

**URGENT**

The Hon Stuart Nash  
Minister of Police  
Parliament Buildings  
Wellington  
9 October 2019

By email to [s.nash@ministers.govt.nz](mailto:s.nash@ministers.govt.nz)

Dear Minister

**Request for urgent correction of Arms (Prohibited Ammunition) Order 2019 and interim suspension of prohibition**

**Notice of potential application for judicial review**

1. We are instructed by the Council of Licensed Firearm Owners ("COLFO") to act in this matter. COLFO seeks the correction of mistakes in the above described Order in Council. That should be preceded by an urgent regulation to suspend the operation of section 43AA of the Arms Act. It became operative on 1 October. It purports to criminalise thousands of unwitting duckshooters, for possessing cartridges with steel shot. They have recently converted to steel from lead, to end the avoidable lead pollution of waterways and wetlands.
2. The Order and new offence provisions of the Act also pointlessly criminalise possibly hundreds of other holders of ammunition who have bought it in good faith, often from the government.
3. The urgent new regulations should also provide for compensation to the ammunition owners whose property has been effectively confiscated by the prohibition. A regime for compensation in a supplementary regulation would extend only to ammunition that should be prohibited to achieve the purposes of the Arms Act amendments made in June this year. After your properly informed review of the purposes of the Act the replacement Order will not affect holders of duck shot cartridges or other innocuous types.
4. With a corrected Order the amounts of compensation should be much less than might have been feared when the decision was made to deny compensation. Our clients offer to work with your officials on this. They urge that you be sceptical in the meantime of technical advice from those by whom you were previously advised on ammunition matters. It appears to have been seriously inadequate.
5. We are instructed to seek an urgent judicial review if we do not get prompt indications that full, fair and reasonable corrections will be forthcoming. Our client believes that the mistakes are causing current injustices. They are also likely to be undermining the purposes of the June 2019 amendments to the Arms Act 1983.

**COLFO's concerns**

6. As you know our client is an umbrella organisation representing a range of sports organisations and sportspeople who use firearms. From our analysis, and from what our

clients are informed, the Arms (Prohibited Ammunition) Order 2019, purports to criminalise many decent and law abiding members of the constituent organisations. That is because it supplies descriptions or definitions that are mistaken, unrelated to the purposes of the Act, or not capable of clear interpretation.

7. COLFO is aware of Police advice to citizens on the meaning of the Order that is not reconcilable with the words of the Order, or with understood purposes of the Act, or the Order.

#### **Request**

8. Accordingly, COLFO asks you to exercise your regulation making powers under sections 74(1)(ra) and 74C of the Arms Act 1983 to suspend operation of the prohibited ammunition provisions. That suspension should last at least until you have ready a suitable replacement Order.
9. COLFO would be glad to work with you on ensuring that the replacement Order is sound and consistent with the proper purposes of the Act.
10. The replacement Order should, of course, not extend to ammunition which is outside the purposes of the Act. The replacement Order should be accompanied by announced procedures for surrender of the ammunition to trigger the existing compensation provisions of the Act, or procedures developed for the current circumstances.
11. You can remedy the omission to compensate people for the losses caused by prohibition.
12. In our view you can recommend an Order and new Regulations including for compensation, which would:
  - a. Provide that Section 43AA not apply to the ammunition described in this letter as wrongly covered by the present Order at least until the expiry of the amnesty period, subject to application of the conditions in Regulation 28G read as if the prohibited ammunition was a prohibited item; and
  - b. Replace the existing Order defining prohibited ammunition with a fresh order that:
    - (i) omits the reference to tracer ammunition, and
    - (ii) Provides that the prohibition is suspended in respect of ammunition to which it would otherwise apply, if made inactive, or held securely or can satisfy an Arms Officer that it will be used only to salvage cases, and/or
    - (iii) Eliminates the enhanced penetration category, that appears to be a disguised prohibition on military specification ammunition, without statutory authority or policy justification.

#### **Details on categories wrongly specified or described in the Order**

##### *Tracer*

13. Nothing in the Act justifies the blanket prohibition of tracer ammunition, described as *"Projectiles containing an element that enables the trajectory of the projectiles to be*

*observed*". The only purported policy justification we can find in official papers, for attempting to prohibit tracer seems to be that advisers were not aware of any "civilian" uses for it.

