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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ANTI-PERSONNEL MINES CONVENTION BILL 1998

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Foreign Affairs, The Hon Alexander Downer MP)

ANTI-PERSONNEL MINES CONVENTION BILL 1998

OUTLINE

The purpose of this Bill is to give effect to Australia's obligations as a party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. The Convention was opened for signature on 3 December 1997 and will enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited with the Secretary-General of the United Nations. Australia has signed the Convention but has not yet ratified it.

Under the Convention, State Parties undertake never under any circumstances to: use anti-personnel mines; to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; or to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention. States Parties also undertake to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of the Convention. The Bill creates offences relating to placement, possession, development, production, acquisition, stockpiling and transfer of anti-personnel mines by Australian citizens or members of the Australian Defence Force or on territory under Australian jurisdiction or control.

Article 3 of the Convention provides a specific exemption to this obligation, namely for the retention or transfer of a minimum number of anti-personnel mines absolutely necessary for the development of, and training in, mine detection, mine clearance, or mine destruction techniques. The Bill authorises the Minister for Defence to grant permission to place, possess, produce or acquire, stockpile or move anti-personnel mines for the purposes of the development of, or training in, mine detection, mine clearance, mine destruction or mine deactivation.

Article 8 of the Convention allows a State Party to formally question Australia in writing about whether Australia is in compliance with provisions of the Convention. Article 8 also provides a mechanism by which Australia could be obligated to receive a fact finding mission consisting of experts whose role would be to collect additional information to clarify the compliance issue. The Bill provides that, if a fact finding mission to Australia is authorised under the Convention, the Minister for Foreign Affairs must appoint each member of the mission as an inspector. The Bill also contains provisions which authorise an appropriate Australian official(s) to accompany members of the fact-finding mission. Access by members of a fact finding mission to question persons and inspect places relevant to clarification of the compliance issues is by consent of the occupier or by warrant issued by a magistrate. The Bill provides that the Minister must not impose any conditions on the appointment of an inspector unless the Minister is satisfied it is necessary to do so for the protection of sensitive equipment, information or areas or for the physical protection and safety of the inspector.

Article 8 of the Convention requires Parties to the Convention to accord members of a mission privileges and immunities necessary for the independent exercise of their functions during the mission. The Bill provides for the power to make regulations with respect to privileges and immunities under Australian law in accordance with the Convention.

The Bill authorises the Minister for Foreign Affairs to obtain information and documents from persons relevant to the administration or enforcement of this Act and to Australia's obligations under the Convention.

FINANCIAL IMPACT

Costs would be associated with the destruction of Australia's anti-personnel mine stockpile and the write-off of destroyed mines. The level of cost will be determined by the most efficient and safe disposal methods and the numbers of anti-personnel mines involved. Defence will also be conducting a study of alternative systems to replace the anti-personnel mine capability.

There is no standing international organisation established under the Convention. Costs associated with future meetings of States Parties to the Convention are likely to be minimal. As far as Australian financial contributions to global mine clearance efforts are concerned, the Convention does not impose any binding legal obligations.

NOTES ON CLAUSES

PART 1 - INTRODUCTION

Clause 1 - Short Title

This clause would provide for the Act to be cited as the *Anti-Personnel Mines Convention Act 1998*.

Clause 2 - Commencement

It is not certain at what time the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ("Convention") will enter into force for Australia as this depends on ratification of the Convention by at least 40 State Parties. Accordingly, this clause would provide that the Act would commence on a day to be fixed by Proclamation. If such Proclamation is not made within six months of the Convention entering in the force for Australia, the Act would automatically commence on the expiry of the six months. The clause would also prevent the Proclamation from fixing a day which is before the date on which the Convention enters into force.

Clause 3 - Simplified outline

This clause would provide a simplified outline that highlights the major issues addressed under the Act.

Clause 4 - Definitions

This clause would set out definitions for terms used in the Act. In particular it allows for subsequent amendments to the Convention to be incorporated in the regulations, which also append the text of the Convention, rather than by amendment to Schedule 1 of the Act itself.

