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## Enforcing Australian law in Antarctica: the HSI litigation

Ruth A. Davis

*University of Wollongong*, [rdavis@uow.edu.au](mailto:rdavis@uow.edu.au)

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## Enforcing Australian law in Antarctica: the HSI litigation

### Abstract

Law enforcement in Antarctica is complicated by uncertainties regarding sovereignty and jurisdiction. In line with the usual practice of the Antarctic Treaty parties, Australia has generally refrained from enforcing its legislation for the Australian Antarctic Territory against foreigners. Recent litigation that attempts to enforce Australian whale protection laws against Japanese whalers in Antarctica represents a challenge to this traditional approach. The HSI Litigation highlights the ongoing difficulties faced by Australia in trying to effectively manage the Australian Antarctic Territory within the constraints of the Antarctic Treaty System. Using fisheries regulation and continental shelf delimitation as comparative examples, this commentary highlights the challenges of law enforcement facing the Antarctic legal regime, and the implications for Australian Antarctic law and policy. The traditionally restrained approach to law enforcement in Antarctica has allowed the Antarctic Treaty System to flourish and develop into a dynamic, and arguably quite effective, regime for the environmental protection of Antarctica. This is despite the fundamental disagreements between states over questions of territorial sovereignty. It seems likely that continuation of the HSI Litigation will provoke an international response from Japan, and potentially have further repercussions for the Antarctic Treaty System.

### Keywords

Enforcing, Australian, law, Antarctica, HSI, litigation

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## COMMENTARIES

### ENFORCING AUSTRALIAN LAW IN ANTARCTICA: THE HSI LITIGATION

RUTH DAVIS\*

*[Law enforcement in Antarctica is complicated by uncertainties regarding sovereignty and jurisdiction. In line with the usual practice of the Antarctic Treaty parties, Australia has generally refrained from enforcing its legislation for the Australian Antarctic Territory against foreigners. Recent litigation that attempts to enforce Australian whale protection laws against Japanese whalers in Antarctica represents a challenge to this traditional approach. The HSI Litigation highlights the ongoing difficulties faced by Australia in trying to effectively manage the Australian Antarctic Territory within the constraints of the Antarctic Treaty System. Using fisheries regulation and continental shelf delimitation as comparative examples, this commentary highlights the challenges of law enforcement facing the Antarctic legal regime, and the implications for Australian Antarctic law and policy. The traditionally restrained approach to law enforcement in Antarctica has allowed the Antarctic Treaty System to flourish and develop into a dynamic, and arguably quite effective, regime for the environmental protection of Antarctica. This is despite the fundamental disagreements between states over questions of territorial sovereignty. It seems likely that continuation of the HSI Litigation will provoke an international response from Japan, and potentially have further repercussions for the Antarctic Treaty System.]*

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\* BEc, LLB, LLM (Sydney); Lecturer, Faculty of Law, University of Wollongong; Member of the Australian National Centre for Ocean Resources and Security ('ANCORS'). The author would like to thank Professor Martin Tsamenyi, Quentin Hanich and Professor Luke McNamara for their helpful comments on earlier drafts of this paper.

## I INTRODUCTION

Law enforcement in Antarctica has always been problematic because of uncertainty regarding sovereignty and jurisdiction in the region. Litigation currently before the Federal Court of Australia has reignited the debate about the extent to which *Antarctic Treaty*<sup>1</sup> parties can enforce their national laws against foreigners in the Antarctic.<sup>2</sup>

The court action has been brought by an environmental group, Humane Society International ('HSI'), against a Japanese company, Kyodo Senpaku Kaisha Ltd ('Kyodo'). It relates to whaling operations that are alleged to have been conducted by Kyodo, contrary to Australian law, in the exclusive economic zone ('EEZ') offshore the Australian Antarctic Territory.

On its face, the litigation appears to involve a fairly straightforward application of Australian laws for the protection of whales. Behind that facade, however, lies a complex web of international law obligations: the law of the sea, laws for the regulation of whaling and laws governing the Antarctic Treaty System.<sup>3</sup> When viewed in this context, the litigation highlights the ongoing difficulties that Australia faces in relation to its assertion of sovereignty over the Australian Antarctic Territory. By raising questions about the ability of Australia to enforce its whale protection laws in Antarctica, the litigation also highlights the difficulties that Australia faces in trying to effectively manage the Australian Antarctic Territory within the constraints of the Antarctic Treaty System.

After briefly noting the international law context, this commentary will outline the HSI Litigation, in particular highlighting the political aspects of the litigation. It will then place the litigation in the context of Australian activities in Antarctica and the *Antarctic Treaty*. The commentary will then examine two issues that have been highlighted by this litigation: the assertion of jurisdiction over maritime areas and the enforcement of laws in Antarctica, in particular, laws dealing with fisheries and whaling. These issues will be assessed in reference to current Australian practice.

This commentary seeks to place the HSI Litigation in its Australian and Antarctic context, and discuss issues relating to jurisdiction and law enforcement. Using fisheries regulation and continental shelf delimitation as comparative examples, it seeks to highlight the challenges posed by law enforcement for the Antarctic legal regime, and the implications for Australian Antarctic law and policy.

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<sup>1</sup> Opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

<sup>2</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 ('*HSI Case*'), reversing *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005).

<sup>3</sup> The Antarctic Treaty System includes: the *Antarctic Treaty*, above n 1; *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175 (entered into force 11 March 1978); *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982) ('*CCAMLR*'); and various recommendations and measures that have been adopted under the main instruments. The most recent addition to the Antarctic Treaty System is the *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998) ('*Madrid Protocol*').

