moment?

Mrs Okotel—No.

Senator LUDLAM—I could not see anything either. Chair, I will yield and come back at the end if there is time.

CHAIR—Senator Kroger.

Senator KROGER—Mrs Thomas, you have made some strong statements in your submission in relation to the clause 72.39. Could you expand on those?

Mrs Thomas—Section 72.39 is on acquisition and retention. I would like to begin by saying that each cluster munition contains hundreds of small submunitions. What I am showing you here is typically what one may look like. They look like balls—they look like golf balls—and children are attracted to them, or else they are cylindrical, bright-coloured little things—once again, children are attracted to them.

The present draft bill proposes that the Minister for Defence may authorise acquisition or retention of cluster munitions. What does this mean? There is no definition provided. Does this mean that we are going to retain canisters containing hundreds of these small bomblets? Does it mean that we are going to retain a few of the small bomblets? There are no specified, absolute minima required and there are no reporting procedures stipulated. We find that to be an absolutely unacceptable and open-ended interpretation of the convention.

Given that there are many hundreds of types of cluster munitions, which ones exactly do we propose to retain? We could retain the one pictured here, which is an AO2.5, Russian manufactured, with 185 grams of explosive. We could keep this one manufactured by Israel, with 27 grams of explosive. We could do the one pictured here—American manufacture, 287 grams of explosive. We could do this one—American manufacture again, with 85 grams of explosive. The diversity of cluster munitions is quite staggering.

Viewed from this standpoint, proposed section 72.39 does not explain which, if any, of these types of cluster munitions we are going to retain; how many we are going to retain; and how we are going to report on this retention.

Senator TROOD—May I just ask you, on this theme, if there are any of the other implementing countries that you regard as having satisfactory legislation preserving the right to retention—the UK, for example?

Mrs Thomas—I think I am going to once again have to refer that to my legal colleagues here; they have more knowledge of other countries' legislation. I will say that there are a number of countries—and I will cite Norway as an example—that have outlawed retention. So it is certainly not the generally accepted view amongst all state parties that you have to retain cluster munitions. In regard to how each individual country that does retain has specified things, I will, as I said, refer to my legal counterparts.

Senator KROGER—Mrs Thomas, given that we are probably talking about a very small number of cluster munitions, do you think that there are ways in which they could be retained for training purposes?

Mrs Thomas—I think that anybody could just look at me and realise that I am not a military expert. I am quoting a particular source here. The source that I am quoting is Jon Guthrie, who is Country Director of Norwegian People's Aid in Vietnam, and he is conducting cluster-bomb and landmine clearance. According to him, the ADF does not presently use either active or inert cluster bombs for training, so it is not necessary to retain them. One point that I would like to make is that cluster munitions differ from landmines in one significant way: when a landmine is lying in the ground, it has not begun its detonation process; by contrast, an unexploded cluster munition has begun its detonation process but it has stalled somewhere in that process. They are highly unstable and the standard procedure is demolition in situ. It would be highly dangerous for Australian defence forces to train using live cluster munitions.

Senator KROGER—Just on that section, would anybody else like to make a comment?

Mrs Okotel—I reiterate to the committee again that the object of the convention is the eradication of cluster munitions. Therefore, if we are going to retain cluster munitions—as Ms Thomas has said—for training purposes, they need not be live munitions. There should be transparency on the number that is retained and the types—as we have seen, there are several types. There may be a need, of course, to facilitate Australia being able to engage in clearance activities, and that may necessitate the retention of some cluster munitions but, again, they should be reported on, and they need not be live munitions.

CHAIR—One issue that I do not know that we canvassed all that much was the issue of the 'under any circumstances' language that is in the treaty and that did not make its way into the bill. I am looking back at some of this stuff, and I remember that one of the reasons that the government has given for that is that it does not sit easily within the way that the Criminal Code is set up. How significant it is that? The treaty talks about the spirit of the thing—'under any circumstances'—but how significant is that that language did not make its way into this legislation?

Ms Thomas—I would like to have seen the language in the legislation but, given that it is not, it is in the convention. Therefore I feel that, if we ratify the convention, we are bound by those obligations to never under any circumstances use them. So, although I would have liked to have seen that wording in the legislation because I think that would have shown a clear and unequivocal commitment both to the Australian people and for it to be used as a precedent for legislation in other countries, nevertheless that language exists in the convention and I believe that we must abide by that if we are abiding by the spirit and intent of the convention.

Mrs Okotel—There is good reason why the phrasing 'never under any circumstances' was included in the convention, and that should be mirrored in our legislation. I refer the committee to the submission of Human Rights Watch. On page 5, in the second paragraph, it states:

The phrase "under any circumstances" is significant because it emphasizes that the convention's prohibitions are comprehensive and apply during both international and non-international armed conflicts, as well as in situations that do not rise to the level of armed conflict. The phrase underlines the importance of foreclosing exceptions to these restrictions.

CHAIR—Ms Docherty, on this particular point: the language of conventions does live in its own world, so to speak, and, firstly, often signatory countries to conventions have different methods of the adoption of the convention and its translation into their own domestic law and, secondly—as we have discussed in passing—nearly all countries have their own historical jurisprudence in the way that they go about drafting legislation for presentation to their respective legislatures. Those who are engaged in these fields of endeavour, both those who are involved in drafting in domestic legislatures and those who are active in the drafting of international conventions and the like, are well aware of the distinctions and the differences that apply. Do you share the

view I think I am hearing that it is absolutely necessary that in domestic legislation the actual drafting itself should be identical to or mirror the drafting in the particular international convention that is being ratified?

Ms Docherty—One of the themes of this panel has been the need to be consistent with the spirit as well as the letter of the treaty. As you said, different states have to implement treaties in different ways, given their national legal systems. While I certainly am in favour of adding the phrase 'under any circumstances' for the reason that was just quoted—they were quoting our submission—I think there are cases where a verbatim copying of the treaty does not necessarily answer all problems. For example, cutting and pasting article 21 of the convention may be helpful in some ways, but it is taking it out of context. So it does not solve the problem to use the verbatim language. You need to look at it as a whole and that includes looking at it in the context of the spirit of the treaty as well as the text. To answer your question, I think that, yes, using the language of the treaty is a very good guide in most cases, but I do not think it is the panacea for all interpretive issues.

CHAIR—As there are no further questions, thank you very much for your assistance to the committee today, Ms Docherty. It is probably the very early hours of the morning where you are, so we wish you well. I also thank the witnesses at the table, Mrs Okotel, Mrs Thomas and Dr Durham, for attending and joining the discussion.

Ms Docherty—Thank you very much for having me.

Mrs Thomas—Before we leave, I have a book that I would like to leave with the panel, *Capturing the Legacy*.

CHAIR—Thank you very much. We will accept that, Mrs Thomas.

