

**Young Lawyers Annual Assembly Forum – International and Environmental Law
– Toothless Tiger or Raging Panther?
International Law and the Protection of Whales in Australian Waters**

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Today I am going to be talking about how Australia has implemented its obligations under International law relating to the conservation of whales and marine biodiversity more generally. I will also be discussing the effectiveness of that implementation in Australian domestic law through the examination of a case I am currently involved in at the EDO in relation to illegal whaling in Australian waters.

Part 1 - Background to Australia's commitment to whale protection

At an international level, Australia has played a pivotal role in negotiating international agreements for the protection and sustainable management of oceans and marine species, in particular, whales. Australia has shown strong opposition to the exploitation by Japan of loopholes in the *International Whaling Convention* as well as opposition to recent proposals by Japan to lift the ban on commercial whaling at the forum of the International Whaling Commission. At the last Conference of the Parties to the IWC held in June this year in Korea, Japan voted to lift the ban on commercial whaling and to double its annual so-called scientific take of 440 minke whales and to extend it to include 50 humpback and 50 fin whales. Australia's Environment Minister, Senator Ian Campbell led the way in ensuring that the proposal was defeated.

Australia is also viewed as a strong supporter of the establishment of multi-jurisdictional marine protected areas, including the Southern Ocean Whale Sanctuary and the proposed South Pacific Whale Sanctuary.

The reasons for Australia's strong engagement in marine biodiversity protection relate most obviously to the vested interest that Australia has in sustainable oceans management due to its vast marine territory. Australia has rights and responsibilities

over approximately 16 million square kilometres of oceans, making Australia the third largest fishing zone in the world.

In addition, Australia is one of the most biologically diverse nations on earth and our marine environment is home to a huge diversity of species, many of which are unique to Australian waters. It is this unique biodiversity and the vast size of Australia's marine jurisdiction which mean that the sustainable management of our marine environment and the conservation of marine biodiversity are a major challenge for environmental law and policy makers.

Part 2 - International Framework

It is against this background that Australia has become a party to a large number of International conventions relating to the protection of the marine environment and to biodiversity conservation more generally. Those conventions include:

- *United Nations Convention on the Law of the Sea*;
- *International Whaling Convention*; and the
- *Antarctic Treaty System* which includes the *Antarctic Treaty*, the *Convention on the Conservation of Antarctic Marine Living Resources* and the *Protocol on Environmental Protection to the Antarctic Treaty*.

As well as the

- *Rio Declaration on Environment and Development 1992*;
- *Convention on Biological Diversity 1993*;
- *Convention on International Trade in Endangered Species of Wild Fauna and Flora 1975*.

UNCLOS

Over 97% of Australia's marine jurisdiction forms what is known as the exclusive economic zone ("EEZ") which surrounds mainland Australia and its external territories and extends to 200 nautical miles seaward of Australia's territorial sea baselines. In 1994 Australia proclaimed an EEZ under *United Nations Convention on the Law of the Sea* ("UNCLOS"). Pursuant to Article 56 of UNCLOS Australia has sovereign rights over its EEZ, which entitles it to explore, exploit, conserve and manage the natural resources within the area of the EEZ. Article 65 of UNCLOS specifically allows coastal states to regulate whaling within the EEZ.

Part 3 - The *Environment Protection and Biodiversity Conservation Act 1999* and the management of marine biodiversity

In June 2000 the Commonwealth of Australia enacted the *Environment Protection and Biodiversity Conservation Act 1999*. The EPBC Act was drafted with the 1992 Rio Declaration firmly in mind, with its objects including the promotion of ecologically sustainable development and the conservation of biodiversity.

The Act sought to consolidate in a single piece of legislation Australia's commitment to give effect to its obligations under international environmental conventions and to establish a comprehensive regime for the environmental impact assessment of actions likely to impact upon matters of national environmental significance. The matters of national environmental significance under the EPBC Act relate directly to Australia's international environmental legal obligations.

Actions & Approvals

The Commonwealth marine environment is identified as a matter of national environmental significance under the EPBC Act.

It's an offence to take an action that has, will have, or is likely to have a significant impact on the Commonwealth marine environment without approval. As a result, actions and decisions that may have a significant impact on the Commonwealth marine environment, or which take place within Commonwealth marine areas and may have a significant impact on the environment are subject to the environment protection procedures under the EPBC Act, which include requirements for environmental impact assessment to be carried out prior to the grant of any approval for the action.

Protection of Cetaceans

The EPBC Act establishes the Australian Whale Sanctuary ("AWS"). The AWS protects cetaceans [explain].

