

**THE STANDING OF CIVIL SOCIETY TO ENFORCE COMMONWEALTH ENVIRONMENTAL LAW UNDER SECTION 475 OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT* AND ITS INTERNATIONAL IMPLICATIONS: THE *JAPANESE WHALING CASE* AND THE LAW OF UNINTENDED CONSEQUENCES**

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I INTRODUCTION

Australia is an island nation with a vast marine jurisdiction extending over some 14.41 million square kilometres of ocean space, including a total Exclusive Economic Zone (EEZ) of 10.19 million square kilometres, and a territorial sea of slightly less than 1 million square kilometres.<sup>1</sup> Australia is also one of the most biologically diverse nations on earth and our marine environment is home to a huge diversity of species, many of which are unique to Australian waters.<sup>2</sup> Our unique biodiversity and the vast size of Australia's marine jurisdiction mean that the

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<sup>1</sup> James B Colwell and Philip A Symonds, 'United Nations Law of the Sea: The New Australia' in Christopher J Yeats and Timothy F McConachy (eds), *Deep Blue Minerals – Towards a Sustainable Marine Minerals Industry*, CSIRO Exploration and Mining Report P2005/135 (2005).

<sup>2</sup> Australian National Oceans Office, *Australia's Oceans Policy* (1998) 7.

sustainable management of our marine environment and the conservation of marine biodiversity are a major challenge for environmental law and policy makers.

In 1998 the then Howard Government released *Australia's Oceans Policy* (Oceans Policy), which set out the overall policy goals for achieving the sustainable management of Australia's ocean space. The Oceans Policy set out a policy framework based upon the concepts of 'integrated ecosystem-based planning and management for multiple uses of our oceans.'<sup>3</sup> One of the key commitments made in the Oceans Policy was the establishment of the Australian Whale Sanctuary.<sup>4</sup> This commitment was subsequently implemented through enactment of provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') that created the Australian Whale Sanctuary, significant parts of which are located in waters adjacent to the Australian Antarctic Territory (AAT).

In direct challenge to Australia's assertion of rights over the waters adjacent to the AAT, for several years Japanese whaling vessels have been conducting whaling within the Australian Whale Sanctuary. While the Whale Sanctuary is located within an area recognised as Australian territory for the purposes of Australian domestic law, other countries including Japan do not recognise Australia's territorial claim in Antarctica.<sup>5</sup> From the Japanese perspective these waters are regarded as high seas and that as a consequence Australian law can have no application to the Japanese whaling fleet. Japan argues that its so called scientific [sic] whaling is lawful under the provisions of Article VIII of the 1946 *International Convention for the Regulation of Whaling*.<sup>6</sup>

On 15 January 2008 the Australian Federal Court delivered its judgment in the case *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3<sup>7</sup> (the '*Japanese Whaling Case*') on the legality under the *EPBC Act* of Japanese whaling in the Whale Sanctuary in the waters adjacent to the AAT. This article examines the consequences of this decision, both for Australian domestic law and perhaps more significantly its international implications. The article begins by outlining the legislative background to the *Japanese Whaling Case* by examining the relevant provisions of the Australian domestic legislation supporting Australia's territorial claim to the AAT and the provisions of the *EPBC Act* that created the Australian

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<sup>3</sup> Ibid 11.

<sup>4</sup> The other commitments made in the *Oceans Policy* in relation to whales included: nomination for international protection under the *Convention on Conservation of Migratory Species of Wild Animals* 1979 all dolphins and porpoises inhabiting Australian waters which meet the relevant criteria; ban capture for live display of whales; continuing to pursue an international ban on commercial whaling; and promote the establishment of a South Pacific Whale Sanctuary to complement the Southern Ocean Whale Sanctuary and as an important step towards a Global Whale Sanctuary.

<sup>5</sup> The international legal status of Australia's territorial claim is examined in Part V of this paper.

<sup>6</sup> *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) ('*Whaling Convention*').

<sup>7</sup> The full text of the court's judgment is available on the internet <[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2008/3.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html)> as at 27 March 2008.

Whale Sanctuary. Part III of the paper then goes on to briefly examine the role played by civil society in the *Japanese Whaling Case* and the importance of section 475 of the *EPBC Act* to the case. In Part IV an analysis of the final judgment of the Federal Court is undertaken. Part V concludes the paper with an examination of the international implications of this case. In particular, while the author strongly sympathizes with the both the moral and ethical arguments against whaling and indeed agrees that the Japanese activities do contravene both the letter and spirit of the International Whaling Convention, it will be argued that attempts to enforce Australian law in Antarctica are the wrong way to go. Any such attempts are not in Australia's long-term national interests and will also ultimately harm the very effective and unique system of environmental governance that has been established in Antarctica. It will be argued that further steps to enforce the judgment in the *Japanese Whaling Case* will in fact bolster the pro-whaling cause and should be abandoned for this very reason.

## II THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT*, THE AUSTRALIAN WHALE SANCTUARY AND AUSTRALIA'S TERRITORIAL CLAIM IN ANTARCTICA

Australia is one of only seven nations that have made territorial claims in Antarctica. The other countries claiming territory in Antarctica are Argentina, Chile, France, New Zealand, Norway and the United Kingdom.<sup>8</sup> Australia's claim has been recognised by France, New Zealand, Norway and the United Kingdom.<sup>9</sup> The USA and the Soviet Union (now Russia) have consistently refused to recognise the claims of any State to any part of the Antarctic, but have reserved the right to make claims themselves at a later date.<sup>10</sup>

The AAT covers nearly 5.9 million square kilometres, which constitutes nearly 42 percent of Antarctica, an area the size of nearly 80 percent of the total area of Australia itself.<sup>11</sup> The Australian claim is based on a long historical association with this part of Antarctica, including the Australasian Antarctic Expedition 1911–1914 led by Douglas Mawson and the subsequent British, Australian and New Zealand Antarctic Research Expedition (BANZARE) of 1929–1931, also led by Mawson.<sup>12</sup> During the BANZARE expedition Mawson claimed what is now the AAT as British sovereign territory.<sup>13</sup> In early 1933 Britain asserted sovereign rights over the claimed territory and placed the territory under the authority of the Commonwealth

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<sup>8</sup> A detailed examination of the basis of Australia's territorial claim in Antarctica is beyond the scope of this paper. For further detailed analysis of this issue, see, for example, Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (1986); Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395.

<sup>9</sup> Opeskin and Rothwell, above n 8, 401.

<sup>10</sup> *Ibid.*

<sup>11</sup> Australian Antarctic Division, <http://www.aad.gov.au/default.asp?casid=1295> at 27 March 2008.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

of Australia.<sup>14</sup> Shortly thereafter, sovereignty over the Territory was transferred from Britain to Australia under the *Australian Antarctic Territory Acceptance Act 1933*, which came into effect in 1936.<sup>15</sup> This Act, perhaps one of the shortest in Commonwealth legislative history, contains merely two sections, section one providing for the legislation's short title, and section 2 which provides:

That part of the territory in the Antarctic seas which comprises all the islands and territories, other than Adelie Land, situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree east longitude, is hereby declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Australian Antarctic Territory.