## II INTERNATIONAL LAW CONTEXT

The HSI Litigation demonstrates how several international law regimes, which are not necessarily consistent, are relevant to an assessment of whaling activities in Antarctic waters. The first clearly applicable regime is the Antarctic Treaty System, the group of international agreements that have developed around the *Antarctic Treaty*. However, despite the clear focus of the Antarctic Treaty System upon environmental issues in general, and marine issues in particular, the issue of whaling is one that the *Antarctic Treaty* parties have tried to avoid. The *Convention on the Conservation of Antarctic Marine Living Resources* ('CCAMLR'), for example, has not been used for the management of cetaceans and specifically states that '[n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the *International Convention for the Regulation of Whaling*'.<sup>4</sup> Similarly, Annex II to the *Madrid Protocol*, which prohibits the taking or harmful interference with native flora and fauna, also defers to the International Whaling Commission ('IWC') on whaling matters.<sup>5</sup> Although the *Antarctic Treaty* is therefore not directly relevant to the issue of whaling, it is important for the general constraints that it places upon the assertion of sovereignty and the exercise of jurisdiction by parties in the region.<sup>6</sup>

Whaling is regulated at international law through the IWC, established under the *International Convention for the Regulation of Whaling* ('ICRW') in 1946.<sup>7</sup> Australia and Japan are both parties to this Convention. The IWC has maintained a moratorium on commercial whaling since the mid-1980s,<sup>8</sup> and Antarctic waters have been protected as a part of the Southern Ocean Sanctuary since 1994.<sup>9</sup> Japan has, however, continued to engage in limited whaling pursuant to the exemption for scientific research under art VIII of the *ICRW*. At the time of the alleged offences, the respondent, Kyodo, was whaling pursuant to a special research permit issued by the Japanese Government.

The *ICRW* does not provide a complete answer, however, as the *United Nations Convention on the Law of the Sea* ('UNCLOS'),<sup>10</sup> to which Australia and Japan are both signatories,<sup>11</sup> is also relevant. Article 65 of *UNCLOS* entitles a coastal state such as Australia to 'prohibit, limit or regulate the exploitation of marine mammals' within its EEZ. It is in pursuit of this right that Australia has

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<sup>4</sup> *CCAMLR*, above n 3, art VI.

<sup>5</sup> *Madrid Protocol*, above n 3, Annex II, art 7. Note, though, that the remaining provisions of the *Madrid Protocol* (including Annex I, relating to environmental impact assessments) are not so limited.

<sup>6</sup> See below Part V.

<sup>7</sup> Opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

<sup>8</sup> *Ibid* sch III(6).

<sup>9</sup> *Ibid* sch III(7)(b). This was established at the 46<sup>th</sup> meeting of the IWC in 1994. Japan formally objected to the sanctuary and is not bound by it.

<sup>10</sup> Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>11</sup> UN Division for Ocean Affairs and the Law of the Sea, *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (2007) <[http://www.un.org/Depts/los/reference\\_files/status2006.pdf](http://www.un.org/Depts/los/reference_files/status2006.pdf)> at 18 May 2007.

enacted its whale protection provisions and provided for their application in its declared EEZ off the coast of the Australian Antarctic Territory.

### III THE HSI CASE

HSI's statement of claim alleged that, between February 2001 and March 2004, the respondent, Kyodo, had unlawfully killed, taken or interfered with around 428 Antarctic minke whales in the Australian Whale Sanctuary located off the coast of the Australian Antarctic Territory.<sup>12</sup> HSI also gave particulars of a permit issued to Kyodo by the Japanese Government for an ongoing whale research program.<sup>13</sup> This permit indicated that the killing of whales would continue.<sup>14</sup>

In its application, HSI sought the enforcement of sections of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') that prohibit both the taking or killing of whales within the Australian Whale Sanctuary and the subsequent possession or treatment of such whales.<sup>15</sup> The *EPBC Act* permits private individuals and organisations to obtain an injunction restraining conduct in contravention of the Act, provided that they are an 'interested' party.<sup>16</sup> Because the respondent is located in Japan, however, the Federal Court Rules 1979 (Cth) required HSI to seek the Court's leave before it could serve its originating process.<sup>17</sup>

At first instance, the Court refused to grant leave to serve outside the jurisdiction on the grounds that the action was likely to be futile and could be contrary to Australia's national interests.<sup>18</sup> Justice Allsop took the unusual step of inviting the Commonwealth Attorney-General to make submissions 'on the proper construction and interpretation of the legislation and treaties involved, in particular in the light of what might be seen to be Australia's national interest, including inter-governmental relations between Australia and Japan'.<sup>19</sup>

The Attorney-General's submissions indicated that, in the view of the Australian Government, any attempt to enforce Australian law against Japanese nationals in the Australian Whale Sanctuary would be seen by Japan as a breach of international law and give rise to an international dispute.<sup>20</sup> Furthermore, because of the sensitive nature of Antarctic sovereignty claims, the enforcement of domestic laws against foreigners would probably also lead to an adverse

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<sup>12</sup> *Humane Society International v Kyodo Senpaku Kaisha Ltd*, 'Statement of Claim' (Statement of Claim of Humane Society International) (19 October 2004) [6(b)]-[6(e)], available from <<http://www.hsi.org.au>> at 18 May 2007.

<sup>13</sup> *Ibid* [7].

<sup>14</sup> *Ibid* [11].

<sup>15</sup> See below Part VIII.

<sup>16</sup> *EPBC Act 1999* (Cth) s 475.

<sup>17</sup> Federal Court Rules 1979 (Cth) O 8, r 3.

<sup>18</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005).

<sup>19</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2004) 292 ALR 551, 552.

<sup>20</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2004) Federal Court of Australia, Doc NSD 1519 of 2004, *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae*. See also Allsop J's summary of the Attorney-General's submissions: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [4]-[16].

reaction by other parties to the *Antarctic Treaty*.<sup>21</sup> In light of these concerns, it has been the Australian Government's practice to only enforce Australian law in Antarctica against foreigners who have submitted to Australian jurisdiction.<sup>22</sup> Therefore, although the *EPBC Act* applies as a matter of Australian law, the 'pursuit of diplomatic solutions' has been seen as a 'more appropriate' response to the issues posed by Japanese whaling offshore the Australian Antarctic Territory.<sup>23</sup>

Justice Allsop was very concerned that, as well as being futile, the litigation could place the Federal Court 'at the centre of an international dispute ... between Australia and a friendly foreign power'.<sup>24</sup> He concluded that, 'in all the circumstances, I should not exercise a discretion to place the Court in such a position',<sup>25</sup> and refused the application.

