

# Chapter 6

## Investment in cluster munitions production

6.1 This chapter explores the issue of investment in the production of cluster munitions with focus on the bill's provisions. It considers the legislation of other states parties to the Convention, Australia's position and the evidence on investment in cluster munitions production.

### Provisions of the bill

6.2 According to subsection 72.38(2) of the bill, a person (the *first person*) commits an offence if:

- (a) the first person assists, encourages, or induces another person to do any of the following acts with a cluster munition:
  - (i) uses it;
  - (ii) develop, produce or otherwise acquire it;
  - (iii) stockpile or retain it;
  - (iv) transfer it to anyone; and
- (b) the other person does the act; and
- (c) the first person intends that the act be done.

6.3 In the second reading speech in relation to the bill the Attorney-General provided an example of conduct that would fall within this offence:

...where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company.<sup>1</sup>

6.4 For the offence to have been committed there must be intent on the part of the individual to provide financial assistance to an entity so that the entity can develop or produce cluster munitions. However, as the joint government submission highlighted, 'accidental or innocent acts of assistance, encouragement or inducement will not fall within the offences' of the bill.<sup>2</sup>

### Interpreting the Convention

6.5 A number of countries have interpreted the Convention's prohibitions to include investment in companies that manufacture cluster munitions or components on

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1 Attorney-General, Second Reading Speech, *House Hansard*, 27 October 2010, p. 8.

2 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 4.

the basis that such investment amounts to a form of assistance with production otherwise prohibited under Article 1. Many have prohibited investment in cluster munitions production in their implementation legislation including Belgium which adopted a law in 2007 prohibiting financial institutions, whether public or private, from investing in companies that produce cluster munitions. France's legislation bans both direct and indirect financing of cluster munitions production.<sup>3</sup> Luxembourg and New Zealand have criminalised investment by public or private entities in companies that produce cluster munitions whilst Ireland banned investment of public money in cluster munitions producers.<sup>4</sup>

6.6 Clause 10(2) of New Zealand's *Cluster Munitions Prohibition Act 2009* states that a person 'who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions' commits an offence. The Act provides an extensive definition of what a fund is and includes clear sanctions.<sup>5</sup> However, New Zealand is yet to detail how it will ensure compliance with these provisions as the Act does not require the government to identify and maintain a list of cluster munition producers.

6.7 In contrast, whilst the *UK Cluster Munitions (Prohibition) Act 2010* prohibits the direct financing of cluster munitions production, it does not prohibit indirect financing of cluster munitions.<sup>6</sup> The view of the UK Government reflected in the Act is that the Convention only bans the provision of funds which directly contribute to the manufacture of cluster munitions.<sup>7</sup> The passage of the bill through the House of Lords, however, generated widespread concern about the issue of indirect financing.<sup>8</sup>

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3 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, p. 10, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 14 December 2010).

4 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, p. 10, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 14 December 2010).

5 Cluster Munition Coalition and International Campaign to Ban Landmines, *Cluster Munition Monitor 2010*, Cluster Munition Ban Policy – New Zealand, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/564](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/564) (accessed 9 December 2010).

6 Foreign and Commonwealth Office, *The Financing of Cluster Munitions Production*, Written Ministerial Statement, 7 December 2009, <http://www.stopexplosiveinvestments.org/uploads/pdf/UK%20Ministerial%20statement.pdf> (accessed 9 December 2010).

7 Jon Lunn, *Cluster Munitions (Prohibitions) Bill [HL]*, Research paper 10/11, House of Commons Library, 11 February 2010, p. 7, <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-011.pdf> (accessed 12 January 2011).

8 Jon Lunn, *Cluster Munitions (Prohibitions) Bill [HL]*, Research paper 10/11, House of Commons Library, 11 February 2010, p. 24, <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-011.pdf> (accessed 12 January 2011).