Subsequent to this Australia has consistently sought to maintain and assert its territorial claim in Antarctica. While a detailed examination of the steps taken by Australia to crystallise its territorial claims in Antarctica under international law are beyond the scope of this paper, it is worth noting specific steps taken by Australia over several decades include enactment of a range of legislation applying specifically to the AAT, maintenance of scientific research personnel and facilities in the AAT, and postal and other communication services within and to the AAT.<sup>16</sup> More recently on 10 January 2008, a new purpose-built permanent runway facility at Casey Station in the AAT received the first of regular direct flights from Hobart. This regular service brings journey times to Antarctica for Australian researchers to approximately 4 hours, considerably quicker than previous journeys by sea.<sup>17</sup>

In addition to the land territory claimed as part of the AAT, Australia also expressly claims a territorial sea adjacent to the AAT pursuant to the provisions of the *Seas and Submerged Lands Act 1973* (Cth).<sup>18</sup> In 1994 Australia also proclaimed an EEZ offshore the AAT under the 1982 *United Nations Convention on the Law of the Sea* (LOSC).<sup>19</sup> Perhaps even more controversially, in 2004 Australia lodged a claim to an extended continental shelf adjacent to the AAT pursuant to Article 76 of

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> These manifestations of State sovereignty are based on the notion of effective occupation recognised in a range of international court and tribunal decisions, most notably by the Permanent Court of International Justice in the *Eastern Greenland Case (Denmark v Norway)* [1933] PCIJ (ser A/B) No 53, the Permanent Court of Arbitration in the *Island of Palmas Case (The Netherlands v United States of America)* [1928] 2 RIAA 829.

<sup>17</sup> For information on this new runway facility see <http://www.aad.gov.au/default.asp?casid=33741> at 21 February 2008.

<sup>18</sup> Opeskin and Rothwell, above n 8, 401.

<sup>19</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 21 ILM 1245 [1982] (entered into force 16 November 1994). See Stuart B Kaye and Donald R Rothwell, 'Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?' (2002) 33 *Ocean Development & International Law* 359. On Australia's maritime boundaries in the AAT see also Julia Green, 'Australian Maritime Boundaries: the Australian Antarctic Territory' (2001) 25 *Marine Policy* 1.

LOSC,<sup>20</sup> although a Note submitted with the claim by Australia also requested the Commission on the Limits of the Continental Shelf not to take any action with respect to that part of its continental shelf claim that related to Antarctica. As Australia had no doubt anticipated, this claim in turn provoked a series of diplomatic responses for reasons that are examined in more detail below.<sup>21</sup>

The creation of the Australian Whale Sanctuary was, therefore, consistent with a longer-term trend of assertion of sovereignty and sovereign rights by Australia in Antarctica.

The *EPBC Act* established the Australian Whale Sanctuary in order to ‘give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas’.<sup>22</sup> Under section 225 of the *EPBC Act* the Australian Whale Sanctuary comprises:

- the waters of the EEZ (other than the coastal waters of a State or the Northern Territory);
- coastal waters of a State or the Northern Territory which are prescribed waters under the *EPBC Act*; and
- any marine or tidal waters that are inside the baseline of the territorial sea adjacent to an external Territory, whether or not within the limits of an external Territory.

The latter provision includes Australia’s proclaimed territorial seas around the AAT in the Australian Whale Sanctuary. The *EPBC Act* operates in the AAT in accordance with the provisions of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth). The *EPBC Act* regulates actions within the Australian Whale Sanctuary that will have, or are likely to have, a significant impact on threatened or migratory cetacean species that are listed under the Act. Five whale species (humpback, blue, fin, sei and southern right) are considered at risk and are listed as threatened species under the Act.<sup>23</sup> The *EPBC Act* also provides for the identification of key threatening processes for native cetacean species and the preparation of threat abatement plans, wildlife conservation plans, conservation agreements and recovery plans in relation to cetaceans and other species.<sup>24</sup>

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<sup>20</sup> On this submission see Julia Jabour, ‘High Latitude Diplomacy: Australia’s Antarctic Extended Continental Shelf’ (2006) 30 *Marine Policy* 197.

<sup>21</sup> Responses to the Antarctic claim were lodged by the USA, Russia, Japan, The Netherlands, Germany, and India. Copies of *Notes Verbales* relating to those responses are available from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_austr.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm) at 27 March 2008.

<sup>22</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), section 225.

<sup>23</sup> Department of the Environment, Water, Heritage and the Arts website <http://www.environment.gov.au/coasts/species/cetaceans/species.html> at 27 March 2008.

<sup>24</sup> *Ibid.*

The *EPBC Act* created a number of criminal offences with respect to activities involving cetaceans in the Australian Whale Sanctuary. These include:

- intentionally taking an action that results in the death of a cetacean under section 229;
- a separate strict liability offence of taking an action that results in the death of a cetacean under section 229A(1);
- intentionally taking, trading, keeping, moving or interfering with a cetacean under section 229B, (the term 'interfere' with a cetacean is defined to include harass, chase, herd, tag, mark or brand the cetacean);
- a strict liability offence of taking, trading, keeping, moving or interfering with a cetacean under section 229B(1);
- treating an illegally killed cetacean under section 229D; and
- possessing a cetacean, part of a cetacean or product derived from a cetacean where the cetacean has been killed in contravention of sections 229 or 229A or taken in contravention of sections 229B or 229C.

In addition sections 232A–235 provide for various offences related to the import and export of cetaceans, parts of cetaceans or products derived from cetaceans, regardless of their place of origin. Section 236 also imposes strict liability on the Master of a foreign whaling vessel if it is brought into an Australian port without permission from the Minister for the Environment.

When the *Japanese Whaling Case* was commenced, penalties which applied for the various offences included:

- imprisonment for not more than 2 years and/or a fine not exceeding \$A110 000 for offences under sections 229, 229B, 229D, 230;
- a fine not exceeding \$A55 000 for the strict liability offences under sections 229A, 229C, 236;
- a fine not exceeding \$A110 000 and/or imprisonment for up to 10 years for the export and import offences under sections 232A, 232B;
- a fine not exceeding \$A110 000 and/or 5 years imprisonment for the possession offence under section 233 and for treating illegally imported cetacean etc. under section 234.

However, under section 235 the *EPBC Act* provides that sections 232A, 232B, 233, 234 do not apply to:

- an action authorised by a permit that was issued under section 238
- an action provided for, by, and taken in accordance with, a recovery plan, or a wildlife conservation plan, made or adopted under the *EPBC Act*
- an action that is taken in a humane manner and is reasonably necessary to relieve or prevent suffering by a cetacean
- an action that is reasonably necessary to prevent a risk to human health

- an action by a Commonwealth or State or self-governing territory agency that is reasonably necessary for the purposes of law enforcement
- an action that is reasonably necessary to deal with an emergency involving a serious threat to human life or property
- an action that occurs as a result of an unavoidable accident, other than an accident caused by negligent or reckless behaviour.

Section 246 of the *EPBC Act* also vests ownership of all cetaceans in the Australian Whale Sanctuary or dealt with in contravention of the Act in the Commonwealth Government.

### III CIVIL SOCIETY AND THE ENFORCEMENT OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT*

The *Japanese Whaling Case* was commenced on 19 October 2004 by the Humane Society International Inc (the Applicant), which is a not-for-profit non-governmental organization (NGO). Kyodo Senpaku Kaisha Ltd, the Respondent in this case (the Respondent) is a Japanese company which the Court found was the registered owner of the vessels the *Kyoshin Maru No 2*, *Yushin Maru*, *Yushin Maru No 2*, *Kyo Maru No 1*, *Kaikoh Maru*, *Toshi Maru No 25* and *Nisshin Maru*. These vessels have conducted whaling in waters off Antarctica pursuant to the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA), issued by Japan under Article VIII of the International Whaling Convention and, from 2005, under a second expanded whaling program known as JARPA II.<sup>25</sup>

Section 475 of the *EPBC Act* was central to the commencement and successful prosecution of this case by the Applicant. Section 475 of the *EPBC Act* permits an ‘interested person’ to bring proceedings where another person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the *EPBC Act*. An ‘interested person’ under section 475 includes, inter alia, organizations whose objects or purposes in the two years immediately before the conduct or proposed conduct occurred, included the protection or conservation of, or research into, the environment. Thus this provision gives standing to environmental NGOs to seek court orders to enforce the Act.