Justice Allsop's decision was reversed on appeal to the Full Federal Court on 14 July 2006.<sup>26</sup> Interestingly, none of the appeal judges gave any weight to the political considerations that had beset the case at first instance.<sup>27</sup> Justice Moore, who would have dismissed the appeal on other grounds, agreed with the majority on this point:

Courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.<sup>28</sup>

In general terms, it is difficult to argue with Moore J's conclusion. To decide otherwise would be to usurp the proper role of the judiciary in a democratic society. Outside the narrow confines of the judicial function, however, the broader context of the dispute should not be ignored. The HSI Litigation is not only the first real test for Australia's anti-whaling provisions, it is also the first real challenge to Australia's Antarctic legal regime. It results from an unusual set of circumstances that have combined to make litigation possible where normally it would be avoided.

#### IV A BRIEF HISTORY OF AUSTRALIAN INVOLVEMENT IN ANTARCTICA

The HSI Litigation is set against a background of a longstanding interest by Australia in Antarctica and the Southern Ocean. In the early days of Antarctic

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<sup>21</sup> *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae*, above n 20, [16].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [16].

<sup>24</sup> *Ibid* [35].

<sup>25</sup> *Ibid* [36].

<sup>26</sup> *HSI Case* (2006) 154 FCR 425.

<sup>27</sup> Instead, the focus of the Full Court decision was on the existence or otherwise of the discretion that Allsop J had purported to exercise, the irrelevance of political considerations to the court's task in determining whether or not to grant leave, and the possible futility of the action should HSI prove successful.

<sup>28</sup> *HSI Case* (2006) 154 FCR 425, 435.

exploration, Australia was important both as a starting point for voyages of discovery and as a centre for the whaling industry.<sup>29</sup>

From the early 1800s, whaling and Southern Ocean exploration were closely linked. In the summer of 1840–41, for example, a British expedition led by Captain James Clark Ross managed to break through the Antarctic ice pack and, amongst other things, discovered Victoria Land (on the eastern border of what is now the Australian Antarctic Territory). In his own account of the expedition, Ross reported sighting large numbers of black, sperm and humpback whales in high latitudes,<sup>30</sup> and commented that '[a] fresh source of national and individual wealth is thus opened to commercial enterprise, and if pursued with boldness and perseverance, it cannot fail to be abundantly productive'.<sup>31</sup>

Later, licenses to conduct whaling operations were used by the British and Australian Governments to support their claims to sovereignty. Licensees were required to 'hoist and maintain the British Flag over any and every establishment that they may erect or maintain in the lands or territorial waters' of Antarctica.<sup>32</sup>

Substantial exploration of land now claimed by Australia was undertaken by Captain Robert Falcon Scott during the period 1901–04. Exploration of the area was continued by Sir Douglas Mawson's Australian Antarctic Expedition of 1911–14 and the 1929–31 British, Australian and New Zealand Antarctic Research Expeditions, also led by Mawson.<sup>33</sup>

Discoveries made during these latter two expeditions formed the basis of a British claim to sovereignty over a portion of the Antarctic continent.<sup>34</sup> The claimed area was then formally transferred to Australia and became known as the Australian Antarctic Territory.<sup>35</sup> The claim was to a sector of the continent covering 'all the islands and territories other than Adélie Land which are situated south of the 60<sup>th</sup> degree of South Latitude and lying between the 160<sup>th</sup> degree of East Longitude and the 45<sup>th</sup> degree of East Longitude'.<sup>36</sup> The territorial claim

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<sup>29</sup> Both are discussed extensively in Robert A Swan, *Australia in the Antarctic: Interest, Activity and Endeavour* (1961). See especially chs 8, 11–15.

<sup>30</sup> *Ibid* 30, citing James Clark Ross, *A Voyage of Discovery and Research in the Southern and Antarctic Regions During the Years 1839–43* (1847) vol 1, 169, 192

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

<sup>32</sup> *Whaling Licence to the Kerguelen Sealing and Whaling Company, Limited in Respect of the Area From Enderby to Queen Mary Lands*, 3 October 1928, as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 109–13.

<sup>33</sup> See *Proclamation Read on Proclamation Island*, 13 January 1930 (Douglas Mawson), as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 120–1; *Proclamation Made from the Air over the Antarctic Continent near Proclamation Island*, 25 January 1930 (Douglas Mawson), as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 120.

<sup>34</sup> *Order in Council Placing Certain Territory in the Antarctic Seas under the Authority of the Commonwealth of Australia* (7 February 1933), as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 142–3 ('*Order in Council*').

<sup>35</sup> Formal acceptance of the Australian Antarctic Territory by Australia was required under s 122 of the *Australian Constitution*. This acceptance was given under s 2 of the *Australian Antarctic Territory Acceptance Act 1933* (Cth).

<sup>36</sup> *Order in Council*, above n 34, 143.



was not widely recognised, a situation that continues today and casts a shadow over Australian legislative and enforcement activity for the territory.<sup>37</sup>

Contemporaneous policy statements show that whaling has always been a major concern for Australian Antarctic policy. On the establishment of the Australian Antarctic Territory, the Minister for External Affairs spoke of the need for authority to regulate the whaling industry as being an important factor behind Australia's Antarctic claim.<sup>38</sup> In addition, his speech emphasised the strategic value of the region and its scientific importance, in particular for meteorological research and long-range Australian weather forecasting.<sup>39</sup>

To a large degree, the scientific and strategic goals remain central today, although current policy recognises the need to act through the Antarctic Treaty System.<sup>40</sup> Complying with *Antarctic Treaty* obligations, cooperating with *Antarctic Treaty* partners and maintaining a position of influence within the Antarctic Treaty System are of great importance.<sup>41</sup> Apart from incorporating the international framework of the Antarctic Treaty System, the major shift in Australia's Antarctic policy over this time has been the evolution from a resource management perspective to one that focuses on environmental protection and resource conservation.<sup>42</sup>