14. The Cabinet paper authors seem to be unaware of what we are advised is the primary reason for obtaining tracer ammunition – that it is often disposed of by the Army when it is old. Some of it may not fire reliably as the primer or charge have aged. That is a serious problem for the military, but not for sports users. Such ammunition is accordingly cheap, when bought in large quantities.
15. It offers savings to people who need practice rounds for their sport. It is also bought by people who do custom reloading of their own ammunition. They extract and discard the bullets and use only the casings. They typically cost around one quarter of the cost of new casings, and perform similarly.
16. Even if the Cabinet paper observation had been correct (that tracer had no "civilian" use) so far as it goes, that is not a consideration pertinent to anything in the Act, its purposes and the purposes of the regulation making powers. Having a tracer element in a projectile does not affect its performance in a firearm, whether prohibited or not. It does not affect the likelihood of the ammunition being misused in a non-prohibited firearm or otherwise. Tracer elements expire within micro-seconds. Whether or not they do, they are not inherently more unsafe than other non-prohibited ammunition of similar calibre and ballistic characteristics. In our opinion, the purported prohibition of tracer is ultra vires.

#### *Alleged penetrator bullets*

17. The same reasoning (that the authors of the Cabinet paper could not think of "civilian" uses) appears to have been the only purported justification for the prohibition of what is termed "enhanced penetration ammunition" (referred to in this letter as 'alleged penetrator bullets'). The description reads "*Projectiles that have a steel or tungsten carbide penetrator intended to achieve better penetration*".
18. We are instructed that many bullets have steel elements that serve a range of purposes. They may help hold the shape in the barrel, or in flight. They may provide mass. They may assist in penetration without making the bullet any more or less inherently lethal or damaging than equivalent calibre and ballistic sporting ammunition which is not prohibited. Indeed, if the decision-maker on the Order thought that the purpose was to reduce casualties in the event of a mass shooting, including risks from stray rounds, the Order might have favoured (instead of prohibiting) ammunition of the kind defined in the second paragraph of the table in the schedule to the Order.
19. Alleged penetrator bullets are likely to be designed to comply with the Hague Convention that outlawed 'dum dums'. They caused more serious wounds than fully jacketed rounds that could sometimes pass through tissue and lodge or exit without fragmenting. You will be aware of the criticisms of use by police, including NZ Police, of soft nosed and hollow point rounds, precisely because they have greater "stopping power" or lethality, despite them being unlawful for use by our military. The intent of military ammunition is to wound as much as to kill.



20. If the prohibition of alleged penetrator bullets is effective at all, it would seem to be contrary to any purpose of reducing the likely toll of death and injury from misuse of firearms.
21. Our clients advise that in fact, it would probably make little difference In another terrorist event. Except for projectiles designed to be armour piercing, (which are separately prohibited) a penetration enhancing aspects of a steel element (if any) is largely immaterial to the likely outcome of misuse. Nevertheless, we consider that the confused reference to a steel component is likely to void or to invalidate that paragraph, if it results in large quantities of ammunition becoming useless, and pointlessly criminalises the person who possesses it.

*Steel shot in shotgun ammunition*

22. It may be an accident of uninformed drafting, but the definition also appears to cover steel shot in shotgun cartridges. You may be aware even if your advisers were not, that thousands of duck shooters have ceased to use lead shot over water, because of concerns that it was leading to avoidable lead ingestion by birds and animals and possibly elevated lead levels in mud or even water.
23. There was particular responsibility on the advisers and the Minister to ensure that the prohibition extended no further than was strictly necessary to advance the stated purposes of the Act. That responsibility was acute where people were not to be compensated for effective confiscation of their property, and to be criminalised. The Minister should have been informed that the prohibitions would extend to ammunition that is useful to its owners, and is as innocuous from a policy and safety perspective as the ammunition that is not designated for prohibition..

*Legal analysis of the descriptions*

24. The Schedule description in the Order (of alleged penetrator bullets):
  - a. By leaving unstated the comparator implied by the word “better” in the description (better than what?) the description becomes hopelessly imprecise. Such an imprecise definition should not be the foundation of imprisonment for up to two years. The omission of the comparator makes it difficult or impossible to determine the scope of the definition. It deprives us of recourse to the usual aid to interpretation – that is the purpose of the prohibition. If it means “better than otherwise similar rounds without the penetrator element” it would appear to be an oblique way to justify favour for rounds which breach the Hague convention. It would seem to be a disguised way to authorise confiscation of rounds which comply with the Hague convention, but not others. Surely that cannot have been intended.
  - b. If the word “better” means better than the most likely alternative, then it may not cover shotgun cartridges with steel shot, if the alternative is lead. But if lead is unlawful over wetlands, it is not the alternative. And there are other shot alternatives. With or without identification of a comparator the description leaves substantial uncertainty about what is intended. We are instructed that Police officers have contended that the Order outlaws all projectiles containing steel). That is not justified by any purpose of the Act. It is unrelated to any safety purpose. If that was the intention it probably renders the prohibition on alleged penetrator bullets also ultra vires;