In an order made on 23 November 2004, Allsop J accepted that the Applicant fell within the definition of an ‘interested person’ under section 475,<sup>26</sup> and this finding was implicit in the Court’s final judgment, and in particular in references to the fact that the Applicant had standing to bring the case without permission from the Attorney-General contained in the judgment.

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<sup>25</sup> Detailed information in English on the purported scientific [sic] research carried out under JARPA and JARPA II programs are available from the website of the Institute of Cetacean Research at <http://www.icrwhale.org/Pamphlets.htm> at 27 March 2008.

<sup>26</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, interim judgment on Applicant’s Motion for Service Outside the Jurisdiction, 23 November 2004, per Allsop J.

The *Japanese Whaling Case* was not the first case where NGOs were held to have standing to seek enforcement of the *EPBC Act*. For example, in *Booth v Bosworth*<sup>27</sup> Spender J held that the applicant Dr Booth had standing to commence proceedings in a case concerning the protection of a colony of flying foxes in a World Heritage listed area in North Queensland.<sup>28</sup> What was novel about the *Japanese Whaling Case* though was that it was the first case involving the application of the *EPBC Act* to a respondent located outside the jurisdiction. As the Respondent in this case was a Japanese company and was therefore resident outside the jurisdiction, under the *Federal Court Rules* the Applicant needed to obtain the leave of the Court to serve the Statement of Claim and other initiating process overseas.

In due course the Applicant filed a notice of motion seeking leave to serve the initiating process outside the jurisdiction. On 23 November 2004 Allsop J adjourned the Applicant's motion for service outside the jurisdiction pending the service of all documents in the proceedings on the Commonwealth Attorney-General. The Court also invited the Attorney-General to consider whether or not the Attorney-General wished to intervene in the proceedings. On 25 January 2005 the Commonwealth Attorney-General filed detailed submissions with the Court as Amicus Curiae. Beyond these submissions the then Attorney-General indicated that he did not want to be further heard.<sup>29</sup>

In his submissions, the then Attorney-General, Phillip Ruddock, did accept that the provisions of the *EPBC Act* apply to Australia's EEZ adjacent to the AAT.<sup>30</sup> Similarly he also agreed with the Applicant's submission that the JARPA is not a 'recognised foreign authority' for the purposes of subsection 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980 (Cth)*.<sup>31</sup>

However, Attorney-General Ruddock did express grave concerns about the likely diplomatic consequences of any enforcement action being taken against the Japanese Whaling vessels. His concerns centred on two aspects. Firstly the fact that Japan does not recognise Australia's territorial claims in Antarctica, and, perhaps more significantly, he expressed concern about the likely reaction of parties to the Antarctic Treaty System. Thus he argued:

Japan would consider any attempt to enforce Australian law against Japanese vessels and its nationals, in the waters adjacent to the AAT, to be a breach of international law on Australia's part

Japan's response would reflect the fact that, in the present case, Australia would be treating as criminal conduct which the Government of Japan not only does not regard

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<sup>27</sup> *Booth v Bosworth* [2000] FCA 1878.

<sup>28</sup> *Ibid.* See also *Mees v Roads Corporation* [2003] 128 FCR 418.

<sup>29</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, Outline of the Submissions of the Attorney-General of the Commonwealth as Amicus Curiae, dated 25 January 2005.

<sup>30</sup> *Ibid* paras 18, 19.

<sup>31</sup> *Ibid* para 31.

as an offence, but which is specifically authorised under Japanese law, in accordance with what Japan considers to be its rights under the Whaling Convention. (The Australian government does not consider that, even if the authorisation is consistent with the Whaling Convention, this overrides the rights of a Coastal State in its EEZ, but Japan does not recognise that Australia has those rights in the area concerned.)

Further, enforcement of Australian law against foreigners in Antarctic waters, based on jurisdiction deriving from Australia's territorial claim to the AAT and associated EEZ, can reasonably be expected to prompt a significant adverse reaction from other Antarctic Treaty Parties. To this point, the Australian Government has not enforced its laws in Antarctica against the nationals of other States which are parties to the Antarctic Treaty, except where such persons have voluntarily subjected themselves to Australian law (for example, by applying for permits under the applicable Australian laws), as each Party has responsibility for the activities of its own national under the Antarctic Treaty

Japan has indicated that enforcement of Australian law against Japanese vessels would be likely to give rise to an international disagreement with Japan. Similar disputes could also arise with other countries that do not accept Australia's claim to the AAT. To this point, Australia's claim to the AAT, although not widely recognised, has not been the subject of a dispute in an international court or tribunal. The object of Article IV of the *Antarctic Treaty* was to avoid such disputes, by preserving the status quo with respect to Antarctic claims. Provoking a disagreement in this instance may undermine the status quo, which would be contrary to Australia's long term national interests.<sup>32</sup>

The Attorney-General therefore argued that it is 'generally more appropriate to pursue diplomatic solutions in relation to activities by foreign vessels in the EEZ of the AAT'.<sup>33</sup>

In reaching a decision on whether to grant leave for service outside the jurisdiction at first instance, Allsop J placed significant reliance on the views expressed by the Attorney-General. In particular he commented:

The views of the Executive Government are relevant. The views concern subject matters which are within the province of the democratically elected Government of this country. The views of the Government may not be shared by the applicant. Nevertheless, they are about considerations that are peculiarly within the field of the Executive Government, as involving political judgments (using that phrase in the broad sense) and lacking legal criteria permitting judicial assessment.

Those views have been laid before me. I propose to take them into account.

In taking them into account, I recognise that Parliament has spoken in the *EPBC Act* and provided an entity such as the applicant with standing to bring these proceedings.

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<sup>32</sup> Ibid paras 13–17.

<sup>33</sup> Ibid para 21.

If the respondent were present in Australia the *EPBC Act* would plainly apply to it and no issue would arise as to jurisdiction. But it is not present. Leave, involving the exercise of a discretion, is required to permit service in a foreign country.

Very relevant to the exercise of that discretion are the kinds of consideration dealt with by the Attorney-General's submissions. I can conclude that Japan will view service or any attempt at service in Japan of process of this Court seeking orders under the *EPBC Act* as the attempted enforcement of rights that it does not recognise and as an interference with rights, under international law, of its nationals to ply the high seas and conduct themselves conformably with Japan's rights under international law, in particular by acting conformably with the Whaling Convention. I can conclude that the Australian Government has the view that the attempt to enforce the *EPBC Act* may upset the diplomatic status quo under the *Antarctic Treaty* and be contrary to Australia's long term national interests, including its interests connected with its claim to territorial sovereignty to the Antarctic. I can also conclude that Japan would take the view that an attempt to invoke the exercise of federal jurisdiction under the *EPBC Act* was itself contrary to international law and that the claim by this Court to the exercise of jurisdiction was based on an impermissible claim by Australia under international law to the Antarctic Territory. Of course, that would be no answer in this Court if the respondent were present within Australia when served or if there were to be voluntary submission by the respondent to the jurisdiction of the Court.

Any difficulties raised by the above would be compounded by the difficulty, if not impossibility, of enforcement of any court order. Enforcement (if the opportunity for such arose) may then place the Executive Government (as the branch of government which may assist in giving effect to and enforcing, in an administrative way, the orders of the Court by assisting in bringing people to court or levying execution on property) in the position of assisting the enforcement of an order of this Court (whether in contempt proceedings or otherwise) contrary to its view that such a course was in the best interests of this country by reference to considerations that are non-justiciable.

