



THE AUSTRALIAN ASSOCIATION FOR MARITIME AFFAIRS Incorporated



PO Box 55, Red Hill ACT 2603

phone: (02) 6295 0056

fax: (02) 6295 3367

email: admin@aama.asn.au

web site: www.aama.asn.au

12 October 2009

The Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Bishop,

**Submission -
Inquiry into the *Defence Amendment*
(*Parliamentary Approval of Overseas Service*) Bill 2008 [No. 2]**

The Australian Association for Maritime Affairs (AAMA) thanks the Committee for this opportunity to comment on the above Bill. The AAMA has, as its aim, the generation of greater public awareness of the significance of maritime affairs for Australia and this Bill, unfortunately, appears to demonstrate the need for our work.

This submission will seek to be confined to Australian *maritime* issues. The AAMA assumes that other organizations and individuals will address the broader general defence issues raised by the legislation, for example:

- The constitutional issues raised by the thrust of the Bill to involve the Parliament directly in what has previously been an exclusively executive responsibility to direct Australian military operations, by requiring the obtaining of the concurrence of Parliament within 48 hours of a “deployment” (whatever that may mean) beyond the territorial limits (however defined for the purposes of this Bill) of Australia.
- The absence of any attempt in the Bill to address the legal or military practicalities if Parliament is *not* recalled, or if Parliament does not approve the deployment.
- The mechanisms whereby all members of the Parliament can be briefed adequately about a crisis situation before debating and voting, particularly if

The Australian Association for Maritime Affairs is grateful for the continuing support of its corporate members:

Sea Power Centre - Australia

Maritime Australia Limited

Australasian Hydrographic Society

Australian Maritime Safety Authority

Australasian Maritime Institute

Australian Marine Environment Protection Association (AUSMEPA)

highly classified information is involved.

- The uncertainty created because, in certain internal Australian political circumstances, full parliamentary approval is not required under this Bill.
- The meaning of the vague term “service” as used in this Bill. There are many fairly precisely defined forms of “service” undertaken by ADF personnel – war service, war-like service, hazardous service, etc – forming a spectrum of “service” which require specific determinations by the Minister. At which level of defined “service” does this Bill apply?
- How would the provisions of this Bill be applied in circumstances where ADF personnel are committed to an operation that is initially determined to involve “service” at one level but which, in the light of experience and perhaps even some time after the operation has *finished*, is subsequently determined by the Minister to have been “service” at another, higher level?
- The absence of any consequential amendments to other legislation, such as the Navy, Army and Air Force Acts, all of which specifically commit ADF personnel to service “within or beyond the territorial limits of Australia” and which, if left unamended, could otherwise be seen, in some circumstances, to create legal tension for ADF personnel due to perceived conflicts with the new section 50.C.(2) proposed by the Bill, which says:

“(2) Subject to this section, members of the Defence Force may not serve beyond the territorial limits of Australia except in accordance with a resolution, which is in effect and agreed to by each House of the Parliament, authorising the service.”

Maritime Issues

Instead, this submission draws the attention of the Committee to the implications of the Bill for Australia’s ability, inherent to an island nation, to enjoy the benefits of a maritime focus for its defence strategy. As the Elizabethan essayist Francis Bacon wrote in *Of the True Greatness of Kingdoms and Estates*:

“But thus much is certain, that he that commands the sea is at great liberty, and may take as much and as little of the war as he will.”

Territorial Limits The term “the territorial limits of Australia”, as used in the Bill, may warrant consideration by the Committee.

Does it mean the 12nm Territorial Sea limit, or the 200nm Exclusive Economic Zone, or the even vaster area of seabed resources claimed by Australia (see the attached map)? If it is only the Territorial Sea limit, then the Bill may be perceived as inhibiting the power of the Government to take immediate and decisive action to protect Australian interests which are normally understood to be internal to the nation.

If the Bill is intended to cover the full geographic range of Australia’s maritime *interests* then considerable clarification appears to be needed.

Australia’s maritime interests, of course, extend far beyond even the geographic limits of its maritime resources. What happens to Australian seaborne trade, possibly on the

other side of the world, may require the commitment of Australian defence assets or, more likely, reciprocal defence arrangements with other friendly nations. Although integral to Australia's defence, such proxy measures do not appear to be addressed in this legislation.

The Committee may also care to explore with the drafter of the Bill the implications of the fact that Australian warships and "public vessels" enjoy sovereign immunity under international law and represent an extension of the sovereignty of the state to which they belong. Arguably the "territorial limits of Australia" include the actual vessels themselves and therefore such vessels, and their personnel serving onboard, take the "territorial limits of Australia" with them wherever they go and no matter what operations they undertake.

Pre-deployed Forces A maritime defence strategy for Australia means that maritime forces are quite likely already deployed, possibly unheralded, in the general vicinity of potential trouble spots, many of them well "beyond the territorial limits of Australia" and, if possible, well in advance of any decision to use them. Such is the nature of maritime forces that they can probably remain deployed for several weeks.