The AWS covers all Commonwealth marine areas and Australia's external territories, including its sub-Antarctic territories of Heard and Macdonald islands and the Australian Antarctic Territory.

Offences

The EPBC Act creates offences which relate to actions involving cetaceans both within and outside of the AWS. These provisions apply to the activities of all persons, aircraft and vessels within the AWS, including foreign nationals and foreign vessels and aircraft. It is an offence to:

1. Recklessly kill a cetacean;
2. Intentionally take, trade, keep, move or interfere with a cetacean;
3. Treat a cetacean that has been illegally killed or taken. "Treating" means cutting up or taking any product from the cetacean; and
4. Possess a cetacean or part of a cetacean that has been illegally killed or taken.

Breaches of these provisions are strict liability offences. The maximum penalty for taking actions without a required permit are up to 2 years imprisonment or a fine of up to \$110,000. Fines of up to \$33,000 can also be imposed if a person contravenes the condition of a permit.

Pursuant to section 236 of the EPBC Act foreign whaling vessels which a brought into a port in Australia or an external Territory are guilty of an offence unless the master of the vessel has obtained the written permission of the Minister to bring the vessel into the port.

The Minister may authorise the issue of a permit to kill, injure, take, trade, keep, possess, move or interfere with a cetacean - but only where he is satisfied that the action will contribute significantly to the conservation of cetaceans and will not adversely affect the conservation status of or population of the species.

Part 4 – Effectiveness

Looking at the issue of how effectively the protections are afforded to cetaceans under the EPBC Act, it must be noted that the EPBC Act has only been in operating for 5

years and is still in its infancy, operating for just 5 years, and therefore the body of case-law applying, enforcing and interpreting the Act is only small. Of the estimated thirteen reported cases that have been brought pursuant to the EPBC Act, only two reported cases have been commenced by the Federal Government.¹ The balance of cases have been brought by third parties, being individuals or organisations with conservation objectives. The majority of those individuals and organisations have been represented by the Environmental Defender's Office.

The cases that have been brought by third parties could arguably have been commenced by the Minister himself. Therefore, a question about the political will to enforce the EPBC Act arises. The cases that have been brought against the Minister himself highlight the need to consider the effectiveness of the mechanisms in the Act for the protection of the environment and the strength of the political will to achieve this protection.

The cases which have been brought by the Minister have arguably involved relatively uncontroversial factual issues. For example, in the case of two recent unreported decisions of the Northern Territory Magistrates Court in the Northern Territory 2 Indonesian fishermen illegally fishing in Australian waters were imprisoned for killing dolphins to use their flesh as shark bait. The decision to bring criminal proceedings in this instance would not have been a difficult one to make. The fishermen were fishing illegally in Australian waters, in which they intentionally killed protected cetaceans, namely dolphins, which have special significance to the Australian community, and they used them to catch other species illegally, species which are also protected in Australian waters.

Indeed, Australia treats illegal fishing in its waters very seriously. The Australian Fisheries Management Authority recently deployed an armed vessel to patrol the Patagonian toothfishery located in Australia's EEZ around its external territories of Heard and McDonald islands in the sub-Antarctic. This fishery is subject to extensive overfishing and illegal fishing. In January 2004 the AFMA seized an Uruguayan vessel

¹ Wilson - Great Aust Bight, Greentree - 100 hectares

and charged the entire crew for illegally fishing in the Australian EEZ off Heard and McDonald islands.²

The approach of the Commonwealth Government has taken to the management of the patagonian toothfishery in the sub-Antarctic is dramatically different to that taken by the Government to protect cetaceans from illegal whaling in Australian waters adjacent to the Australian Antarctic Territory, which is also an external territory of Australia. Here Japanese vessels are permitted to kill protected whales in the Australian Whale Sanctuary without being patrolled, arrested or even chased out upon sighting.

As a result of government inaction in relation to illegal Japanese whaling in Antarctica, a non-government organisation, in October 2004 the Humane Society International, represented by the EDO, has used its own resources to bring proceedings against a Japanese whaling company in an attempt to restrain it from continuing to breach the provisions of the EPBC Act which protect whales in Australian waters. This case is *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*.

It is possible for HSI and other conservation groups to bring proceedings to enforce the provisions of the EPBC Act as a result of the broad standing provisions in section 475 of the EPBC Act, which permits an “interested person”³ to apply to the Federal Court for an injunction to restrain a breach of the Act.