On 7 December 2009, the UK Government announced to Parliament that it would work with the financial sector, non-government organisations and other interested parties to promote a voluntary code of conduct to prevent indirect financing of cluster munitions.<sup>9</sup> Whilst 'it would not become illegal to provide funds generally to companies that manufacture a range of goods, including cluster munitions', the UK Government recognised a need to establish measures to end indirect financing of cluster munitions. It took the view that a thorough consultation was needed in the first instance given the complex nature of indirect financing.<sup>10</sup>

## **Joint Standing Committee on Treaties and Government response**

6.8 In its inquiry on the Convention, JSCOT queried whether investment by Australian entities in companies that develop or produce cluster munitions would be viewed as assisting the production of cluster munitions, and if so, whether such investment would be criminalised.<sup>11</sup> DFAT responded that the Convention does not explicitly prohibit investment in companies that develop or produce cluster munitions, nor does it define the term 'assist'. It noted, however, that Australia had interpreted 'assist' to mean direct physical participation in any activity prohibited under the Convention.<sup>12</sup>

6.9 In light of its concern that terms contained in the Convention were not clearly defined and noting that the interpretation of terms such as 'assist' will need to be considered in the development of legislation, JSCOT recommended that the Australian Government have regard to:

preventing investment by Australian entities in the development or production of cluster munitions, either directly, or through the provision of funds to companies that may develop or produce cluster munitions.<sup>13</sup>

## **Evidence**

6.10 The majority of submitters argued in favour of an explicit prohibition on both direct and indirect investment in the production of cluster munitions with many

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9 Foreign and Commonwealth Office, 'Cluster bombs ban moves a step closer', Press Release, 17 March 2010, <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21900970> (accessed 9 December 2010).

10 Foreign and Commonwealth Office, 'The Financing of Cluster Munitions Production', Written Ministerial Statement, 7 December 2009, <http://www.stopexplosiveinvestments.org/uploads/pdf/UK%20Ministerial%20statement.pdf> (accessed 9 December 2010).

11 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 23.

12 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 23.

13 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 27.

supporting the realisation of JSCOT's recommendation 2 in the bill.<sup>14</sup> For example, ALHR held that an explicit prohibition on investment in statutory form would:

provide clarity to the definition of the term 'assist' and give guidance to the prosecution, defence and judiciary in any future proceedings. At present, these matters rely entirely upon prosecutorial policy and eventual judicial interpretation, thereby creating an unnecessary level of uncertainty.<sup>15</sup>

6.11 Act for Peace argued for a more comprehensive legal framework beyond that of the suite of criminal offences of the bill and held that the government should consult with investor stakeholders in order to establish such a framework including a ban on investment and framework for divestment.<sup>16</sup>

6.12 Human Rights Watch and IHRC agreed that the bill should explicitly ban investment because it assists with a prohibited act. In their view, production cannot be curtailed and cluster munitions eliminated if a state party allows direct or indirect financial support to manufactures of cluster munitions. They further noted that as private investors often provide important financial support to such companies, the ban should extend to private funds.<sup>17</sup> Mr Robert Rands argued that a prohibition on Australian investment in off-shore manufacturers of cluster munitions would in the long run, decrease the 'amount of foreign aid we so generously expend on removing explosive remnants of war, and on aiding survivors and their communities in affected areas'.<sup>18</sup>

6.13 The Australian Council of Super Investors (ACSI) raised a number of issues in its evidence which were pursued by the committee. The ACSI noted that the bill would make it illegal for a person or bank to provide financial assistance to, or invest in a company that develops or produces cluster munitions but 'only where that person or bank intends to assist, encourage or induce the development or production of cluster munitions by that company'.<sup>19</sup> The concern of ACSI is that the bill's drafting implies that financial assistance is illegal only if it is provided 'solely for the purpose of cluster bomb production and with recourse only to that activity' and yet it was not

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14 Sally McGushin, *Submission 1*; Willy Bach, *Submission 2*; Australian Council of Superannuation Investors, *Submission 4*; Robert Rands, *Submission 5*; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, pp. [3–4]; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 8*, p. 1; Quaker Peace and Justice Committee, *Submission 10*; CBM Australia, *Submission 11*, p. 3; Union Aid Abroad–APHEDA, *Submission 12*, p. [1]; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Law Council of Australia, *Submission 20*, p. 12; Oxfam Australia, *Submission 14*, p. 3, Adrian von der Borch, *Submission 25*.