If there is no need to use force, such maritime deployments are called "port visits" and "exercises", rather than "invasions" or "strikes" or "blockades", but one can become the other in much less time than the Bill envisages that it takes to recall the Parliament. The ability of sea-based forces to loiter for long periods offshore means their actions are not "hostile" until the moment when they are used and, even then, much will depend on the way in which the foreign nation, and/or its people, responds.

The AAMA assumes that the drafters of the Bill do not envisage that Parliament would need to be recalled to approve the commitment of Australian forces *before* any operation commences, thus giving at least 48 hours notice to the potential enemy of possible operations involving Australian forces! We therefore draw the Committee's attention to the practicalities of a *post facto* parliamentary approval process.

In some cases, the mere presence of maritime forces can achieve the desired outcome but, if they do need to conduct operations, the decision to do so will need to be implemented quickly and, once operations commence, any attempt to recall the forces by the Parliament some 48 hours later could be extremely perilous to the Australian forces conducting what would be, in effect, a fighting withdrawal. The subsequent diplomatic challenges boggle the mind – "Oops! Sorry! We didn't mean to invade/bomb/sink you. Let's all be friends again."

The Real World

The point to be considered by the Committee is whether war is now, or is ever likely to be again, a nice clear-cut matter of formal declaration, to be followed by the raising and dispatch of Australian expeditionary forces? This Bill appears to be predicated on such a process, a relic of a by-gone era, which ignores the practicalities and benefits to Australia of a defence strategy based on maritime power.

In fact modern military operations tend to mirror escalating (or de-escalating) political developments, and are governed by Rules of Engagement. Nowhere is that more obvious than in the maritime sphere, where a routine peacetime deployment to a geographic region may change from being:

- a. an opportunity to exercise with friendly (and potentially friendly) forces; to

- b. an operation to evacuate Australian citizens, with or without the cooperation of whatever local government may exist; to
- c. the interdiction of weapons deliveries either to the local government or to its internal opponents; to
- d. strikes, or threats of strikes, against selected targets; to
- e. the insertion of Australian or allied land forces; and
- f. operations in defence of Australian trade, resources, facilities or even homeland which may flow from the initial incident.

The Committee will be aware that, within that spectrum, the insertion of Australian land forces is only one, and a fairly extreme one at that, option in the range of military responses that may be available to an Australian government which has adequate maritime forces at its disposal. Due to the inherent flexibility of sea power, it is possible to move between the other options at extremely short notice, possibly measured in minutes.

Providing general guidance to the naval and military commanders in such potentially fluid scenarios will be their Rules of Engagement, which have to give them flexibility both to defend Australian forces and to support Australian policy aims. As the Committee will be aware, in the real world, depending on the aims and calculations of the foreign forces involved, incidents can escalate to the brink of all-out hostilities, and may then de-escalate again, in a matter of hours. This Bill, on the other hand, seeks to insert a parliamentary approval process requiring up to two days notice, or perhaps not at all if Parliament has been prorogued, into an already complex diplomatic and operational environment.

In another context, if Australian units have already been deployed to operate as part of an international, perhaps even United Nations, force, would the Bill require prior parliamentary approval even if the service was expected to be entirely peaceful? If, due to changes in the foreign political situation while the Australian forces were deployed, a United Nations humanitarian operation then had to involve “peacekeeping”, or even “peacemaking”, to ensure that aid could be provided to the civilian victims of the situation, would anyone seriously suggest that Australian forces *might* be unilaterally withdrawn in mid-operation due to the provisions of this legislation?

As an example of the interaction between the flexibility provided by the use of sea power and the complexities of international law, the Committee may care to consider the current anti-piracy operations off Somalia, far, far “beyond the territorial limits of Australia” that are addressed in this Bill. The Australian ships and personnel involved, although much more powerfully armed than the pirates, run a very real risk of damage and/or casualties.

- Would it have been the intent of the Bill, prior to the establishment of any international cooperative anti-piracy operations, to require passing RAN units to ignore the presence of nearby pirates until Parliament could be recalled?
- Is participation in the international anti-piracy operation considered “service” under the terms of this Bill, so that RAN units could not even be committed to such an operation without a resolution of the Parliament, or could be committed

but only with the proviso that they might be unilaterally withdrawn 48 hours later?

- Assuming the answer is “Parliamentary approval is not required at that stage”, if casualties are then inflicted by independent and lawless pirate bands, would that trigger the operation of this Bill, potentially involving the withdrawal of the Australian forces if Parliament proved unable to approve the involvement within 48 hours?
- If, instead, the pirate bands were simply to *announce* that they are operating as part of some quasi-national revolutionary state, would that trigger the operation of the provisions of the Bill?

The Committee may care to reflect upon the military benefits that would be provided to potential ‘enemies’, however ‘enemies’ may be defined, if they knew the answers to such questions.

Conclusion

The legislation suggests a lack of appreciation of the realities of modern military operations and, particularly, the flexibility provided by maritime power, as well as the needs of the defence of Australia’s worldwide maritime interests.

The AAMA believes that the Committee should recommend to the Parliament that the Bill should not proceed in its present form.

Yours sincerely

Richard Griffiths
Chair

Attachment: Map – What are Australia’s “territorial limits”?

What are Australia's "territorial limits"?