- c. If the description is read so that the primary unwanted condition is an exceptional penetration capacity it will apply to very little ammunition that is not already clearly caught by the armour piercing ammunition prohibition, which our clients support. Many citizens will know that their cheap practice ammunition does not have exceptional penetration capacity. But they will often not know that they may have a steel element. They will not know whether it is correctly identified as a penetrator.
25. The prohibition on alleged penetrator bullets needlessly exposes citizens and Police to the risk of pointless legal proceedings.

**Omission to provide for compensation**

26. The omission from the Arms Regulations 1992 of provision for compensation to owners of newly prohibited ammunition:
- a. Is unfair and unreasonable;
  - b. Is inconsistent with fundamental obligations of the state, not to deprive citizens of the use of their property without good reason and without compensation, and the legitimate expectation of citizens (some of whom had recently bought newly prohibited ammunition from the state) that they would not be so deprived without compensation;
  - c. Is inconsistent with the conscious regard in sections 13, 28 and 37 of the Act before the June 2019 amendments, to that fundamental principle. Those sections reassured citizens that the Arms Act would not result in the state seizing or depriving them of lawfully held property without fair compensation. The new Regulations attempt to oust that assurance;
  - d. Seems likely to contribute to the possession of such ammunition by persons who are willing to act outside the law, much more than if provisions for fair compensation had been included in the Regulations. It will accordingly be working contrary to the purposes of the Act. That outcome is patently predictable. People denied their legitimate expectation of compensation are likely to resist compliance. They may do that by not reporting and taking the risk of being caught. More likely, among people who are currently usually law-abiding, will be strong incentives to give the offending ammunition to people who are less concerned about being outside the law. In our opinion, the promulgation of an Order with that predictable effect, and no countervailing benefit from denying compensation, is not a proper exercise of the regulation making powers;
  - e. May depend on a mistaken view that the Act does not permit compensation for the prohibition of ammunition because of the absence of specific provisions for calculation and payment of such compensation for newly prohibited ammunition. Prohibited ammunition is not within the defined term 'prohibited items', for which there are detailed compensation provisions. But that is not an exclusion of entitlement to compensation.
27. We think the Minister should also have been advised that the provisions for calculation and payment of compensation for prohibited items are primarily restrictive, and should not be



regarded as a model, or even influential in relation to ammunition. Prohibited ammunition appears to have been carefully excluded from treatment as among prohibited items. The express regime for prohibited items is a temporary special case scheme to govern a programme of surrender that is expected to be very expensive. The regulations do not supersede or match pre-existing provisions in the Act that continue, and prescribe for compensation in a number of situations, on a more normal, and therefore more fair and reasonable basis.

28. The relatively small numbers of people likely to be suffering the losses from prohibition of ammunition, and the correspondingly small sums involved, may make it reasonable for Parliament to assume that regulation making for the ammunition prohibition would apply normal compensation considerations. The advice to the Minister should have considered the surviving provisions for normal compensation. Advice appears to have been deficient.

**The transitional compensation scheme is defective, and should not be a model for correction of the ammunition error**

29. It is not clear to us whether the Minister has been misled by the example of the scheme for compensation for prohibited items (as defined). That scheme has limits and restrictions that seem designed to evade some of the normal obligations to keep innocent parties whole, while misleading the public into an impression that it is fair. That scheme has statutory crafting to allow discretionary exclusion of heads of loss that would ordinarily be taken into account in a reasonable compensation plan. But its translation into regulations turned a discretion into a blanket exclusion. Regulatory provisions for compensation could be invalidated.