#### V MANAGEMENT OF ANTARCTICA UNDER THE ANTARCTIC TREATY SYSTEM

To fully appreciate the significance of the HSI Litigation, it is necessary to consider the operation of the Antarctic Treaty System, in particular the manner in which issues of territorial sovereignty are dealt with under that system. Sovereignty has been a continuous source of tension in relation to Antarctic activities and resources. Prior to the conclusion of the *Antarctic Treaty* in 1959, seven states had claimed a portion of the Antarctic continent: Australia, New Zealand, Argentina, Chile, France, Norway and the United Kingdom.<sup>43</sup> Three of the claims overlap (UK, Argentina and Chile), whilst a large proportion of the continent remains unclaimed. None of the asserted claims are widely recognised.<sup>44</sup>

There are significant problems in applying the traditional rules of international law to the acquisition of Antarctic territory. According to established principles of international law, mere discovery of territory leads only to an inchoate title, and must be followed by activities that demonstrate an intention to act as sovereign in order for title to be perfected.<sup>45</sup> The problem with

<sup>37</sup> Only the UK, New Zealand, France and Norway recognise the Australian claim: Standing Committee on Legal and Constitutional Affairs, House of Representatives, Parliament of Australia, *Australian Law in Antarctica* (1992) 9 ('Standing Committee Report').

<sup>38</sup> Swan, above n 29, 208–9.

<sup>39</sup> Ibid, citing Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1933, 1953 (John Latham, Attorney-General).

<sup>40</sup> Australian Government Antarctic Division, *Statement of Purposes and Values* (2004) <<http://www.aad.gov.au/default.asp?casid=6267>> at 18 May 2007.

<sup>41</sup> Ibid.

<sup>42</sup> See Marcus Haward et al, 'Australia's Antarctic Agenda' (2006) 60 *Australian Journal of International Affairs* 439.

<sup>43</sup> *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae*, above n 20, [6].

<sup>44</sup> Standing Committee Report, above n 37, 9.

<sup>45</sup> *Island of Palmas Case (the Netherlands v US)* (1928) 2 RIAA 829, 831.

Antarctic territorial claims arises from the inhospitable nature of the polar regions and the fact that they cannot be 'settled' in any conventional sense.

Instead, claimant states have relied heavily on the formal provision of legal and administrative measures, the establishment of scientific bases and the implementation of ongoing Antarctic research programs to demonstrate their intention to assert sovereignty.<sup>46</sup> Whether or not these actions would be sufficient to establish title has not been formally tested, and this approach is one that, in Australia at least, has come up against considerable criticism.<sup>47</sup>

Since 1959, the issue of territorial sovereignty has officially been put aside in favour of regional cooperation under the *Antarctic Treaty*. The *Antarctic Treaty* is a relatively short document that applies to the area south of latitude 60 degrees south.<sup>48</sup> It requires that Antarctica be used only for peaceful purposes, provides for freedom of scientific investigation and encourages international cooperation and exchange of information and personnel.<sup>49</sup> In addition to the agreement relating to sovereignty,<sup>50</sup> the parties agree that jurisdiction over certain persons in Antarctica remains with their national government, wherever they may be in Antarctica.<sup>51</sup>

The mechanism for avoiding sovereignty disputes under art IV of the *Antarctic Treaty* is superficially quite simple. The *Antarctic Treaty* itself does not affect existing claims or potential claims, nor the (non)recognition of such claims by any contracting party.<sup>52</sup> The parties agree that acts or activities taking place while the *Antarctic Treaty* is in force cannot 'constitute a basis for asserting, supporting or denying a claim to territorial sovereignty ... or create any rights of sovereignty in Antarctica'.<sup>53</sup> In addition, there is a ban on making any new claim or enlarging an existing claim whilst the *Antarctic Treaty* is operative.<sup>54</sup>

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<sup>46</sup> For example, Australia bases its claim to sovereignty on

acts of discovery and formal claims of title by British and Australian explorers, the formal transfer of the territory from Britain to Australia and Australian acceptance by legislation, and subsequent acts showing an intention by Australia to exercise sovereignty over the Territory. This intention is demonstrated, inter alia, by the application by Australia of legislation to the Territory, the negotiation and conclusion of treaties affecting the Territory and by the engagement in a degree of administrative activity there.

Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 1979, 3502 (Andrew Peacock, Minister for Foreign Affairs).

<sup>47</sup> Standing Committee Report, above n 37, chs 2, 3.

<sup>48</sup> *Antarctic Treaty*, above n 1, art VI.

<sup>49</sup> Ibid arts I, II, III.

<sup>50</sup> Ibid art IV.

<sup>51</sup> Ibid art VIII.

<sup>52</sup> Ibid art IV(1).

<sup>53</sup> Ibid art IV(2).

<sup>54</sup> Ibid.

There are now 45 state parties to the *Antarctic Treaty*: the 12 original parties who were invited to the 1959 Washington Conference at which the *Antarctic Treaty* was negotiated, and the 33 states that have since acceded to the *Treaty*.<sup>55</sup> A key feature of the management regime that has developed out of the *Antarctic Treaty* is that it is 'based on consensus and collaboration'.<sup>56</sup> Article IX establishes a system of regular meetings of the *Antarctic Treaty* parties, known as the Antarctic Treaty Consultative Meetings ('ATCMs'), at which they may devise 'measures in furtherance of the principles and objectives of the Treaty'.<sup>57</sup> The 12 original parties, plus 16 of the acceding states, have the status of Consultative Party and are entitled to vote on such measures.<sup>58</sup> The remaining states can attend ATCMs but cannot participate in formal decision-making.<sup>59</sup>

## VI SOVEREIGNTY AND JURISDICTION

Despite the provisions of the *Antarctic Treaty*, sovereignty remains a source of underlying tension within the Antarctic Treaty System. Although the *Antarctic Treaty* clearly bans the assertion of new claims,<sup>60</sup> it does not clearly set limits for acceptable behaviour by states that made claims prior to the signing of the *Antarctic Treaty*.

A significant issue faced by claimant states, including Australia, is the fact that the *Antarctic Treaty* is not a universal agreement: currently only 45 countries are parties.<sup>61</sup> The prospect of defending a claim against a non-party requires that a claimant state demonstrate its intentions regarding sovereignty through the provision of legal and administrative measures; merely relying upon the protection of art IV of the *Antarctic Treaty* is insufficient. However, this requires a delicate balancing act, as implementing such measures too aggressively could be seen as a breach of the *Antarctic Treaty*. These apparently conflicting goals create a tension that is clearly illustrated by the HSI Litigation.

