

Australia can lawfully stop whaling within its Antarctic EEZ

Dr Chris McGrath¹

INTRODUCTION

The Federal Court has declared Japanese whaling in Australia's Antarctic waters is unlawful under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and granted an injunction restraining it. The result is the culmination of a series of decisions since 2004 in the Japanese Whaling Case that have navigated the complex interplay between international law and Australian domestic law applying to Antarctica and whaling.²

Despite the declaration and injunction issued in this case, ultimately enforcement of the prohibition against whaling in the Australian Whale Sanctuary (AWS) under the EPBC Act rests on the shoulders of the new Australian Government. The Australian Government could stop the whaling by the respondent Japanese company by ordering an Australian customs or fisheries vessel to seize the Japanese whaling company's vessels operating in the AWS adjacent to Antarctica. Prior to being elected and prior to the injunction being issued by the Federal Court, the Australian Labor Party committed itself to "enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary", stating:³

- It is illegal under the Environment Protection and Biodiversity Conservation Act 1999 ... 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 within the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory, penalising any whalers found to have breached Australian law.

¹ BSc, LLB (Hons), LLM (Environmental Law), PhD, Barrister-at-Law. Junior counsel, instructed by the Environmental Defenders Office (NSW) Ltd, for the Humane Society International Inc in the Japanese Whaling Case. The law and facts are stated as at 6 May 2008. This paper is available at <http://www.envlaw.com.au/whale24.pdf> (viewed 6 May 2008). Earlier versions of this paper were delivered in Sydney and Hobart in early 2008.

² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; (2004) 212 ALR 551, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3. For commentary on this case, see McGrath C, "The Japanese Whaling Case" (2005) 22 EPLJ 250; McGrath C, "Japanese Whaling Case appeal succeeds" (2006) 23 EPLJ 333; Davis R, "Taking on the whalers: The Humane Society International litigation" (2005) 24(1) UTasLR 78; Blay S and Bubna-Litic K, "The interplay of international law and domestic law: the case of Australia's efforts to protect whales" (2006) 23 EPLJ 465; Davis R, "Enforcing Australian law in Antarctica: the HSI litigation" [2007] MelbJIL 6; and Ch 2, 5 and 10 in Kriwoken LK, Jabour J and Hemmings AD (eds), *Looking South: Australia's Antarctic agenda* (The Federation Press, 2006). Background documents for this case, including court documents, submissions, affidavits and maps, are available at <http://www.envlaw.com.au/whale.html> (viewed 23 January 2008).

³ Rudd K and Garrett P, "Federal Labor's Plan To Counter International Whaling" (ALP Media Statement, 19 May 2007), available at <http://www.alp.org.au/media/0507/msenhloo190.php> (viewed 23 January 2008).

After the election the new Australian Government removed the previous government's formal opposition in the Federal Court to the Japanese Whaling Case and in January 2008 dispatched a customs vessel, *Oceanic Viking*, to monitor Japanese whaling. However, it stopped short of intercepting and seizing the Japanese vessels. No public explanation has been given for the discrepancy between the Government's election commitment and its failure to enforce Australian law against Japanese whalers.

The analysis presented in this seminar paper is not intended as a criticism of the new Australian Government. The Government faces a considerable challenge in weaving a path through the maze of legal and diplomatic issues that arise from Japanese whaling in Australia's Antarctic waters. The aim here is to assist the Government and inform the wider policy community by providing considered legal advice and policy guidance.

The primary purpose of this seminar paper is to answer the question: can Australia stop Japanese whaling in its Antarctic waters? The answer given to this question is, yes, Australia can lawfully stop Japanese whaling within its exclusive economic zone (EEZ) adjacent to Antarctica. Such an exercise of jurisdiction will be lawful under international law, including the Antarctic Treaty System (ATS).

A secondary purpose of this seminar paper is to suggest how Australia can pursue its multiple objectives of: maintaining Australian sovereignty in Antarctica; maintaining strong and cooperative diplomatic relationships with other nations concerned with Antarctica; and protecting whales. It is recommended that, to meet these objectives, Australia should base its long-term policy position concerning Japanese whaling in Antarctica on two levels:

- Supporting international cooperation under the ATS and not applying Australian law to matters regulated under the cooperative arrangements of the ATS (e.g. Russian drilling at Lake Vostok); but also,
- Applying Australian laws to matters outside the ATS, such as whaling and the activities of any nationals of non-parties (e.g. fishing vessels operating under flags of convenience).

This paper is structured in three parts. The first part considers international legal issues associated with enforcing Australian law against Japanese whaling in Antarctica. The second part considers the facts of the Japanese Whaling Case to understand the factual nature of the problem and how far Australia can go in unilaterally stopping whaling in Antarctic waters. The third part addresses the recommendations for Australian policy on Japanese whaling in Antarctica.

Before turning to consider the first part of the analysis, brief mention will be made of the theoretical frameworks that are used here and the need to guard against ideological biases.

THEORETICAL FRAMEWORKS AND BIAS

Two issues that require special consideration at the outset are the theoretical frameworks adopted in this analysis and the issue of ideological bias. The first and second parts of the analysis adopt the standard techniques of normative legal analysis and the theoretical premises of Legal Positivism. Consequently, the analysis focuses on what the law *is* rather than what the law *ought* to be. These parts attempt to identify and disentangle the relevant legal issues for Australian domestic law to regulate whaling by foreign nationals in Antarctica and explain the relevant law in a logical, systematic and rigorous way. The third part of the analysis involves policy design rather than strict legal analysis. This part adopts the theory and principles for environmental policy design described by Neil Gunningham and Peter Grabosky to design an

optimal policy framework for Australia to address Japanese whaling in Antarctica.⁴ In contrast to the first and second parts, the focus in the third part of the analysis is very much on what Australia's legal and policy response *ought* to be to best achieve its multiple policy objectives in relation to Antarctica and whaling.

In addition to identifying the theoretical frameworks adopted in the analysis undertaken here, ideological biases need to be recognised and guarded against. As Robert Bartlett noted in the context of evaluating environmental policy, "claims are often consciously crafted to be consistent with some ideological standpoint and perspective or to support or attack some *a priori* political position."⁵ It is for others to judge whether that has occurred here but a conscious effort has been made to avoid this outcome.

Four main forms of potential ideological bias can be identified for analysing the ability of Australia to regulate whaling in Antarctica. The first is what I will term "national bias". In considering Antarctic policy it is important to guard against bias in favouring the perceived national interests of a writer's own country. It is unlikely to be a mere coincidence that most writers on Antarctica adopt views on sovereignty and the ability to regulate activities in Antarctica that are consistent with the views of their national governments. It is more likely that many writers innocently or deliberately skew their analysis to favour their own country's interests. I am an Australian national and I explicitly recognise and attempt to guard against skewing my analysis to accord with Australia's policy position and perceived national interests for the legal analysis undertaken in the first and second parts of this paper, which deal with the law. However, Australia's national interests are deliberately incorporated and emphasised in the third part of the analysis when considering the preferable policy position for Australia to adopt.

The second form of bias I will term "adversarial bias". Lawyers acting for clients can easily fall into the trap of viewing favourably only the arguments that support their clients' perceived interests. That is a dangerous pitfall in professional practice. In academic research it is impermissible and must be strictly guarded against. Having acted as a barrister for HSI in the Japanese Whaling Case for five years, I am particularly conscious of this issue and have attempted to guard against it to present an impartial and objective analysis. The analysis presented here is not done on behalf of HSI. It has been undertaken voluntarily to contribute to the professional literature and public debate.

Third, it is important to guard against what I will term "professional bias" in policy analysis. As Stephen Dovers notes, "political ideology or disciplinary leaning play a strong role in determining what policy options will be favoured."⁶ Lawyers tend to favour traditional legal approaches of command-and-control regulation, economists tend to favour economic instruments, industry favours self-regulation and voluntary measures, scientists favour research, and diplomats favour diplomacy.⁷ I recognise and have attempted to guard against this form of bias in the third part of this analysis when considering the best policy response for Australia to adopt in relation to Japanese whaling in Antarctica.

Fourth, in considering the issue of whaling it is important to guard against "ethical bias" either supporting or challenging whaling on moral grounds. Ethics and morals have an important role to play in sound policy formulation but this must be tempered with a recognition that reasonable people can disagree on these issues. The ethics of whaling are not considered in the

⁴ Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Melbourne, 1998).

⁵ Bartlett R, "Evaluating Environmental Policy Success and Failure" in Vig N and Kraft M (eds), *Environmental Policy in the 1990s - Towards a New Agenda* (2nd ed, CQ Press, Washington, 1994), p 183.

⁶ Dovers S, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (The Federation Press, Sydney, 2005), pp 106-107.

⁷ A similar point is made by Gunningham and Grabosky, n 4, p 14, and other policy analysts.

first or second parts of this analysis dealing with the law. In the third part of the analysis, Australia's policy of ending commercial whaling is accepted without analysing the ethical basis or justification for it.

In summary, the analysis undertaken here attempts to proceed systematically, sceptically and ethically for the purpose of seeking the correct legal and policy answers. Deliberate consideration is given to the merits or validity of claims and arguments based on the premises, reasoning and evidence supporting or refuting them. Adopting this approach, the first topic for consideration is the international legal issues that determine the legality of Australia regulating Japanese whaling in Antarctica.

INTERNATIONAL LEGAL ISSUES

There are several, related international legal issues relevant to the ability of Australia to regulate whaling in Antarctica and Australian domestic law addressing this issue:

- Australian sovereignty in Antarctica;
- the Antarctic Treaty System;
- incorporation of the Antarctic Treaty System into Australian law;
- international regulation of whaling and Japanese "scientific research" whaling;
- exclusion of whaling from the Antarctic Treaty System;
- Australia's ability to regulate whaling in the Australian EEZ.

Each of these issues will be considered before turning to the litigation in the Federal Court.

Australian sovereignty in Antarctica

The application of Australian law to waters adjacent to Antarctica is based upon Australian sovereignty in Antarctica and international law. The Australian Antarctic Territory (AAT) was proclaimed by Australia in 1936 as a result of a transfer of title from the United Kingdom and the pioneering work of Australians in the area of Antarctica directly to Australia's south and south-west.⁸ The AAT covers a large sector (42%) of the Antarctic mainland lying south of 60°S latitude (to the South Pole) and between 45°E–136°E and 142°E–160°E longitude.

The AAT is an external Territory of Australia as a matter of Australian domestic law. Section 17 of the *Acts Interpretation Act 1901* (Cth) defines "External Territory" to mean "a Territory, not being an internal Territory, for the government of which as a Territory provision is made in any Act". The Australian Government declared the AAT to be a Territory under the authority of Australia on the commencement of the *Australian Antarctic Territory Acceptance Act 1933* (Cth) in 1936. The *Australian Antarctic Territory Act 1954* (Cth) provides for the government of the AAT and applies Australian law to the AAT.