[5.47 pm]

ABIDI, Mr Azhar, Director, Sustainability and Responsible Investment, Industry Funds Management

SPATHIS, Mr Phillip Arthur, Manager, Strategy and Engagement, Australian Council of Superannuation Investors

CHAIR—Welcome to this hearing. A copy of today's opening statement is before you. Do you have any questions regarding that document?

Mr Spathis—No.

CHAIR—The committee has before it the submission, which we have numbered 4, from the Australian Council of Superannuation Investors. Do you wish to make any amendments to the submission?

Mr Spathis—No further amendments, Chair.

CHAIR—I invite you to make a brief opening statement and then we will proceed to questions.

Mr Spathis—Thank you. ACSI represents 39 superannuation funds that manage the retirement incomes on behalf of three-quarters of the Australian workforce. The Australian managed funds industry at $1.4 trillion is the fourth largest in the world. Our super fund members want to retire with a decent retirement income, but they expect their trustees and investors not to use their assets to assist in the manufacture of cluster bombs.

We commend the federal government for taking measures to give effect to the Convention on Cluster Munitions. However, the bill falls short as it allows continued investments in cluster bomb companies. It only restricts direct financing and prohibits intentional assistance to producers of cluster munitions. We are concerned that this is not sufficient. Manufacturers will continue to raise capital and seek indirect financial assistance from investors. Let me explain. Most companies that produce cluster bombs have diversified operations, with a range of military and civilian businesses. Investors will rarely know how funds raised by such companies are allocated across various parts of the business. Therefore, our point is that intentional assistance is almost impossible to prove. In other words, our concern is that nothing will change.

Whilst the bill carves out the possibility of mum and dad investors being held liable as beneficial owners of units of shares that they invest in companies—a point that was raised by the government's submission and one that we concur with unequivocally—it still gives professional investors, fund managers and trustees the continued ability to access and invest in these companies with no ramifications whatsoever. This diminishes Australia's attempt to capture the spirit of the convention.

Whilst we are not experts in the interpretation of international conventions, we can indicate our support for recommendation 2 of JSCOT, which correlates the term 'assisting' contained in the convention with:

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.

Accordingly, our proposition is to recommend an explicit prohibition of institutions regulated by ASIC or APRA from lending or trading in securities or investing in companies that produce cluster bombs.

This reflects the approach taken by a number of governments in their application of the convention. New Zealand, Belgium, Ireland and Luxembourg have dealt with the investment issue by having interpreted the broad prohibition on assistance to extend to an investment ban. We also believe that the absence of a prohibition has the potential to create financial, operational and reputational risks for investors. Therefore, our submission is not radical; it is based on investor concerns to send a clear and practical message to these companies that produce an indiscriminate weapon that causes unacceptable humanitarian harm.

In a practical way, a prohibition would require the government to provide a reference list of companies that manufacture cluster bombs, which, at present, is seven companies worldwide. This would complement the engagements that we as an industry have undertaken over the last six months where we have directly engaged with two major Australian finance sector companies that were cited in a report last year as providing financial assistance through loan facilities to companies that are involved in such manufacture. These companies have either withdrawn their investments or received assurances from their clients, the manufacturers of cluster bombs, that they will cease production of cluster-bomb components. So we want to lift the tide here. We want to send out a very clear message and we want to work with the parliament, which now has the opportunity to work with us, to stop the flow of Australian funds to cluster-bomb producers by implementing a comprehensive ban on investments in this area. Thank you.

CHAIR—Mr Spathis, are there only seven companies in the world that are engaged in the manufacture of cluster bombs?

Mr Spathis—According to a report put together by the Pax Christi group, there are seven companies.

CHAIR—Do you know whether those companies are engaged purely in the business of manufacture of cluster bombs, or is the cluster-bomb business they are in one aspect of wider munitions manufacture?

Mr Spathis—Correct. It is very much the latter case. If you look at Lockheed Martin, for example, you will find that it represents a very small percentage of their overall operations as a supplier of civilian and defence aeroplanes and other sorts of supplies. It is a very small component.

CHAIR—Major suppliers, in a unit or subunit of one of their divisions, are engaged in the manufacture of cluster munitions. Let us go down that path. This country purchases weapons from a range of major worldwide multinationals. Lockheed Martin is one, and the others are well known. The impact of your proposal, if accepted by the government, would be to prohibit investment funds from this country going into those companies. Do you also seek that the government prohibit itself from purchasing other weapons that are manufactured by those companies?

Mr Spathis—Our submission is really related to the possibility of our members' investments landing, ultimately, in these companies. So we are looking for a specific prohibition in the discharge of our fiduciary duties as trustees and as fund managers.

CHAIR—I understand that argument.

Mr Spathis—We would like to think that, as we have found through experience in direct engagement, that has a very strong and powerful persuasive impact on these corporations. We saw that with one such corporation late last year. When the hardheads in the finance sector are sending out a very clear message that they are concerned about their reputations and the reputation and the longevity of their investments, then it is the investments that we are focused on. I am not sure that we are able to actually say anything on behalf of the government and what it can or cannot do in relation to this.

CHAIR—No. There are consequences to the course of action you propose.

Mr Spathis—I understand that, but we are not alone. Looking at other jurisdictions—

CHAIR—Let me come at the argument from a different direction. I have sat through numerous inquiries where members of your organisation have come before the inquiry and pleaded earnestly for self-regulation, for market determination of outcomes, for minimum regulation, for minimal government oversight in a whole range of activities that member companies of yours engage in. Why do you now seek such a recommendation from this committee when it is certainly within the capacity of your peak organisation to issue a recommendation, suggestion or directive—whatever the word might be—to members of your organisation not to invest in any way in the seven companies you have identified who are in this business?

Mr Spathis—You are correct, Chair, that we have over the years, especially around areas of the Corporations Act and around the areas of SIS law. We believe that both political parties when they enter into government have generally taken a good approach to hard law versus principle based law in those areas. We commend the government for that over the last 10 years. But this issue is just too critical and goes to the core of risk and reputation. The issue of risk is something that actually arises under the SIS legislation that impacts on superannuation funds.

We have concerns that, in the absence of any direction from this parliament, it is basically left to the marketplace and, to date, the marketplace has responded in a very mixed sort of way. According to the report from Pax Christi, these companies still attract I think in the order of $45 billion in funding and in credit facilities and loans from 150 financial organisations across the globe. Obviously, self-regulation is not working in that regard. We should have a look over the Tasman at what New Zealand has to say in this area and look at what Luxembourg, Ireland and Belgium have to say in terms of providing a bit of a prompt to the invisible hand of the market in this area.

Senator KROGER—Mr Spathis, I am a bit surprised by your evidence. The reason I am surprised is not because you are taking a principled position, and I hear what you are saying, but because you are taking such a strong regulatory approach, essentially. I am quite surprised and, like Senator Bishop, quite taken aback by that. I think I read that you represent 39 not-for-profit organisations. Have they all been consulted by you on this matter? Do they support the position that you are taking?

