



09 February 2011

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

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

The Australian Maritime Safety Authority (AMSA) appreciates this opportunity to comment on the proposed *Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010* (the Bill).

AMSA is a national statutory agency responsible for maritime safety, protection of the marine environment, and maritime and aviation search and rescue. AMSA's principal functions are:

- promoting maritime safety and protection of the marine environment;
- preventing and combating ship-sourced pollution in the marine environment;
- providing infrastructure to support safety of navigation in Australian waters; and
- providing a national search and rescue service to the maritime and aviation sectors.

AMSA is responding to this Inquiry on the basis that the proposed Bill, if enacted as drafted, could potentially render AMSA or its employees guilty of an offence by conducting certain of AMSA's statutory functions in circumstances involving organisations engaged in whaling. The reasons for this are explained below.

The proposed amendment

The Bill proposes to insert the following offence provision into the *Environment Protection and Biodiversity Conservation Act 1999* (the Act):

229E Providing support to whaling

- (1) A person commits an offence if the person provides any service, support or resources to an organisation engaged in whaling.
- (2) An offence against subsection (1) is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.



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Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.

(3) In this section:

whaling means any activity, or any activity undertaken as part of a venture, the intention of which is to kill, injure, take, trade or treat whales, whether for commercial or other purposes, and includes:

- (a) any action undertaken with the intention of contravening section 229, 229A, 229B, 229C, 229D or 230, even if no such contravention occurs; and
- (b) any activity undertaken by or on board a foreign whaling vessel.

Note: Sections 229, 229A, 229B, 229C, 229D and 230 set out offences relating to killing, injuring, taking etc., treating and possessing cetaceans.

Section 231

After "229D", insert ", 229E".

AMSA notes that there is no definition of "service, support or resources" in subsection 229E(1) and we presume that this would therefore capture the operations of Commonwealth agencies in the performance of their statutory functions. Further there is no exemption for the actions of Commonwealth agencies specifically within the proposed section 229E nor within section 231 (which deals with proposed exemptions). This has a number of potentially adverse impacts upon the operations of AMSA.

Potential criminalisation of AMSA's statutory functions

Section 229E as currently drafted could potentially render AMSA criminally liable if a whaling ship arrived at an Australian port seeking a re-issue of an expired statutory certificate, and such a certificate was issued by AMSA. Due to the broad wording of s.229E, this could potentially be seen as providing services, support or resources to an organisation engaged in whaling, and would subsequently be an offence. It is not clear to AMSA whether this would fall into one of the exemptions contained within s.231, but we think not.

Other services that AMSA is obligated to provide and which may trigger the proposed offence provision include:

- the provision of radio communication services under the International Convention for the Safety of Life at Sea (SOLAS) IV/5;
- navigational warnings under SOLAS V/4 and information with regards to aids to navigation under SOLAS V/13.3; and
- meteorological services and warnings under SOLAS V/5.

Again, it is unclear whether these services would fall within the actions contained within s.231 and therefore be exempt.

It is conceivable that other Commonwealth agencies, such as the Australian Customs Service, may also inadvertently fall foul of the proposed offence provision.

Recommendations

AMSA is of the opinion that if the Bill is passed as currently drafted it would potentially be exposed to criminal liability as a direct result of the performance of its statutory obligations.

If the Bill is to be passed, it is the opinion of AMSA that:

- The phrase "service, support or resources" should be defined in a manner that excludes the statutory functions of Commonwealth agencies; or
- An exemption from the operation of proposed section 229E is granted for Commonwealth agencies generally within s.231, rather than only actions taken for the purposes of law enforcement.

AMSA appreciates the opportunity to make this submission about the proposed Bill. If you require any further information please contact Peter Edwards on the details provided below.

Yours sincerely

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