The tension is evident in two particular issues that are highlighted by the circumstances of the litigation. First is the uncertain status of maritime zones around the Antarctic continent. Second is the general question of enforcement of domestic laws by states in Antarctica.

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<sup>55</sup> Antarctic Treaty Secretariat, *ATCM Contacts* (2007) <<http://www.ats.aq/uploaded/listofcontacts.pdf>> at 18 May 2007.

<sup>56</sup> Haward et al, above n 42, 446.

<sup>57</sup> *Antarctic Treaty*, above n 1, art IX.

<sup>58</sup> Ibid art IX(4).

<sup>59</sup> The Treaty permits acceding states to participate in ATCMs 'during such time as that [acceding state] demonstrates its interest in Antarctica by conducting substantial scientific research activity there': ibid art IX(2).

<sup>60</sup> Ibid art IV(2).

<sup>61</sup> Antarctic Treaty Secretariat, above n 55.

A *Maritime Zones in Antarctica*

Maritime claims to the waters around Antarctica present even greater difficulties than territorial claims.<sup>62</sup> International law relating to maritime zones has evolved considerably since the *Antarctic Treaty* was signed, and is now embodied in *UNCLOS*. In relation to Antarctica, there is a threshold question about the ability of any state to regard itself as a 'coastal state', thus giving it the right to assert a maritime zone.<sup>63</sup> Assuming that this hurdle can be passed, there is also the problem that maritime claims, or extensions of claims, run the risk of offending art IV(2) of the *Antarctic Treaty*.<sup>64</sup>

Australian practice with regard to Antarctic maritime zones reflects the conflicting demands of sovereignty and Treaty membership. Australia has been active in asserting Antarctic maritime zones, but in practice has sought only to enforce them against its own nationals. Australia claims a territorial sea adjacent to the Australian Antarctic Territory,<sup>65</sup> which it extended from three to twelve nautical miles in 1990, apparently without protest.<sup>66</sup> In line with *UNCLOS*, it also claims part of the Antarctic continental shelf and an EEZ.<sup>67</sup>

The continental shelf claim provides a useful example of how Japan and other Treaty partners might be expected to react to Australia's enforcement of whale protection laws in Antarctica. Australia's original continental shelf claim predates the *Antarctic Treaty*.<sup>68</sup> In 2004, however, pursuant to its rights under art 76 of *UNCLOS*, Australia lodged an extended continental shelf claim with the Commission on the Limits of the Continental Shelf.<sup>69</sup> As a part of its claim, Australia included data pertaining to the continental shelf offshore Antarctica. However, a diplomatic note accompanying the submission requested that the Commission not examine that portion of the data. This note appears to be an

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<sup>62</sup> The issue is well documented: see, eg, Donald R Rothwell, 'A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean' (1994) 15 *Australian Yearbook of International Law* 155; Stuart Kaye and Donald R Rothwell 'Australia's Antarctic Maritime Claims and Boundaries' (1995) 26 *Ocean Development and International Law* 195; Christopher C Joyner, *Antarctica and the Law of the Sea* (1992) ch 3; Sir Arthur Watts, *International Law and the Antarctic Treaty System* (1992) chs 5–6; Phillipe Gautier, 'The Maritime Area of the Antarctic and the New Law of the Sea' in Joe Verhoeven, Philippe Sands and Maxwell Bruce (eds), *The Antarctic Environment and International Law* (1992) 121.

<sup>63</sup> *UNCLOS*, above n 10, art 55.

<sup>64</sup> Which, it may be recalled, bans the assertion of new territorial claims or the extension of existing claims.

<sup>65</sup> *Seas and Submerged Lands Act 1973* (Cth) s 6.

<sup>66</sup> Brian R Opeskin and Donald R Rothwell, 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395, 402.

<sup>67</sup> *Seas and Submerged Lands Act 1973* (Cth) ss 10A, 11.

<sup>68</sup> *Proclamation Claiming Sovereign Rights over the Continental Shelf of Australia and its Territories*, 10 September 1953, as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 172–3.

<sup>69</sup> Commonwealth of Australia, *United Nations Convention on the Law of the Sea: Submission to the Commission on the Limits of the Continental Shelf on the Outer Limits of Australia's Continental Shelf Extending Beyond 200 Nautical Miles from the Territorial Sea Baseline — Executive Summary*, UN Doc AUS-DOC-ES (15 November 2004) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_web\\_delivery.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_web_delivery.pdf)> at 18 May 2007.

attempt by Australia to satisfy its Treaty partners, whilst at the same time preserving its territorial claim:

Australia recalls the principles and objectives shared by the *Antarctic Treaty* and *UNCLOS*, and the importance of the Antarctic system and *UNCLOS* working in harmony and thereby ensuring the continuing peaceful cooperation, security and stability in the Antarctic area ... [Having regard to the] special legal and political status of Antarctica under the provisions of the *Antarctic Treaty* ... Australia requests the Commission in accordance with its rules not to take any action for the time being with regard to the information in this submission that relates to continental shelf appurtenant to Antarctica.<sup>70</sup>

Australia's submission provoked responses by eight nations, six on the basis of its Antarctic implications. The US response, contained in a diplomatic note dated 3 December 2004, is representative of the responses received. It referred to 'the importance of the Antarctic system and [*UNCLOS*] working in harmony and thereby ensuring the continuing peaceful cooperation, security and stability in the Antarctic area'.<sup>71</sup> The US also affirmed its non-recognition of Antarctic territorial claims, and acknowledged 'with appreciation Australia's request' that the Commission not examine the Antarctic component.<sup>72</sup>

Japan's response was framed in stronger terms. After stating that it did not recognise any of the territorial claims, nor any of the claims over the waters or seabed adjacent to the Antarctic continent, it went on to stress 'that the balance of rights and obligations in the *Antarctic Treaty* should not be affected in any way in handling [Australia's submission]'.<sup>73</sup> Further, it directly requested 'the Commission not to take any action on the portion of Australia's submission relating to [Antarctica]'.<sup>74</sup>

The international reaction to Australia's extended continental shelf claim demonstrates the continued sensitivity of Antarctic territorial claims. It provides some evidence of how the international community might be expected to react should the HSI Litigation reach the final stage of enforcement.