The nature of the underlying issues also illuminates the international political framework and content of the dispute. It does not involve private rights of property or liberty. It involves the protection of whales (which, subject to UNCLOS, are owned by no one) from interference and killing. To express the matter thus is not intended, in the slightest, to diminish either the statutory right sought to be enforced or the views of those who guide the applicant. The whales being killed by the respondent are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them in the manner that has occurred is deeply wrong. These views are not shared by all. It may be assumed that they are shared by many Australians. It may be assumed that they are not shared by many in Japan, and in Norway and in other places. They are views which, at an international level, are mediated through the Whaling Commission and its procedures, by reference to the Whaling Convention and the views of nation States. They are views which contain a number of normative and judgmental premises, the nature and content of which do not arise in any simple application of domestic law, but which do, or may, arise in a wider international context.

Weighed against this is the standing of the applicant and the material disclosing a clear prima facie case of contravention of Australian municipal law.

The issue for me is not only whether there appears to be a contravention of the *EPBC Act*, but also whether I should exercise a discretion to permit service of proceedings under the *EPBC Act* which seek a declaration and an injunction under domestic legislation dealing with these issues of international political controversy of the above character with the possible consequences referred to above and which are otherwise dealt with under international law and procedures.<sup>34</sup>

Justice Allsop thus concluded in light of the matters raised by the Attorney-General that it was not appropriate to grant leave to serve the originating process in Japan and accordingly leave was refused. In coming to this conclusion His Honour also took note of the very strong likelihood that with any court order such as an injunction would probably not be enforced. Thus he observed:

It was accepted in submissions that a legitimate consideration to take into account in the exercise of the discretion was the lack of means of making any injunction effectual. See *Marshall v Marshall* (1888) 38 Ch D 330; *Kinahan v Kinahan* (1890) 45 Ch D 78, 84; and *cf Watson v Daily Record* [1907] 1 KB 853; and also *ACCC v Chen* [2003] FCA 897; (2003) 132 FCR 309 at [45] and *ACCC v Kaye* [2004] FCA 1363 at [199]–[202]. Relevant to such a consideration here are the facts that there is no apparent reason for any of the ships of the respondent (apart from requiring refuge) to call into Australian ports and that there is no place of business of the respondent in Australia. Also, as the issue is one for public law, it cannot be expected that Japanese courts would give effect to an injunction.

The making of a declaration alone (a course suggested by the applicant) might be seen as tantamount to an empty assertion of domestic law (by the Court), devoid of utility beyond use (by others) as a political statement.

Futility will be compounded by placing the Court at the centre of an international dispute (indeed helping to promote such a dispute) between Australia and a friendly foreign power which course or eventuality the Australian Government believes not to be in Australia's long term national interests.

In my view, in all the circumstances, I should not exercise discretion to place the Court in such a position.

For these reasons, I do not propose to grant leave to serve originating process in Japan.<sup>35</sup>

The Applicant subsequently appealed to the Full bench of the Federal Court against the ruling to refuse leave to serve outside the jurisdiction. This appeal was upheld

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<sup>34</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, per Allsop J, paras 24–31, [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2005/664.html?query=title\(Humane%20Society\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2005/664.html?query=title(Humane%20Society)) at 24 March 2008.

<sup>35</sup> *Ibid* paras 34–37.

and leave was granted for the Applicant to serve outside the jurisdiction. In upholding the appeal the Court was particularly critical of Allsop J's focus on political considerations in his determination of whether or not to grant leave. Thus Black CJ and Finkelstein J commented:

[T]he primary judge was in error in attaching weight to what we would characterise as a political consideration. It may be accepted that whilst legal disputes may occur in a political context, the exclusively political dimension of the dispute is non-justiciable. It is appropriately non-justiciable because the court lacks competence to resolve disputes and issues of an exclusively political type, the resolution of which will involve the application of non-judicial norms: compare *Japan Whaling Association v American Cetacean Society* (1986) 478 US 221 at 230.

Even if, in special circumstances, there is occasion for political considerations to be taken into account in deciding whether an action should be permitted to go forward, there is no room, in our view, for those considerations where, as here, the Parliament has provided that the action is justiciable in an Australian court: *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [1998] UKHL 41; [2000] 1 AC 61 at 107.<sup>36</sup>

In a similar vein Moore J (although dissenting on the question of granting leave to serve outside the jurisdiction) agreed with Black CJ and Finkelstein J in finding the primary judge erred in the exercise of his discretion by taking into account political considerations. Thus he observed:

The political repercussions of service of the process and, additionally, potentially the litigation of this application in an Australian court, are irrelevant in deciding whether to grant leave. To allow such considerations to influence the resolution of the application for leave denies this Court its proper role in our system of government. Courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject-matter of the proceedings.<sup>37</sup>

The Full Court also disagreed with the primary judges approach to the question of futility on a number of grounds. First Black CJ and Moore J accepted that, while an injunction is by its nature a discretionary remedy which may be refused if it cannot be enforced, they held that that question should only be dealt with where there is either an application to set aside service or when the application itself is heard.<sup>38</sup> It was not something that should be determined when the Court is deciding whether to grant leave to serve outside the jurisdiction.<sup>39</sup>

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<sup>36</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116, per Black CJ and Finkelstein J, paras 12–13.

<sup>37</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116, per Moore J, para 38.

<sup>38</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116, per Black CJ and Finkelstein J, para 14.

<sup>39</sup> *Ibid.*

Second Black CJ and Finkelstein J were also of the view that the primary judge had in effect imposed upon the appellant the obligation of showing the injunction would be a useful remedy, when in fact that onus lies on the defendant.<sup>40</sup> They also were of the view that when asked to grant an injunction, the Court should not necessarily contemplate that it would be disobeyed.<sup>41</sup>

Perhaps more significantly though for present purposes is the Court's finding that the public interest character of section 475 prevents futility from being raised as a ground for refusing leave. Thus Black CJ and Finkelstein J stated:

Parliament has determined that it is in the public interest that the enforcement provisions of the *EPBC Act* should be unusually comprehensive in scope. Section 475 of the *EPBC Act* and its related provisions form part of a much larger enforcement scheme contained in the 21 divisions of Pt 17. The provisions include the conferral of powers of seizure and forfeiture, powers to board and detain vessels and authority to continue a pursuit on the high seas.

It is an important and distinctive feature of Div 14 of Pt 17 of the *EPBC Act* that, like s 80(4) of the [*Trade Practices Act 1974*], the Federal Court is expressly empowered to grant an injunction restraining a person from engaging in conduct whether or not it appears to the Court that the person intends to engage again in conduct of that kind and, even, whether or not there is a significant risk of injury or damage to the environment if the person engages or continues to engage in conduct of that kind: see s 479(1)(a) and (c).

The public interest character of the injunction that may be granted under s 475 of the *EPBC Act* is also emphasised by other elements in Div 14 of Pt 17. Thus, as we have noted, standing is conferred upon 'an interested person' to apply to the Court for an injunction. Likewise, the traditional requirement that an applicant for an interim injunction give an undertaking as to damages as a condition of the grant is negated. Indeed, s 478 provides, expressly, that the Federal Court is *not* to require such an undertaking. These modifications to the traditional requirements for the grant of injunctions have the evident object of assisting in the enforcement, in the public interest, of the *EPBC Act*. This does not of course mean that the traditional requirements are irrelevant: see *ICI Australia Operations Pty Ltd v TPC* at 256-257.

Although 'deterrence' is more commonly used in the vocabulary of the law than 'education', the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. Thus, there being a 'matter' (see [28] below), the grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the *EPBC Act*. Indeed, some of those objects are expressed directly in the language of 'promotion', including the object provided for by s 3(1)(c), namely to promote the conservation of biodiversity, which is an object

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<sup>40</sup> Ibid para 15.

<sup>41</sup> Ibid para 16.

that the legislation links to the establishment of an Australian Whale Sanctuary ‘to ensure the conservation of whales and other cetaceans’: s 3(2)(e)(ii).