*Detail on compensation*

30. The reasons are similar to those explained above for considering the ammunition Order to be invalid or voidable in part. That is:
  - a. The Regulations apply a mistaken interpretation of the significance of the Act's discretions with respect to compensation. They convert discretions to limit or deny some heads of compensation (Clause 7(4) of the Schedule to the Act) by adopting them into Regulation 28I as a blanket negation of compensation for the types of loss mentioned.
  - b. The Regulations may therefore be a self-fettering of the statutory discretionary power to regulate. By negating eligibility for compensation for some forms of loss in toto in the regulations, there is no scope for genuine merit consideration of compensation requirements needed to make sure the Act's primary purposes are served.
  - c. Schedule 1 Clause 6(4) of the Act indicates that the regulations may be intended to be a code with respect to compensation for prohibited items. That does not apply to prohibited ammunition. Clause 7(4) protects a discretion with respect to compensation for prohibited items, by saying that regulations need not include compensation for particular categories of loss. That again applies to prohibited items, not ammunition.

- d. We are not aware of any adequate information provided to the Minister on the purposes, intended effects and likely effects of prohibition of ammunition without compensation. There was a particularly strong obligation to ensure that the Minister was properly informed, in the context of the creation of offences that could involve status or strict liability, punishable by imprisonment.
- e. Even if prohibition of some categories of ammunition does serve the purposes of the Act, despite a lack of apparent consideration of the purposes or evidence that the prohibition would serve them, the Order may not serve its own intended purposes overall. The regulations constitute instructions to Police administering the Order. They omit an element necessary to make effective the implementation of the Order. The absence of compensation is so predictably likely to lead to the supply of prohibited ammunition to persons who are less concerned about the law, or to criminals, that its absence alone impugns the Minister's recommendation of the Order. Accordingly if that is not corrected the High Court should examine the validity of the processes that lead to the Order without compensation arrangements, and its enforceability.

#### **Further Background**

- 31. The recommendation for the Order should have taken more into account the practical circumstances of people with ammunition that may be prohibited by it. Considering for example the thousands of duck shooters whose steel shot cartridges have "steel penetrators intended to achieve better penetration".
  - a. Many of them will be dimly aware of unaware of that criminalising fact.
  - b. Others will know they have steel shot, but not that it renders their ammunition prohibited;
  - c. Others again may be aware of a risk, but not know whether they should take it seriously, because it seems too absurd;
  - d. None of them will be able to get conclusive legal advice, because determining the intentions of the Order is difficult. It is too oblique and imprecise.
  - e. The sweeping definition is being supplemented by unwarranted advice from police officers. COLFO is informed that they are essentially claiming that military spec ammunition is prohibited. In our opinion that is not a reasonable or accurate conclusion from the Order. It may be what Police intended, for unknown reasons. But the Act does not authorise that, and it is not what has emerged in the Order. We understand that owners applying careful analysis to the Order, or who have sought legal advice - are becoming dismissive of Police expertise, and even honesty. COLFO wants people to be able to trust Police expertise and advice.
  - f. Other owners of ammunition may know that illegality may affect them in due course but are unaware that 1 October was an activation date for the Order. Many of them will assume that they have until 20 December, to work out exactly what is required and what they must do, as with newly prohibited items.

## Summary

32. In our opinion, fair and reasonable implementation of the purposes of the June Amendments require suspension of the criminalisation and a new Order.
33. Nothing in the Act justifies the prohibition of tracer.
34. The safety purposes of the Act, to the extent that they are engaged at all by the Order, cannot turn on a military specification that is designed to be consistent with a convention to favour ammunition that is less damaging to humans than the ammunition which remains lawful for non-military use. The interpretation of the Order claimed by Police is so misdirected that it works directly against some putative purposes of the law.
35. Given the new section 43AA penalty of up to two years in prison for being in possession of prohibited ammunition we do not want lawyers to encourage clients to leave the illegality or invalidity of the Order to be tested when Police attempt to enforce the section.
36. Our client wants to preserve as much as can be, of the foundation for New Zealand's traditional mutual trust between firearms' users and Police and among citizens generally. It does not want more public alarm than is necessary, when events disclose what appears to be incompetent advice to the Minister. COLFO wants to be able to tell firearms users that you moved to correct error and alleviate anxiety as soon as it was drawn to your attention.

## Timetable

37. Given the automatic criminalisation of innocent people under the Order, we are instructed to apply for an urgent hearing in the High Court, if we have not heard from you or your office and the Police, within 10 days of this letter, with an obviously good faith plan to address properly the issues outlined in this letter.

## Further Concerns

38. A response to the issues explained above that forestalls an application for the judicial review described may not necessarily preclude such an application on other grounds.

Yours faithfully  
**FRANKS OGILVIE**



**Stephen Franks**  
Director