Mr Spathis—Within the governance structure of our own organisation, the positions that we have taken directly with companies, our submissions that have been submitted to this parliament and of course what we convey here today has been discussed at the committee of management of our organisation. That is not to say, though, that each individual superannuation fund cannot by law fetter its decision making obligations to an organisation or to any other body, for that matter. What they do as individual investors is ultimately, within the confines of the law, subject to trustee discretion. But we are a collective organisation and come to this parliament with a position endorsed by the committee of management.

Senator KROGER—I appreciate that. Essentially, I am interested to know whether in fact the position you have taken is one that is broadly agreed with and supported by those superannuation companies.

Mr Spathis—We speak for those 39 superannuation funds.

CHAIR—Do you speak for the industry superannuation funds?

Mr Spathis—The majority of industry super funds belong to our organisation.

CHAIR—I have membership of a couple of industry funds from previous endeavours and they are heavily invested in securities and bonds.

Mr Spathis—Of course they are.

CHAIR—Of course they are—they are multibillion dollar organisations. And they have investments in military manufacturing companies in the United States. I do not know the extraordinary detail, but I do know that they have holdings in Lockheed Martin, for one. So they invest in those companies and they take a return every year, but you say they seek direction not to do so.

Senator KROGER—Why do they not seek not to do it now?

CHAIR—Why do they not just give effect to the principles they argue? Why do your members not give effect to the principles you say they believe in and you articulate on their behalf?

Mr Spathis—They did when we spoke to the chair of the ANZ in relation to this—

CHAIR—That is good.

Mr Spathis—and they gave us some very clear direction when they wanted us to talk to the Commonwealth Bank. They wanted us to influence and engage with these corporations who are providing loan facilities and credit facilities to Lockheed Martin and to L-3. The Commonwealth Bank have divested their investments altogether from those companies. In relation to the ANZ Bank, they have been able to engage with Lockheed Martin, who have indicated that they are prepared to look again at their approach in this whole area and move out of this space.

CHAIR—That is fine. I do understand that. I am not trying to be particularly argumentative, and fair praise to both the Commonwealth Bank and ANZ for having pursued that responsible path.

Mr Spathis—Unequivocally.

CHAIR—But I was not talking about banks; I was talking about industry superannuation funds.

Mr Spathis—We invest in the banks.

CHAIR—Yes, and a number of these industry superannuation funds, because they are so large, invest directly in securities and bonds issued by these munitions manufacturers.

Mr Spathis—Of course.

CHAIR—My question again is: in respect of these superannuation funds, why do they not simply take the option of choosing not to invest in these heinous manufacturers?

Mr Spathis—That is a really good question, because in the situation of direct investment some funds have already taken that path. They have chosen to not invest for those reasons. In other circumstances, a superannuation fund might be an index investor following, for example, a worldwide index like the MSCI. It is not insurmountable for a fund or fund manager to carve out certain aspects of the index. That may well be an option. What we are looking at is also taking it a step further and sending out a clear signal from this parliament in relation to realigning that index—and it would not be a very significant realignment. I am not a fund manager, but readjusting those six or seven companies on the MSCI would be a mere blip in relation to the universe that they invest in. So I would be very surprised if it had any major effect—but again I make the point that it is persuasive and it is a direct message to these companies from investors that there is more to be lost if they continue to manufacture, given the magnitude of all the other work that they are doing.

Senator LUDLAM—Not surprisingly, I take a view slightly at odds to my two colleagues. I think it is to be celebrated if your sector is coming here and putting this kind of proposition before us. It took a little while for me to catch on as to why my colleagues were surprised. I feel the fund is not going to invest in organised crime or an international terrorist organisation or something which is clearly proscribed. We are in the process of rendering these weapons illegal under international law so that they eventually will be placed beyond the pale. So I wonder whether that is the kind of thinking we are looking for: let us ring-fence this stuff right now so that when it is unlawful to invest in this stuff the industry will already be there. Is that what you are putting to us?

Mr Spathis—Absolutely. We are looking for a clear message. For example, I would be interested to understand the attitude and approach of the Future Fund in relation to this area. I think that is a question worth asking. Let us ask that question and see what policies they have in place and whether or not they are capable of dealing with this issue or whether they have dealt with or thought about this issue. The challenge is not insurmountable. We have to pay more than just lip-service to the notion of being a responsible investor. We are not looking at compromising your retirement income or the rate of return. In fact, we want to enhance that but not at any cost—it is reputation that we are talking about. A clear message has emerged, not only from the industry funds or the public sector funds which, over the years, have been accused of having a certain bent; the message is also from fund managers. This was very strongly exemplified by the Commonwealth Bank and its fund management arm. They saw that there was a unequivocal and overriding risk attached to continuing their investments and assistance in this area. Basically, we are looking for a very clear signal, one which is not novel, not radical and exists in other jurisdictions not dissimilar to ours.

Mr Abidi—We would not be here talking to you if this legislation was not being ratified by Australia. We can self-regulate, we can choose which stocks we buy and which we sell. That is what we do all the time. However, this is an opportunity for us to take that process a bit further and have a prohibition on investment because Australia is ratifying that treaty and because, if you do not have that investment, then you have a double standard where the state has ratified the treaty but lets the capital markets do what they do, which is produce weapons of mass destruction. If you say that that is the business of capital markets, you miss your opportunity because this is your opportunity to have that prohibition on capital markets in place. While there will be some fund managers who will divest out of these companies, over time the fund managers who do not divest will start getting postcards and campaigns from people like the Cluster Munitions Coalition telling them to divest out of their super funds and go into super funds which do not have those companies in their unit trust. You will get all these movements happening and the diminution of the value of units in funds because of movements out of funds over time. We are here to prevent those things happening by asking for a recommendation now.

Senator LUDLAM—You should be celebrated for taking the initiative and saving our friends behind us from having to print up the postcards in the first place. The Attorney has argued in submissions to us that the convention does not include a prohibition on investment in companies that develop and produce these munitions and, similarly, does not include an investment offence—but some acts of investment will fall within the scope of offences in the bill. So there is some kind of grey area here. Can you tease that issue out for us?

Mr Abidi—You are asking about the direct?

Senator LUDLAM—Yes; that is what it seems to hinge on.

Mr Abidi—Okay. What is a direct investment? If there is a company out there that is producing only cluster bombs—that is its sole line of business—and you want to invest in that company because you want to buy shares and you want to get a return on investment from the production and sale of cluster bombs, then that is a direct investment. Arguably, there can be an intent that you want to make money out of that company producing and making a profit from cluster bombs. As we said before, no companies that we know of have a direct, sole business in the production of cluster bombs. There are defence aerospace companies with diversified businesses. Some of them are even in the business of making pharmaceuticals. So even if you wanted to go out and find a business that makes only cluster bombs you will not be able to do it; if you have the intent you will not be able to find that. That is the difference between indirect and direct. Therefore, you cannot establish intent because you will not be able to find a direct source of investment in the cluster bombs.