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<sup>70</sup> *Diplomatic Note from the Permanent Mission of Australia to the UN, to the UN Secretary General, regarding Australia's Submission to the Commission on the Limits of the Continental Shelf*, Note No 89/2004 (November 2004) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_attachment.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf)> at 18 May 2007. A similar diplomatic approach can be seen with respect to the EEZ, Australia having declared the zone but not enforcing its rights, for example, over fishing there: Standing Committee Report, above n 37, 18.

<sup>71</sup> *Diplomatic Note from the US Mission to the UN, to the UN Secretary General, regarding Australia's Submission to the Commission on the Limits of the Continental Shelf* (3 December 2004) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/clcs\\_03\\_2004\\_los\\_usatext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_usatext.pdf)> at 18 May 2007 ('*Diplomatic Note from the US Mission to the UN*'). Similar responses were received from the Russian Federation (9 December 2004), Netherlands (31 March 2005), Germany (5 April 2005) and India (5 July 2005) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_austr.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm)> at 18 May 2007.

<sup>72</sup> *Diplomatic Note from the US Mission to the UN*, above n 71.

<sup>73</sup> *Diplomatic Note from the Permanent Mission of Japan to the UN, to the UN Secretary General, regarding Australia's Submission to the Commission on the Limits of the Continental Shelf* (19 January 2005) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/clcs\\_03\\_2004\\_los\\_jap.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_jap.pdf)> at 18 May 2007.

<sup>74</sup> *Ibid.*

## B Enforcement Jurisdiction

The HSI Litigation also raises the issue of jurisdiction over individuals in Antarctica. The question is dealt with in the *Antarctic Treaty*, but only to a very limited extent. Individuals in Antarctica who are designated as observers under art VII(1) of the *Antarctic Treaty*, or scientific personnel who are on exchange with another Treaty party pursuant to art III(1)(b), are subject only to the jurisdiction of their own state.<sup>75</sup> This restriction is fairly limited in scope, and is 'without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica'.<sup>76</sup> Therefore, while jurisdiction based upon nationality is prescribed for a limited class of individuals, the *Antarctic Treaty* is silent on the question of claimant states asserting jurisdiction upon the basis of territoriality.

Watts comments that 'any assertion of jurisdiction based on the possession of territorial sovereignty over the area where something happens may be fraught with complications'.<sup>77</sup> He states that:

Fortunately, the jurisdictional uncertainties in Antarctica have not in practice led to major international confrontations ... [because, inter alia] the States concerned have appreciated the value to their own interests of not pushing to their logical conclusion the legal rights to which they believe themselves entitled.<sup>78</sup>

The approach to jurisdiction conventionally taken by the Australian Government has followed this circumspect approach. If successful, the HSI Litigation would involve pushing Australia's legal rights beyond that usual level of restraint.

There are two levels at which the issue of jurisdiction operates. First is the assertion of legislative jurisdiction over Antarctic territory through the passing of laws which apply to all persons within such territory. In practice, the passing of such legislation is not uncommon amongst Antarctic claimant states, and has not of itself caused any great difficulty amongst *Antarctic Treaty* parties.<sup>79</sup> The second level at which jurisdiction becomes relevant is at the enforcement level. If a claimant state were to attempt to enforce its laws against foreign nationals, this would be expected to generate protest.

At this point it is useful to consider the manner in which Australia has legislated for Antarctica, and the extent of jurisdiction claimed. The *Australian Antarctic Territory Act 1954* (Cth) provides a general legal regime for the Australian Antarctic Territory. As well as importing most of the laws of the Australian Capital Territory, s 8(1) of the *Australian Antarctic Territory Act 1954* (Cth) provides for the Commonwealth to make laws that expressly apply in the Australian Antarctic Territory. Laws made specifically for the Australian Antarctic Territory include the *Antarctic Treaty Act 1960* (Cth) ('*Antarctic Treaty Act*'), the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) ('*Antarctic Treaty (EP) Act*'), the *Antarctic Marine Living Resources Conservation Act 1981* (Cth) ('*AMLRC Act*'), and regulations made under the latter two Acts. Other Commonwealth laws that apply generally in Australia can

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<sup>75</sup> *Antarctic Treaty*, above n 1, art VIII(1).

<sup>76</sup> *Ibid.*

<sup>77</sup> Watts, above n 62, 166.

<sup>78</sup> *Ibid* 168–9.

<sup>79</sup> *Ibid* 166.

be expressed to extend to the Australian Antarctic Territory, as is the case with the *EPBC Act*.

The general restrictions upon jurisdiction in the *Antarctic Treaty* are given effect by the *Antarctic Treaty Act*. Designated observers and scientific personnel on exchange who are not Australian citizens are not subject to Australian laws in the Australian Antarctic Territory. Conversely, Australian observers and scientists are subject to Australian law (and only Australian law) wherever they may be in Antarctica.<sup>80</sup> Beyond these minimum requirements, the application of different Australian laws to persons in the Australian Antarctic Territory is varied.<sup>81</sup> The *Antarctic Treaty (EP) Act* takes a broad view of jurisdiction and applies to all persons, including foreigners — subject only to the limitations in s 4(1) of the *Antarctic Treaty Act*. Conversely, fisheries laws take a much more restricted approach to jurisdiction in the Australian Antarctic Territory, applying only to Australian nationals.

Regardless of how the laws are drafted, it has been the Australian Government's practice not to enforce Australian laws in Antarctica against non-nationals.<sup>82</sup> In the HSI Litigation, the Attorney-General stated that

the Australian Government has not enforced its laws in Antarctica against the nationals of other States which are Parties to the *Antarctic Treaty*, except when such persons have voluntarily subjected themselves to Australian law ... as each Party has responsibility for the activities of its own nationals under the *Antarctic Treaty*.<sup>83</sup>

Whilst this would appear to overstate the level of protection offered under art VIII of the *Antarctic Treaty*, it indicates the conservative approach to enforcement traditionally taken by the Australian Government.

