



# **Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012**

**No. 114, 2012**

**An Act to criminalise some acts involving certain munitions, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012**

**No. 114, 2012**

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## **An Act to criminalise some acts involving certain munitions, and for related purposes**

[Assented to 8 September 2012]

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012*.

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## **2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	8 September 2012
2. Schedule 1	The day the Convention on Cluster Munitions, done at Dublin on 30 May 2008, comes into force for Australia.  The Minister must announce by notice in the <i>Gazette</i> the day the Convention comes into force for Australia.	

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Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in Column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Criminal Code Act 1995

### 1 At the end of Division 72 of the *Criminal Code*

Add:

#### Subdivision C—Cluster munitions and explosive bomblets

##### 72.37 Purpose

The purpose of this Subdivision is to create offences relating to cluster munitions and explosive bomblets and give effect to the Convention on Cluster Munitions.

##### 72.38 Offences relating to cluster munitions

###### *Doing acts with a cluster munition*

- (1) A person commits an offence if the person does any of the following with a cluster munition:
- (a) uses it;
  - (b) develops, produces or otherwise acquires it;
  - (c) stockpiles or retains it;
  - (d) transfers it to anyone.

Penalty: Imprisonment for 10 years.

###### *Promoting acts with a cluster munition*

- (2) 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) use 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.

Penalty: Imprisonment for 10 years.

*Geographical jurisdiction*

- (3) Section 15.2 (extended geographical jurisdiction—category B) applies to an offence against this section.

*Relationship with other provisions*

- (4) Division 11 does not apply in relation to an offence against subsection (2).

Note 1: Later sections of this Subdivision set out defences.

Note 2: This section relates to Articles 1 and 9 of the Convention on Cluster Munitions.

**72.39 Defence—acquisition or retention authorised by Defence Minister**

- (1) Section 72.38 does not apply to the acquisition or retention of a cluster munition authorised under subsection (2).

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3).

- (2) The Minister administering the *Explosives Act 1961* may authorise, in writing, specified members of the Australian Defence Force or other specified Commonwealth public officials to acquire or retain specified cluster munitions for one or more of the following purposes:

- (a) the development of, and training in, cluster munition and explosive submunition detection, clearance or destruction techniques;
- (b) the development of cluster munition counter-measures;
- (c) the destruction of the munitions.

Note 1: For specification by class see the *Acts Interpretation Act 1901*.

Note 2: This section relates to paragraphs 6 and 7 of Article 3 of the Convention on Cluster Munitions.

- (3) The regulations may prescribe requirements relating to authorisations under subsection (2).
- (4) An authorisation made under subsection (2) is not a legislative instrument.



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- (5) The Minister described in subsection (2) may delegate his or her power under that subsection to:
- (a) the Secretary of the Department administered by that Minister; or
  - (b) an SES employee in that Department.

Note: For the definition of *SES employee* see the *Acts Interpretation Act 1901*.

## **72.40 Defence—transfer for destruction etc.**

### *Transfer to foreign party to Convention on Cluster Munitions*

- (1) Section 72.38 does not apply to the transfer of a cluster munition to a party to the Convention on Cluster Munitions for one or more of the following purposes:
- (a) the development of, and training in, cluster munition and explosive submunition detection, clearance or destruction techniques;
  - (b) the development of cluster munition counter-measures;
  - (c) the destruction of the munition.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3).

Note 2: This subsection relates to paragraph 7 of Article 3 of the Convention on Cluster Munitions.

### *Intended transfer to Australian Defence Force*

- (2) Subsections (3) and (4) have effect if:
- (a) a person has a cluster munition; and
  - (b) the person gives notice to a police officer or member of the Australian Defence Force that the person wishes to transfer the munition to a member of the Australian Defence Force or other Commonwealth public official; and
  - (c) the person gives notice without delay after the first time the person has the cluster munition after the commencement of this subsection.
- (3) Subsection 72.38(1) does not apply to the person stockpiling or retaining the cluster munition at any time before the person transfers it to a member of the Australian Defence Force or other Commonwealth public official.

