

The Senate

Environment and Communications Legislation Committee

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

March 2011

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Committee membership

Committee members

Senator Doug Cameron (ALP, NSW) (Chair)
Senator Mary Jo Fisher (LP, SA) (Deputy Chair)
Senator Scott Ludlam (AG, WA)
Senator Anne McEwen (ALP, SA)
Senator the Hon. Judith Troeth (LP, VIC)
Senator Dana Wortley (ALP, SA)

Participating members for this inquiry

Senator Simon Birmingham (LP, SA)
Senator Rachel Siewert (AG, WA)

Committee secretariat

Mr Stephen Palethorpe, Secretary
Mr Geoff Dawson, Principal Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ec.sen@aph.gov.au
Internet: www.aph.gov.au/senate/committee/ec_ctte/index.htm

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Chapter 1

Background to the inquiry and the bill

Conduct of the inquiry

1.1 On 23 November 2010 the Senate referred the Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010 to the Environment and Communications Legislation Committee for inquiry and report by 24 March 2011.¹

1.2 The bill is a private senators' bill introduced by Senator Siewert and Senator Bob Brown. It was first introduced in the Senate on 4 February 2010 by Senator Siewert and Senator Abetz, but lapsed at the end of the 42nd Parliament before being debated. It was reintroduced on 29 September 2010.

1.3 The committee advertised the inquiry on its website and in *The Australian*, and wrote to relevant organisations inviting submissions. The committee received five submissions (see Appendix 1). The committee thanks submitters for their contribution.

Description of the bill

1.4 At present it is an offence to kill, injure or interfere with a cetacean within the 'Australian Whale Sanctuary'. The Australian Whale Sanctuary is generally the area to 200 nautical miles off the coast of Australia and its territories, including the Australian Antarctic Territory.² Furthermore, an Australian person, ship or aircraft may not kill or injure a cetacean anywhere outside the Australian Whale Sanctuary.³

1.5 The bill amends the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to make a new offence of providing 'any service, support or resources to an organisation engaged in whaling'.⁴

1.6 In the new offence, 'whaling' means:

1 *Journals of the Senate*, 23 November 2010, p. 397.

2 The Australian Whale Sanctuary corresponds to Australia's Exclusive Economic Zone. The outer limit is less than 200 nautical miles in some places in accordance with agreements with neighbouring countries. It excludes state and territory waters, but all states and territories also protect cetaceans within their waters. Australian jurisdiction over the Antarctic portion is not recognised by all countries.

3 *Environment Protection and Biodiversity Conservation Act 1999*, sections 224ff. Some exceptions are allowable by permit or in special situations, for example to deal with an emergency or prevent a risk to human health: section 231.

4 Item 1, proposed section 229E.

...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 [the existing cetacean related offence provisions in the EPBC Act], even if no such contravention occurs; and

(b) any activity undertaken by or on board a foreign whaling vessel.⁵

1.7 The penalty is imprisonment for not more than two years and/or a fine of not more than 1000 penalty units.⁶

1.8 Exceptions to the existing offence provisions (for example, actions that are necessary to prevent a risk to human health or to deal with an emergency), also apply to the new offence.⁷

1.9 The bill arises from an incident in the 2009–10 Antarctic whaling season, in which Japanese whalers reportedly hired aircraft in Australia to track the movements of anti-whaling protest ships.⁸ According to its promoters, 'the bill fixes a glaring gap in our current laws and is a necessary measure to ensure that those responsible for the slaughter of whales in our Southern ocean receive no assistance from Australia'.⁹

Comment of the Scrutiny of Bills Committee

1.10 The Senate Scrutiny of Bills Committee reviews all bills in relation to (among other things) whether they trespass unduly on personal rights and liberties.¹⁰ The Scrutiny of Bills Committee commented on this bill:

Item 1 seeks to make it an offence if a person 'provides any service, support or resources to an organisation engaged in whaling.' The explanatory memorandum states that the intention of the proposed section 'is to make unlawful the provision of any assistance to a whaling venture...'.⁵

The Committee prefers that proposed offences are specific so that the parameters of the prohibited conduct are as clear as possible, but notes that the provision reflects the policy intent to capture any assistance given to whaling.