Leaving aside the AAT's status under Australian domestic law, it can be noted that sovereignty over Antarctica is a sensitive international topic and only the United Kingdom, France, Norway and New Zealand officially recognise Australian sovereignty over the AAT. Japan does not recognise Australian sovereignty, along with the United States of America, China, and Russia. Japan also renounced all claims to Antarctica at the end of World War II.⁹

Recognition, however, is not the test of sovereignty under international law. General recognition by other states of a state's sovereignty over a particular territory no doubt assists a

⁸ Following British expeditions dating from the 1830s, Douglas Mawson's 1911-1914 Australasian Antarctic Expedition and 1929-1931 British, Australian and New Zealand Antarctic Research Expedition (BANZARE) discovered and mapped much of the coast of (what became) the AAT.

⁹ The relevant documents are collected in Bush WM, *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana Publications Inc, 1982-).

state in establishing sovereignty but it is not determinative. Under customary international law acquisition of sovereignty over territory that does not already belong to another state is established by effective occupation of the territory.¹⁰ While some authors argue “Antarctica is not subject to the ordinary legal regime of land territory, and rather than *res nullius* it is *res communis*”¹¹ and, therefore, should be declared a part of the “common heritage of mankind” and unable to support a claim of sovereignty, there is little support for this in the principles established by courts and other bodies exercising international jurisdiction. The decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* (1933) PCIJ Series A/B No 53 is particularly significant in relation to sovereignty over inhospitable, thinly populated polar territories such as Antarctica. In that case the court observed:¹²

... a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.
...

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

Despite the general lack of recognition by other states, Australia has established territorial sovereignty in Antarctica under international law through effective occupation of the coastline surrounding its three permanent Antarctic bases (Mawson, Davis and Casey).¹³ Gillian Triggs authored the leading study of Australian sovereignty in Antarctica and her analysis is accepted as authoritative for the purposes of this article. She concluded that:¹⁴

Australia has valid title to those parts of the Australian Antarctic Territory which have been effectively occupied by it. Such areas are the coastal mainland bases of Davis, Casey and Mawson and their surrounding territory and the continental shelves adjacent to them. These coastal areas lie between longitudes 120°E and 60°E. That part of Australia’s claim which lies between 160°E and 142°E supports no bases at all. The coastal area however, has been mapped and explored to some extent, and such Australian legislation as extends to the Australian Antarctic Territory has effect there also. It is possible that these facts alone satisfy the requirement of effective occupation. However, there is little evidence to support Australian sovereignty over the vast hinterland of its claimed sector beyond exploratory expeditions and the extension of legislation. It is thus doubtful whether Australia can support its claim to sovereignty over such territory.

James Crawford and Don Rothwell considered the principles for acquisition of territory in international law and noted Trigg’s views on Australian sovereignty in Antarctica, but added a cautionary note:¹⁵

While the [Australian] claim to the Australian Antarctic Territory may not have been perfected, it is probably a better claim than that which could currently be asserted by a rival claimant.

But the real problem ... is that to assume a mere bilateral rivalry begs the question. The real problem is the challenge from States, Antarctic Treaty parties or not, which reject the validity of claims to any exclusive title there. The forum before which Antarctic claims may have to be

¹⁰ Sovereignty can also be acquired by cession from another state, accretion, subjugation, and prescription. See generally Jennings R and Watts A, *Oppenheim’s International Law* (9th ed, 2 vols, Harlow, Essex, 1992), Vol 2, pp 677-679 and 686-708.

¹¹ Charney JI, “The Antarctic System and Customary International Law” in Francioni F and Scovazzi T (eds), *International Law for Antarctica* (2nd ed, Kluwer Law International, The Hague, 1996), p 58.

¹² *Legal Status of Eastern Greenland* (1933) PCIJ Series A/B No. 53, pp 45-46

¹³ Mawson was established in 1954, Davis in 1957 and Casey (previously Wilkes Station established by the USA) in 1958.

¹⁴ Triggs G, *International Law and Australian Sovereignty in Antarctica* (Legal Books Ltd, Sydney, 1986), pp 322-323.

¹⁵ Crawford J and Rothwell DR, “Legal issues confronting Australia’s Antarctica” (1991-1992) 13 AYBIL 53 at 59-61.

vindicated in future is unlikely to be that of a bilateral arbitration in which the parties are agreed that someone has sovereignty, and that it can only be one of them. It is much more likely to be a multilateral diplomatic forum, in which the arguments will focus on legitimacy more than legality. Unless Australia and other claimant States can convincingly argue that the maintenance of their claims is consistent with the broader interests of the international community, the legitimacy of their position is likely to be denied.

Crawford and Rothwell's recourse to "the broader interests of the international community" to determine sovereignty in Antarctica is curious argument. Sovereignty over land and freedom of the high seas are two pillars of the international legal system even within the restrictions imposed by multilateral treaties.¹⁶ Why should Antarctica be placed in a special category? Antarctica is clearly very different from the deep sea-bed and outer space to which the "common heritage of mankind" principles are applied.¹⁷ And, whereas the Arctic is comprised of floating sea-ice only, Antarctica is a continent comprised of land and glaciers. Why should the normal principles of international law for sovereignty over land, such as stated in the *Legal Status of Eastern Greenland* case, not apply in Antarctica? If sovereignty and, with it, the ability to control activities in Antarctica is to be determined by some other regime and different principles, such as "the broader interests of the international community", why not apply such principles to other areas of international law such as the notoriously difficult issue of control of fishing on the high seas?

It may be that in the future, as Crawford and Rothwell intimate, nations opposed to Australian sovereignty in Antarctica will succeed in establishing the normal principles of sovereignty do not apply in Antarctica and, thereby, defeat Australian sovereignty in the continent. But this begs the question: if Australian sovereignty over the AAT is established under the normal principles of international law, even to a smaller geographic area than claimed by Australia, why do so few nations recognise this sovereignty? Why do so many nations wish to apply a special regime for the control of Antarctica? One answer is that the recognition of sovereignty is a political process, not merely legal. By refusing to recognise Australian sovereignty, the United States, Russia, China, Japan, and other nations keep alive their ability to use resources in the AAT. This ability is fettered only by the practical difficulties in operating in the hostile and remote Antarctic environment, and by the Antarctic Treaty System. This approach is contrary to The Rule of Law but explained by the *realpolitik* of international relations.

The Antarctic Treaty System

In 1959 Australia and Japan, and other nations concerned with the control and use of Antarctica, agreed to freeze further claims to sovereignty in Antarctica under the *Antarctic Treaty 1959* (Antarctic Treaty). The treaty has been supplemented by the *Convention for the Conservation of Antarctic Seals 1972* (Seals Convention), the *Convention on the Conservation of Antarctic Marine Living Resources 1982* (CCAMLR), and the *Protocol on Environmental Protection to the Antarctic Treaty 1991* (Madrid Protocol). Collectively, this regime is known as the Antarctic Treaty System (ATS).¹⁸

¹⁶ See Fisher DE, "The impacts of international law upon the Australian environmental legal system" (1999) 16 (5) EPLJ 372; Triggs G, *International Law: Contemporary Principles and Practices* (LexisNexis, Sydney, 2006).

¹⁷ See Triggs, n 14, Ch 9. Contrast the views of Baslar K, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers, London, 1998).

¹⁸ See generally Bush, n 9; Sahurie EJ, *The International Law of Antarctica* (New Haven Press, New Haven, 1991); Watts A, *International Law and the Antarctic Treaty System* (Grotius Publications Ltd, Cambridge, 1992); Simmonds K, *The Antarctic Conventions* (Simmonds & Hill Publishing Ltd, London, 1993); Francioni and Scovazzi, n 11; Rothwell D, *The Polar Regions and the Development of International Law* (Cambridge University Press, Cambridge, 1996); Rothwell D and Davis R, *Antarctic Environmental Protection: A Collection of Australian and International Instruments* (The Federation Press, Sydney, 1997); and Cohan H (ed), *Handbook of the Antarctic*

Australian sovereignty over the AAT was not lost by entry into the Antarctic Treaty, nor does the treaty prevent Australia exercising jurisdiction over nationals of other parties to the treaty. Crucially, Article IV of the Antarctic Treaty states:

1. Nothing in the present Treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Party of previously asserted rights or claims to territorial sovereignty in Antarctica;
 - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. 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.

Triggs noted that:¹⁹

The purpose of Article IV was to preserve the apparently irreconcilable interests of claimants, potential claimants and non-claimants. As a result, this ambiguous Article states what it doesn't mean and doesn't state 'what it does mean'. It is deliberately obscure, leaving each State free to interpret the Article consistently with its particular interests. While Article IV creates a 'purgatory of ambiguity', more positively, it enabled the parties to move forward to establish the Treaty regime.

Noting Triggs' comment on the inherent ambiguity of Article IV, Crawford and Rothwell suggested in relation to Article IV(2) that:²⁰

There are two quite different aspects to Article IV(2). The first sentence is concerned with the legal effects, on the international plane, of "acts or activities taking place while the present Treaty is in force". The sentence does not prohibit any particular conduct, including the making and enforcement of laws. It simply qualifies or removes the international legal consequences of such conduct, to the extent that it would otherwise reinforce, consolidate or extend a claimant's sovereignty. By contrast the second sentence does require abstention, the abstention from making a "new claim", or from "enlarging" an existing claim. What are the implications of this?

So far as the ordinary exercise of legislative power goes, they are, in our view, not extensive. When a State legislates for territory it asserts sovereignty over, it does not make a "new claim" to that sovereignty: it just exercises it. ... It follows that the enactment of laws for the [AAT] is not prohibited by the Treaty. ...

Is the position any different when it comes to the enforcement of laws? It is difficult to see why it should be. The enforcement of an existing law is not more a new claim to sovereignty than its enactment. ...

As Crawford and Rothwell suggest, Article IV of the Antarctic Treaty is ambiguous to an extent, but on its face there is no prohibition against applying Australian law to foreign nationals within the AAT. It does not state that Contracting Parties with sovereignty at the time of entering the Treaty may not create or enforce their own laws against foreign nationals. Note, however, that one interpretation of Article IV could lead to this result. If "acts or activities taking place while the present Treaty is in force" were interpreted to mean the acts or activities of natural people rather than of the acts or activities of Contracting Parties as states, then Article IV(2) could be said to prevent the Contracting Party enforcing its laws against foreign nationals because to do so would be an assertion of territorial sovereignty. However, read in context Article IV(2) appears to be directed at the acts or activities of Contracting Parties as States

Treaty System (9th ed, US State Department, Washington DC, 2002) (Available at <http://www.state.gov/g/oes/rls/rpts/ant/>, viewed 28 June 2005); Triggs G and Riddell A (eds), *Antarctica: Legal and Environmental Challenges for the Future* (BIICL, London, 2007).