Examination of the *EPBC Act* in light of other Australian laws for Antarctica demonstrates that the *EPBC Act*, whilst not unusual in the extent of jurisdiction that it asserts, is quite exceptional in the manner in which the legislation can be enforced. The examples of fisheries and whale protection laws will now be examined to provide a benchmark against which the current regime for whale protection in the Australian Whale Sanctuary may be assessed.

## VII REGULATION OF FISHERIES

Antarctic fisheries are regulated under the *AMLRC Act*, which implements Australia's obligations under *CCAMLR*. The *AMLRC Act* operates in conjunction with Australia's principal fisheries legislation, the *Fisheries Management Act 1991* (Cth) ('*Fisheries Management Act*').

Both pieces of legislation use the concept of an Australian Fishing Zone ('AFZ') as the basis for defining who is subject to Australian fisheries regulation. The *AMLRC Act* applies to Australians wherever they may be, but only applies to non-nationals when located within the AFZ.<sup>84</sup> As there is no AFZ

<sup>80</sup> *Antarctic Treaty Act 1960* (Cth) s 4.

<sup>81</sup> See, eg, *Antarctic Treaty (EP) Act 1980* (Cth) s 4; *AMLRC Act 1981* (Cth) s 5(2).

<sup>82</sup> *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae*, above n 20, [16].

<sup>83</sup> *Ibid.*

<sup>84</sup> *AMLRC Act 1981* (Cth) s 5(2).

around Antarctica, fisheries regulations can only be applied to Australian citizens in those waters.<sup>85</sup> In addition, the *AMLRC Act* applies subject to ‘the obligations of Australia under international law, including obligations under any international agreement binding on Australia’.<sup>86</sup>

It is interesting to consider why Australian fisheries law does not apply to the waters around the Australian Antarctic Territory. In 1979, when control of fishing activities out to 200 nautical miles was first asserted by Australia,<sup>87</sup> the *Antarctic Treaty* parties were in the process of negotiating the *CCAMLR*. It was therefore thought appropriate to exclude Australian Antarctic Territory waters from the AFZ, so as not to affect the negotiations.<sup>88</sup> When enacted in 1991, the *Fisheries Management Act* defined the AFZ in the same manner as earlier fisheries legislation: as the waters adjacent to Australia and its external territories out to 200 nautical miles, but excluding, inter alia, waters that are ‘excepted waters’.<sup>89</sup> Exclusion of Australian Antarctic Territory waters was continued under the *Fisheries Management Act* by proclamation on 14 February 1992.<sup>90</sup>

In 1994, when *UNCLOS* came into force and Australia formally established an EEZ, the basis of the AFZ was changed to reflect this development.<sup>91</sup> The AFZ is now defined as the waters adjacent to Australia and its external territories, and within the EEZ, but excluding the coastal waters of a state or internal territory, and excluding excepted waters.<sup>92</sup> When Australia declared its EEZ in 1994, it did so for waters adjacent to all of its external territories, including the Australian Antarctic Territory. However, as the 1992 proclamation under the *Fisheries Management Act* remains in force, the waters offshore the Australian Antarctic Territory continue to be excepted from the AFZ.

The non-application of Australian fishing laws to foreigners in Australia’s Antarctic EEZ was strongly criticised by the 1992 Parliamentary Committee examining the legal regime of the Australian Antarctic Territory.<sup>93</sup> It stated that the ‘application of Australian law to the Australian Antarctic Territory is an assertion of jurisdiction and therefore an essential element in the maintenance of

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<sup>85</sup> Note, however, that the AFZ, and consequently the *AMLRC Act* do apply in the 200 nautical mile zone around the Heard and McDonald Islands Territory: *Fisheries Management Act 1991* (Cth) s 4(1).

<sup>86</sup> *AMLRC Act 1981* (Cth) s 5(3)(a).

<sup>87</sup> *Fisheries Amendment Act 1978* (Cth) s 3.

<sup>88</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 1979, 1463–5 (Ian Sinclair, Minister for Primary Industry). On 20 September 1979, waters offshore the Australian Antarctic Territory were declared to be part of the Australian Fishing Zone. Shortly afterwards, on 31 October 1979, they were excluded by proclamation: *Proclamation Constituting Waters of 200 Nautical Miles Around Australia and Its External Territories Proclaimed Waters for the Purposes of the Fisheries Act*, 20 September 1979, as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 202–3; *Proclamation Declaring Waters Around the Australian Antarctic Territory to be Excepted Waters under the Fisheries Act 1952*, 31 October 1979, as reproduced in William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 208–9.

<sup>89</sup> *Fisheries Management Act 1991* (Cth) s 4.

<sup>90</sup> Commonwealth of Australia, *Government Gazette*, Proclamation No S52 (14 February 1992).

<sup>91</sup> *Maritime Legislation Amendment Act 1994* (Cth) sch 1.

<sup>92</sup> *Fisheries Management Act 1991* (Cth) s 4(1).

<sup>93</sup> Standing Committee Report, above n 37, 15.



Australia's claim to sovereignty over the Territory'.<sup>94</sup> It therefore recommended that

the *Fisheries Management Act 1991* be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the Australian Antarctic Territory so as to extend Australian jurisdiction to the activities of non-Contracting Parties to the *Antarctic Treaty*.<sup>95</sup>

However, the Australian Government's view appears to be that a balance has to be drawn between protecting Australia's sovereign rights and cooperating with other Treaty parties within the Antarctic Treaty System. Maintenance of the Treaty System, and of Australia's influence within it, is a central concern of Australia's Antarctic policy.<sup>96</sup> There is a concern that if Australia actively seeks to enforce its laws against foreigners in the Australian Antarctic Territory, then the benefits of cooperation under the *Antarctic Treaty* could be lost.<sup>97</sup>