15 Australian Lawyers for Human Rights, *Submission 19*, p. [13].

16 Act for Peace, *Submission 18*, p. 4.

17 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 13.

18 Robert Rands, *Submission 5*, p. [2].

19 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

aware that direct financing of cluster munitions actually exists.<sup>20</sup> Mr Azhar Abidi from ACSI clarified the term '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.<sup>21</sup>

6.14 To support their argument, ACSI drew on the findings of a report by IKV Pax Christi and Netwerk Vlaanderen which identified only seven companies worldwide that produce cluster munitions. Moreover, as they are diversified conglomerates and do not source direct finance solely for the production of cluster munitions, the production of cluster munitions is only one component of their overall operations.<sup>22</sup>

6.15 The ACSI further argued that it was not practical to restrict weapons producers from using corporate lending facilities for the purpose of producing cluster munitions. It noted, however, that it was 'highly likely that weapons producers will increasingly shift to indirect financing of controversial munitions to avoid reputational damage'. This presents what ACIS called a 'major loophole' in the bill as most financing is indirect.<sup>23</sup> Citing evidence from the IKV Pax Christi and Netwerk Vlaanderen report which established that 146 identified financial institutions have provided over US \$43 billion of investments and financial services to the seven cluster bomb producers, ACIS argued that:

Companies source financing through corporate loans, syndicated loans, rights issues, new equity and raising through other securities and unless there is a mechanism to restrict weapons producers from using such financing towards the production of cluster munitions, the legislation will not be effective in complying with the spirit of the CCM.<sup>24</sup>

6.16 The ACSI held that unless a mechanism is introduced into the bill to restrict weapons producers from using such financing towards the production of cluster munitions, the legislation will not be effective. It argued that unless the loophole is closed, it is likely that 'capital from Australian investors or Australian companies in

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20 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

21 Azhar Abidi, Australian Council of Superannuation Investors, *Committee Hansard*, 3 March 2011, p. 15.

22 Australian Council of Superannuation Investors, *Submission 4A*, [1]. See also IKV Pax Christi and Netwerk Vlaanderen, *Worldwide Investments in Cluster Munitions: A Shared Responsibility*, April 2010, p. 8, <http://www.ikvpaxchristi.nl/files/Documenten/wap%20cluster%20munitie/Clustermunitie/Stoep%20Explosive%20Investments/2010%20Worldwide%20Investments%20in%20Cluster%20Munitions%20-%20April%202010%20update%20full%20report%20DEF.pdf> (accessed 15 December 2010).

23 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

24 Australian Council of Superannuation Investors, *Submission 4*, pp. [1–2].

unit trusts, superannuation funds and other forms will continue to be used indirectly in the production of cluster bombs around the world'.<sup>25</sup>

6.17 In relation to the question of clear intent, the ACSI held the view that individual investors in a trust fund cannot be held accountable for the operations of the companies in a unit trust. It recognised that it would not be likely for such individuals to be informed of the companies' operations in great detail and that individual investors would rarely have the voting power to influence the corporate behaviour of the companies they invest in. However:

On the other hand, the brokers, fund managers and investment banks who sell such unit trusts in Australia can ensure that they do not provide exposure to companies that breach the Bill. Similarly, the super funds can ensure that they do not expose their members to companies that breach the Criminal Code Amendment by excluding companies that are involved in cluster bomb production from their investment portfolios. Only by making such a restriction a legislative requirement can the Commonwealth ensure that Australian companies—banks, fund managers, brokers and other financial institutions—do not provide advertent or inadvertent assistance to cluster bomb producers.<sup>26</sup>