¹⁹ Triggs, n 14, p 137 (footnote omitted).

²⁰ Crawford and Rothwell, n 15, p 79.

rather than natural people and, therefore, it does not appear to prevent Australia enforcing its laws against foreign nationals within the AAT. As Crawford and Rothwell suggest, it is “concerned with the legal effects, on the international plane, of ‘acts or activities taking place while the present Treaty is in force’”.²¹ Note in this regard that Japan does not conduct the whaling in Antarctic waters itself. Japan grants a permit to a private Japanese company and Japanese nationals to conduct the whaling as private individuals. This is discussed further below.

Applying the normal rules of interpretation, Article IV of the Antarctic Treaty also does not appear to prevent Australia claiming an EEZ adjacent to the AAT and regulating activities within that zone. Ordinarily a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.²² The ordinary meaning of Article IV suggests that Australia is not restricted from claiming an EEZ adjacent to the AAT because a declaration of an EEZ under the *United Nations Law of the Sea Convention 1982* (UNCLOS) is based on an assertion of *sovereign rights* of a coastal state and is not an assertion of *territorial sovereignty* over that area.²³ This is a very significant distinction. A useful analogy for lawyers and others who are unfamiliar with these concepts is that the distinction is similar to the private law concepts of *ownership* and a *lease* of land. A person who owns land has wide rights to use and sell it. In contrast, a person who leases land merely has rights to occupy and use the land subject to their lease but does not “own” the land. The distinction between *territorial sovereignty* and *sovereign rights* is similar in an international law context.

While there is room for argument based on good faith and the object and purpose of the Antarctic Treaty that the reference to “territorial sovereignty” in Article IV(2) should be interpreted to include a restriction on asserting sovereign rights over waters adjacent to an existing claim, such an argument seems tenuous. The more obvious interpretation is that Article IV(2) means what it says – “no new claim, or enlargement of an existing claim, to *territorial sovereignty* in Antarctica shall be asserted” (emphasis added) – and it does not restrict a coastal state with existing territorial sovereignty claiming sovereign rights over adjacent waters.

Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation can also be used as an aid to interpretation of Article IV.²⁴ However, this offers little assistance to the question at hand due to contradictory practice. Australia maintains its right to enact and enforce laws against foreign nationals within the AAT and adjacent maritime zones and has actually enacted laws over those matters. These acts of sovereignty, such as Australia’s claim of an EEZ adjacent to Antarctica, have been objected to by several other Contracting Parties and have created ongoing tension. Australia appears not to

²¹ Crawford and Rothwell, n 15, p 79.

²² Article 31(1) of the *Vienna Convention of the Law of Treaties 1969*. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, Vol 1155, p 331. While the *Vienna Convention* was entered after the Antarctic Treaty and does not strictly apply to its interpretation, Article 31 reflects the general principles of international law for interpreting treaties.

²³ Article 56 of the UNCLOS makes this clear. See the discussion in Gautier P, “The maritime area of the Antarctic and the new law of the sea” in Verhoeven J, Sands P, and Bruce M (eds), *The Antarctic Environment and International Law* (Graham & Trotman, London, 1992), pp 121-126; Watts, n 18, p 133; Kaye S and Rothwell DR, “Australia’s Antarctic maritime claims and boundaries” (1995) 26 *Ocean Development and International Law* 195 at 199-200; Kaye S, *Australia’s Maritime Boundaries* (Centre of Maritime Policy, Wollongong, 1995); and Mossop J, “When is a whale sanctuary not a whale sanctuary? Japanese whaling in Australian Antarctic maritime zones” (2005) 36 *VUWLR* 757. For contrary views, see Joyner C, *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, 1992); Vidas D, “The Antarctic Treaty System and the Law of the Sea: a new dimension introduced by the Protocol” in Stokke OS and Vidas D (eds), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, Cambridge, 1996); Blay and Bubna-Litic, n 2 at 475-476.

²⁴ Article 31(3)(a) of the *Vienna Convention of the Law of Treaties 1969*.

have enforced these laws against foreign nationals for diplomatic reasons rather than acceptance that it is legally prohibited from doing so by the Antarctic Treaty. As Crawford and Rothwell suggest:²⁵

The thoroughgoing abstention, non-intervention, non-application of Australian laws and procedures within the AAT is the product of a tacit understanding, rather than the Treaty itself. (It is also in part a result of the logistic problem of applying and enforcing laws in such a place.)

Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, for interpreting Article IV.²⁶ However, it is doubtful that such supplementary means can assist greatly in resolving the question at hand. If, as Triggs suggests, Article IV “is deliberately obscure, leaving each State free to interpret the Article consistently with its particular interests”²⁷ any supplementary means of interpretation are likely to be beset with contradictory indicators based on the parties’ various negotiating positions.

In addition to Article IV not appearing to restrict Australia claiming an EEZ adjacent to the AAT, Article VI of the Antarctic Treaty also does not appear, on its face, to prevent Australia claiming an EEZ adjacent to the AAT and regulating activities within that zone. Article VI states that nothing in the Antarctic Treaty is intended to “prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within” the area south of 60°S latitude. On its face Article VI does not prevent a coastal state, such as Australia, claiming an EEZ under international law with regard to the high seas adjacent to its Antarctic territory and, thereby, removing those waters from the high seas.²⁸

Article VIII of the Antarctic Treaty also supports the view that Article IV does not prevent Contracting Parties having territorial sovereignty in Antarctica from exercising jurisdiction against foreign nationals within their territory. It provides:

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under sub-paragraph 1(b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.
2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1(e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

If Article IV prevented or was intended to prevent Contracting Parties exercising jurisdiction against foreign nationals there would be no need for Article VIII. Reading the Treaty as a whole and trying to avoid redundancy of provisions suggests that Article IV does not prevent Australia exercising jurisdiction over foreign nationals within the AAT or its adjacent EEZ.

From an Australian policy perspective a very important report in this context is the 1992 report on *Australian Law in Antarctica* by the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs. This is the most comprehensive and authoritative published analysis of this topic by an Australian Government body. In recommending that, as a matter of principle, Australian law be extended and applied to those

²⁵ Crawford and Rothwell, n 15, p 87.

²⁶ Article 32 of the *Vienna Convention of the Law of Treaties 1969*.

²⁷ Triggs, n 14, p 137.

²⁸ See Kaye and Rothwell, n 23, p 199; Watts, n 18, p 133.

foreign nationals in the AAT and in Australia's adjacent maritime zone who are not otherwise exempt under the Antarctic Treaty, the Committee stated:²⁹

The Committee is of the view that there exists a strong misconception about the scope of Article 4(2) of the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees with the views of the Department of Foreign Affairs and Trade, Dr Tsamyeni and the Department of the Arts, Sport, the Environment and Territories that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.

It is both in Australia's sovereign interests and consistent with Australia's obligations under the Antarctic Treaty to extend and apply Australian law to foreign nationals in the Australian Antarctic Territory who are not otherwise exempted by Article 8(1) of the Antarctic Treaty....

RECOMMENDATION 1

The Committee recommends that, as a matter of principle, Australian law be extended and applied to those foreign nationals in the Australian Antarctic Territory who are not otherwise exempt under Article 8(1) of the Antarctic Treaty."

The House of Representatives Standing Committee on Legal and Constitutional Affairs criticised the practice of not enforcing Australian law against foreign nationals in the AAT.³⁰

The Committee is greatly concerned at the practice of not applying to foreign nationals Commonwealth legislation expressly relating to the Australian Antarctic Territory, particularly in relation to legislation which implements Australia's international obligations in Antarctica. Not only is it in contravention of the express intentions of the Parliament but it, arguably, sits ill with Australian claims to sovereignty over the Territory.

The failure of the previous and current Australian Governments to enforce Australian law against Japanese whaling in Australia's Antarctic EEZ is contrary to the Committee's recommendations.

Incorporation of the ATS into Australian law

Australian domestic law has created a carefully nuanced approach to incorporate the ATS. Despite the fact that Australia appears to be legally entitled under international law to regulate the activities of foreign nationals within the AAT to the extent to which Australia has sovereignty over the AAT, in deference to the ATS, the Australian Parliament has provided two notable exemptions from criminal prosecution and civil litigation in Australian courts for activities conducted pursuant to a permit from other Contracting Parties to the Antarctic Treaty. These exemptions are provided by s 7 of the *Antarctic Marine Living Resources Conservation Act 1981* (Cth) and s 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) (ATEP Act).

Section 7(1) of the ATEP Act states that:

7 Application of other laws

- (1) Notwithstanding any other law ... no action or proceeding lies [in an Australian court] against any person for or in relation to anything done by that person to the extent that it is authorized by ... a recognised foreign authority. ...

A "recognised foreign authority" is defined in s 3 of the ATEP Act:³¹

²⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica: The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory* (Australian Government Printing Service, Canberra, 1992), para 2.31, available at <http://www.apf.gov.au/house/committee/laca/antarctica.pdf> (viewed 26 February 2008). Note, in passing, that Japanese whalers are not exempt under Article 8(1) of the Antarctic Treaty as they are not scientists exchanged under Art 3(1)(b) or designated observers under Art 7(1).

³⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, n 29, p 18.

recognised foreign authority means a permit, authority or arrangement that:

- (a) authorises the carrying on of an activity in the Antarctic; and
- (b) either:
 - (i) has been issued, given or made by a Party (other than Australia) to the Madrid Protocol that has accepted under that Protocol the same obligations as Australia in relation to the carrying on of that activity in the Antarctic; or
 - (ii) has been issued, given or made by a Party (other than Australia) to the Seals Convention that has accepted under that Convention the same obligations as Australia in relation to the carrying on of that activity in the Antarctic.

Section 7(1) of the ATEP Act was crucial to HSI's ability to bring proceedings in the Federal Court of Australia against Japanese whaling adjacent to the AAT because it potentially extinguished or excluded the right to maintain such proceedings. Japan is a Party to the Madrid Protocol.

The Federal Court accepted in the Japanese Whaling Case that a permit for whaling granted by the Government of Japan is not a "recognised foreign authority" because Australia and Japan have not accepted any obligations under the Madrid Protocol in relation to whaling.³² Instead, whaling is regulated under a separate international regime. Understanding this important point requires consideration of the international regime regulating whaling and how whaling regulated under it is excluded from regulation under the Madrid Protocol.