Clause 5 - Crown to be bound

This clause would provide that the Act will bind the Crown in all its capacities but that the Crown would not be liable to be prosecuted for an offence.

Clause 6 - External Territories

This clause would provide that the Act extends to all of Australia's external Territories.

PART 2 - OFFENCES RELATING TO ANTI-PERSONNEL MINES

Clause 7 - Offence to place, possess, develop, produce, acquire, stockpile or transfer anti-personnel mines

Australia is prohibited by Article 1 of the Convention from using, developing, producing, acquiring, stockpiling, retaining or transferring anti-personnel mines; and obliged under Article 9 to prevent and suppress any such activity undertaken by persons or on territories under its control.

Subclause 7(1) would implement the provisions of Articles 1 and 9 by making it an offence for a person to engage in the prohibited activities. In this context "person" is intended to

include corporations. The offence would be punishable by either imprisonment for 10 years or a fine of \$66,000 (or both) for an individual; or a fine of \$1,100,000 for a corporation.

Subclause 7(2) would implement the exception to the prohibition given in Article 3 of the Convention, namely where the retention or transfer of anti-personnel mines occurs for development and training purposes. The clause would also provide that retention or transfer by a member of the Australian Defence Force (ADF) or a Police Officer for purposes of conduct of a criminal proceeding or for rendering the mine harmless would not constitute an offence under the Act.

Subclause 7(3) would provide that the prohibition would not extend to activity done in conjunction with the armed forces of a country that was in breach of the Convention but was not a State Party to the Convention.

Subclause 7(4) would clarify that the prohibition extends to acts done outside Australia by Australian citizens and members of the ADF (it is possible for members of the ADF not to be Australian citizens).

Clause 8 - Minister for Defence may grant permission to retain anti-personnel mines for the development of, and training in, mine detection techniques etc.

This clause would authorise the Minister for Defence, in accordance with Article 9 of the Convention, to grant permissions to retain anti-personnel mines for the development of, and training in, the detection, clearance, destruction and deactivation of anti-personnel mines. The Minister for Defence would also have to ensure the number of permissions granted did not exceed the minimum necessary for development and training.

The clause further provides that the Minister for Defence would have to establish principles, in conjunction with the Minister for Foreign Affairs, for exercising this power. The principles would be disallowable instruments and therefore would have to be tabled in Parliament for 15 days before entering into force.

Clause 9 - Offence not to deliver up anti-personnel mines

This clause would make it an offence if a person in Australia was knowingly in possession of an anti-personnel mine and failed to deliver it up to a member of the ADF or a police officer unless the possession was for the purpose of the conduct of criminal proceedings or for the purpose of rendering the mine harmless. In this context "person" is intended to include corporations. The offence would be punishable by either imprisonment for 10 years and/or a fine of \$66 000 for an individual; or a fine of \$1 100 000 for a corporation.

Clause 10 - Destruction or deactivation of anti-personnel mines

In accordance with Article 1 of the Convention, this clause would ensure that all anti-personnel mines delivered up to a member of the ADF or a police officer under clause 9 would be destroyed or permanently deactivated unless they were to be used for development and training, or for the conduct of criminal proceedings.

Clause 11 - Forfeiture of anti-personnel mines

This clause would allow a court, where it convicts a person of an offence under this Part or where it proves a person to be guilty but decides to discharge the person without proceeding

to conviction, to order any anti-personnel mines to be forfeited to the Commonwealth. The clause would further provide that any anti-personnel mines so forfeited must be destroyed or permanently deactivated, unless they were to be used for development and training.

PART 3 - POWERS OF FACT FINDING MISSIONS

Clause 12 - Appointment of inspectors

Article 8 of the Convention provides a mechanism by which Australia could be obligated to receive a fact-finding mission consisting of experts to collect information as to whether Australia was in compliance with the Convention. Australia is obliged under Article 8 to cooperate fully with any fact-finding missions and facilitate the collection of information related to the alleged compliance issue.