5 Item 1, proposed section 299E.

6 This is the same as the existing penalties for whaling offences in the EPBC Act.

7 Item 2 of the bill. EPBC Act, section 231.

8 Humane Society International, *Submission 1*; Senator R. Siewert, second reading speech, *Senate Hansard*, 29 September 2010, p. 294; 'Japanese whalers in spy flights', *The Age*, 6 January 2010, p. 1.

9 Senator R. Siewert, second reading speech, *Senate Hansard*, 29 September 2010, p. 295.

10 Senate Standing Order 24.

Since the bill appears to be seeking to implement what is a clear policy decision, the committee leaves to the Senate as a whole any further consideration of this issue.¹¹

11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 2 of 2010, 24 February 2010, p. 39.

Chapter 2

Background on regulation of whaling

International regulation of whaling

2.1 The International Convention for the Regulation of Whaling (ICRW) was agreed by participating governments in 1946. It was to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.

2.2 The convention created the International Whaling Commission (IWC) as a body to advise the participating governments and to regulate detailed provisions of the convention (for example, concerning permitted whaling seasons or protected species).¹ The IWC currently has 88 country members, including Australia and Japan.²

2.3 Since then, most member countries have abandoned whaling, but continue to participate in the IWC as a forum to focus on the conservation of whales.³

2.4 Australia prohibited whaling in Australian waters in 1980.⁴ The current prohibition is contained in the *Environment Protection and Biodiversity Conservation Act 1999*: a person may not kill, injure or interfere with a cetacean within the 'Australian Whale Sanctuary'.

2.5 In 1982, the IWC agreed a moratorium on commercial whaling from 1986. This was done by amendment to the schedule of the convention. In keeping with convention rules, member countries that objected to the amendment are not bound by

1 *International Convention for the Regulation of Whaling*, 1946: preamble; Articles III, IV and V. Detailed provisions regulating whaling are in a schedule to the convention. Under the convention, the IWC may amend the schedule (a three quarter majority vote is required). There are provisions for a member government to object to a proposed amendment. A member which maintains its objection is not bound by the amendment: Article 5(3). See www.iwcoffice.org/commission/convention.htm#convsigs and www.iwcoffice.org/commission/procedure.htm#procedure (accessed 7 January 2011).

2 www.iwcoffice.org/commission/iwcmain.htm#nations (accessed 6 January 2010).

3 Department of Sustainability, Environment, Water, Population and Communities, 'International Protection of Whales', at www.environment.gov.au/coasts/species/cetaceans/international/index.html#sanctuaries (accessed 6 January 2011)

4 *Whale Protection Act 1980*. Australia's last commercial whaling operation, near Albany WA, had already ended in 1978. Department of Sustainability, Environment, Water, Population and Communities, *History of Whaling in Australia* at www.environment.gov.au/coasts/species/cetaceans/international/history.html (accessed 6 January 2011).

it. Japan objected at the time, but withdrew its objection in stages during 1987–88. In recent years Norway and Iceland have continued commercial whaling under objection.⁵

Scientific research whaling

2.6 Although there is a moratorium on commercial whaling, under Article VIII of the Convention a member government may authorise its nationals, by permit, to kill whales 'for purposes of scientific research'. A member government must provide proposed permits and research results to the IWC for comment by the IWC's Scientific Committee.⁶

2.7 In recent years only Japan and Iceland have issued scientific permits. Under the 'JARPA II' program (Japan's current research program in the Antarctic), in the 2009/10 season Japan issued permits to take 850 plus or minus 10 per cent Antarctic minke whales, 50 fin whales and 50 humpback whales.⁷ In that season Japanese whalers actually took 506 Antarctic minke whales and one fin whale.⁸

2.8 In the 2010/11 season, Japan issued permits to take up to 935 Antarctic minke whales, 50 fin whales and 50 humpback whales.⁹ In mid-February 2011, Japanese whalers ended their season early as a result of anti-whaling protest actions, after reportedly catching only a small proportion of their quota.¹⁰

2.9 Fin whales and humpback whales are listed as 'vulnerable' under the threatened species provisions of the *Environment Protection and Biodiversity*

5 In 2008 Norway took 536 minke whales and Iceland took 38 minke whales commercially. International Whaling Commission, 'Catch limits and catches taken' at www.iwcoffice.org/conservation/catches.htm (accessed 10 January 2011).