International regulation of whaling and Japanese "scientific research" whaling

It is unnecessary to discuss the history of whaling here, other than to note that a moratorium on all commercial whaling was declared by the International Whaling Commission (IWC) in 1982 to take effect in 1985/86. The moratorium was in the form of an amendment to para 10(e) of the Schedule of the *International Convention for the Regulation of Whaling 1946* (International Whaling Convention) to make catch limits zero for commercial purposes. The IWC also declared the Southern Ocean Sanctuary in 1994 under para 7(b) of the Schedule to the Convention.³³

Despite the official moratorium on commercial whaling and repeated resolutions urging it not to do so,³⁴ the Government of Japan continues to permit "scientific research" involving the killing of whales and ultimate sale of the whale meat in Japan under Article VIII of the International Whaling Convention.³⁵ Paras 1 – 2 of Article VIII provide:

1. Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

³¹ This definition was amended on 11 June 2007 by the *Environment and Heritage Legislation Amendment (Antarctic Seals and Other Measures) Act 2006* (Cth) to specifically recognise permits issued by contracting parties under the Seals Convention in addition to permits under the Madrid Protocol.

³² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at [25]-[61] and [2005] FCA 664 at [40].

³³ However, Japan lodged an objection to para 7(b) with respect to minke whales and is therefore not bound to observe the Southern Ocean Sanctuary in relation to minke whales for the purposes of its obligations under the Convention.

³⁴ IWC resolutions 1987-1, 1994-10, 1995-8, 1996-7, 1997-5, 1998-4, 1999-3, 2000-4, 2001-7, 2003-2 and 2005-1. Available at <http://www.iwcoffice.org/> (viewed 28 June 2003).

³⁵ The Japanese perspective on whaling and the IWC is explained well by Hirata K, "Why Japan supports whaling" (2005) 8 JIWL 129.

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

During 1986-2005 the whaling undertaken by Japanese whalers was done under a program known as the “Japanese Whaling Research Program under Special Permit in the Antarctic” (JARPA). The JARPA initially involved killing 300 ($\pm 10\%$) Antarctic minke whales (*Balaenoptera bonaerensis*) annually. The take was raised to 400 ($\pm 10\%$) in 1995. At the 2005 IWC meeting in Ulsan, South Korea, the Government of Japan announced the “Second Phase of the Japanese Whaling Research Program under Special Permit in the Antarctic” (JARPA II).³⁶ Under this whaling program, Japan proposed to kill 850 ($\pm 10\%$) Antarctic minke whales annually. During a “feasibility study” in 2005-2007, 10 fin whales (*Balaenoptera physalus*) were also planned to be killed, although a fire on board the factory vessel *Nisshin Maru* limited the actual take of fin whales to 3 in 2006/2007. After 2007, JARPA II planned to kill 50 fin whale and 50 humpback whales (*Megaptera novaeangliae*); however, in response to international criticism it did not carry out its plan to kill humpback whales in the 2007/2008 season.

The general location of the Japanese whaling activity alternates biennially between two broad areas: Area IV and Area IIIE, which is located south of 60°S latitude between 35°E–130°E; and Area V and Area VIW, which is located between 130°E–145°W longitude.³⁷ Both areas have at least some overlap with the AWS; however, Area IV and Area IIIE contain much greater overlap.

A cogent argument can be made that the lethal research conducted by Japan whalers is not necessary from a scientific perspective and appears to be an abuse of right under the International Whaling Convention.³⁸ However, this issue cannot be challenged in an Australian domestic court because to do so would infringe the principle of international comity.³⁹ It is beyond the intended scope of this article to explore this issue further.

The point might be made that if the Australian Government were successful in challenging Japanese “scientific whaling” as an abuse of right in an international forum or if the Government of Japan becomes frustrated by the IWC ban on commercial whaling, Japan could continue whaling by withdrawing from the International Whaling Convention.⁴⁰ If Japan were to withdraw from the International Whaling Convention it would not be bound by the moratorium on commercial whaling.⁴¹ Australia and other nations are, therefore, ultimately powerless to lawfully stop Japanese whaling on the high seas if the Government of Japan chooses to continue to permit whaling by its nationals. Australia is only entitled under international law to stop whaling by foreign nations within Australian waters.

³⁶ Government of Japan, “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources”, research plan presented to the 57th IWC conference, Ulsan, South Korea, 2005.

³⁷ Note that the references to “Area IV” etc reflect the stock classification areas designated in the Schedule to the International Whaling Convention.

³⁸ See Triggs G, “Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?” (2000) 5(1) *Asia Pacific Journal of Environmental Law* 33.

³⁹ The principle that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign’s own territory: *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41.

⁴⁰ Hirata, n 35, comments on the potential for Japan to withdraw from the International Whaling Convention if international pressure intensifies and if the IWC adopts more resolutions to restrict whaling.

⁴¹ However, if Japan were to adopt this course then whaling by its nationals would no longer be exempt from the ATS. As explained in the following section of this article, the CCAMLR and Madrid Protocol exclude whaling only to the extent that it is otherwise regulated under the International Whaling Convention.

Note finally in relation to this topic that the whaling is not undertaken directly by the Government of Japan, but by a private company, Kyodo Senpaku Kaisha Ltd (Kyodo). This company was formed in 1986 for the purpose of carrying out whaling for JARPA by Japanese fishing companies which had previously engaged in commercial whaling. The company owns the five vessels used for the whaling, employs their crews, and, ultimately, sells the whale meat in Japan. Several Japanese universities and an organisation known as the Institute of Cetacean Research also are involved in the whaling.⁴²

Exclusion of whaling from the ATS

The International Whaling Convention pre-dated the ATS and the Contracting Parties to the ATS have taken care to exclude the regulation of whaling from their agreements, preferring to leave regulation of this activity to the International Whaling Convention. Two recommendations of the Antarctic Treaty Consultative Meetings⁴³ were central to the approach taken under the CCAMLR and Madrid Protocol of not regulating whaling to the extent it is regulated under the International Whaling Convention.

In 1964 the Contracting Parties to the Antarctic Treaty agreed to measures for the conservation of Antarctic fauna and flora but whales were expressly excluded from protection under this agreement.⁴⁴ “Native mammals” were protected⁴⁵ but whales were expressly excluding them from the definition of this term as follows:

“Native mammal” means any member, at any stage of its life cycle, of any species belonging to the Class Mammalia indigenous to the Antarctic or occurring there through natural agencies of dispersal, excepting whales.

In 1977 the Contracting Parties to the Antarctic Treaty began a process to draft a definitive regime to “provide for the effective conservation of the marine living resources of the Antarctic ecosystem as a whole”⁴⁶, which culminated in the CCAMLR in 1980. The new regime took an ecosystem approach and sought to at least consider all species present in Antarctica, including whales. However, considering all species did not mean that whaling would be regulated under the new regime because the Contracting Parties agreed:⁴⁷

the regime should not apply to species already regulated pursuant to existing international agreements but should take into account the relationship of such species to those species covered by the regime.

The exclusion in 1964 of whales from the definition of native mammal in the Agreed Measures and later development in 1977 to the inclusion of whales but the exclusion of whaling regulated under the International Whaling Convention lay the foundation for the present system under the CCAMLR and the Madrid Protocol.⁴⁸ Article VI of the CCAMLR expressly excludes whaling regulated under the International Whaling Convention:

Article VI

Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.

⁴² See <http://www.icrwhale.org/eng-index.htm> (viewed 18 August 2006); and Hirata, n 35, pp 139-140.

⁴³ Held annually under Article IX of the Antarctic Treaty. See generally, Cohan, n 18, Chapter III.

⁴⁴ Recommendation III-VIII (Agreed Measures for the Conservation of Antarctic Fauna and Flora), done at the Third Antarctic Treaty Consultative Meeting at Brussels on 2 June 1964.

⁴⁵ For instance, Article VI prohibiting the killing, etc. of any “native mammal” within the Treaty Area.

⁴⁶ Recommendation IX-2 (Antarctic Marine Living Resources), done at the Ninth Antarctic Treaty Consultative Meeting at London on 19 September 1977.

⁴⁷ Recommendation IX-2, n 46.

⁴⁸ Recommendation XV-1 (Comprehensive Measures for the Protection of the Antarctic Environment) of the Fifteenth (1989) Antarctic Treaty Consultative Meeting, which ultimately led to the Madrid Protocol, built upon the Agreed Measures and followed the approach taken in Recommendation IX-2.

Reflecting the approach taken under the CCAMLR, the Contracting Parties to the Madrid Protocol excluded whaling regulated under the International Whaling Convention from the regime for environmental protection that the Protocol created. Article 7 of Annex II of the Madrid Protocol provides:⁴⁹

Article 7

Relationship with other agreements outside the Antarctic Treaty System

Nothing in this [Protocol] shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling.

The plain meaning of Article 7 of Annex II is that the Madrid Protocol does not detract from, lessen, take away or impair any obligations or rights provided under the International Whaling Convention.⁵⁰ Bush discussed the meaning of “derogate” in relation to Article 4(2) of the Madrid Protocol and suggested it means the specified other instruments prevail if inconsistent with the Protocol.⁵¹ International jurists uniformly accept the regulation of whaling under the International Whaling Convention is excluded from the Madrid Protocol and ATS.⁵²

Against this backdrop of the ATS, the reasons for the JARPA/JARPA II not being regarded as a “recognised foreign authority” for the purposes of s 7(1) of the ATEP Act are clear. Section 7(1) of the ATEP Act and its counterpart in s 7 of the *Antarctic Marine Living Resources Convention Act 1981* (Cth) are intended to recognise approvals given by other Contracting Parties to the ATS for activities regulated under the ATS.⁵³ Whaling is not regulated under the ATS to the extent that it is regulated under the International Whaling Convention. Consequently, the JARPA/JARPA II is not a “recognised foreign authority” that would provide a defence to Kyodo under Australian law for whaling within the AWS. Put another way, s 7(1) of the ATEP Act does not extinguish or exclude the ability to commence and maintain proceedings against Japanese whaling in the AWS.

The corollary of this point is to recognise that most activities undertaken by foreign nationals in Antarctica and the AAT are likely to be protected under “recognised foreign authorities” of foreign governments that are Contracting Parties to the ATS. No proceedings may be pursued in an Australian court to prohibit or regulate those activities because of s 7(1) of the ATEP Act. This point should be emphasised in response to claims that the Japanese Whaling Case represents a breach of the ATS and may be a harbinger of other actions by third parties against activities of foreign nations in the AAT. Section 7(1) of the ATEP Act is very wide and would be expected to apply to the vast majority of activities that currently occur within the AAT under the authority of foreign governments. Russian drilling in Lake Vostok is an example of an

⁴⁹ In addition to this Article, the Contracting Parties confirmed whaling was not regulated under the Madrid Protocol in paragraph 7 of the *Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting* done at Madrid on 3-4 October 1991.