Consistently with this view it has been said in relation to s 80(4) of the [*Trade Practices Act 1974*] that whilst the Court should not grant an injunction unless it is likely to serve some purpose, it may be that in a particular case an injunction will be of benefit to the public by marking out the Court’s view of the seriousness of a respondent’s conduct: see *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) ATPR 40-748 at 48,135 and *Trade Practices Commission v Mobil Oil Australia Ltd [1984] FCA 363*; (1984) 4 FCR 296 at 300.

Similarly, it has been said, again in the context of s 80 of the [*Trade Practices Act 1974*], that the purpose of an appropriately drafted injunction may be merely to reinforce to the marketplace that the restrained behaviour is unacceptable: *ACCC v 4WD Systems Pty Ltd [2003] FCA 850*; (2003) 200 ALR 491 at [217]. That is to say, a public interest injunction may have a purpose that is entirely educative. In *ACCC v 4WD Systems*, the enjoined behaviour had ceased and there was little likelihood of repetition and yet it was considered appropriate to grant an injunction.

More generally, we agree with the view expressed by Sackville J in *ACCC v Chen [2003] FCA 897*; (2003) 132 FCR 309 that the fact that an injunction granted under s 80 of the [*Trade Practices Act 1974*] may prove difficult or even impossible to enforce is not necessarily a bar to the grant of relief, although it is a material consideration to be weighed against other circumstances relevant to the exercise of the Court’s discretion: see at [45], citing I C F Spry, *The Principles of Equitable Remedies* (6<sup>th</sup> ed, 2001) at 42.<sup>42</sup>

While the Full Court granted leave for service outside the jurisdiction, the political considerations that had figured so prominently in Allsop J’s original refusal to grant leave then posed a very real obstacle to further prosecution of the Applicant’s case. Pursuant to the leave granted by the Full Court the Applicant sought to effect service through diplomatic channels in accordance with Order 8 of the *Federal Court Rules*. However, as clearly was anticipated, the Government of Japan declined to provide any assistance in effecting service. In a *Note Verbale* dated 26 October 2006 the Japanese Ministry of Foreign Affairs responded to the request for assistance to effect service:

The Ministry of Foreign Affairs presents its compliments to the Australian Embassy and, with reference to the latter’s *Note Verbale* No 160/06 of September 14 2006, requesting the Ministry’s assistance in serving the judicial documents on Kyodo Senpaku Kaisha Ltd, has the honour to inform the Embassy that the documents were unable to be accepted for the reasons stated in the enclosed note and to return herewith the relevant documents on [sic] the Embassy.<sup>43</sup>

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<sup>42</sup> Ibid paras 19–25.

<sup>43</sup> *Note Verbale* Japanese Ministry of Foreign Affairs to the Australian Embassy dated 26 October 2006 quoted by Allsop J in judgment on Applicant’s request for Order for Substituted Service *Humane Society International Inc v Kyodo Senpaku Kaisha [2007] FCA 124*, 16 February 2007.

The note enclosed with the *Note Verbale* stated:

The request for service of documents with regards to Kyoto [sic] Senpaku Kaisha Ltd cannot be processed because this issue relates to waters and a matter over which Japan does not recognise Australia's jurisdiction.<sup>44</sup>

In light of the lack of cooperation by the Japanese Government, on 2 February 2007 Allsop J granted the Applicant's request for an Order for Substituted Service.<sup>45</sup> The case therefore proceeded to trial in the absence of the Respondent on 18 September 2007.

#### IV THE TRIAL, JUDGMENT AND SUBSEQUENT REACTION: SPIN OR SUBSTANCE?

After commencing the proceedings, the Applicant sought leave to plead its case, in part, on the basis that the whaling conducted pursuant to the JARPA by the Respondent was not scientific whaling. However, the Applicant was not given leave to do this. So it is important to note that the case did not challenge the legality or otherwise of the JARPA permits under the Whaling Convention. Instead the case centred solely on the legality or otherwise of the Respondent's whaling under Australian law and under the *EPBC Act* in particular.

The case alleged by the Applicant, as set out in its amended statement of claim, was as follows:

- That the Respondent has intentionally engaged in a series of activities that have resulted in Antarctic minke whales and fin whales being killed, taken and interfered with, and humpback whales being taken and interfered with, within the Australian Whale Sanctuary, and subsequently intentionally treated and possessed in contravention of sections 229, 229A, 229B, 229C, 229D, 230 of the *EPBC Act*.
- That the conduct was done in accordance with the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA) issued by the Government of Japan under Article VIII of the Whaling Convention.
- That JARPA is not a recognised foreign authority for the purposes of subsection 7(1) of the *Antarctic Treaty (Environment Protection Act) 1980* (Cth).

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<sup>44</sup> Enclosed note accompanying *Note Verbale* Japanese Ministry of Foreign Affairs to the Australian Embassy dated 26 October 2006 quoted by Allsop J in judgment on Applicant's request for Order for Substituted Service *Humane Society International Inc v Kyodo Senpaku Kaisha* [2007] FCA 124, 16 February 2007.

<sup>45</sup> See Allsop J judgment on Applicant's request for Order for Substituted Service *Humane Society International Inc v Kyodo Senpaku Kaisha* [2007] FCA 124, 16 February 2007. The order was made on 2 February 2007 and the reasons for judgment on this order were subsequently published on 16 February 2007.

- That the Respondent is not permitted or authorised to kill, take, interfere with, treat or possess whales in accordance with sections 231, 232 or 238 of the *EPBC Act*.
- That, unless restrained, the Respondent will in the future intentionally kill, take and interfere with whales within the Australian Whale Sanctuary, and subsequently intentionally treat and possess Antarctic minke whales, fin whales and humpback whales in contravention of the *EPBC Act*.

In presenting its case the Applicant relied upon reports submitted by the Respondent to the International Whaling Commission pursuant to JARPA and JARPA II as evidence of the Respondent's whaling activity in the Antarctic. In considering this evidence Allsop J was satisfied that it showed:

Under JARPA, the whaling activity was conducted in two groups of areas, alternating on a biennial basis. In the 2001/2002 and 2003/2004 seasons, whaling was conducted south of latitude 60deg. S to the ice edge of the Antarctic land mass between longitude 35deg. E and longitude 130deg. E (referred to as Area IV and Area IIIE). In the 2000/2001, 2002/2003 and 2004/2005 seasons, whaling was conducted south of latitude 60deg. S to the ice edge of the Antarctic land mass between longitude 130deg. E and longitude 145deg. W (referred to as Area V and Area VIW). After the introduction of JARPA II, the internal boundaries were shifted such that in the 2005/2006 season, whaling occurred between 35deg. E and 175deg. E and in 2006/2007, between 175deg. E and 145deg. W.<sup>46</sup>

The number of whales killed in the waters off Antarctic each season, as outlined by the Respondent's own reports, were as shown in Table 1.

Whaling season	Number of Antarctic minke whales killed under JARPA and JARPA II	Number of fin whales killed under JARPA and JARPA II
2000/2001	440	0
2001/2002	440	0
2002/2003	440	0
2003/2004	440	0
2004/2005	440	0
2005/2006	853	10
2006/2007	505	3
Total	3558	13

*Table 1: Number of Whales Killed under JARPA and JARPA II*<sup>47</sup>  
(JARPA: Japanese Whaling Research Program under Special Permit in the Antarctic)

<sup>46</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, per Allsop J, para 32.

<sup>47</sup> This table is reproduced from Allsop J's judgment. See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, para 34.