Everything in this market is done indirectly. These companies are syndicated to raise their money, credit and loan facilities; they raise them on capital markets through bond issues. There are 30 banks lining up for syndication and they might have one or two per cent of a loan issued by Lockheed or L-3, so a couple of hundred million dollars, $500 million—nothing here or there in the scheme of things. There is no intent, but

the money that is used by the company will be diversified and allocated to all the businesses that it is in and some of that money will go into the production of cluster bombs.

Senator LUDLAM—So if it is just about subsidiarity, about whether you are investing in the parent company of these gigantic octopuses or in a particular subsidiary, do you think there is a loophole that we are closing or is this in the bill deliberately? What is your sense of the intention that the government has brought to the drafting?

Mr Spathis—On our reading, and this was amplified in the submission made by the government, there is an attempt to try and protect the 'mums and dads' and go to the issue of unintentionally investing in some unit trusts and superannuation funds that do invest in these corporations. Our concern is the point that you have, I guess, dealt with the beneficial owner of shares or the beneficial owner of the units but you have not really dealt with the activities and the objectives of the fund manager who acts on behalf, as a fiduciary, of the member. That is a gaping loophole, in our view, and it needs to be addressed.

Senator LUDLAM—It sounds to me like a level playing field argument. Thanks very much for presenting today.

CHAIR—Thank you very much, Mr Spathis and Mr Abidi, for coming along and being of assistance to the committee.

Proceedings suspended from 6.13 pm to 6.23 pm

BINSKIN, Air Marshal Mark Donald, Chief of Air Force, Royal Australian Air Force

GOUSSAC, Ms Netta, Acting Principal Legal Officer, Office of International Law, Attorney-General's Department

HURLEY, Lieutenant General David, Vice Chief of Defence Force, Department of Defence

MANNING, Mr Greg, First Assistant Secretary, Office of International Law, Attorney-General's Department

McKINNON, Mr Allan, First Assistant Secretary, International Security Division, Department of Foreign Affairs and Trade

PULESTON, Ms Gaia, Counter Proliferation Section, Department of Foreign Affairs and Trade

ROSE, Mr Andrew, Director, International Law Section, Department of Foreign Affairs and Trade

SKINNER, Ms Rebecca, First Assistant Secretary, Strategic Policy, Department of Defence

CHAIR—Welcome. A copy of today's opening statement is before you. Do any of you have questions regarding the document? No. The committee has before it submission No 24 from the Attorney-General, the Minister for Foreign Affairs and the Minister for Defence. Do you wish to make any amendments to the submission? No. I remind you that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of the officer to a superior officer or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I now invite you to make a brief opening statement and then we will proceed to questions.

Mr Manning—I will speak at the outset. I would like to thank the committee for its invitation to be here today. I am not proposing to give a formal opening statement save to say that the Australian government is a very strong supporter of the Convention on Cluster Munitions and as such it has sought to faithfully implement the relevant parts of the convention through the bill that is before the committee, and to ensure that all conduct that is prohibited by the convention is the subject of a criminal offence under Australian law. The bill contains the legislative measures necessary to give effect to the convention and its passage will enable the government to move forward with its commitment to ratify the convention. We trust that the information provided both in the joint ministerial submission and the departments' responses to the questions of the committee has assisted the committee in its review of the bill and we welcome the opportunity to answer any further questions of the committee.

CHAIR—Thank you, Mr Manning. There have been finally some detailed responses received which have been of assistance to the committee in its preparation today. There are a number of relatively discrete headings under this discussion, so we might try to work through them one by one. Firstly, in terms of convention wording, I think it was the witnesses in panel 1 who highlighted the fact that the government has chosen the preferred choice of legislative action under the Criminal Code as opposed to stand-alone legislation such as the Anti-Personnel Mines Convention Act. Certain consequences seem to derive from that in terms of requisite intent. Could you put on the record why the government has chosen that particular path and what the reasoning is behind that approach?

Mr Manning—Certainly. The government thinks that an amendment to the Criminal Code is the most appropriate and efficient way to give effect to those parts of the convention that require legislative implementation. Importantly, there is no legal effect in proceeding with this course as compared to having a stand-alone piece of legislation. The impact is the same in that it prohibits that conduct that Australia has an obligation to prohibit under the convention. Secondly, the bill inserts those offences in the Criminal Code, which is the appropriate place for them to be established in that it is the main act that creates criminal offences under federal law and indeed already contains some similar offences, particularly in its division 72, which deals with explosive and lethal devices. So the government's aim is to achieve the legal impact in the most appropriate and efficient way, and that is why it has chosen to amend the Criminal Code rather than have a stand-alone bill.

CHAIR—Okay. Let me ask the question in a slightly different way. We do have the Anti-Personnel Mines Convention Act. There was clearly justification then for creation of that act and there seems to be some sort of

value in the precedent. If both approaches are relatively equal, why was that path with some precedent not availed of?

Mr Manning—I think over time governments take different approaches to the number of acts they would like to implement and how they like to implement treaty conventions. It is the approach of this government to limit the size of the statute book, which is developing rather rapidly, and so to reduce the complexity of the law and make it easy to access the law. Therefore it decided that the best way to implement these obligations was through an amendment to the Criminal Code rather than stand-alone legislation. It could have done either but thought this was the most efficient and appropriate way, for the reasons I have outlined earlier.

CHAIR—Do you have a question on this point, Senator Ludlam?

Senator LUDLAM—I do. Mr Manning, thanks for that. I am not sure whether they were received directly from your office, but we did get answers to questions on notice from the Attorney-General's Department arguing that the insertion of the words 'never under any circumstances' in relation to prohibited activities in section 72.38 'would depart from the standard drafting practice in the Criminal Code Act 1995'. I think you were in the room when we had a brief discussion of this earlier.

Mr Manning—I was, yes.

Senator LUDLAM—Presumably, had this been drawn up as a standalone piece of legislation, you would not have confronted that issue.

Mr Manning—I am not sure I agree with that.

Senator LUDLAM—I am just reading your words back to you.

Mr Manning—No, I agree with what we said—I am not sure I agree with the conclusion you were drawing from that. Regardless of whether the government proceeded to amend the Criminal Code, or to produce standalone legislation, the drafting instructions would have been sent to the Office of Parliamentary Counsel, who would have drafted them in accordance with standard drafting practice. So the offences would have been produced in the same way. The reading of the offences shows that it achieves the same as the words 'never under any circumstances' in that, in clause 72.38(1), there is a blanket prohibition. So the government's position is that it has prohibited everything that is prohibited under the convention. The issue of the amendment of the Criminal Code versus a standalone act would not have changed the nature of the offences as drafted.