This clause would enable the Minister for Foreign Affairs to appoint two types of inspectors to exercise powers under this Part. These are (i) members of fact-finding missions and (ii) Commonwealth, State or Territory employees (domestic inspectors). Persons appointed as domestic inspectors must have a *bona fide* appointment with the Commonwealth, a State or Territory in another capacity. Domestic inspectors would not be able to exercise their powers unless they were accompanied by a member of the fact-finding mission who had also been appointed as an inspector. The clause would further provide that the Minister for Foreign Affairs must consult the Minister for Defence before appointing domestic inspectors. The duration of the appointment of the inspector could be limited using the power granted by S.33 of the *Acts Interpretation Act 1901* to revoke instruments of this nature.

When exercising their powers or performing their functions, domestic inspectors would have to comply with any directions issued by the Minister. Inspectors would have an identity card containing their photograph and would have to carry it at all times when they were exercising powers or performing functions as an inspector. The identity cards would be issued by the Minister in a form to be prescribed in the regulations. On ceasing their appointment, inspectors must return their identity card to the Minister - failure to do so would attract a maximum penalty of \$110.

Clause 13 - Conditions of appointment as an inspector

Consistent with Article 8 of the Convention, this clause would authorise the Minister for Foreign Affairs, in consultation with the Minister for Defence, to impose conditions on the appointment of an inspector where those conditions were necessary for the physical protection of the inspector or for protection of sensitive equipment, information or areas. They may stipulate the inspector is not authorised to enter specific premises or not authorised to exercise specific powers while on specific premises.

Clause 14 - Powers available to inspectors for monitoring compliance

This clause would authorise an inspector to enter any premises and exercise inspection powers for the purposes of finding out whether the Convention had been complied with, in circumstances where the occupier had consented or a warrant had been issued by a magistrate under the Act. This authorisation would be subject to any conditions imposed by the Minister for Foreign Affairs in the instrument of appointment.

Clause 15 - Inspector must produce identity card on request

This clause would make it clear that inspectors could not exercise any of the powers under this Part in relation to premises unless they produced their identity card upon being requested to do so by the occupier.

Clause 16 - General powers of inspectors in relation to premises

This clause would set out the general powers inspectors may exercise when entering premises to clarify whether there had been compliance with the Convention. These would include the power to search premises and things found on the premises, the examination and testing of things on the premises, the taking of photographs or other forms of recordings of premises and things, and the inspection and copying of records and any other documentation.

Where the inspector was authorised by a warrant to enter the premises, the inspector would be able to require any person on the premises to answer any questions put by the inspector or produce any documents requested by the inspector. By virtue of proposed subclause 16(2), an individual who contravenes these requirements is liable to a maximum penalty of \$3300. The offence created by proposed subclause 16(2) does not however abrogate the privilege against self-incrimination.

Clause 17 - Details of warrant to be given to occupier etc.

This clause would provide that if a warrant in relation to premises is being executed, a copy of the warrant must be made available to the occupier of the premises and the inspector must identify himself or herself to the occupier.

Clause 18 - Announcement before entry

This clause would provide that before an inspector enters premises under a search warrant he or she must announce he or she is authorised to enter and must give any person at the premises opportunity to allow entry unless there are reasonable grounds to believe immediate entry is required.

Clause 19 - Occupier entitled to be present during search

This clause would allow occupiers to observe the search of the premises providing they did not impede the conduct of the search. However this right to observe would not preclude inspectors from searching two or more areas of the premises at the same time.

Clause 20 - Monitoring warrants

This clause would enable a Magistrate to issue a warrant that permits one or more inspectors to enter the same premises for the purposes of establishing whether there had been compliance with the Convention. The warrant would authorise the use of force that was reasonable and necessary to enter the premises and exercise the general powers conferred on inspectors under clause 16. The warrant must specify the dates on which it authorises entry and may also specify the time of day that entry is authorised.

Clause 21 - Offences relating to warrants

By this clause it would be an offence, punishable by imprisonment for 2 years, if a person made a statement in an application for a warrant that was false or misleading in a material particular.