6 *International Convention for the Regulation of Whaling*, 1946, Article VIII and Schedule, clause 30. The Scientific Committee consists of scientists nominated by member countries that wish to be represented. See www.iwcoffice.org/commission/procedure.htm#procedure (accessed 10 January 2011).

7 International Whaling Commission, 'Scientific permit whaling' at www.iwcoffice.org/conservation/permits.htm (accessed 7 January 2010). Pers. comm. IWC, 18 February 2011.

8 International Whaling Commission, *Report of the Scientific Committee*, June 2010, IWC/62/Rep 1, pp 69–70. Japan also has a 'JARPN II' research program in the North Pacific. In 2008 Japan took 323 whales under JARPN II. From 2003 to 2007 Iceland took between 25 and 60 scientific permit whales each year. See www.iwcoffice.org/conservation/table_permit.htm (accessed 8 February 2011).

9 IWC, pers. comm. 18 February 2011.

10 The whalers reportedly took 170 Antarctic minke whales and one fin whale: 'The whales win: Japan surrenders', *The Age*, 21 February 2011, p. 1.

Conservation Act 1999.¹¹ Antarctic minke whales are not listed; however the population of Antarctic minke whales is uncertain.¹²

2.10 Japan's scientific research whaling has been highly contentious. According to the IWC, 'recent discussions [in the IWC Scientific Committee] have centred on accusations that such permits have been issued merely as a way around the moratorium decision'.¹³ In recent years the IWC has passed a number of resolutions asking governments to refrain from issuing scientific permits. According to the IWC 'these discussions are usually contentious and the resolutions passed by relatively small majorities'.¹⁴

Australia's policy on whaling

2.11 The Australian Government's policy goals for whaling are:

- whaling in the Southern Ocean to be phased out within five years;
- all other whaling around the world, other than aboriginal subsistence whaling, to be phased out within a reasonable period of time;
- all whaling to be brought under the control of the [International Whaling] Commission ending the practice of countries being able to unilaterally grant permits for so-called 'scientific' whaling.¹⁵

2.12 In May 2010, Australia initiated legal action in the International Court of Justice against Japanese scientific whaling in the Southern Ocean.¹⁶ Australia argues

11 See www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna. The criteria for threatened species categories such as 'vulnerable', 'endangered', 'critically endangered', are at www.environment.gov.au/biodiversity/threatened/species.html#categories (accessed 10 January 2010).

12 According to the International Union for Conservation of Nature (IUCN), 'the population size is clearly in the hundreds of thousands. [However] the data analysed by standard methods suggest a reduction of approximately 60 per cent between the 1978–91 period and the 1991–2004 period... If the decline is real, its extent and causes are currently unknown, and it may still be continuing... If the decline proves to be largely or mainly an artefact [for example, because of a reduction in sighting efficiency], or proves to have been transient in the light of analyses of more recent data, the species would qualify as Least Concern. If it were real, the species would qualify as Endangered.' IUCN, *IUCN Red List of Threatened Species*, version 2010.4. See www.iucnredlist.org (accessed 10 January 2011).

13 International Whaling Commission, 'Scientific permit whaling' at www.iwcoffice.org/conservation/permits.htm (accessed 7 January 2010).

14 International Whaling Commission, 'Scientific permit whaling' at www.iwcoffice.org/conservation/permits.htm (accessed 7 January 2010).