On 15 January 2008 Justice Allsop handed down the Court's judgment concluding that on the basis of the evidence submitted by the Applicant the Court was satisfied that:

[T]he respondent has contravened ss 229, 229A, 229B, 229C, 229D and 230 of the *EPBC Act* in relation to Antarctic minke whales and fin whales by killing, injuring, taking and interfering with them and the treating and possessing of them and by injuring, interfering with and treating and possessing humpback whales and that, unless restrained, it will continue to kill, injure, take and interfere with them, and treat and possess them.<sup>48</sup>

Accordingly the Court issued the following Orders:

1. The Court declares that the respondent has killed, injured, taken and interfered with Antarctic minke whales (*Balaenoptera bonaerensis*) and fin whales (*Balaenoptera physalus*) and injured, taken and interfered with humpback whales (*Megaptera novaeangliae*) in the Australian Whale Sanctuary in contravention of sections 229, 229A, 229B and 229C of the Environment Protection and *Biodiversity Conservation Act 1999* (Cth), (the "Act"), and has treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of sections 229 D and 230 of the Act, without permission or authorisation under sections 231, 232 or 238 of the Act.

2. The Court orders that the respondent be restrained from killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*), fin whale (*Balaenoptera physalus*) or humpback whale (*Megaptera novaeangliae*) in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Australian Whale Sanctuary, unless permitted or authorised under sections 231, 232 or 238 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).<sup>49</sup>

There was no Order made as to costs in the proceedings.

In summary the Court's decision to issue these Orders was based on the following reasoning:

- The Court documents commencing the proceedings had been validly served on the Respondent in Japan in accordance with the *Federal Court Rules*, and that accordingly the Court could proceed to hear the case notwithstanding the Respondent did not participate in the hearing.
- The *EPBC Act* applies to all persons and all vessels within territorial Australia and the EEZ, including persons who are not Australian citizens and vessels that are not registered Australian vessels.<sup>50</sup>
- Australia's claimed EEZ extends to the waters within 200 nautical miles of the AAT.<sup>51</sup>

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<sup>48</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, para 54.

<sup>49</sup> *Ibid* para 55.

<sup>50</sup> *Ibid* para 6.

- A significant number of whales were taken inside the Australian Whale Sanctuary within Australia's EEZ adjacent to the AAT.<sup>52</sup>
- The Australian Government has not issued a permit under s 238 of the *EPBC Act* authorising the acts of the Japanese whalers.<sup>53</sup>
- The crews of the whaling vessels were employees of the Respondent and were acting with the Respondent's authority.<sup>54</sup>
- Although Australia's claim to sovereignty over the AAT is recognised only by four nations (New Zealand, France, Norway and the United Kingdom) and Japan considers these surrounding waters high seas, the sovereign claim by Australia to the AAT is not a matter capable of being questioned by the Court.<sup>55</sup> Thus the refusal of Japan to recognise Australia's claim to Antarctica was not a matter for the Court to consider. Accordingly the disputed status of Australia's territorial claims was not a ground for invalidity of the *EPBC Act*.<sup>56</sup>
- The practical difficulty (if not impossibility) of enforcement and the fact the Orders may not be complied with was not a reason to refuse to grant the Orders sought by the Applicant.<sup>57</sup>

One very significant political development between the trial and the final judgment was the change of government in Australia in national elections held on 24 November 2007. The Liberal-National Coalition Government of Prime Minister John Howard was defeated by the now Prime Minister Kevin Rudd and the Labor Party in a massive landslide election victory. Unusually for national politics in Australia, environmental issues (and in particular the incumbent Government's failure to respond to climate change) were a significant factor in the election outcome.<sup>58</sup> While climate change was a major issue in the election campaign, the whaling issue and how the government should respond to the issue also received significant attention during the election campaign. It is perhaps no coincidence that there was a degree of competition between the Government and the Opposition on who could be seen to be the strongest in standing up to Japan on the issue.

In its election campaign the Labor Party's official policy committed a Labor Government to 'enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary'.<sup>59</sup> In that regard it is worth noting in commenting on that policy commitment the policy document stated:

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<sup>51</sup> Ibid para 12.

<sup>52</sup> Ibid para 39.

<sup>53</sup> Ibid para 40.

<sup>54</sup> Ibid para 42.

<sup>55</sup> Ibid para 13.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid paras 45–53.

<sup>58</sup> Environmental issues were not the sole issues of significance in the election though. Industrial relations in particular was a major election issue.

<sup>59</sup> Australian Labor Party, 'Federal Labor's Plan To Counter International Whaling' <http://www.alp.org.au/media/0507/msenhloo190.php> at 4 March 2008.

It is illegal under the *Environment Protection and Biodiversity Conservation Act 1999* Act [sic] to kill or injure a whale within the Australian Whale Sanctuary. Since 1999, more than 400 whales have been killed in the Australian Whale Sanctuary without a single prosecution, despite these actions being illegal under Australian law.

The Attorney-General, Phillip Ruddock, tried to block an action by the environment group Humane Society International to get Federal Court enforcement of Australian law, arguing that the prosecution of Japanese whalers would ‘create a diplomatic disagreement with Japan’

A Federal Labor Government will enforce Australian law prohibiting whaling with the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory, penalizing any whalers found to have breached Australian law.<sup>60</sup>

The policy document then went on to commit a Labor Government to monitoring whaling vessels operating in Australian waters, and intercept vessels operating illegally.<sup>61</sup> Specifically the policy provided:

A Federal Labor Government will *monitor* Japanese whaling activities within the Australian Antarctic Territory, recognising that it is not the role of non-government organisations to enforce Australian law and protect Australian territories.

Labor will maintain the option of boarding whaling vessels operating within the Australian fishing zone.<sup>62</sup>

The wording here is significant and merits close attention because of what it tells us of the possible response by the new government to this issue. As George Orwell has observed:

Political language is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind.<sup>63</sup>

In the case of the Labor Party’s commitment on whaling, one’s first impression is that they were giving a commitment to interdict and arrest the Japanese whalers operating in the Australian Whale Sanctuary. But when one looks closely at the language of this document no such commitment is given. The Labor Party gave a commitment only to *monitor* the Japanese whaling vessels. The policy is curiously vague on who would actually be responsible for enforcement of the *EPBC Act*.

Subsequent action (or indeed lack of action) by the new Government suggests it has backed away from this policy. For reasons outlined below this is perhaps a prudent course of action.

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> George Orwell, *Politics and the English Language* quoted in Don Watson, ‘When Words Hide the Truth’ *The Age Online*, 30 October 2004  
<http://www.theage.com.au/articles/2004/10/29/1099028198595.html> at 2 April 2008.

V THE INTERNATIONAL IMPLICATIONS OF  
THE *JAPANESE WHALING CASE*

As noted earlier in this paper, although issues of international law were referred to in the Court's judgment, the final decision was made solely on the basis of Australian domestic law. While as a matter of law one must, with respect, accept the decision in this case (and the decision of the Full Court that made it possible for the matter to proceed to trial), the failure of the Court to consider the international law issues and the foreign policy implications of its decision is regrettable. It is the author's view that any further attempt to prosecute this case, and in particular to seek to enforce the Court's judgment by attempting to arrest the Japanese whaling vessels is fraught with major legal, diplomatic and strategic implications for Australia. Simply put, any attempt to arrest the Japanese whaling fleet should be avoided at all costs.

While at a personal, moral and ethical level I have strong philosophical objections to Japanese whaling, I think one must step back from the emotion of the issue and consider the broader implications for Antarctica of an attempt by Australia to arrest these vessels. As a matter of international law, Japan's attempt to dress up commercial whaling under both JARPA and JARPA II as scientific research clearly subverts the intent and purpose of the International Whaling Convention and arguably also is in breach of the *Convention on International Trade in Endangered Species* or CITES.<sup>64</sup> While that may be the case, perhaps what has been glossed over in arguments put before the Federal Court in the *Japanese Whaling Case* is the potential impact of the enforcement of Australian law on the entire regime for environmental governance in Antarctica that has grown up under the Antarctic Treaty System. While, as noted above, Australia does have a strong basis to its territorial claims in Antarctica, it is important to understand that those territorial claims occur against the backdrop of Australia's commitment and participation in the various treaties and bodies that exist under the suite of treaties that make up the Antarctic Treaty System.