⁵⁰ Simpson JA and Weiner ESC, *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989), Vol IV, p 504, define “derogate” as follows: derogate, *ppl.a.* 1. Annulled or abrogated in part; lessened in authority, force, estimation, etc. ... derogate, *v.* 1. To repeal or abrogate in part (a law, sentence, etc); to destroy or impair the force and effect of; to lessen the extent or authority of. ... 2. To detract from; to lessen, abate, disparage, depreciate. ... 3. To curtail or deprive (a person) of any part of his rights. ... 4. To take away (something *from* a thing) so as to lessen or impair it. ... 5. To take away a part *from*; to detract, to make an improper or injurious abatement *from*.

⁵¹ Bush, n 9, documentD.ATO4101991A.1, p 16 (see similar comments in relation to Article 7 of Annex II of the Madrid Protocol regarding the International Whale Convention at p 104 and in relation to Article VI of the CCAMLR, document AT20051980B, p 408).

⁵² See Watts, n 18, pp 210-211; Maffei M, “The Protection of Whales in Antarctica”, in Francioni and Scovazzi, n 18, pp 187 and 191-192; Auburn FM, *Antarctic Law and Politics* (Hurst & Co, London, 1992), pp 230-231; and Vicuña FO, “The effectiveness of the Protocol on Environmental Protection to the Antarctic Treaty”, Chapter 7 in Stokke OS and Vidas D, *Governing the Antarctic: The effectiveness and legitimacy of the Antarctic Treaty System* (Cambridge University Press, Cambridge, 1996), pp 195-196.

⁵³ The pending amendments of the definition of “recognised foreign authority”, noted above at n 31, appear to confirm this interpretation of s 7 of the ATEP Act.

activity occurring in the AAT under the authority of a foreign government that is likely to be protected from litigation in Australian courts by s 7(1) of the ATEP Act.

To summarise, s 7(1) of the ATEP Act does not apply to exempt Japanese whaling regulated under the International Whaling Convention from potentially being subject to court action in Australia. This leads to consideration of how Australian law regulates whaling in Antarctic waters.

Australia's ability to regulate whaling in its EEZ

An initial point in relation to Australia's ability to regulate whaling in its waters needs to be made: whether or not the "scientific" whaling carried out by Japanese whalers is lawful in international waters under Article VIII of the International Whaling Convention, Australia and other nations may further regulate whaling within national waters. The 1898 *Behring Sea Fur Seals Arbitration* and later cases established that, as a matter of customary international law, a state may unilaterally regulate fishing and the taking of marine mammals within its territorial waters.⁵⁴ The corollary of this principle is that, subject to international agreement to the contrary, a state may not regulate fishing or taking of marine mammals outside its territorial waters (in international waters or "the high seas") unless the person carrying out the activity is a national of the state or it is the flag state of the vessel carrying out the activity.

The UNCLOS extended the limits of waters in which coastal states may regulate activities such as fishing and taking of marine mammals. As relevant here, the UNCLOS permits coastal states to regulate activities within an EEZ of 200 nautical miles (roughly 370 km). As noted above, regulation of activities within an EEZ is based on sovereign rights rather than territorial sovereignty over that area.

In 1994 Australia proclaimed under the UNCLOS an EEZ around the coastline of its mainland and external territories, including the waters adjacent to the AAT.⁵⁵ Article 65 of the UNCLOS specifically allows coastal states to regulate whaling within the EEZ. Cetaceans were protected from whaling by Australians or foreign nationals from 1 August 1994⁵⁶ to 16 July 2000⁵⁷ in the Australian Fishing Zone, which included the EEZ of the AAT under the *Whale Protection Act 1980* (Cth).

On 16 July 2000 Australia proclaimed the AWS in the waters of its EEZ. Australian and foreign nationals are prohibited from killing, injuring, taking, interfering with, treating or possessing cetaceans (i.e. whales, dolphins and porpoises) within the AWS by ss 229-230 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).⁵⁸ Australian nationals and Australian vessels are also prohibited from killing, injuring, taking, interfering with, treating or possessing cetaceans anywhere in the world through extraterritorial operation of these laws.⁵⁹ Sections 231, 232 or 238 of the EPBC Act provide limited defences to these offences. These defences include killing a cetacean in an emergency threatening human life, in

⁵⁴ *Behring Sea Fur Seals Arbitration* in Moore, *Int. Arbitration Awards*, I (1898). The arbitration involved an attempt by the USA to regulate sealing by British (Canadian) vessels outside 3 nautical miles from Alaska. See generally Birnie P and Boyle A, *International Law & The Environment* (2nd ed, Oxford University Press, Oxford, 2002), pp 649-651.

⁵⁵ The Australian EEZ was proclaimed by the Governor-General under s 10B of the *Seas and Submerged Lands Act 1973* (Cth) on 29 July 1994 to include waters within 200 nautical miles from the baselines established under international law of the external Territories (*Commonwealth Gazette* No. S 290, Friday, 29 July 1994). The proclamation was declared to commence on 1 August 1994.

⁵⁶ Australian nationals were prohibited from killing whales in this area from 1980, but the laws were not extended to foreign nationals until 1994.

⁵⁷ The date of commencement of the EPBC Act and repeal of the *Whale Protection Act 1980* (Cth).

⁵⁸ Sections 5 and 224-225 of the EPBC Act extend the application of the Act to the EEZ of the external Territories.

⁵⁹ See ss 5 and 224 of the EPBC Act.

an unavoidable accident, or authorised by a permit issued by the Australian Environment Minister. These domestic laws are based upon and conform with the international regime established under the UNCLOS.

This backdrop of international law and Australian domestic law set the stage for litigation to attempt to resolve whether the whaling in the AWS was lawful.

LITIGATION IN THE FEDERAL COURT

Nature of the application

In late 2004 the Humane Society International Inc (HSI), commenced proceedings in the Federal Court of Australia against the company undertaking the whaling, Kyodo Senpaku Kaisha Ltd, for illegally whaling within the AWS. HSI sought a declaration and injunction under s 475 of the EPBC Act against Kyodo for contravening ss 229-230 of the EPBC Act. In 2005, in response to the increased number of species to be killed under JARPA II, HSI amended the relief sought. HSI sought:

- A declaration that the killing, injuring, taking or interfering with any Antarctic minke whale, fin whale or humpback whale in the AWS by Kyodo contravenes ss 229, 229A, 229B and 229C of the EPBC Act, and that the treating or possessing by Kyodo of any such whale killed or taken in the AWS contravenes ss 229D and 230 of the Act, unless permitted or authorised under ss 231, 232 or 238 of the Act.
- A prohibitory injunction restraining Kyodo from killing, injuring, taking or interfering with any Antarctic minke whale, fin whale or humpback whale in the AWS, or treating or possessing any such whale killed or taken in the AWS, unless permitted or authorised under sections 231, 232 or 238 of the EPBC Act.

Leave to serve the originating process in Japan

Kyodo does not have a registered company office in Australia and, therefore, to commence the proceedings, HSI needed to first obtain leave from the Federal Court to serve the originating process on the company in Japan under Order 8, rule 2 of the *Federal Court Rules* 1979 (Cth) (the Rules). Three criteria must be satisfied for the grant of leave to serve originating process outside the Commonwealth, namely that:

- the court has jurisdiction in the proceedings;
- there is a relevant ground of service because of a connecting factor with Australia (as specified in Order 8, rule 1 of the Rules);
- the applicant has a *prima facie* case for the relief sought.

In addition, the court must be satisfied that it should not exercise its discretion to refuse to assume jurisdiction because it is a *forum non conveniens* or for some other reason.⁶⁰ HSI succeeded in satisfying the three criteria for service specified in Order 8, rule 2 of the Rules, but Allsop J refused to allow service of the proceedings as an exercise of the court's over-riding discretion. This refusal was overturned on appeal.

The evidence of whaling in the AWS

To obtain leave to serve outside the jurisdiction, HSI was required to establish a *prima facie* case for the relief sought and at trial it was required to prove its case on the balance of

⁶⁰ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564.

probabilities. Most of the evidence of the whaling presented by HSI is based on reports of the whaling co-authored by employees of the company, which had been presented to the IWC.

By overlaying a map of the AWS on maps presented by the Government of Japan to the IWC when reporting on the Japanese “research”, HSI was able to estimate the number of whales killed within the AWS. These estimates are shown in Table 1.

Table 1: Total number of whales killed and the approximate number killed within the AWS under the JARPA and JARPA II

YEAR	Total of Antarctic minke whales killed under the JARPA and JARPA II	Approximate number of Antarctic minke whales killed within the AWS	Total of fin whales killed under the JARPA and JARPA II	Approximate number of fin whales killed within the AWS
2000/2001	440	65	0	0
2001/2002	440	215	0	0
2002/2003	440	21	0	0
2003/2004	440	164	0	0
2004/2005	440	20	0	0
2005/2006	853	768	10	9
2006/2007	505	0	3	0
TOTAL	<u>3,558</u>	<u>1,253</u>	<u>13</u>	<u>9</u>

The reports presented by the Government of Japan to the IWC indicate that pregnant and lactating female whales are also killed, so the total number of whales killed is higher than the totals set out in Table 1. A high percentage of females killed are reported to be pregnant but relatively few are reported to be lactating. For example of the 391 female Antarctic minke whales reported to have been killed in 2005/2006, 224 (57%) were reported to be pregnant and 3 (0.7%) were reported to be lactating.⁶¹ Killing a pregnant female obviously kills her unborn foetus. Killing a lactating mother presumably results in the suckling young whale dieing of starvation. The report of the 2001/2002 whaling made special note of the killing of a pregnant female at a location which is approximately 150 nautical miles within the AWS.⁶²

Mark recapture (Discovery tag)

Two discovery tags (No. 43924 and No. 39415) were recovered from a whale during the biological research on 31 January 2002. The whale was sighted as a solitary school at 66°37'S, 120°47'E (East-south stratum in Area IV). This whale (sample number 250) was a pregnant female with body length of 8.94 m and body weight of 7.70 t. Fetal body length was 46.3cm. ...

In addition to the evidence from Japanese reports of the whaling, a first-hand account and photographs of the whaling inside the AWS on 16 December 2001 was provided by Kieran Mulvaney, the expedition leader of a Greenpeace anti-whaling expedition in 2001/2002. His evidence included the following observations:

On the morning of 16 December 2001 the [Japanese whaling] fleet located a polynya (ie a large expanse of open water in the middle of fast ice or pack ice, and a haven for whales) at Latitude 63° 0'6" South, Longitude 051° 32'7" East, approximately 40 nautical miles within the Australian Whale

⁶¹ Nishiwaki S, et al, *Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in 2005/2006 – Feasibility Study*, Table 9, p 16, submitted by the Government of Japan to the IWC meeting in 2006.