15 Hon. P. Garrett MP, Minister for Environment Protection, Heritage and the Arts, *Australia advances a new proposal for whale conservation*, media release 25 February 2010. Further details are in *The Future of the International Whaling Commission: An Australian Proposal*, which Australia submitted to an IWC working group in February 2010. See www.environment.gov.au/coasts/species/cetaceans/international/index.html#future (accessed 10 January 2010).

that the program cannot be justified under the scientific permit provisions of the ICRW because of the 'lack of any demonstrated relevance for the conservation and management of whale stocks':

'...having regard to the scale of the JARPA II programme, the lack of any demonstrated relevance for the conservation and management of whale stocks, and to the risks presented to targeted species and stocks, the JARPA II programme cannot be justified under Article VIII of the ICRW...

Australia alleges further that Japan has also breached and is continuing to breach, inter alia, its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and under the Convention on Biological Diversity.¹⁷

2.13 The court has fixed 9 May 2011 as the deadline for filing initial pleadings by Australia, and 9 March 2012 as the deadline for filing initial pleadings by Japan.¹⁸

2.14 According to the Department of Sustainability, Environment, Water, Population and Communities, 'Australia will continue to seek a diplomatic agreement to end whaling in the Southern Ocean through the International Whaling Commission.'¹⁹

Anti-whaling protests

2.15 In recent years there have been concerted anti-whaling protests in the Antarctic by Greenpeace (up to summer 2007–08) and by the Sea Shepherd Conservation Society (from 2002–03 to the present).²⁰

2.16 The Sea Shepherd Conservation Society (SSCS) has harassed Japanese whalers in the Antarctic by means such as attempting to foul propellers with ropes, throwing stink bombs onto ships' decks, and shining lasers at ships.²¹

16 Hon. P. Garrett MP, Minister for Environment Protection, Heritage and the Arts, Hon. S. Smith MP, Minister for Foreign Affairs and Trade, Hon. R. McClelland MP, Attorney-General, *Government initiates legal action against Japanese whaling*, media release, 28 May 2010.

17 International Court of Justice, *Australia institutes proceedings against Japan for alleged breach of international obligations concerning whales*, press release, 1 June 2010.

18 International Court of Justice, *Whaling in the Antarctic (Australia v. Japan) Fixing of time limits for the filing of initial pleadings*, press release, 20 July 2010.

19 Department of Environment, Water, Heritage and the Arts, *Annual Report 2009-2010*, p. 35. The department was renamed Department of Sustainability, Environment, Water, Population and Communities in new administrative arrangements from 14 September 2010.

20 The two groups do not cooperate with each other, as Greenpeace does not approve of the SSCS's more confrontational approach to direct action. See Greenpeace, *Paul Watson, Sea Shepherd and Greenpeace: some facts*, at www.greenpeace.org/international/en/about/history/paul-watson/ (accessed 11 February 2011).

2.17 On 6 January 2010, the SSCS vessel *Ady Gil* collided with the Japanese whaler *Shonan Maru No. 2*. An investigation by Maritime New Zealand found that both vessels failed to act appropriately to avoid a close quarters situation, however there was no evidence that either intended to hit the other.²²

2.18 The IWC at its June 2010 meeting noted with concern 'reports of an escalation of such behaviour [dangerous behaviour at sea]'. On several occasions the IWC has passed resolutions deploring actions that put life or property at risk at sea.²³ Japan has urged the flag states, and Australia as the 'virtual home port of the SSCS vessels', to 'take every means available to prevent their unlawful activities'.²⁴

2.19 The Australian Government does not condone activities which put safety at sea at risk.²⁵

2.20 In the 2010/11 season, the SSCS's Antarctic protest action used ships registered in Australia (*Gojira*) and the Netherlands (*Bob Barker* and *Steve Irwin*). In February 2011 the Japanese cut short their whaling season. Japan's Institute of Cetacean Research described this as being 'to avoid any injury or threat to life of the crew members and property of the fleet caused by the continued illegal attacks and sabotage by Sea Shepherd Conservation Society'.²⁶