- (4) Subsection 72.38(1) does not apply to the person transferring the cluster munition to a member of the Australian Defence Force or other Commonwealth public official.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) and whichever of subsections (3) and (4) is relevant: see subsection 13.3(3).

#### **72.41 Defence—acts by Australians in military cooperation with countries not party to Convention on Cluster Munitions**

A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence against section 72.38 by doing an act if:

- (a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions; and
- (b) the act is not connected with the Commonwealth:
  - (i) using a cluster munition; or
  - (ii) developing, producing or otherwise acquiring a cluster munition; or
  - (iii) stockpiling or retaining a cluster munition; or
  - (iv) transferring a cluster munition; and
- (c) the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control.

Note 1: A defendant bears an evidential burden in relation to the matter in this section: see subsection 13.3(3).

Note 2: The expression *offence against section 72.38* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(2).

Note 3: This section relates to paragraphs 3 and 4 of Article 21 of the Convention on Cluster Munitions.

#### **72.42 Defence—acts by military personnel of countries not party to Convention on Cluster Munitions**

- (1) Section 72.38 does not apply to the stockpiling, retention or transfer of a cluster munition that:
- (a) is done by:

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- (i) a member of the armed forces of a foreign country that is not a party to the Convention on Cluster Munitions; or
  - (ii) a person who is connected with such forces as described in subsection (2) and is neither an Australian citizen nor a resident of Australia; and
- (b) is done in connection with the use by those forces of any of the following in Australia in the course of military cooperation or operations with the Australian Defence Force:
- (i) a base;
  - (ii) an aircraft of any part of those forces or an aircraft being commanded or piloted by a member of those forces in the course of his or her duties as such a member;
  - (iii) a ship of any part of those forces or a ship being operated or commanded by a member of those forces in the course of his or her duties as such a member.

Note: A defendant bears an evidential burden in relation to the matter in this section: see subsection 13.3(3).

- (2) This subsection covers a person with any of the following connections with the armed forces of a foreign country that is not a party to the Convention on Cluster Munitions:
- (a) the person is employed by, or in the service of, any of those forces;
  - (b) the person is serving with an organisation accompanying any of those forces;
  - (c) the person is attached to or accompanying those forces and is subject to the law of that country governing any of the armed forces of that country.

### **72.43 Forfeiture of cluster munition**

- (1) This section applies if a court:
- (a) convicts someone of an offence against subsection 72.38(1); or
  - (b) makes an order under section 19B of the *Crimes Act 1914* relating to an offence against subsection 72.38(1).

Note: The expression *offence against subsection 72.38(1)* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(2).

- (2) The court may order forfeiture to the Commonwealth of any cluster munition involved in the offence.
- (3) A cluster munition ordered to be forfeited to the Commonwealth becomes the Commonwealth's property.

#### **72.44 Application of this Subdivision to explosive bomblets**

This Subdivision applies in relation to explosive bomblets in the same way as it applies in relation to cluster munitions.

#### **72.45 Definitions**

In this Subdivision:

***cluster munition*** has the meaning given by paragraph 2 of Article 2 of the Convention on Cluster Munitions.

***Convention on Cluster Munitions*** means the Convention on Cluster Munitions done at Dublin on 30 May 2008.

Note: In 2012, the text of the Convention was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

***explosive bomblet*** has the meaning given by paragraph 13 of Article 2 of the Convention on Cluster Munitions.

***explosive submunition*** has the meaning given by paragraph 3 of Article 2 of the Convention on Cluster Munitions.

***police officer*** means:

- (a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
- (b) a special member of the Australian Federal Police (within the meaning of that Act); or
- (c) a member (however described) of a police force of a State or Territory.

***transfer*** has the meaning given by paragraph 8 of Article 2 of the Convention on Cluster Munitions.

Note: Imports and exports are some examples of transfers.

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*[Minister's second reading speech made in—  
House of Representatives on 27 October 2010  
Senate on 22 November 2010]*

(263/10)

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*Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012 No. 114, 20129*