The case gives rise to a number of interesting issues relating to the interaction between international and Australian domestic law and the role of politics in law enforcement. There are several issues raised by the case including:

- Australian sovereignty in Antarctica

² See AFMA media release 12 February 2004. Available at <http://www.afma.gov.au/news/media/2004/mr120204.php>. See also *Olbers v Commonwealth (No. 4)* (2004) 136 FCR 67.

³ *Environment Protection and Biodiversity Conservation Act* s. 475(7). An “interested person” is defined as:

- an organisation whose interests have been, are, or would be affected by the conduct or proposed conduct to which the injunction relates;
- an organisation whose objects or purposes included the protection, or conservation of, or research into the environment during the 2 years immediately before the conduct; and

- The interpretation of the Antarctic Treaty System
- International regulation of whaling and Japanese so-called “scientific whaling” and
- Australia’s ability to regulate whaling in the Australian EEZ.

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd

Although Australia has a long history of whaling prior to the closure of the last whaling station in 1978, since the declaration of an international moratorium on commercial whaling under the International Whaling Convention in 1982, Australia has been one of the most vocal anti-whaling nations at the IWC.

Australia’s anti-whaling stance is reflected in its legislation. As outlined already, the EPBC Act contains a very comprehensive and powerful regime for the protection of whales and other cetaceans. However, the gap between the existence of these legislative provisions and the practice of the Australian government in enforcing its laws has been spectacularly demonstrated in this case. The case has been followed with interest by both academia and by the popular media both because of the high profile status of whales and the recent developments at the IWC. For example, in a recent public petition organised by the Daily Telegraph, the paper collected more than 300 emails from readers protesting against Japanese whaling in Australian waters. The emails were delivered to the Japanese Embassy in green Coles bags.

While Australia has been quick to enforce the laws protecting cetaceans in the EEZ surrounding Australia’s mainland the same level of protection has not been afforded to cetaceans in Australian waters adjacent to Australia’s external territories.

Hence the need for this case. The decision to bring this case was not an easy one and there were a number of complex international and domestic legal issues which we needed to explore before advising HSI to commence the proceedings. The first issue was why Australian law applies to Antarctic waters.

- the organisation engaged in a series of activities related to the protection, or conservation of, or research into the environment.

Australia's claim to sovereignty in Antarctica pursuant to a transfer of title from the United Kingdom. Australia proclaimed the Australian Antarctic Territory in 1936. Sovereignty in Antarctica is a sensitive international issue and only the UK, France, Norway and New Zealand officially recognise Australian sovereignty over the AAT.

Despite the lack of recognition, Australia has effectively established sovereignty in Antarctica under customary international law through effective occupation of the coastline surrounding its 3 permanent bases there which are Mawson, Davis and Casey. Effective occupation is a question of fact and is demonstrated by effective administrative control over territory. Recognition of sovereignty or lack of recognition by other nations is not determinative of sovereignty under international law.

As I said earlier, Australia established an EEZ under UNCLOS. UNCLOS allows nations to regulate whaling activities within the EEZ. Accordingly, the declaration of the AWS through the enactment of the EPBC Act and the prohibition of whaling within Australian waters is validly based on international law.

The question arises therefore why do so few nations recognise Australian sovereignty over the AAT? It leads one to suspect that the recognition of sovereignty is a decision based on politics more so than on law. By refusing to recognise Australian sovereignty in Antarctica, Japan and other nations can continue to use the resources in Antarctica and the waters surrounding Antarctica as though they were the High Seas and without having to defer to the sovereign rights of Australia to protect those resources.

In 1959 Australia, Japan and other nations agreed to freeze further claims to sovereignty in Antarctica under the Antarctic Treaty. Pursuant to Article 4 of the Antarctic Treaty Australian sovereignty over the AAT remained despite the freeze on claims. In 1992 the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs stated that Australia is not prevented by the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.

Since 1994 foreign nationals have been prohibited from whaling in the Australian EEZ under the *Whale Protection Act* of 1980. This Act was superceded by the EPBC Act in

July 2000. Since then, all cetaceans have been provided complete protection in the Australian Whale Sanctuary.

Despite the application of the EPBC Act to foreign nationals there was one further hurdle for HSI – that was the exemptions in s 7 of the *Antarctic Marine Living Resources Conservation Act* and s 7 of the *Antarctic Treaty (Environment Protection Act)*. These provisions protect foreign nationals from prosecution in Australian courts for actions in relation to the marine environment in the EEZ adjacent to the AAT that would otherwise be an offence where those actions are authorised by a permit issued by the foreign government under the Madrid Protocol or CCAMLR. This potentially extinguished HSI's ability to bring these proceedings. We submitted and it was accepted by the court, that because whaling is not regulated by the Madrid Protocol and whales are expressly excluded from the application of CCAMLR. Accordingly, these provisions did not affect the operation of the EPBC Act to foreign nationals in respect of whaling in the AWS off Antarctica.