- 21 Fouling propellers: SSCS, *2005 – 2006 Antarctic Whale Defense – 2nd expedition*, at www.seashepherd.org/no-compromise/history.html; *Greenpeace meets George Orwell – Greenpeace rewrites history*, 15 January 2011, at www.seashepherd.org/news-and-media/editorial-110115-1.html (accessed 11 February 2011). Stink bombs: variously described as 'rotten butter', 'a foul smelling substance' and 'butyric acid': SSCS, *Sea Shepherd begins second week of shutting down illegal whaling activities*, 11 February 2010, at www.seashepherd.org/news-and-media/news-100211-2.html (accessed 11 February 2011); Institute of Cetacean Research, *Sea Shepherd attacks Japan's research vessels*, media release 3 March 2008, at www.icrwhale.org/080303Release.htm (accessed 11 February 2011). Lasers: described by the SSCS as 'photonic disrupters': SSCS, *Confronting Japan's Ministry of Truth*, 8 February 2010, at www.seashepherd.org/news-and-media/editorial-100208-1.html (accessed 11 February 2011). See also Institute of Cetacean Research, *Illegal harassment and terrorism against ICR research*, at www.icrwhale.org/gpandsea.htm (accessed 11 February 2011).
- 22 Maritime New Zealand, *Ady Gil and Shonan Maru No. 2 collision on 6 January 2010, investigation report*, November 2010, p. 1. The *Ady Gil* was registered in New Zealand.
- 23 International Whaling Commission, resolutions 2 of 2006, resolution 2 of 2007. Report of 2010 meeting, press release day 3, 23 June 2010. See <http://www.iwcoffice.org/meetings/meeting2010.htm#day3> (accessed 10 January 2010).
- 24 For example Institute of Cetacean Research, *Gojira attempts to sabotage the Nisshin Maru*, media release 9 February 2011.
- 25 Hon. S. Smith MP, Foreign Minister, *Joint press conference with Japanese Foreign Minister Katsuya Okada*, 21 February 2010.
- 26 Institute of Cetacean Research, *JARPA II research vessels to return home*, media release 18 February 2011, at www.icrwhale.org/eng-index.htm (accessed 3 March 2011).

Chapter 3

Discussion of issues

Summary of submissions

3.1 The Humane Society International and the Conservation Council of South Australia supported the bill, on the grounds that Australia should 'take every action to promote its long-standing anti-whaling position', and the amendments would 'enable the government to take strong and swift action should the need arise in the future'.¹

3.2 Other submissions were concerned that the legal ramifications are unclear, and the offence may be too broad.

3.3 The Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) submitted that the new offence provisions are 'duplicative and excessively broad', and the existing provisions in the EPBC Act and the Criminal Code are adequate to prosecute whaling offences.²

3.4 SEWPAC, the Australian Maritime Safety Authority (AMSA), and the NSW Department of Environment, Climate Change and Water (DECCW), were concerned that the offence may catch activities which should not be offences.

Concerns about the definition of 'service, support or resources'

3.5 The new offence is to provide any 'service, support or resources' to an organisation engaged in whaling. 'Service, support or resources' is not further defined.³

3.6 AMSA was concerned that the offence could catch AMSA's activities such as providing radiocommunications services, navigation warnings and meteorological warnings, or reissuing an expired statutory certificate. AMSA suggested that either:

- 'services, support or resources' should be defined to exclude the statutory functions of Commonwealth agencies; or
- under section 231 (exemptions from the offence provisions), Commonwealth agencies generally, not only their law enforcement actions, should be exempt.⁴

1 Humane Society International, *Submission 1*, p. 2; Conservation Council of South Australia, *Submission 2*.

2 SEWPAC, *Submission 3*, pp 2–3.

3 Item, 1, proposed section 229E.

4 Australian Maritime Safety Authority, *Submission 5*, pp 2–3. EPBC Act, paragraph 231(e).

3.7 Similarly, the New South Wales Department of Environment, Climate Change and Water (DECCW) was concerned that the offence could catch a broad range of activities by government agencies, companies or individuals, such as 'refuelling, restocking and providing telecommunications services to vessels'.⁵

3.8 SEWPAC argued that the offence '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'.⁶

The offence goes beyond existing whaling offences

3.9 The existing whaling related offences in the EPBC Act are narrowly defined as acts that take or interfere with a cetacean, or result in death or injury to a cetacean.⁷

3.10 The proposed new offence is to provide any service, support or resources to an organisation engaged in 'whaling' as defined. '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 [the existing offence provisions], even if no such contravention occurs; and

(b) any activity undertaken by or on board a foreign whaling vessel.⁸

3.11 In the bill, 'whaling' as defined is not itself an offence, and it could include acts that are outside the scope of the existing offences – for example, preparing a whaling expedition which is cancelled; carrying out a whaling expedition which does not catch any whales (subject to comment below concerning attempted offences); or 'treating'⁹ a whale by carrying out an autopsy on a whale that has died of natural causes.

