



Australian Government

Department of Sustainability, Environment, Water, Population and Communities

**Submission to the Senate Standing Committee on Environment and
Communications**

**Inquiry into the Environment Protection and Biodiversity Conservation
Amendment (Prohibition of Support for Whaling) Bill 2010**

by the

**Department of Sustainability, Environment, Water,
Population and Communities**

3 February 2011

The Australian Government Department of Sustainability, Environment, Water, Population and Communities (the department) welcomes the opportunity to make a submission to the Senate Standing Committee on Environment and Communications for the purposes of its inquiry into the Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010.

Background

During the 2009/2010 whaling season a complaint was lodged alleging that Japan's Institute of Cetacean Research contracted aerial observation services out of Australia to search for anti-whaling protest vessels within the Southern Ocean, and report this information to the whaling fleet. It is understood that this information was for the purpose of assisting the whaling fleet in avoiding the protest vessels while conducting so-called 'scientific' whaling (which includes the lethal take of whales) in the Southern Ocean.

An investigation into these flights concluded that based on the evidence collected about this specific incident there was no basis on which a contravention of the existing *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) provisions could be pursued.

In February 2010 the Greens and the Coalition introduced a bill to amend the EPBC Act which was developed in response to the flights. This was not debated.

On 29 September 2010, the Australian Greens together with the Liberal Party again proposed amendments to the EPBC Act. These amendments were essentially identical to the previously proposed amendments.



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The amendments are in the Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010 (the Bill) and propose amending the EPBC Act to create new offences prohibiting the provision of services, support and resources to whaling ventures.

On 23 November 2010, the Senate referred the Bill for inquiry and report.

Submission

Existing Offence Provisions

There are currently provisions in the EPBC Act and the Criminal Code which are relevant to whaling, and providing assistance for whaling.

Subdivision C of Division 3 of Part 13 of the EPBC Act creates a number of offences in relation to cetaceans in the Australian Whale Sanctuary, or in waters beyond the outer limits of the Australian Whale Sanctuary. These include:

- killing or injuring cetaceans (section 229);
 - a corresponding strict liability offence (section 229A);
- intentionally taking or interfering with a cetacean (section 229B); and
 - a corresponding strict liability offence (section 229C).

Sections 229 and 229B include penalties of imprisonment for two years or a fine of 1,000 penalty units and the strict liability offences are punishable by a fine of 500 penalty units.

Under the Criminal Code, a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence.

In the Department's view, the existing provisions in the EPBC Act and the Criminal Code provide adequate mechanisms to prosecute whaling offences.

The proposed offence

The Department is of the view that the proposed offence, which states '*A person commits an offence if the person provides any service, support or resources to an organisation engaged in whaling.*' is problematic from both a legal and policy perspective.

The proposed offence is very broad in its application and would capture some conduct that is already captured by the existing offences in the EPBC Act and Criminal Code. However, the proposed offence does not require any link between the provision of services, support or resources to a whaling organisation and its actual whaling activities and because of the broad meaning of 'services, support or resources', it would also potentially capture very minor forms of assistance (including legal services, training, cleaning services and taxi services) which may be unconnected with the whaling activities of the organisation.

The definition of whaling in the Bill is largely dependent on the intention to undertake whaling or to contravene offence provisions. This may make it difficult to prove that the offence has been committed given the need to prove the intention of the whaling organisation. As a consequence the Department does not believe that the Bill would necessarily increase the likelihood of successful prosecution of people participating in whaling activities.

The definition of whaling in the Bill also means that a person may commit an offence by providing any service, support or resources to a whaling organisation in circumstances where the organisation itself may not be committing an offence (including where service, support or resources were provided for a whaling venture that was subsequently cancelled without actually undertaking whaling).

In addition, unlike the existing whaling offences within the EPBC Act, the proposed offence would apply in relation to whaling activities in state and territory waters.

The Bill as currently drafted has potential to introduce offence provisions into the EPBC Act that are considered duplicative and excessively broad.