Senator LUDLAM—That is interesting. I will pick some of these up later, chair, if you want to carry on.

CHAIR—I was going to leave this topic now.

Senator LUDLAM—That is okay.

CHAIR—We might turn now to what is really at the heart of this: military cooperation with non-state parties. You would have heard the discussion of section 72.41 and 72.42. Mr Manning, many submitters argue that article 21 allows military engagement with non-state parties and agree with the government that inadvertent participation in the use or assistance in the use of cluster munitions is not prohibited by the convention. However—and this is the important part—they also argue that it does not expressly allow state parties to assist non-state parties to engage in acts prohibited by the convention. In that context, does the bill allow Australia to assist a non-state party in activities associated with cluster munitions?

Mr Manning—If I turn first to the interpretation of the convention, I think it is important that the convention is read as a whole and given its ordinary meaning, as is appropriate in relation to international treaties. In that regard, it is important to note that subarticle 3 of article 21 creates an exception to article 1, but then in clause 4 it limits the scope of that exception. By limiting the scope of the exception it makes it clear that certain things that would be prohibited but for the fact of the exception created by subsection 3 are not prohibited, because subsection 4 picks up some of the conduct in article 1 and makes it clear that, notwithstanding the general exception, a country cannot engage in that conduct. So, when taken as a whole, the government's view is that the convention itself does permit certain conduct and what is prohibited is more narrow than the general prohibition in article 1. That is faithfully picked up in the bill. That means that the conduct in clause 4 of article 21 remains prohibited, notwithstanding the otherwise general exception, but that other conduct is not prohibited.

CHAIR—So the answer to the question is yes.

Mr Manning—That is right. And that is faithfully represented in the bill.

CHAIR—So you say the bill expressly authorises particular assistance to non-state parties and that that is covered by the convention. That viewpoint, or that interpretation—

Mr Manning—Sorry, Senator, could I just clarify: it permits military cooperation; it does not prohibit certain things—

CHAIR—I understand. And you say that is comprehended by the convention and, by necessary interpretation, it is expressly permitted. Do other state parties to the convention hold a similar view, or the same view, as the Australian government? Because it is a fairly basic point, I would have thought.

Mr Manning—My understanding is that others do. Some others might have enacted different legislation, but the point I would like to make there is that Australia has made a policy decision to implement its obligations under the convention. If other state parties decided to go further than that, then that is a policy decision they may have made, but it in no way suggests that Australia has not faithfully fulfilled its obligations under the convention. Although, as I said earlier, my understanding is that numerous other countries take the exact same approach, the point I am trying to make is that the fact that others may take a different approach does not mean that Australia's approach is not valid.

CHAIR—You say that, as far as the government of Australia is concerned, its approach to the bill faithfully reflects the intent of the convention.

Mr Manning—That is right.

CHAIR—Does the interpretation by the Australian government of the convention as reflected in section 72.41 mean that in joint military operations its military personnel may assist military personnel of non-state parties to use, develop, produce, acquire, stockpile, retain or transfer cluster munitions?

Mr Manning—The effect of 72.41 is that the Australian government itself cannot use, develop, produce or otherwise acquire but that the ancillary provisions are open to Australia. So yes—it can.

CHAIR—How do you reconcile the apparent authority to assist non-state actors to engage in those activities which we just identified with the apparent obligations on Australia to make its best efforts to discourage the use of cluster munitions in article 21(2)? Are they not inconsistent?

Mr Manning—I do not think they are inconsistent. Obviously Australia's obligations under the convention are all of equal weight. However, there is no prohibition on Australia in relation to the type of conduct that we are talking about. It may choose to implement its obligations under article 21(2) in a number of ways, but the convention itself reflects a balance here and acknowledges that whilst states are doing that they are not prohibited from engaging in the type of conduct accepted in the later clauses in article 21.

CHAIR—A number of the witnesses in the first panel regard Australia's reserving to itself in this legislation the right to assist non-state parties or to retain the ability to access cluster munitions in limited circumstances for training or clearance or whatever as being the least best options, and they argue for a complete ban on the use or participation or assistance to non-state actors who use cluster munitions. Why has the Australian government not gone for 100 per cent coverage as opposed to perhaps 95 per cent?

Mr Manning—I may call on one of my colleagues from DFAT and Defence to speak through some of the policy issues that were raised in that question, although I would point out that, in relation to article 3(6), which talks about retention or acquisition of a limited number of cluster munitions for the training purposes et cetera, that is permitted under the convention.

CHAIR—It is.

Mr Manning—I would make the same point in relation to that as I have been making in relation to the exception in 21(3) and 21(4)—that is, it is permissible conduct under the convention.

CHAIR—I am not arguing that the behaviour I just identified is not expressly authorised by the convention or that the government is not faithfully giving effect to its obligations. I am really asking a policy question as to why the government chose to go down that path as opposed to going down the path apparently gone down by some other countries: a blanket prohibition of any and all activities to do with cluster munitions.

Mr Manning—One of my colleagues from the Department of Foreign Affairs or the Department of Defence might like to address that question.

Mr McKinnon—I am happy to go first. Essentially, a very significant policy imperative in the negotiation was to maintain our capacity for interoperability with the United States forces. Our relationship with them is

somewhat different from some of the other examples cited—New Zealand's or Norway's cooperation with them, for example.

Of course, the convention as negotiated then obviously hinged on this issue, and there was, specifically, an article 21—the room, if you like, given to enable the interoperability to be sufficient for Australia's purposes. It is what we needed in the convention and the convention specifically allows it.

Lt Gen. Hurley—I think at the outset it would have been important to say that the Department of Defence fully recognises its obligations under the convention and intends to abide by them. On the issue of total exclusion, I think at times calls for total exclusion do not recognise the deeply integrated nature of interoperability. For example, our people are deeply embedded with US forces or coalition forces on operations today. Total exclusion would negate interoperability, which is one of the balancing parts of the convention. If we want to be interoperable, to be able to conduct military cooperation and military operations with a non-state party, total exclusion would prevent us from doing that.

CHAIR—So really the core answer is: the requirement for interoperability effectively prohibits total exclusion or total banning of the use of cluster munitions by ADF members.

Lt Gen. Hurley—Correct.

Mr Manning—I would like to add one more point there in terms of Australia's conduct. The balance that is represented in the convention is the balance that was agreed by, I think, 109 states parties at the conference at which the convention was adopted. So Australia's strong belief is that its legislation and its attitude to the convention are representative of the international agreement about what should occur in this regard. I just think that is an important point to make when comparing Australia's approach to that of some other countries.

CHAIR—In fact, our government would argue that we are engaging in very progressive behaviour in giving almost immediate implementation to the policy thrust behind the convention, would it not?

Mr Manning—It would.