3.12 This means that a person could commit the new offence of providing services etc. (for example, providing assistance to a planned whaling expedition), in circumstances where the party being serviced does not itself commit an offence (for example, because the expedition is cancelled). In submissions it was implied that this is an illogical outcome.¹⁰

5 New South Wales Department of Environment, Climate Change and Water, *Submission 4*, p. 1.

6 SEWPAC, *Submission 3*, p. 2.

7 There are also offences of possessing or treating a cetacean that has been killed or taken illegally: section 229D, 229E. 'Treat' means 'divide or cut up, or extract any product from'.

8 Proposed section 229E.

9 SEWPAC, *Submission 3*, p. 3; NSW DECCW, *Submission 4*, p. 1.

10 SEWPAC, *Submission 3*, p. 3; NSW DECCW, *Submission 4*, p. 1.

3.13 It should be noted that under general provisions in the Criminal Code, the EPBC Act offences include the offence of attempting to commit an offence.¹¹ This raises the possibility that 'undertaking a venture, the intention of which is to kill whales' could be an 'attempt' offence, or could include an 'attempt' offence. In that case, it might be argued that it is reasonable to make providing services to the venture an offence as well.

3.14 However, an 'attempt' offence requires that a person's conduct must be 'more than merely preparatory'.¹² Whether conduct is more than merely preparatory is a question of fact – that is, it would be for a court to decide, in the circumstances of the case, at what point between planning an expedition, and unsuccessfully chasing a whale, an 'attempt' offence is committed.

3.15 So it remains a real prospect that a person could commit the new 'providing services' offence, in circumstances where there is no offence by the party being serviced – either because the conduct of the party being serviced is not an offence in any case (it is outside the scope of the existing offences, as in the example of the autopsy); or because it is 'merely preparatory' to an attempt.

3.16 SEWPAC also noted that defining 'whaling' based on the intention may make it difficult to prove that an 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.¹³

The offence goes beyond existing aiding/abetting offences

3.17 The Criminal Code includes offences of attempting to commit an offence, and of aiding or abetting the commission of an offence by another. However, there is no aiding/abetting offence unless the substantive offence is actually committed. It is not an offence to aid or abet mere preparations. It is not an offence to aid or abet a failed attempt.¹⁴

3.18 The new offence could in some cases amount to 'aiding or abetting mere preparations to commit an offence', or 'aiding or abetting a failed attempt'. Thus it goes beyond the scope of the Criminal Code.

11 Criminal Code, sections 11.1, 11.6.

12 Criminal Code, section 11.1(2).

13 SEWPAC, *Submission 3*, p. 3.

14 Criminal Code, sections 11.1, 11.2, 11.2(2)(b).

The offence applies to state/territory waters

3.19 Submissions noted that the new offence will apply to whaling activities in state/territory waters.¹⁵ This is contrary to the provisions of the EPBC Act, which excludes state/territory waters.¹⁶

Committee comment

3.20 The committee supports Australia's current diplomatic and legal efforts to end Japanese whaling in the Antarctic. However the committee does not think the bill is suitable to aid that purpose.

3.21 The committee agrees with concerns that the new offence provision is both unclear and too broad. It may criminalise innocuous activities – for example, AMSA's navigation warning or radiocommunications services – or activities unconnected to a whaling organisation's whaling activities.

3.22 The committee agrees that it is unsound to create a 'providing services' offence which may apply in circumstances where the party being serviced does not itself commit an offence.