Regime under the International Whaling Convention

Despite the moratorium on commercial whaling under the International Whaling Convention declared in 1982 and the creation of the Southern Ocean Sanctuary in 1994 by the International Whaling Commission, the Government of Japan continues to permit “scientific research” whaling involving the killing of whales and the sale of the whale meat in Japan under Article 8 of the International Whaling Convention.

Between 1986 and 2005 Japan has undertaken whaling under a program known as the Japanese Whaling Research Program under Special Permit in the Antarctic (**JARPA**). JARPA involves the killing of 440 Antarctic Minke whales in the Southern Ocean. The location of the whaling alternates biennially between 2 areas in Antarctic waters, both areas overlap with the AWS. Japan has killed minke whales in the AWS since 1986 in accordance with the JARPA permit and the meat is considered a delicacy in Japan.

It is arguable that the killing of whales is not necessary for scientific research and may be an abuse of right under the International Whaling Convention. It may be possible for Australia to challenge this in the International Court of Justice, but this issue cannot be

challenged in the Australian Courts as to do so would infringe the principal of international comity.⁴ There is no argument by HSI in this case regarding the validity of the JARPA permit or that Kyodo conducts its whaling otherwise than in conformity with the permit issued by the Government of Japan.

The basis of HSI's claim is that between December 2000 and March 2004 the Japanese company Kyodo Senpaku Kaisha Limited killed approximately 428 Antarctic minke whales within the AWS adjacent to the AAT. Kyodo did not hold a permit to kill whales under sections 231, 232 or 238 of the EPBC Act allowing it to kill whales in the AWS. HSI is seeking a declaration that the activities of Kyodo are in breach of sections 229-230 of the EPBC Act and an injunction under section 475 of the EPBC Act restraining Kyodo from further unlawful activities.

Because Kyodo is not a registered company in Australia and it does not have a registered company office in Australia HSI is required pursuant to the Federal Court Rules to seek leave to serve the proceedings on Kyodo in Japan. In order to grant leave to HSI to serve the proceedings outside of Australia, the Court must be satisfied that:

1. it has jurisdiction to hear the proceedings;
2. the proceeding are founded on a breach of an Act committed in the Commonwealth;
3. HSI has a *prima facie* case on findings of fact; and
4. the Court is the appropriate forum in which to bring the proceedings.

The Evidence

The evidence as to the details of the location of the whaling and the numbers of whales caught by Kyodo in Australian waters was obtained from reports co-authored by Kyodo, the Institute for Cetacean Research based in Tokyo and the Obihiro University of Agriculture and Veterinary Medicine. Those reports were presented to the IWC and are publicly available. Photographic evidence of whaling by Kyodo was collected by Greenpeace, which conducted an expedition to the Antarctic to photograph illegal whaling in Australian waters during 2001 to 2002.

⁴ 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.

HSI was able to demonstrate that approximately 428 whales were killed by Kyodo within the AWS since July 2000 and that Kyodo intends to continue to whale within the AWS.

The case was first heard by Justice Allsop of the Federal Court. Concerned by the diplomatic implications of the proceedings Justice Allsop ordered that HSI serve the proceedings on the Commonwealth Attorney General and invite the Attorney General to make submissions in relation to the proceedings.

In response to Justice Allsop's invitation, the Commonwealth Attorney-General made written submissions to the Court. In those submissions the Attorney-General conceded that HSI had established that Kyodo had breached the EPBC Act and acknowledged that the lack of recognition by Japan and other States of Australia's AAT does not preclude the application of the EPBC Act in the EEZ off the AAT. However, the Attorney-General refused to lend support to the leave application on the basis that the it considered it more appropriate to pursue diplomatic solutions in relation to activities by foreign vessels in the EEZ off the AAT.

Annexed to the Attorney-General's submissions is an extract from instructions to Australian Antarctic Division Voyage Leaders. The instructions direct voyage leaders who sight vessels involved in whaling activities within the Australia's EEZ adjacent to the AAT to advise those vessels that they are within the AWS and to ask them to leave. The instructions specifically state that in the event that Japanese whaling vessels are encountered in those waters, no enforcement action may be taken against them in the event that they refuse to leave. This is an explicit instruction made by an executive body to its employees to ignore a breach of an Australian law by a foreign national. This decision of the executive is directly contrary to section 5(4) of the EPBC Act which provides that the Act applies to everyone in the Australian EEZ including persons who are not Australian citizens and vessels that are not Australian vessels.