Senator LUDLAM—Since we have talked about progressive behaviour, maybe I could put a couple of questions to foreign affairs. Thank you for coming. I should say at the outset—I do not think I did at the beginning—that we strongly support this legislation and congratulate the government on bringing it forward. But I just wonder whether anybody at the table has taken the time to read the submissions that were put to this committee and whether you think any of the, I believe, quite serious arguments that have been raised have any legitimacy. Or are you all collectively completely comfortable with the bill as it is drafted?

Mr McKinnon—You said you were addressing questions to foreign affairs, so I will lead off on that. Do you have a specific question? We have people at the table who have read all of those submissions, but it is possible to answer that question in the broad.

Senator LUDLAM—I am happy to have it answered in the specific. Did any issue raised by any of the submitters ring a bell? Or has nothing of any legitimacy come across your desks as far as you are concerned? Is there anything at all that anybody wrote in the course of bringing this evidence to this committee or perhaps said this afternoon during the hearing that has caused you to think that perhaps this bill might need some amendment?

Mr McKinnon—There was consideration given to every submission, of course, but, as my AGD colleague has pointed out, our implementing legislation actually implements the convention. You might argue that it could have been done this way or that way, but in a sense we are completely comfortable with the way the convention has been written into the implementing legislation.

Senator LUDLAM—There have been really serious arguments raised that we are not actually implementing it at all—that we are cutting directly across the spirit if not the letter of it and that we are potentially setting quite a serious example for countries that might choose to embed this in their domestic law around the world in the future. I will put the question to you again. You drafted the legislation some time ago. The Joint Standing Committee on Treaties expressed some fairly serious reservations at an earlier stage. Since then, quite a deal of evidence has come to light that some of the folk with us in the room this afternoon have put a lot of work into. Some of the arguments sounded quite legitimate to me, but you are saying not a word of the bill needs to change from your original drafting proposition as a result of the evidence that has been put to you.

Mr Manning—I might answer that by saying that the government has, of course, considered all of the views put forward and many of the views put forward today were put forward previously. It also considered

the views of the Joint Standing Committee on Treaties, which did recommend ratification but asked that the government consider certain aspects in the development of the legislation. As noted in the government's response, the government did consider it but is convinced that the approach taken in the bill to date is the best approach.

The government firmly believes if you read the convention and give the words there their ordinary meaning and then read the bill that the bill is a faithful implementation of Australia's obligations under the convention. It is fair to say that the government does not believe it needs to change the bill, but I do not think it can be concluded from that that the government has not considered very seriously and taken on board all of the comments and views put forward through a range of parties in the drafting of the bill.

Senator LUDLAM—I was more interested in your thinking subsequent to the drafting. I do not know that we should single out the United States—there are plenty of other states around the world that deploy these wretched things, but they are our closest ally in this regard—but are we obliged, once this bill passes the parliament, to communicate our views to the United States, seeing that what we are trying to do here is eliminate these things? Will we be communicating the fact of the passage of the legislation and any requests that we might be making of our allies with regard to these weapons specifically? That is the question I was going to put to the foreign affairs department.

Mr McKinnon—As you are well aware, article 21 does contain positive obligations in relation to states that are not party to this convention. In particular:

> Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

That is fairly standard language in conventions and treaties. We will be and have been encouraging the United States—just to pick them out—to accede to this. There is no evidence at this stage that they are considering doing so, but that certainly would not rule it out for all time. For example, in relation to the landmine convention, initially they took a position that was quite reserved about that, and the judgment was that they would never sign onto it, but there are now clear and public signs that they are reconsidering their position. So, over time, the policy discussion has shifted and their position has shifted too. So, yes we will be encouraging the United States to reconsider their position on this. Our aspiration is to have these weapons eventually made illegal or unacceptable. Obviously we are dealing with the real world, but we will be encouraging the United States and other non-parties to become parties.

Senator LUDLAM—Maybe you could take this on notice. It sounds as though there are specific instances in which the Australian government has communicated to the United States that these weapons should be stood down and dismantled, according to what is in the convention. Is that the case and are you able to provide us with some examples of when we have done that? I do not expect you to have them on the table with you now.

Mr McKinnon—In preparatory committees in the negotiation on this we would have been doing that. I am happy to get you specific dates. It would not have been in the context of a formal demarche; it is a constant theme of our discussions with the United States.

Senator LUDLAM—All right. Thank you for that. I will turn my questions to Defence. I think it is reasonably well understood that the ADF does not deploy these things, that we do not use them. Have we ever used them?

Air Marshal Binskin—From an Air Force perspective and, as far as I know, across the other two services, no.

Senator LUDLAM—I put some questions to the witnesses in the first tranche about the degree to which we might have stockpiled, hosted or allowed the transhipment of these things. How much can you tell us about the degree to which that is done?

Air Marshal Binskin—I need to go back and clarify my previous answer. We have not used them operationally. For a number of years in the eighties we did test some cluster munitions from an aircraft. There was a program to build them within Australia—that was the Karinga weapon—but that was all terminated.

Senator LUDLAM—I did not know that. For what reason did we terminate or why don't we deploy them these days?

Air Marshal Binskin—I would have to go to what the policy was back in the eighties. Basically, we did not see a need, for the way we operate, to develop those weapons.

Senator LUDLAM—All right. Thanks for that clarification. What about ones belonging to other people?

Ms Skinner—We have some training stocks of weapons that have been collected from other countries that are used for training and development purposes. As the convention would require, they be minimal stocks. We have a list of them here.

Senator LUDLAM—We already have those. Would you like to table that rather than taking up the committee's time?

Ms Skinner—Yes.

Lt Gen. Hurley—I will just clarify that answer from Ms Skinner. We do not develop; it is training and countermeasures development, not development of cluster munitions.

Senator LUDLAM—That is a helpful clarification.

Lt Gen. Hurley—Thank you, Senator.

Senator LUDLAM—If I one day got a security clearance to go and visit *Stirling*, Fleet Base West, would I find some secret stockpile of United States cluster munitions that they can sweep by and pick up? To cut to the chase: are we stockpiling these materials on behalf of anybody else?

Lt Gen. Hurley—We are not stockpiling cluster munitions on behalf of anybody.

Senator LUDLAM—Okay. Do they get transhipped through Australian airspace or over land?

Lt Gen. Hurley—If US forces are transiting Australian airspace or sea passage there is a possibility they will have them on board, yes.

Senator LUDLAM—Would Defence be brought into the conversation as a result of negotiations that kicked off late last year between us and the US government on an expanded US military presence here? How would the general public know if cluster munitions were to be brought onto Australian soil?

Lt Gen. Hurley—There are a couple of hypotheticals in that. We are in very early stages of the force posture review discussions with United States armed forces. The nature and characteristics of the outcome of those discussions are really hard to tell at the present time, and whether that would involve any stockpiling of US explosive ordnance in Australia would be a decision far down the track. I think that would be a policy decision government would make and it would determine how it would advise the population.