The Antarctic Treaty System is composed of five main treaties: the 1959 *Antarctic Treaty*,<sup>65</sup> the 1971 *Convention for the Conservation of Antarctic Seals*,<sup>66</sup> the 1980

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<sup>64</sup> This point has been debated extensively in the literature. Detailed discussion of this issue is beyond the scope of this paper but for further detailed discussion see detailed publications such as Peter H Sand, 'Japan's "Research Whaling" in the Antarctic and Southern Ocean in Face of the Endangered Species Convention (CITES)' (2008) 17(1) *Review of European Community and International Environmental Law* 56 and the extensive list of publications cited by that author.

<sup>65</sup> *The Antarctic Treaty*, done at Washington, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) ('*Antarctic Treaty*').

<sup>66</sup> *Convention for the Conservation of Antarctic Seals*, done at London, opened for signature 1 June 1971, 11 ILM 251, 417 (entered into force 11 March 1978).

*Convention on the Conservation of Antarctic Marine Living Resources*,<sup>67</sup> the 1988 *Convention on the Regulation of Antarctic Mineral Resource Activities*,<sup>68</sup> and the 1991 *Madrid Protocol to the Antarctic Treaty*.<sup>69</sup> Although there have been periodic challenges to its legitimacy, the Antarctic Treaty System is the main international governance regime which applies to Antarctica and the Southern Ocean. Some countries, such as Malaysia, have periodically criticised the Antarctic Treaty System as a ‘club’ of former colonial powers and have called for greater involvement of the United Nations in the management of the Antarctic. But these criticisms have become muted in recent years, with Malaysia now indicating it is prepared to take an active part in the Antarctic Treaty System. It now appears that there is near universal acceptance that the Antarctic Treaty System serves the international community well and should remain for the foreseeable future the main forum for management of issues related to the Antarctic and the Southern Ocean.<sup>70</sup>

Emerging at the height of the Cold War, one of the first aims of the 1959 *Antarctic Treaty* was to prevent the militarisation of Antarctica. Article I (1) of the treaty provides that ‘Antarctica shall be used for peaceful purposes only’ and prohibits any military measures in Antarctica including ‘the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons’.

Consistent with the demilitarisation of Antarctica, Article V(1) of the *Antarctic Treaty* also prohibits the testing of nuclear weapons in Antarctica. While the military have provided logistical support for several countries’ activities in Antarctica, the effective demilitarisation of Antarctica has been one of the clear achievements of the Antarctic Treaty System.

Australia could never possibly hope to adequately protect its national and strategic interests if Antarctic were to become a new field of potential military conflict or, to use an American analogy, a Cuba on Australia’s southern door step. Imagine the world today if nuclear weapons were stationed in Antarctica pointing at continental Australia. Perhaps more realistically, what if the air force of a hostile nation were to have an airbase only four hours flying time from Hobart or five hours from Melbourne? While for the time being these remain purely hypothetical scenarios, it

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<sup>67</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, done at Canberra, opened for signature 20 May 1980, 19 ILM 841 [1980] (entered into force 7 April 1982) (‘CCAMLR’).

<sup>68</sup> *Convention on the Regulation of Antarctic Mineral Resource Activities*, done at Wellington, opened for signature 2 June 1988, not in force 27 ILM 868 [1988] (‘*Antarctic Minerals Convention*’). This treaty never entered into force and is unlikely to do so due to the subsequent negotiation of the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*, done at Madrid, 4 October 1991, 30 ILM 1461 [1991] (entered into force 14 January 1998).

<sup>69</sup> *Ibid.*

<sup>70</sup> For a detailed and comprehensive analysis of the position of Malaysia and other developing countries’ objections to the Antarctic treaty system and the recent change of their position, see Peter J Beck, ‘The United Nations and Antarctica, 2005: The End of the “Question of Antarctica”’, (2006) 42(222) *Polar Record* 217.

is clearly in Australia's long-term strategic interests that Antarctica remains forever demilitarised.

Attempts to arrest the Japanese whaling vessels potentially threaten that fundamental pillar of international governance in Antarctica. In response to recent reckless attempts by environmental groups such as Sea Shepherd to stop the Japanese whaling vessels from carrying out their illegal whaling activities, it already appears that the Japanese Government considers a military response an appropriate course of action to this dispute. The Japanese Government has signalled that armed coastguard officers will protect its whaling ships from further interference by anti-whaling protesters.<sup>71</sup> How much further might this conflict escalate before Japan sends warships to the Antarctic to protect its whaling fleet? In response, is it possible that other nations will dispatch military vessels? How long before a few armed coastguard officers become permanent garrisoned military bases in Antarctica? Perhaps scenarios such as this are remote, but it is precisely such a rapid escalation of military conflict and the militarisation of Antarctica and the Southern Ocean that the *Antarctic Treaty* aims to prevent.

One of the other major achievements of the *Antarctic Treaty* is the way it has dealt with actual and potential disputes with respect to territorial claims in Antarctica. Article IV (2) of the *Antarctic Treaty* provides:

No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

While as a matter of Australian law the Federal Court could not look behind Australia's territorial claims in Antarctica, it is important to note that as a matter of international law the *Antarctic Treaty* effectively freezes all claims and potential claims to Antarctic territory. Consistent with these provisions Australia has consistently maintained a policy of not seeking to enforce Australian law in Antarctica against non-Australian nationals.

If Australia were to diverge from this long-term policy approach to Antarctica, it is likely (as Attorney-General Ruddock noted in his intervention in the whaling case) that Japan and probably many other countries could potentially see this as a repudiation of the *Antarctic Treaty* by Australia. One possible worst case scenario here is that some of these countries would then withdraw from the *Antarctic Treaty* and the Antarctic Treaty System and the whole international governance regime that applies in Antarctica would come tumbling down. This would lead to the re-opening of a whole range of territorial disputes in Antarctica again, possibly

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<sup>71</sup> See ABC News Online, 'Armed Guards will Protect Whalers: Japan', 8 March 2008 <http://www.abc.net.au/news/stories/2008/03/08/2183991.htm> at 3 April 2008.

resulting in international tensions and in a worse case scenario military conflict in Antarctica.

Perhaps also more importantly for the environment a very effective (although by no means perfect) environmental governance regime with its foundations in the *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR) and the Madrid Protocol could also potentially disintegrate. Issues, such as fishing, tourism, mining, pollution etc., would all potentially become new environmental problems for Antarctica and the Southern Ocean. While the environmental governance framework provided by the *Antarctic Treaty* system has a lot of gaps and more could be done, just imagine the state of the Antarctic environment today if these regulations were not in place?

Of course the abovementioned scenarios are worst case scenarios. But can the international community really risk that? Does that then mean it's a zero sum game here? Is it really a choice between stopping whaling and maintaining the Antarctic Treaty System? The answer is clearly no. But what is needed here though is a smarter and perhaps more nuanced response to the whaling issue. As a first step anti-whalers (such as myself) should support further action by nations such as Australia and other like-minded nations to stop Japanese whaling through the mechanisms of the International Whaling Commission (IWC). There is no doubt that the previous Government (the Government that also enacted the *EPBC Act*) was clearly committed to this course and the new Government appears also to follow the same policy at the IWC.

Beyond this there are two longer-term paths to pursue. The first is what might be called the international litigation path. Although not without its risks (not the least of which is the potential of a finding adverse to Australia's territorial claims to Antarctica), the possibility of litigation before the International Tribunal on the Law of the Sea or the International Court of Justice is a desirable path.<sup>72</sup> Given commitments made by the new Government both before and after the 2007 election to pursue this course, time will tell if this is effective or not.