3.23 The committee is concerned that the new offence could in some cases amount to an offence of 'aiding or abetting mere preparations to commit an offence', or 'aiding or abetting a failed attempt'. This is contrary to the Criminal Code, which rejects the idea that these are offences. It should not be accepted without thorough consideration of the broader implications for consistent criminal law.

3.24 For all of these reasons the committee does not support the passage of the bill.

Recommendation

3.25 The committee recommends that the bill should not be passed.

Senator Doug Cameron
Chair

15 SEWPAC, *Submission 3*, p. 2. NSW DECCW, *Submission 4*, p. 2.

16 The EPBC Act provisions can be extended to state/territory waters by regulation, with the consent of the state/territory: sections 225, 226. All states and territories also prohibit whaling in their waters.

Coalition Senators' Additional Comments

Coalition Senators accept the arguments against this bill as presented in the majority report.

However, given the Government has used this inquiry and report as an opportunity to peddle the supposed merit of its actions against whaling, Coalition Senators similarly wish to highlight briefly what has been a gulf between Labor's rhetoric prior to the 2007 election and its actions in government.

Prior to the 2007 election, Labor on many occasions presented the need to stop Japanese whaling as among the most urgent of matters, for example:

"We cannot afford another year of complacency. The Howard Government must act immediately to take Japan to the International Court of Justice."

Kevin Rudd and Anthony Albanese, media release, 18 July 2005.

"A Rudd Labor Government will pull out all stops in the international courts to stop whaling for all time."

Peter Garrett, media release, 14 February 2007

Coalition Senators note that it took the Labor Government fully 2½ years after its election in November 2007 to initiate legal action in the International Court of Justice in May 2010 against Japanese scientific whaling in the Southern Ocean, yet the full legal case could still take up to eight years.

The Coalition has sought for the Labor Government both to release its anticipated timeline for a decision on its legal action, and for the Government to take out interim legal action to stop whaling now. It has done neither.

Senator Mary Jo Fisher (Deputy Chair)

Senator the Hon Judith Troeth

Senator Simon Birmingham

Dissenting Report

The Australian Greens

The Environment Protection and Biodiversity Conservation Amendment (Prohibition of Support for Whaling) Bill 2010 seeks to address a gap in Australia's regulation of whaling. The bill prohibits support being provided to persons engaged in whaling activities.

As outlined in the majority report the current Australian law prohibits killing, injuring or interfering with a cetacean. These provisions essentially amount to a ban on whaling. However, there is no specific offence of offering support to persons engaged in whaling.

Many Australians were rightly appalled when Australian air services were used to assist whaling operations in 2009-2010. The exposure of this event highlighted the gap in the Commonwealth's regulation of whaling activities.

The submissions to the Inquiry have brought to our attention some unintended consequences in the current drafting of the bill. In particular we note the submission from the Australian Maritime Safety Authority indicated its concern that its statutory functions could be caught by the bill. It was not the intention of the bill to catch activities of organisations like AMSA relating to radio communication services, navigation warnings or meteorological warnings. We agree that statutory functions of government agencies should be exempt from the offence created by the bill.

However, the Australian Greens remain committed to ensuring a more complete prohibition of any involvement in whaling activities and urge support for the bill in creating a specific offence of providing services, support or resources to persons engaged whaling activities. We strongly believe the offence must be sufficiently broad to capture actions that assist in the harming or killing of whales or assist persons who intend to harm or kill whales.

The Australian Greens welcome this government's commitment to prohibiting whaling, including its initiation of legal action in the International Court of Justice against Japanese scientific whaling in the Southern Ocean. The Greens have called for such legal action to be taken for a number of years. Alongside this action, the government should also ensure our laws are robust in preventing any assistance to whaling as well as prohibiting whaling itself. We recommend the bill be supported.

Recommendation 1: That the bill be amended to exempt Commonwealth and State Government agencies undertaking their statutory functions.

Recommendation 2: That the bill as amended be supported.

Senator Rachel Siewert

Appendix 1

Submissions

- 1** Humane Society International
- 2** ConservationSA
- 3** Department of Sustainability, Environment, Water, Population and Communities
- 4** Department of Environment, Climate Change and Water, NSW Government
- 5** Australian Maritime Safety Authority