CHAIR—On this issue, are we engaged in any theatres at the moment where cluster munitions are being used by allies of ours?

Lt Gen. Hurley—Not to our knowledge.

CHAIR—Would the clearance of cluster munitions, once their necessity for use in theatre has passed, be an activity for serving personnel or is it an activity that in due course NGOs are capable of engaging in, like in the clearance of landmines?

Air Marshal Binskin—Generically, during operations it could be both. During the operation itself, our personnel may be required to go in and de-arm these types of weapons. After the fact, in some of the countries round the world where you have seen what are referred to as cluster munitions but are antipersonnel type of weapons, you may have NGOs doing that, or a mixture.

Lt Gen. Hurley—Yes, it may be a mixture, as we have done in the past, to help with mine clearing.

CHAIR—Either or both.

Air Marshal Binskin—The fact that ADF personnel may do it is why we require to have some very small stock holdings for that training.

CHAIR—Yes. Is it the practice of the ADF, in training, to use live cluster munitions or are they de-armed before the training exercise is engaged in?

Lt Gen. Hurley—We do not possess any.

CHAIR—We don't possess any live cluster munitions?

Lt Gen. Hurley—Not that can be delivered, only non-operational. The only live we would have would be if we had collected it from battlefield for coming back for exploitation and research. But we do not have them in a usable form.

CHAIR—So when Ms Skinner referred to a small stockpile?

Lt Gen. Hurley—The word 'training' is used—

Air Marshal Binskin—Two ways.

Lt Gen. Hurley—It is not training to deliver; it is training to understand the system and be able to exploit or render it inert. We are not training to use.

Air Marshal Binskin—Training can be referred to in two ways.

CHAIR—Thank you. I had presumed it was training to use.

Air Marshal Binskin—No. It is training to be able to de-arm. So you will need some access to some of these weapons to be able to train to de-arm.

CHAIR—But as to the ones that we are training our personnel to de-arm, that small stockpile: when the personnel are being trained to de-arm, would they be armed or are they, at that stage, inert?

Air Marshal Binskin—Inert.

CHAIR—They would be inert.

Air Marshal Binskin—Inert, yes.

CHAIR—I am going to go on to investment shortly; Senator Ludlam, do you want to pursue anything else?

Senator LUDLAM—I have a couple more questions before we move on. As to joint training exercises and the like, one that I know of is Talisman Sabre, which we undertake in conjunction with the United States every two years at Shoalwater.

Lt Gen. Hurley—Correct.

Senator LUDLAM—Can you tell us how much you know about the deployment, or the use for training or whatever, of these weapons in a joint exercise like that?

Lt Gen. Hurley—They would not be employed on a training exercise in Australia. Whether US ships would hold them would be questionable. Every vessel of the Royal Australian Navy or of the US that would go to sea would go to sea with some sort of live fit-out of ammunition, but they would not employ them on our ranges.

Senator LUDLAM—Not even dud ones?

Lt Gen. Hurley—No.

Senator LUDLAM—I am not talking about ADF—even if we are talking about our partners?

Lt Gen. Hurley—No.

Senator LUDLAM—Is that because we have asked them not to?

Lt Gen. Hurley—We keep our ranges fairly pristine and, like everyone else, we would not want to have them littered with cluster munitions.

Senator LUDLAM—That sound sensible. But I was talking about de-armed ones—ones that are not active at all.

Lt Gen. Hurley—No. We primarily drop HE—high explosive—on our ranges.

Senator LUDLAM—Are you still talking about the United States defence force?

Lt Gen. Hurley—Both.

Senator LUDLAM—The same?

Lt Gen. Hurley—We approve what the US would deploy or drop on our ranges in our territory during exercises.

Senator LUDLAM—That is good to know. Have we explicitly asked the United States not to train or practice or play around with those things, live or not live, during exercises in or around Australia?

Lt Gen. Hurley—I could not say that we have explicitly told them not to drop them or bring them, but I can say that we have expressly told them that they are not to be dropped on our activities.

Senator LUDLAM—I think you have just directly contradicted yourself; I am not sure whether that is a yes or no.

Lt Gen. Hurley—What I am saying is: we have not said, 'You can't bring them on your ships.' What we say is, 'You can't drop them in Australia.'

Senator LUDLAM—We will not be using these in any kind of practice context during Talisman Sabre or anywhere else?

Lt Gen. Hurley—Yes.

Senator LUDLAM—Maybe I should put this back to the Attorney's office. The issue was raised earlier in the session about inserting an objects clause to deal with some of the ambiguity that people feel this drafting has brought into the debate. Maybe that is hypothetical until you have seen it, but are you okay with the general principle of an objects clause, if it is reasonably well crafted, to deliberately capture the spirit, if you will, of the treaty?

Mr Manning—The government's view is that an objects clause is not necessary and would just add to the complexity of the legislation. There is already a clause that sets out the purpose of these provisions in the legislation which makes it clear that it is to give effect to the Convention on Cluster Munitions. The offences and defences in the act, as I have said, already give effect to the obligations in the conventions, insofar as we are required to under article 9, in that we are required to take legislative measures in relation to those things that are banned under the convention. Also, in the explanatory memorandum and second reading speech, it is made clear what the purpose of the bill is. So the government's view is that an objects clause is not necessary and would just add another layer of complexity to the legislation that is not required. So it has decided not to use one.

Senator LUDLAM—Maybe it is difficult to come in here and have to declaim that the bill is perfect and needs no further work, but that is the sense I get. With the consent of the committee, I might submit some questions on notice rather than tying you up now if you want to shift to the investment question, Chair.

CHAIR—You have the right to put questions on notice, so that is no problem. Can we now turn to investment in the light of the points made by the superannuation organisations that just appeared before the committee. DFAT stated before the Joint Standing Committee on Treaties that it was doubtful that Australian investment in companies that develop or produce cluster munitions is prohibited under the convention. Is that still the view of the Australian government?

Ms Puleston—I think we answered this question in our response to the committee's question No. 18. There is a lengthy quote that gives some context to the quotation you refer to by the DFAT representative. In short, the DFAT representative at that committee said that we will be considering how the convention might be implemented in Australia and I think she was referring to the interpretation of 'assist' under the landmine convention. We have considered the terms of the legislation and how we might go about implementing the obligations of the convention, including in regard to the interpretation of this word 'assist'. In our responses to the question Nos 16 and 17, we outlined that the government's position is that the convention does not actually include an explicit prohibition on investment and therefore some acts of investment may fall within the scope of the prohibitions under the convention and some may not, depending on how it applies under the circumstances of the bill.

CHAIR—In the answers to 16, 17 and 18, do you identify those instances which are comprehended by the legislation and those which are not?

Ms Puleston—Yes, I believe we do.