Beyond that the other strategy, which perhaps needs a much more longer-term focus, is the need for the opponents of whaling to focus on educating the Japanese population of the environmental arguments against whaling. While there are many Japanese citizens who oppose whaling, including some members of the Japanese Parliament, based on my own experience of engagement with Japan for the past 25 years (including nearly four years living in Japan), in my opinion it is probably fair to say that there is little evidence that the people of Japan understand the environmental issues behind opposition to whaling. What little attention is given to the whaling issue in media in Japan (to the extent that there is any coverage) largely

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<sup>72</sup> On the potential risks of this strategy see Andrew Hutchinson, 'Baleen out the IWC: Is International Litigation an Effective Strategy for Halting the Japanese Scientific Whaling Program?' (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 1.

focuses on how poorly treated Japan is by the rest of the international community over the issue. The recent Sea Shepherd incidents, for example, were portrayed by Japan's leading media outlets such as NHK as essentially acts of terrorism against innocent Japanese vessels on the high seas. There was little if any examination of the reasons behind it. Opposition by Australians in particular was portrayed as something emotional or irrational due to some special emotional attachment we have to cetaceans. The environmental impact of whaling received little if any attention. The significant issues, that is, threats to endangered species, and the broader issue of the sustainability of Japan's fishing practices in the high seas, rarely if ever gets detailed attention by the Japanese media. While there is some evidence of an emerging environmental consciousness in Japan, there is still widespread ignorance within Japan of the impact of its fishing practices and its level of unsustainable consumption more broadly on the global environment.<sup>73</sup>

As a longer-term action, therefore, there needs to be greater attention by opponents of whaling to educating the Japanese population of the environmental impact of whaling and of their fishing practices more widely. This strategy of course could be extended to a whole range of environmental issues.

Beyond that, opponents of whaling also have to become better informed of how Japanese society and politics operates. Although on the surface Japan is a parliamentary democracy, it is somewhat naïve to assume that the Japanese democracy functions in the same manner as other democracies. To change Japanese government policy on whaling, opponents of whaling will not be able to rely simply on having an educated and informed public lobby members of parliament. Japanese policy on whaling is not made in parliament. It is made by the faceless and unaccountable members of the Fisheries and other ministries and is the result of the interplay of relationships intertwined in a complex web of stakeholders and vested interests. Similar networks and vested interests (which some in other cultures may view as tantamount to corruption) lie at the heart of all government policy in Japan.<sup>74</sup>

Nationalism and in fact the extreme right wing of politics in Japan is also lurking in the background. While direct action, such as public protests etc., have their place in an overall strategy to stop whaling, one also has to recognise that at times reckless actions such as those of the Sea Shepherd play right into the hand of the pro-whaling lobby and the extreme right of Japanese politics. The extreme right wing of politics in Japan love it when outsiders attack Japan as it gives more support to their

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<sup>73</sup> On this point see M S Suneetha et al, 'Symposium: Biodiversity and Climate Change' (2007) 37(5) *Environmental Policy and Law* 422.

<sup>74</sup> A detailed examination of this issue is beyond the scope of this paper. One of the best studies so far which captures the nature of how policy is formed in Japan that matches with my own observations working and living in Japan is Alex Kerr, *Dogs and Demons: The Fall of Modern Japan* (2001). For examination of the development of Japan's longer-term strategy on whaling see Sidney J Holt, 'Whaling: Will the Phoenix Rise Again?' (2007) 54 *Marine Pollution Bulletin* 1081. See also Sidney J Holt, 'Propaganda and Pretext' (2006) *Marine Pollution Bulletin* 363.

arguments that Japan has been victimised by the west since World War Two. Actions such as these won't change Japanese policy; they merely increase public support behind government policy, give new life to extreme politicians, and make it harder for more moderate pro-environment groups to be heard.

Simply put, I would suggest that to stop whaling in Japan the anti-whalers need to stop for the moment and consider how well do they understand Japan? What are the real reasons behind whaling? To what extent are issues such as food security at the heart of Japan's policy on this issue? In particular as one recent author has noted, to 'understand the importance of whaling to Japan the issue must be seen not in isolation but in the much broader context of international fisheries policy'.<sup>75</sup> As the same author goes on to relate:

[W]haling itself represents a potentially slippery slope: a major loss or concession on this issue could potentially have severe ramifications for Japan's extensive and critically important fisheries agreements elsewhere.

Mr Morishita [Japan's key whaling and fisheries negotiator] himself inadvertently illustrated this dilemma in an amusing incident which occurred at the 2001 IWC meeting in London. In an intervention at an [IWC Scientific Committee] plenary session, he explained why he disliked a procedure that had been suggested for managing Antarctic minke whales, and concluded by saying that this was a 'very bad way to manage southern bluefin tuna'. After a pause in which everyone in the room looked up quizzically, he added, 'Sorry-wrong meeting'. The slip said much about the inextricable connection between whaling and other fisheries issues for the [Government of Japan], and the basic blueprint underlying its approach to the management of a wide range of exploited marine species.

For a nation that is as dependent upon fisheries resources as Japan, this is a critical fight to win. Or to modify the concluding statement of Morishita's article: Japan's fisheries policy can't be protected without whaling.<sup>76</sup>

It is only through understanding what truly lies beneath Japan's policy that a nuanced response can be developed to bring about a change to this policy. While many veteran conservationists may once have hoped the battle over whaling was coming to an end, unfortunately it appears it is a long battle that has only just begun. It is a long-term battle and not one that will be won by grabbing a few sensational headlines by throwing rotten butter at Japanese ships in the Southern Ocean. The environmental movement needs to go back to the beginning and start to understand why Japan is acting like it is and shape smarter more effective plans of action in response. It needs in particular to draw a clear link in the minds of the Japanese people between whaling and the more broader question of the unsustainable nature of Japan's current fishing practices. Only then will it be possible for there to be some movement on this issue by Japan.

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<sup>75</sup> Phillip J Clapham et al, 'The Whaling Issue: Conservation, Confusion and Casuistry' (2007) 31 *Marine Policy* 314.

<sup>76</sup> Ibid 318.

## VI CONCLUSION

It is unclear, but probably unlikely, that when the *EPBC Act* was drafted policy makers could have foreseen that section 475 would be used in such a way as to make an already very complicated diplomatic issue even more complicated than it was. How the new Government will navigate its way around these unintended consequences remains to be seen. This case though is perhaps an unusual scenario: a very unique clash between international and Australian domestic law. Given this is such an unusual case, there is absolutely no justification for removing the standing of NGOs to seek enforcement of the *EPBC Act*. Some might argue that the outcome of this case highlights the need for further amendment to the *EPBC Act* to remove standing of 'interested persons' in matters relating to the AAT. This article has not and does not advocate such a response. The provisions of section 475 are entirely consistent with trends in environmental governance elsewhere in the world, of introducing transparency and accountability into environmental law by granting greater standing to civil society and other non-state actors. Any attempt to undermine that transparency and accountability, especially in the Antarctic context, would, in the author's view, be a retrograde step.

However, one clear lesson that can be drawn from the *Japanese Whaling Case* is that while granting standing to NGOs as a general rule is to be encouraged, at times it can have unintended consequences. In this case those unintended consequences have been to highlight the difficulties for Australia on the one hand of seeking to extend its laws to the territory it claims in Antarctica and the waters adjacent to that claimed territory, while at the same time seeking to play an active role as a partner in the international governance mechanisms for Antarctica embodied in the Antarctic Treaty System.

What the case also highlights is the limits of law in resolving disputes such as this where there appears to be a significant conflict between the interest and aspirations of different nations. To bridge this gulf and ultimately to bring about an end to Japanese whaling the NGO community needs simply to adopt other smarter tactics to that of confrontation on the seas. Neither hurling rotten butter at Japanese whaling vessels, nor seeking to enforce Australian domestic law will bring an end to Japan's environmentally irresponsible policy on whaling. A smarter approach is needed to stop the slaughter of the whales.