PART 4 - INFORMATION GATHERING POWERS

Clause 22 - Minister may obtain information and documents from persons

This clause would authorise the Minister for Foreign Affairs to give written notice to a person requiring the giving of information or delivery of documents to the Minister where the Minister had reason to believe the person had information or documents that would be relevant to the enforcement of the Act or Australia's reporting obligations under Articles 7 and 8 of the Convention. If the person specified in the notice recklessly contravenes the requirement he or she would be guilty of an offence punishable by a fine of \$5500.

Clause 23 - Copying documents - reasonable compensation

This clause would provide that where the Minister for Foreign Affairs has required a person to provide copies of documents under clause 22, that person would be entitled to reasonable compensation from the Commonwealth for complying with that requirement.

Clause 24 - Self-incrimination

This clause would prevent a person from refusing to give information or produce a document to the Minister under this Part on the grounds that to do so would incriminate the person or expose him or her to a penalty. However the clause would further provide that any information or document produced would not be admissible in evidence in criminal proceedings against the person unless those proceedings were instituted under this Part.

Clause 25 - Giving false or misleading information

This clause would make it an offence, punishable by imprisonment for 12 months, if a person provided information pursuant to a notice given by the Minister for Foreign Affairs under clause 22 that was false or misleading in a material particular.

Clause 26 - Provision of false or misleading documents

This clause would make it an offence, punishable by imprisonment for 12 months, if a person produced a document pursuant to a notice given by the Minister under clause 22 that was false or misleading in a material particular. However the clause would not apply if the person produced the document with an attestation the document did contain a false or misleading material particular, outlining which material particular was false or misleading.

Clause 27 - Copies of documents

This clause would permit the Minister for Foreign Affairs to make and retain copies of documents produced under this Part. Where a person was required to produce a copy of the document, the Minister may retain that copy.

Clause 28 - Minister may retain documents

This clause would permit the Minister to retain documents produced under this Part for as long as necessary. The person otherwise entitled to possession of the document would be entitled to be supplied with a copy of the document certified by the Minister to be a true copy. Until the Minister provided such a copy the person would be entitled to have access to the document to make copies or take extracts from it.

PART 5 - MISCELLANEOUS

Clause 29 - Delegation by Minister or Minister for Defence

This clause would permit the Minister for Foreign Affairs to delegate any of his or her powers under the Act. It would also permit the Minister for Defence to delegate the power to grant permissions to retain anti-personnel mines in accordance with the Convention. However the power to formulate principles to be adhered to when granting permissions to retain anti-personnel mines may not be delegated. The clause would ensure that delegations made under the clause are only to specified and appropriate persons.

Clause 30 - Privileges and immunities

This clause would allow regulations to be made to confer appropriate privileges and immunities on members of an authorised fact-finding mission as are necessary to give effect to the operation of Article 8 of the Convention. The clause would provide that any privileges and immunities granted by the regulations would not operate to limit privileges and immunities already available under the *International Organisations (Privileges and Immunities) Act 1963*.

Clause 31 - Powers to be exercised in accordance with Convention

This clause would set the parameters for the exercise of powers granted conferred by the Act, namely that they must not be exercised inconsistent with the Convention and must be done with regard to Australia's obligations under the Convention.

Clause 32 - Offences

This clause provides that Chapter Two of the *Criminal Code*, which codifies the general principles of criminal responsibility, would apply to all offences against the Act.

Clause 33 - Compensation for acquisition of property

This clause would make the Commonwealth liable to pay reasonable compensation to a person whose property had been acquired by otherwise than on just terms by operation of the Act and where such acquisition was not in accordance with the power conferred by the Constitution to make laws for the acquisition of property on just terms. Where the Commonwealth and the person aggrieved were unable to agree on the amount of compensation payable the person would be entitled to institute appropriate proceedings in the Federal Court seeking compensation.

Clause 34 - Regulations

This clause would authorise the Governor-General to make regulations generally for the administration of the Act.