Mr McKinnon—If I could add if it is relevant: there was no explicit prohibition on investment in the other arms control treaties that have been concluded in recent times—the Anti-Personnel Landmines Convention, the Convention on Certain Conventional Weapons and the Biological Weapons Convention—nor was there, to my knowledge, any reference in the implementing legislation in Australia to a prohibition on investment. It has not been necessary. I guess the broad argument is that it is comprehended within the term of 'assist'.

CHAIR—In that case, can you succinctly state what the government understands its obligations to be under the convention in terms of investment and how the bill gives effect to that?

Mr Manning—The government understands its obligations to be those that are clearly set out in article 1 of the convention—that is, it prohibits:

(b) Develop, produce, otherwise acquire, stockpile, retain or ...

(c) Assist, encourage or induce anyone—

to do it. In deciding how to reduce that obligation into specific offences, the approach whereby you pick and choose the contexts in which it could occur and then make a specific offence for those contexts carries with it some great risk, in the sense that if you do not foresee all those contexts—and that is what normally happens—

you will not be prohibiting conduct that you intend to prohibit. Therefore, the norm when framing criminal offences is to focus on the conduct you are trying to prohibit and then leave it to be decided on the facts of a particular case whether or not that conduct falls within that prohibition. That is the approach that the government has taken in the bill. It repeats the words of the prohibition in the convention, and whether or not a particular act of investment falls within that is left to be determined on the facts. One other point I would make on this is that in relation to the offence in 72.38(1), of course it picks up by normal operation of the Criminal Code the ancillary provisions of the Criminal Code. I am talking about aiding, abetting, counselling and procuring or acting through agents. That type of conduct that is also prohibited. When you are determining whether or not a particular act related to investment—and that could be a very broad range of action—is covered, you would look at the full range of conduct that is prohibited by the offences and as extended by those ancillary codes in relation to 72.38(1). The government's view is that that is a more prudent approach rather than trying to pick in advance the contexts in which the prohibition in the convention could arise.

CHAIR—That approach, by definition, provides an explanation as to why issues of direct or indirect investment are not spelt out as in—

Mr Manning—The ancillary provisions?

CHAIR—Yes.

Mr Manning—And the offences in 72.38(2), assistance et cetera, are already by their nature ancillary, although under the convention and under the proposed act they are treated just as seriously.

CHAIR—I now understand the approach of the government. Thanks.

Senator LUDLAM—I have a supplementary question on that issue. I think you were all in the room before when the super fund organisation was in here. That issue was quite a crucial one—the one that the chair just raised about whether it is direct investment or investment in a subsidiary. Is their reading of the way that this bill is constructed essentially correct, or do you think they are misreading it?

Mr Manning—I had to step out for a short period of time then, but if you could clarify for me—

Senator LUDLAM—We can bring them around to this side of the table and they can ask the questions.

Mr Manning—In the part of their testimony which I was here for my understanding was that they were talking about the fact that certain categories of investment activity are not captured. I suppose I can, without wanting to be too circular, go back to my previous answer, which was that it depends on whether or not the conduct that is being engaged in by an investor is captured by the words in the bill—the word 'assist', for example—or any of the ancillary provisions in the Criminal Code.

Senator LUDLAM—If this goes completely down a rabbit hole, I might end up getting my head straight and putting this to you in writing. But the issue that they put to us, as far as I could tell, was that at the moment there is a prohibition on direct investment or providing other forms of investment assistance, if you like, to a company manufacturing cluster munitions—if that is all they do and if it is direct investment. They also put to us that there is actually no such thing, that the companies that manufacture these horrible things are all subsidiaries of very large organisations that do a variety of different things. First of all, is that contention correct?

Mr Manning—I do not know.

Senator LUDLAM—Okay, fair enough. But is it the case that there is nothing in the bill as drafted at the moment that prevents a fund investing in—I forget what the example was that we were speaking of earlier.

CHAIR—Lockheed Martin.

Senator LUDLAM—Yes, for example.

CHAIR—Securities or bonds issued by Lockheed Martin.

Mr Manning—I suppose I can only come back to the provisions of the bill. There is a prohibition on assisting someone to develop a cluster munition. So whether or not the action is captured by that, whether it is direct or indirect, would presumably be determined on the facts. As to whether some situation that is established and designed to get around that does in fact get around it, I cannot sit here and answer whether it will in all cases. I do not mean to be evasive, but we come back to the question: do the facts fall within the language of the prohibition? That will determine whether or not activity in the investment sphere is captured.

Senator LUDLAM—I respect that you are not able to provide legal advice to us as such, but you are the only one we have who can interpret how this thing is going to operate in practice. Will investing in Lockheed

Martin—or taking up a bond issue, for example, as the chair has raised—count as assisting for the purposes of this legislation?

Mr Manning—I really do not feel I can answer the question because, again, all I can come back to is what is prohibited, and that is a person intentionally assisting someone to do something. Whether or not a particular commercial arrangement does that—

Senator LUDLAM—Does investing in one of these conglomerates count as intentionally assisting or not?

Mr Manning—I would have thought that, if you do not have knowledge that that is what is occurring as a result of your investment, no.

Senator LUDLAM—How much due diligence do you have to do as a fund manager? Do you as a fund manager have to work out which parts of that conglomerate do what kinds of things? Is that where the test will be?

Mr Manning—Yes. The test will be: does the person intended to assist someone to produce a cluster munition?

Senator LUDLAM—So the more ignorant you are the more likely you are to be able to get away with inadvertently investing, and the more due diligence you have done the less of a defence you will have.

Mr Manning—Presumably, if you are a fund manager ignorant of what you are investing in, you will not be investing money for long. My point is that, presumably, people have some knowledge of what they are doing. As the previous witnesses spoke about, there is also potential for people to make ethical or commercial decisions in relation to their reputation and self-regulate that way as well. But, for the purpose of the act, you would have to intend to assist to be captured.

Senator LUDLAM—I find that completely unsatisfactory and I am just wondering whether you think that there is a really good, legitimate example of 'why not put it beyond doubt?'—as the folk who were at the table before proposed. Why not just legislative the ambiguity out of existence? To me, this feels like a complete grey area. I have no idea how you would regulate that or prosecute in any event.

Mr Manning—I suppose it comes back to what the government is trying to achieve through the bill, which is to implement the convention.

Senator LUDLAM—No, you don't—that is not okay. Can we just stay on topic. Should we simply legislate out of existence the ambiguity that you have just introduced through a fairly simple amendment that says 'Direct or indirect; that does not matter. You need to do your due diligence or you will be in breach of your obligations'?

CHAIR—We are now straying into policy questions as to the intent of government. Mr Manning can address the purpose of the bill and the intent of the government in the bill. He may not address purpose or intent otherwise.

Senator LUDLAM—I think you are off the hook. I have no other questions, gentlemen.

CHAIR—Ladies and gentlemen, thank you very much for coming in and for being of considerable assistance to the committee.

Committee adjourned at 7.11 pm