In its reply to the submissions of the Attorney-General,⁵ HSI refers to the 1992 House of Representatives Standing Committee on Legal and Constitutional Affairs report to Parliament on Australian law in Antarctica⁶ which stated that:

“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.

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, as least arguably, sits ill with Australian claims to sovereignty over the Territory. ...”

HSI’s submissions also noted that it was significant that the Parliament has provided standing to a class of persons including HSI in s 475 of the EPBC Act to seek an injunction to restrain a breach or other contravention of the Act, thereby by-passing the Attorney-General’s traditional discretion to grant his fiat to support a relator action to enforce public laws.

In his final decision on HSI’s leave application Justice Allsop was swayed by the submissions of the Attorney-General and His Honour declined to grant leave to HSI to serve the proceedings on Kyodo. The basis for the decision was that the enforcement of the prohibition of whaling in the AWS established in the EPBC Act would be likely to give rise to an international disagreement between Australia and Japan. His Honour agreed with the view of the Attorney-General 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”*. Furthermore, His Honour also determined that the proceedings would be futile because the remedy of an injunction could not be enforced by HSI and furthermore, *“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*

⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 Applicant’s Reply to the Submissions of the Attorney-General and to the Court’s Questions dated 10 February 2005 available at <www.hsi.org.au>

⁶ 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* (AGPS, Canberra, 1992), pp 15-18.

statement. His Honour also considered the cultural differences between Japan and Australia in relation to how Australians view the killing of whales as opposed to how whaling is viewed by the Japanese.

The EDO lodged an appeal to the Full Federal Court on behalf of HSI on 17 June 2005. The grounds of the appeal include failure to consider the intention of the legislature that the EPBC Act be applied to foreign nationals and the consideration of irrelevant matters, including political and diplomatic issues. It is also out submission that the judge's consideration of the ability of HSI to enforce the remedy is premature at an interlocutory stage and that the finding that a declaration would be devoid of utility is wrong because a declaration does not rely on enforcement against foreign nationals and the grant of a declaration would clarify the legal rights and obligations of the parties under Australian domestic law.

The appeal is to be heard on 18 November 2005.

Although the Australian government is very vocal in support of a permanent ban on whaling, it refuses to enforce its own laws against foreign nationals in Australian waters in Antarctica and it does not support the court action by HSI. Swayed by public pressure and a concerted media campaign following the announcement of Japan to overhaul JARPA by doubling the quota of Antarctic minke whales and to begin targeting Humpbacks and Fin whales,⁷ both of which are listed threatened species under the EPBC Act,⁸ the Prime Minister Mr John Howard, was moved to write a letter to the Japanese Prime Minister Junichiro Koizumi, asking Japan to stop killing whales in the name of science.⁹ Mr Koizumi ignored the letter and from December 2005 Japan will commence the killing 850 Antarctic minke whales, as well as 50 Humpback and 50 Fin whales, most of which will be in protected Australian waters.

Conclusion

⁷ Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources released at the 57th Meeting of the IWC during 20-24 June 2005.

⁸ See See Department of Environment and Heritage website at <<http://www.deh.gov.au/biodiversity/threatened/species/index.html>>

⁹ On 24 May 2005.

Australia has adopted one of the most progressive approaches to integrated marine resource conservation and management through the EPBC Act. However, whilst there are sound legal protections for marine species, the application of relevant laws has been limited. Clearly there are difficulties in policing activities in Australia's vast marine territory. However, where evidence of breaches is readily available, such as in the example of Japanese whaling in Antarctic waters, the failure of the Federal government to take legal action is disappointing. The intervention by the Attorney-General in the *HSI v Kyodo* case was demonstrative of the political complexity of enforcing marine laws in external territories and the EEZ and foreshadows the possibility that marine species in those areas may be afforded lesser protection than species in Australian coastal waters. This however, is not consistent with the provisions and intention of the EPBC Act.

Marine management is one of the few areas where international and domestic laws intersect. The Australian government takes the view, as demonstrated by the above cases, that it is in the best interest of marine biodiversity conservation as a whole, for disputes relating to species management to be solved diplomatically through fora such as the IWC. However, in circumstances where strong laws with express application to foreign nationals have been promulgated, the failure to rely upon those laws sends a message that Australia lacks the political will to address some of the most pressing threats to that environment.

THANKYOU.