⁶² Ishikawa H, et al, *Cruise Report of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) Area IV and Eastern Part of Area III in 2001/2002*, p 6, submitted by the Government of Japan to the IWC meeting in 2002.

Sanctuary ... our helicopter ... located the [Japanese vessel] *Yushin Maru* hunting an Antarctic minke whale ... the gunner took aim and fired but missed the whale. The *Yushin Maru* continued its chase for 40 minutes and fired six times but missed on each occasion. Finally, on the seventh attempt the harpoon found its mark and the whale was killed, hauled to the surface and tied alongside.⁶³

Based on this evidence, Allsop J found in granting leave to serve the originating process that the evidence disclosed “a clear prima facie case of contravention of Australian municipal law”.⁶⁴ When the matter ultimately proceeded to trial, Allsop J found on the balance of probabilities that “a significant number of ... whales were taken inside the Australian Whale Sanctuary” by the respondent Japanese whaling company in contravention of the EPBC Act.⁶⁵

Preliminary decision of Allsop J

In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; (2004) 212 ALR 551, Allsop J considered the application for leave to serve the originating process on Kyodo in Japan. He was clearly concerned by the diplomatic implications of the proceedings and made an interim order that HSI serve the Commonwealth Attorney-General with copies of the originating process, affidavits and submissions relied upon by HSI. He was not greatly concerned about futility of the proceedings at that point. He stated in relation to this issue:⁶⁶

There may or may not be a question of the effectiveness of the orders sought. Perhaps even to raise that issue at this point is to assume matters which should not be the subject of assumption. The Court will not make futile orders. Whether or not they are futile may depend upon many matters, including but far from limited to the attitude of persons who are not present before the Court. This is a matter which is better dealt with in due course, with an understanding of the response to the litigation of the respondent.

Allsop J’s approach to futility was to change dramatically following the Attorney-General’s submissions.

The Attorney-General’s submissions

In response to the invitation from Allsop J, the Attorney-General filed submissions in the proceedings as amicus curiae in early 2005.⁶⁷ The Attorney-General, in effect, conceded that HSI had a valid legal basis for service of the proceedings on Kyodo under Order 8, rule 2(2) of the Rules,⁶⁸ but submitted that the court should not allow service of the proceedings in Japan for diplomatic reasons.⁶⁹ The Attorney-General submitted that allowing HSI to enforce the prohibition of whaling in the AWS adjacent to the AAT “would be likely to give rise to an international disagreement with Japan”.⁷⁰ The Attorney-General submitted further that, “similar disputes could also arise with other countries that do not accept Australia’s claim to the AAT” which may “be contrary to Australia’s long term national interests”.⁷¹

⁶³ Extract from the affidavit of Kieran Mulvaney, sworn 9 November 2004, available at <http://www.envlaw.com.au/mulvaney.pdf> (viewed 15 August 2005). For an excellent account of the Greenpeace voyages, see Mulvaney K, *The Whaling Season: An Inside Account of the Struggle to Stop Commercial Whaling* (Island Press, Washington, 2003).

⁶⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [30].

⁶⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha* [2008] FCA 3 at [39]-[43].

⁶⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha* [2004] FCA 1510 at [70].

⁶⁷ Commonwealth Attorney-General, “Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*”, filed on 25 January 2005. Available at <http://www.envlaw.com.au/whale.html> (viewed 28 February 2008).

⁶⁸ Commonwealth Attorney-General, n 67, paras [19], [31], [32] and [35].

⁶⁹ Commonwealth Attorney-General, n 67, paras [14]-[17] and [28]-[30].

⁷⁰ Commonwealth Attorney-General, n 67, para [17].

⁷¹ Commonwealth Attorney-General, n 67, para [17].

Refusal of HSI's application for leave to serve

Due in large measure to the submissions of the Attorney-General, in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, Allsop J declined to grant leave under Order 8, rule 2 of the Rules for HSI to serve the originating process in Japan. He stated:⁷²

Very relevant to the exercise of that discretion [to grant leave to serve] 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.

Surprisingly, Allsop J appeared to also consider cultural differences between Japan and Australia as a basis for not applying Australian law in this case.⁷³ Allsop J also considered that the proceedings were futile because any injunction granted by the court could not be enforced by HSI and:⁷⁴

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.

Appeal to the Full Court

HSI appealed to the Full Court of the Federal Court against Allsop J's decision based on a number of grounds. The principal ground of appeal was that Allsop J erred by considering political and diplomatic issues incidentally associated with proceedings between private litigants, which are regularly brought, do not infringe the principle of international comity, and are consistent with Australian domestic law and international law.

The Full Court, by majority, allowed HSI's appeal.⁷⁵ The decision is important for three main reasons. First, from a practical perspective for protecting whales, the decision prises ajar a doorway into a legal process that may lead to the enforcement of Australian law prohibiting whaling in a massive tract of water adjacent to Antarctica. Second, from a private international law perspective, the case confirms that diplomatic and political issues are not relevant to the grant of leave to serve originating process outside the jurisdiction for proceedings that are regularly commenced, do not infringe the principles of international comity, and can be resolved without reference to any non-justiciable issues. Third, from an environmental law perspective, the case sets out broad principles for the grant of public interest injunctions under the EPBC Act. It is the second and third respects in which the decision is important that are the subject of further discussion here.

⁷² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [27].

⁷³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [29].

⁷⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [33]-[34].

⁷⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; [2006] FCAFC 116 (Black CJ and Finkelstein J; Moore J dissenting).

The Full Court was unanimous in holding that diplomatic and political issues are not relevant to the grant of leave to serve proceedings outside the jurisdiction in this case. Black CJ and Finkelstein J stated:⁷⁶

We are also persuaded that the 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* [2000] 1 AC 61 at 107.

Moore J agreed.⁷⁷

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.

The principle that political considerations are not relevant to the grant of leave for service outside the jurisdiction is important from a private international law perspective, but it is the principles stated by the majority for the grant of public interest injunctions under the EPBC Act that will be much more significant in general.

Black CJ and Finkelstein J emphasised the public interest nature of injunctions under the EPBC Act, which they saw as modelled on the *Trade Practices Act* 1974 (Cth) (TP Act).⁷⁸ Leap-frogging on the approach applied under the TP Act, Black CJ and Finkelstein J stated principles for the grant of injunctions under the EPBC Act that mark a very important development for public interest environmental law in Australia. Broadly speaking the principle that emerges is that the Federal Court may grant an injunction under s 475 of the EPBC Act even if it may prove impossible to enforce where it serves the public interest objects of the Act by having an educative effect.⁷⁹

Moore J, in dissent, took a much more limited view of the role of injunctions under the EPBC Act. He saw the grant of an injunction as futile in the circumstances of this case and would, therefore, have refused the appeal. For reasons that are less clear, he also saw the making of a declaration by the court about the illegality of whaling to be inappropriate in the circumstances.⁸⁰

Two distinct approaches emerge from the reasoning of the judges in this case in relation to the principles for the grant of injunctions under the EPBC Act. Black CJ and Moore J built upon principles of promoting the public interest in statutory injunctions in ways that go beyond the traditional limitations of equitable injunctions. Their approach emphasises the public interest nature of the statute and looks to achieve the legislative objects. Allsop J and Moore J felt more constrained by the traditional equitable principles and limitations on injunctions. Their approach

⁷⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [12]-[13].

⁷⁷ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [38].

⁷⁸ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [18]-[21].

⁷⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [22]-[27].

⁸⁰ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [47].

is largely unstirred by the winds of change that have been felt through the TP Act favouring public interest remedies. The former approach is the more attractive and likely to prevail in the future.⁸¹ Certainly the principles set out in the majority decision in this case will be binding on trial judges for injunctions and declarations sought under the EPBC Act in the future.

The principles that have emerged in this case are important for future public interest litigation under the EPBC Act and, potentially, under other environmental legislation in Australia.⁸² They are perfectly consistent with an important statement of principle regarding the grant of injunctions under the EPBC Act by Branson J in the Flying Fox Case.⁸³ In that case Branson J held, in granting an injunction to restrain an electric grid killing flying foxes to protect a lychee crop that had been found to be causing a significant impact to the world heritage values of the Wet Tropics World Heritage Area, that:⁸⁴

In weighing the factors which support an exercise of the Court's discretion in favour of the grant of an injunction under subs 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.

The principles stated by Black CJ and Finkelstein J in this case for the grant of public interest injunctions under the EPBC Act are also consistent with the principle stated by Kiefel J in the Nathan Dam Case for interpreting the Act. Her Honour stated in that case that, "no narrow approach should be taken to the interpretation of legislation having objects of this kind" because of the "high public policy apparent in the objects of the Act."⁸⁵

Substituted service

The difficulties in proceeding with this case due to diplomatic issues did not end with the appeal. After the Full Court granted leave to serve Kyodo in Japan, HSI attempted to effect service through the normal diplomatic channel in accordance with Order 8 of the Rules;⁸⁶ however, the Government of Japan declined to effect service.⁸⁷ The reason stated by the Japanese Ministry for Foreign Affairs was:

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.

⁸¹ Consider the approach taken in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515, 528 and 537 to public interest remedies under the TP Act.

⁸² The case has been referred to in support of an order to restrain an offence against the *Nature Conservation Act* 1992 (Qld) in *Booth v Yardley & Anor* [2006] QPEC 119 at [23] (Wilson SC DCJ).

⁸³ See McGrath C, "The Flying Fox Case" (2001) 18 EPLJ 540.

⁸⁴ *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453 at [115].

⁸⁵ *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2004] FCA 1463 at [40] citing *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515, 528 and 537. See also *Minister for the Environment & Heritage v Queensland Conservation Council* (2004) 139 FCR 24; [2004] FCAFC 190; (2004) 134 LGERA 272 at [52]-[53] where the Full Court (Black CJ, Ryan and Finn JJ) took a broad view of interpreting relevant impacts under the EPBC Act consistent with the plain meaning and objects of the Act.

⁸⁶ Under this process, once the Federal Court has granted leave to serve outside Australia, the party seeking to serve a foreign respondent provides the relevant documents (including translations) to the Commonwealth Attorney-General's Department. The Attorney-General's Department provides the documents to the government in the country in which the documents are sought to be served, which facilitates service in accordance with the rules of service in that country.

⁸⁷ For an explanation of the normal rules of service in Japan, see MacDonald AJ, "Service of Australian originating process in Japan" (1992) 66 ALJ 810 at 816; and Gamertsfelder L, "Cross border litigation: exploring the difficulties associated with enforcing Australian money judgments in Japan" (1998) 17 *Australian Bar Review* 161 at 171.