6.18 ACSI argued that the bill should not be restricted to persons or companies who intended to assist, encourage or induce the development or production of cluster munitions. It noted that companies would rarely, if ever, solicit direct funding for the development or production of controversial weaponry and would rarely provide such funding in light of the controversy surrounding cluster munitions. However, it argued that as it is 'extremely likely' that companies will continue to use general corporate loans and equity towards producing cluster munitions that would not attract direct funding. Therefore, ACSI argued that the bill must restrict the ability of cluster bomb producers to secure any capital from Australian investors by 'making it illegal for Australian investors to provide financing to such companies'.<sup>27</sup> ACSI held that the restriction should apply to all Australian institutions regulated by ASIC or APRA and that under its proposal:

...these institutions will be prohibited in trading in securities or investing monies (their own or on behalf of their clients) in companies that produce cluster bombs. Finally, under our proposal, the Bill will contain a Schedule with a list of such companies that will be updated by the Commonwealth as required.<sup>28</sup>

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25 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

26 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

27 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

28 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

## The government's position

6.19 The government takes the view that an explicit prohibition on investment in companies that develop or produce cluster munitions is not appropriate because the Convention does not contain such a provision.<sup>29</sup> In this regard, AGD highlighted that the bill gives effect to the Convention in Australian law and that it is both guided and limited by the Convention's contents.<sup>30</sup>

6.20 Proposed subsection 72.38(1) of the bill creates the offence of developing or producing cluster munitions and according to the AGD, the operation of the Code's ancillary offence means that:

...a person who aids, abets, counsels or procures the commission of this offence commits an offence. In addition, proposed subsection 72.38(2) creates the offence of assisting, encouraging or inducing the development or production of cluster munitions.<sup>31</sup>

6.21 Rather than expressly prohibiting investment, Article 1 prohibits the direct or indirect development or production of cluster munitions and the provision of assistance, encouragement or inducement to anyone engaged in such activities. The bill uses therefore the language of the Convention in order to ensure that any conduct prohibited by the Convention is the subject of a criminal offence under Australian law, as required by Article 9.<sup>32</sup> In terms of acts of investment that will fall within the proposed offence, AGD provided an example:

The intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence.<sup>33</sup>

6.22 In relation to offences that will probably fall outside the proposed offence, these include accidental or innocent acts of assistance, encouragement or inducement including as the joint submission noted:

For example, a person who contributes to a superannuation fund which includes investment in companies that may develop or produce cluster munitions is unlikely to satisfy the required mental elements for the offence contained in the Bill.<sup>34</sup>

6.23 In response to concerns that there was no explicit prohibition on direct investment in the bill, Mr Greg Manning of AGD assured the committee that the government's approach was consistent with usual practice:

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29 Department of Foreign Affairs & Trade, *Additional information*, 1 March 2011, pp. 11–12.

30 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

31 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

32 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 11.

33 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

34 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 4.

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.<sup>35</sup>

6.24 Mr Manning then repeated the point made in the government's submission about the Code's ancillary offence. In his view, the offence in subsection 72.38(1):

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).<sup>36</sup>

6.25 Mr Manning argued that the alternative 'pick and choose' approach carries great risk if all possible contexts are not foreseen and that conduct that you intend to prohibit will not be prohibited.<sup>37</sup> He emphasised that the real test will be to establish whether the person intended to invest in cluster munitions and that for the purpose of the act, intention to assist is the central element.<sup>38</sup>

## **Committee view**

6.26 The committee accepts the government's position that the manner in which a prohibition on investment has been framed is consistent with the normal approach to the framing of criminal offences. The committee believes, however, that the explanatory memorandum should have provided information on investment and explanation of the government's legislative approach in this regard, especially in light of JSCOT's recommendations.

## **Committee conclusion**

6.27 The committee understands that the intention of the government is to 'move as quickly as possible towards lodging Australia's instrument of ratification for the Convention' once all measures to give effect to the Convention are in place.<sup>39</sup> To this end, the committee recognises that the bill gives effect to the Convention requirement to impose penal sanctions.

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35 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, pp. 24–25.

36 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 25.

37 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 24.

38 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 26.

39 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 1.



6.28 The committee recommends therefore that the bill be passed.

**Recommendation 1**

**6.29 The committee recommends that the Senate pass the bill.**

SENATOR MARK BISHOP  
CHAIR