HSI, therefore, applied for substituted service. Order 7, rule 9 of the Rules provides a general power for the Court to allow substituted service “where for any reason it is impractical to serve a document in the manner set out in the Rules”.⁸⁸

Allsop J (to whom the case was returned after the appeal) granted the application for substituted service on 2 February 2007, finding that it was not possible or feasible and, thus, impractical to serve the originating process in Japan using the diplomatic channel.⁸⁹ HSI proceeded to effect service in accordance with the orders of the Court. The respondent did not appear at a directions hearing on 24 July 2007 and the matter was listed for trial.

The trial

The respondent Japanese whaling company did not appear at the trial and Allsop J proceeded to hear the matter in September 2007. At the trial Allsop J sought confirmation of the Attorney-General’s views on the proceedings. In October 2007 the then Attorney-General, the Hon Philip Ruddock MP, confirmed his opposition to the proceedings. However, following the Australian federal election in November 2007, the new Attorney-General, the Hon Robert McClelland MP.⁹⁰

requested the Court not to place any reliance upon the views conveyed to the Court on behalf of the previous Attorney-General. The Commonwealth Government believes that the matter would best be considered by the Court without the Government expressing a view.

Allsop J did not acknowledge the changed views of the new Attorney-General in his reasons for judgment but ultimately granted the declaration and injunction sought by HSI pursuant to the principles for public interest injunctions stated by the majority of the Full Court.⁹¹ HSI has since effected substituted service of the orders,⁹² thereby enlivening the potential for future contempt proceedings should the Japanese whaling company refuse to comply with the injunction.

Enforcement of the injunction

Enforcement of the injunction against the Japanese whaling company will be difficult and without the help of the Australian Government probably impossible, emphasising the importance of the change in the government’s attitude to the case. The company’s office is located in Japan and it has no assets outside Japan other than its vessels during whaling voyages. The injunction cannot be enforced in Japan because it is a non-money order and contrary to public policy under Japanese law.⁹³

If, as seems likely, the Japanese whaling company ignores the declaration and injunction and continues to whale within the AWS, HSI can bring contempt proceedings against it under Order 40 of the *Federal Court Rules*. The main penalty that the Court can impose is to fine the company; however, the fine can be enforced through sequestration (i.e. confiscation and sale of property to satisfy a judgment) of the respondent’s whaling vessels.⁹⁴ Section 31 of the *Federal*

⁸⁸ The Court may order substituted service by any means that are reasonably probable to inform the person served of the proceedings: *Hadgkiss v Aldin* [2006] FCA 1164 at [3].

⁸⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 at [14].

⁹⁰ Unpublished correspondence, dated 12 December 2007, written on behalf of the Attorney-General to Allsop J.

⁹¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

⁹² Pursuant to orders granted in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36 (Rares J).

⁹³ See generally in relation to service and execution of judgments in Japan, MacDonald AJ, “Service of Australian originating process in Japan” (1992) 66 ALJ 810; and Gamertsfelder L, “Cross border litigation: exploring the difficulties associated with enforcing Australian money judgments in Japan” (1998) 17 *Australian Bar Review* 161.

⁹⁴ In relation to the Court’s wide powers to punish for contempt, see *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129 at 146 [70]-[74] per North, Goldberg and Weinberg JJ.

Court Act 1976 (Cth) provides the Court has the same power to punish contempt as is possessed by the High Court. Rule 11.04.1(b) of the *High Court Rules 2004* provides the High Court has power to order, where the contemnor is a body corporate, that the contemnor pay a fine and some or all of the property of the contemnor be sequestered.

The vessels must first be seized before they can be sold to satisfy any fine imposed for contempt. The term, “seizure” is preferable to describe this act rather than “arrest” of the vessels because “arrest” has a technical meaning in Admiralty law for an interim remedy similar to a Mareva Injunction. Under the 1952 and 1999 Arrest Conventions, “arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.⁹⁵ Francesco Berlingieri explains that this reflects the civil law distinction between provisional arrest to secure a maritime claim pending judgment (*saisie conservatoire*) and attachment or seizure of a ship following judgment (*saisie exécutoire*).⁹⁶ The Arrest Conventions govern only the former category and do not prohibit seizure, appraisal and sale of a ship following judgment to satisfy or enforce the judgment.⁹⁷ The Arrest Conventions do not prohibit seizure, appraisal and sale (i.e. sequestration) of the Japanese whaling vessels following judgment to enforce an injunction or to satisfy a fine imposed for contempt. Sequestration of assets is normally carried out by an officer of the Court and as the property involved in these proceedings is a ship a Federal Admiralty Marshall would be the most appropriate person to seize and sequester a vessel.⁹⁸

The practical difficulty of actually seizing one of the whaling vessels is the greatest hurdle to enforcement of the injunction. It is unlikely the Japanese whaling vessels will enter an Australian mainland port or friendly overseas port where seizure and sequestration could most simply occur. The Australian Government has made it known to the Japanese Government that the vessels are not welcome and the Japanese wish to avoid the potential for public protests against the whaling. It is also a separate offence against s 236 of the EPBC Act for a whaling vessel to enter a port in Australia or an external territory. The Japanese whaling fleet sails directly from Japan to Antarctica and back, refuelling and resupplying at sea, without stopping in any foreign ports. However, on rare occasions the opportunity for seizure may occur. For instance, in 2006 one of the vessels in the whaling fleet approached close to Hobart to allow a medical evacuation of a crew member. Seizure can also occur within Australian waters adjacent to Antarctica, but the practical difficulties of such a course are obviously immense and without the support of the Australian Government impracticable.

As noted in the introduction, prior to being elected and prior to the injunction being issued by the Federal Court, the Australian Labor Party committed itself to “enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary”; however, since being elected the new Government has not fulfilled this election commitment. The Government dispatched the *Oceanic Viking* to monitor the whaling but did not intercept and seize the

⁹⁵ See Art 1(2) of the *International Convention on Certain Rules Relating to the Arrest of Sea-Going Ships 1952*, done at Brussels on 5 October 1952, and Art 1(2) of the *International Convention on Arrest of Ships 1999*, done at Geneva on 3 December 1999. While Australia has not ratified the 1952 and 1999 Arrest Conventions, they are relevant to the interpretation of the *Admiralty Act 1988* (Cth) due to its legal and historical context in international maritime law: *Owners of MV ‘Iran Amanat’ v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 at 138; *Tisand (Pty) Ltd v Owners of the Ship MV ‘Cape Moreton’ (ex ‘Freya’)* (2005) 143 FCR 43 at 60; *Comandate Marine Corp v Ship ‘Boomerang I’* (2006) 151 FCR 403 at 411. See generally, Australian Law Reform Commission, *ALRC Report No. 33 – Civil Admiralty Jurisdiction* (ALRC, Canberra, 1986).

⁹⁶ Berlingieri F, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (4th ed, Informa, London, 2006), pp 87-88.

⁹⁷ See generally on the question of interim and final relief for maritime claims involving arrest and sale of a ship: Jackson DC, *Enforcement of Maritime Claims* (4th ed, LLP, London, 2005), Pt III and IV, particularly Ch 15 and 25, pp 369, 376, 377, 647-649, 662-664; and Meeson N, *Admiralty Jurisdiction and Practice* (3rd ed, LLP, London, 2003), pp 17 and 151-152.

⁹⁸ Cf. *Redhead v Admiralty Marshal, WA District Registry* (1998) 87 FCR 229 (Ryan J).

Japanese vessels operating illegally in the AWS. While no reason has been publicly stated for not fulfilling its election commitment, the reason is presumably similar to those expressed by the previous Australian Government in submissions to the Federal Court: concern over the diplomatic implications with other Contracting Parties to the ATS of enforcing Australian law against foreign nationals. This leads to the topic of the appropriate policy response to Japanese whaling in Australia's Antarctic waters.

POLICY RECOMMENDATIONS

Balancing multiple policy objectives

Despite the admonition of the Full Federal Court against courts considering political and diplomatic considerations and the declaration and injunction ultimately granted by the Federal Court in this case, diplomatic considerations rightly affect the Australian Government's actions in the international arena and in relation to Antarctica. Altering the historic "thoroughgoing abstention, non-intervention, non-application of Australian laws and procedures within the AAT [that] is the product of a tacit understanding"⁹⁹ with other Contracting Parties to the Antarctic Treaty will no doubt create diplomatic tensions.

Consequently, it is necessary to consider at a political and diplomatic level how Australia can pursue its multiple objectives of: maintaining Australian sovereignty in Antarctica; maintaining strong and cooperative diplomatic relationships with other nations concerned with Antarctica; and protecting whales and the Antarctic environment generally?

Some legal and policy commentators believe Australia should not enforce its laws against Japanese whalers in Antarctica. For example, Sam Blay and Karen Bubna-Litic criticized HSI for initiating the Japanese Whaling Case and argued that:¹⁰⁰

The courtroom is not an appropriate battlefield if Australia is to win the battle to stop commercial whaling. The environmental movement needs to rethink its strategies with a new focus on international law and diplomacy.

Blay and Bubna-Litic argue that "the Australian legislation relating to the AWS in the EEZ of the AAT is unenforceable against foreign nationals and that any attempt to enforce it will be in breach of Australia's international obligations under the Antarctic Treaty." To support this view the authors adopt the view that Antarctica is not subject to the customary international law rules on the acquisition of territorial sovereignty.¹⁰¹ Unfortunately, this view is not supported by any consideration of case law, including the *Legal Status of Eastern Greenland* case. The authors discount Triggs' detailed analysis of the history and legal concepts applying to Australian territorial sovereignty in Antarctica in two footnotes without any detailed analysis of their own.¹⁰² The analysis of Triggs on this point is far stronger and more rigorous and, consequently, should be preferred to the views of Blay and Bubna-Litic.

Crawford and Rothwell suggested that, while enforcement of Australian law in the AAT will not infringe the Antarctic Treaty, the tacit approach of not enforcing Australian law against foreign nationals was the best option for Australia to follow in the interest of maintaining stability in the ATS. They concluded that, "for all its difficulties, it is a stability which seems the best option on offer" for managing Antarctica.¹⁰³ Yet Crawford and Rothwell were also alive to the inherent weakness in the ATS to regulate the activities of non-parties. As with vessels

⁹⁹ Crawford and Rothwell, n 15, p 87.

¹⁰⁰ Blay and Bubna-Litic, n 2.

¹⁰¹ Blay and Bubna-Litic, n 2, pp 475-476.

¹⁰² Blay and Bubna-Litic, n 2, p 475 (footnotes 76 and 78).

¹⁰³ Crawford and Rothwell, n 15, at p 88.

operating under flags-of-convenience to avoid international controls on fisheries on the high seas:¹⁰⁴

so far as third States are concerned Australia suffers, with the other claimant States, from the inherent weaknesses of treaties as law-making instruments. The Antarctic Treaty system is, if only because it rests on a disagreement about status, not an objective territorial regime. The parties could not agree on the “correct” territorial regime as between themselves, and that would surely be a prerequisite to any attempt to enforce it as against the world. It therefore applies only as a treaty, ie as a contractual arrangement.

While some legal and policy commentators and, indeed, most other Contracting Parties to the ATS argue that Australia cannot and should not attempt to enforce Australian laws against foreign nationals within the AAT and adjacent EEZ, what is Australia’s best way to navigate the thicket of Antarctic diplomacy in the context of whaling? Don Rothwell and Shirley Scott point out:¹⁰⁵

Whilst the Federal Government’s submissions in the HSI litigation reflect a pragmatic assertion of legal realism, and legitimate concerns over the impact upon the Treaty system of a dispute between longstanding Treaty Parties, Australia’s Antarctic environmental policy will be seen as fundamentally flawed [by the Australian public] if it is unable to address concerns over Japanese whaling. ... Australia’s Antarctic policy may once again be at the crossroads.

Consistent with Crawford and Rothwell, the analysis in this paper concluded that Australia can lawfully enforce its domestic laws against foreign nationals in the AAT and adjacent EEZ. However, accepting that the stability of the ATS should be maintained, the question remains whether Australia can regulate whaling while maintaining the ATS? At present, Australian law in the AAT is only enforced against Australian nationals and expeditions. While this approach maintains harmony in the ATS, it is, at best, neutral for maintaining Australian sovereignty in Antarctica, and it does nothing to protect whales. Julia Jabour and her colleagues comment in this context:¹⁰⁶

... it is highly unlikely Australia will ever achieve its goal of a permanent international ban on commercial whaling. The Australian government has intractable beliefs, bolstered by perceived public approval and verified by the media and conservation NGOs. While successive Australian governments continue their role as moral entrepreneurs in the great whale debate, they will attract no-cost votes from their constituents – an attractive proposition indeed – while the futility of their efforts is likely to remain heroic and irrelevant. Finally, its stated position is to take a strong diplomatic approach to issues raised inside the IWC, particularly Japanese scientific research, but it is clear that this in no way impinges on business as usual in other areas such as trade and security.

Is Australia’s position on whaling as futile as Jabour and her colleagues suggest or is there a suitable compromise policy position that may be found to allow Australia to better meet its policy objectives for Antarctica, including protecting whales? Or, is the ATS so fragile that it would be destroyed or severely damaged by Australia enforcing its laws against Japanese whalers and nationals of non-parties? The long-standing disagreement inherent in Article IV of the Antarctic Treaty indicates disagreement is not lethal to the ATS. International relations regularly accommodate disagreements. Indeed, as the Australian Prime Minister, Kevin Rudd, stated recently in voicing his concerns that it was “clear that human rights abuses were being

¹⁰⁴ Crawford and Rothwell, n 15, at p 87.

¹⁰⁵ Rothwell D and Scott S, “Flexing Australian Sovereignty in Antarctica: Pushing Antarctic Treaty Limits in the National Interest?”, Ch 2 in Kriwoken LK, Jabour J and Hemmings AD (eds), n 2, p 20. See also, Stephens T and Boer B, “Enforcement and Compliance in the AAT: Legal and Policy Dilemmas”, Ch 5 in Kriwoken LK, Jabour J and Hemmings AD (eds), n 2.

¹⁰⁶ Jabour J, Iliff M, and Jaap Molenaar E, “The Great Whale Debate: Australia’s Agenda on Whaling”, Ch 10 in Kriwoken LK, Jabour J and Hemmings AD (eds), n 2, p 148.

committed in Tibet” by the Chinese Government, a statement that greatly angered the Chinese Government.¹⁰⁷

It’s important, as I said in my speech earlier today, to have a relationship that is capable of handling a disagreement and putting views in a straight-forward fashion.

The Antarctic Treaty is built upon a fundamental disagreement over sovereignty yet has survived for 50 years. Writing in the early 1990s, Crawford and Rothwell suggested it “is easy to suspect that the present stability is the product merely of an ever-more-complex holding pattern in the form of the Antarctic Treaty system”.¹⁰⁸ Little appears to have changed in this holding pattern and it suggests that the other parties will strive to accommodate ongoing differences to maintain the system. The close and long-established diplomatic ties between Australia and other Contracting Parties such as the United States and Japan also suggest that these countries would accommodate Australia enforcing its laws against whaling in Antarctica. In the light of these matters, viewed objectively the risk that the ATS will be destroyed or severely destabilised by Australia enforcing its laws against Japanese whaling in Antarctica appears small and remote. There is no real doubt that Australia and Japan’s strong economic and diplomatic ties would survive Australia enforcing its laws against Japanese whalers operating in Australia’s Antarctic waters. Viewed objectively, the same conclusion is reached for Australia’s relationships with other Contracting Parties to the ATS.

A suitable compromise policy position for enforcing Australian law against foreign nationals operating in the AAT, with minimal risk of destabilising the ATS, could be based on two levels:

- Supporting international cooperation under the ATS and not applying Australian law to matters regulated under the cooperative arrangements of the ATS (e.g. Russian drilling at Lake Vostok); but also,
- Applying Australian laws to matters outside the ATS, such as whaling and the activities of any nationals of non-parties (e.g. fishing vessels operating under flags-of-convenience).

Enforcing Australian law against Japanese whalers is consistent with this two-pronged approach to protecting the Antarctic environment. It is true that any enforcement of Australian law against foreign nationals in the AAT or adjacent EEZ is likely to attract a diplomatic rebuke because it inherently involves an assertion of sovereignty. Agreeing to disagree on the issue of sovereignty, however, this approach can be justified to other Contracting Parties with minimal risk of destabilising the ATS or jeopardizing the current cooperative approach under it for two reasons, explained in detail in the earlier sections of this article:

- Firstly, the Contracting Parties themselves excluded whaling from regulation under the ATS (e.g. by Article 7 of Annex II of the Madrid Protocol).
- Secondly, Australian domestic law recognises foreign authorities granted by parties to the ATS and, therefore, will not be enforced against activities taken pursuant to foreign authorities.

Whaling regulated under the International Whaling Convention was deliberately excluded from regulation under the ATS by the Contracting Parties and this provides ample justification, both politically and diplomatically, for the Australian Government to enforce Australian law against Japanese whaling while generally leaving other activities of foreign nationals within the AAT to be regulated by their own governments.

¹⁰⁷ The Prime Minister’s speech, made in China on 9 April 2008, was widely reported, include at <http://www.abc.net.au/news/stories/2008/04/09/2212467.htm> (viewed 10 April 2008).

¹⁰⁸ Crawford and Rothwell, n 15, at p 88.

Australian domestic law has a carefully nuanced approach that balances the general practice of not exercising jurisdiction over foreign nationals in the AAT but also allows regulation of foreign nationals in limited circumstances. This balance is provided by s 7 of the *Antarctic Marine Living Resources Conservation Act 1981* and s 7(1) of the ATEP Act, which were set out above. The point raised by HSI, accepted by the previous Attorney-General, and ultimately accepted by Justice Allsop in the Federal Court proceedings,¹⁰⁹ is that a permit for whaling granted by the Government of Japan is not a “recognised foreign authority” because whaling is not regulated under the Madrid Protocol or the ATS.

As the regulation of whaling in Antarctic waters was excluded from the ATS by the Contracting Parties themselves and Australian domestic law carefully recognises the general rule that Australian law will not be enforced against foreign nationals operating under an authority granted by a party to the ATS, Australia can justify enforcing its own laws against the Japanese whaling in this case.

End to research whaling?

Before concluding it is significant to note that a new possibility has arisen that may stop whaling in Antarctic waters at least for the immediate future. Recent media reports suggest that parties to the International Whaling Convention meeting in London in early March 2008 reached a provisional agreement that Japanese whalers will be allowed to kill 150 minke whales within their own territorial waters but not conduct “scientific research” in seas anywhere else.¹¹⁰ Such provisional agreement, if it in fact occurred, will need to be confirmed at the International Whaling Commission meeting in June 2008 to take effect.

If Japan restricts its whaling activities to its own waters the ongoing breach of Australian law will cease, thereby removing the need for the Australian Government to enforce the law at least for the immediate future. Over the longer term, however, Australia’s ban on whaling within its Antarctic EEZ could be tested further as other countries seek to return to or enlarge their whaling activities. Not only Japan, but Norway, Iceland, Russia, Korea, China and other countries may wish to conduct whaling in these waters in the future. If that occurs, the policy position set out above may offer a suitable compromise approach for Australia to adopt.

CONCLUSION

The Japanese Whaling Case raises an intriguing interplay between national and international law, and some very difficult legal issues. The case is important at a number of levels, not least of which is the complete protection of whales in a massive body of ocean adjacent to Antarctica. Sovereignty over Antarctica and international politics simmer in the background because of the diplomatic dispute over sovereignty in Antarctica and because, ultimately, enforcement of the injunction and the prohibition on whaling in the AWS rests with the Australian Government.

This article has suggested that the Australian Government can lawfully fulfil its election commitment to “enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary” while meeting the diplomatic concerns of other Contracting Parties. The cooperative management approach achieved for Antarctica under the ATS is important to maintain but, viewed objectively, the risk that the ATS will be destroyed or severely destabilised by Australia enforcing its laws against Japanese whaling in Antarctica appears small and remote.

¹⁰⁹ See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; (2004) 212 ALR 551 at 556-561 [28]-[62]; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [40]; and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 at [44].

¹¹⁰ Miranda C, “Deal restricts Japanese to kill in own waters” *Courier Mail*, 10 March 2008, available at <http://www.news.com.au/couriermail/story/0,23739,23354454-953,00.html> (viewed 19 March 2008).

To achieve the Australian Government's objectives of maintaining Australian sovereignty in Antarctica, strong and cooperative diplomatic relationships with other nations concerned with Antarctica, and the protection of whales, the Government can base its long-term policy position concerning Japanese whaling in Antarctica on two levels:

- Supporting international cooperation under the ATS and not applying Australian law to matters regulated under the cooperative arrangements of the ATS (e.g. Russian drilling at Lake Vostok); but also,
- Applying Australian laws to matters outside the ATS, such as whaling and the activities of any nationals of non-parties (e.g. fishing vessels operating under flags of convenience).

Enforcing Australian law against Japanese whalers is consistent with this two pronged approach to protecting the Antarctic environment.