#### VIII REGULATION OF WHALING

The regulation of Antarctic fisheries may be contrasted with the operation of the Australian Whale Sanctuary and, in particular, the provisions under which HSI is challenging Japanese whaling in Antarctica. The Australian Whale Sanctuary was established under s 225(1) of the *EPBC Act* 'in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters'. Like the AFZ, the location of the Australian Whale Sanctuary is defined principally by reference to Australia's EEZ.<sup>98</sup> Unlike the AFZ, however, it includes the waters offshore the Australian Antarctic Territory, up to 200 nautical miles from baselines.<sup>99</sup>

The *EPBC Act* specifies various offences, including killing or injuring a cetacean, taking or interfering with a cetacean, possessing a cetacean or treating (processing) a cetacean.<sup>100</sup> Its application varies depending upon the location of the relevant offence. Within Australia's EEZ, the *EPBC Act* applies both to Australians and to nationals of other countries.<sup>101</sup>

Regulation of whaling activities in Antarctic waters is not new. Australia has had regulations dealing with whaling in place since the Australian Antarctic Territory was established. Both the *Whaling Act 1935* (Cth) and *Whaling Act 1960* (Cth) had some operation in relation to waters offshore the Australian Antarctic Territory.<sup>102</sup> In 1980, following a change in government policy, the

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<sup>94</sup> *Ibid* 16.

<sup>95</sup> *Ibid* 18.

<sup>96</sup> *Ibid*.

<sup>97</sup> Department of the Arts, Sport, the Environment, Tourism and Territories, *Submission to Standing Committee on Legal and Constitutional Affairs* (1991) vol 1, 87; Department of Foreign Affairs and Trade, *Submission to Standing Committee on Legal and Constitutional Affairs* (1991) vol 3, 384-7.

<sup>98</sup> *EPBC Act 1999* (Cth) s 225(2).

<sup>99</sup> Commonwealth of Australia, *Government Gazette*, Proclamation No S290 (29 July 1994).

<sup>100</sup> *EPBC Act 1999* (Cth) ss 229, 229A, 229B, 229C, 229D, 230.

<sup>101</sup> *EPBC Act 1999* (Cth) s 5(4).

<sup>102</sup> William Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (1982) vol 2, 149.

focus on regulation of whaling was replaced by legislation directed at whale conservation — the *Whale Protection Act 1980* (Cth) ('*Whale Protection Act*').

The operation of the *Whale Protection Act* in relation to waters off the coast of the Australian Antarctic Territory was originally unclear. The Act 'extended' to every external territory, which clearly included the Australian Antarctic Territory.<sup>103</sup> However, outside the AFZ it applied only to Australians and Australian vessels.<sup>104</sup> Elsewhere it applied to all persons and all vessels.<sup>105</sup> As was explained above in relation to fisheries, waters around the Australian Antarctic Territory were officially excluded from the AFZ; that is, no attempt was made to regulate foreign whaling activities in Australia's Antarctic fisheries.

In 1994, when Australia declared an EEZ offshore the Australian Antarctic Territory, the territorial basis of the *Whale Protection Act*'s operation was also changed from the AFZ to the EEZ.<sup>106</sup> Therefore, *all* whaling in the EEZ offshore the Australian Antarctic Territory became prohibited under Australian law. The *Whale Protection Act*, however, expressly stated that its provisions were 'subject to the obligations of Australia under international law',<sup>107</sup> presumably preventing its application to whaling activities that were carried out in accordance with the *ICRW*.

In 1999, the regime under the *Whale Protection Act* was brought within the more general scope of the *EPBC Act*. The operation of the *EPBC Act* provisions has already been explained. For current purposes, two changes from the previous regime are significant. The first is the omission of any requirement that the provisions be read subject to international law.<sup>108</sup> The second is the importation of broad enforcement provisions,<sup>109</sup> including third party enforcement, that have come to be characteristic of environmental laws.<sup>110</sup>

Actual enforcement of Australian anti-whaling laws in the Australian Antarctic Territory has followed the circumspect approach described above.<sup>111</sup> Although the broadly drafted laws clearly apply, in practice they are not enforced against foreign nationals. This approach to enforcement has been adopted in order to balance the often conflicting goals of preserving Australia's sovereignty claim whilst acting in a cooperative and collaborative manner within the Antarctic Treaty System.<sup>112</sup> Against this background, the HSI Litigation represents a substantial departure from standard practice.

Other major environmental laws that apply in the Australian Antarctic Territory, such as the *Antarctic Treaty (EP) Act*, do not contain procedures to compel enforcement. This can be contrasted with the third party enforcement

<sup>103</sup> *Whale Protection Act 1980* (Cth) s 6(1).

<sup>104</sup> *Whale Protection Act 1980* (Cth) s 6(2).

<sup>105</sup> *Whale Protection Act 1980* (Cth) s 6(2).

<sup>106</sup> *Maritime Legislation Amendment Act 1994* (Cth) sch 1.

<sup>107</sup> *Whale Protection Act 1980* (Cth) s 6(3).

<sup>108</sup> Which would presumably forestall any action in regard to conduct that is in compliance with the *ICRW*.

<sup>109</sup> *EPBC Act 1999* (Cth) s 475.

<sup>110</sup> See, eg, *World Heritage Properties Conservation Act 1983* (Cth) s 14, repealed by *Environmental Reform (Consequential Provisions) Act 1999* (Cth); *Environmental Planning and Assessment Act 1979* (NSW) s 123.

<sup>111</sup> Watts, above n 62, 168–9.

<sup>112</sup> *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae*, above n 20.

provisions of the *EPBC Act*. Allowing for the laws to be enforced at the behest of an ‘interested party’<sup>113</sup> has effectively removed the Australian Government’s discretion regarding whether to enforce the laws in Antarctica, and introduced an element over which the government lacks control. This is contrary to the manner in which Antarctic activities have historically been dealt with, and defeats the mechanism that has been used to diffuse any conflicts over sovereignty.

## IX CONCLUSION

Legislation for the Australian Antarctic Territory has historically been restrained in its application to foreigners. Although formal restrictions in the *Antarctic Treaty* are very narrow and certainly would not prevent Australia from enforcing its laws against foreigners, in practice, the parties to the *Antarctic Treaty* have refrained from doing so, and Australia has followed this general practice. This approach has worked well and allowed the Antarctic Treaty System to flourish and develop into a dynamic, and arguably quite effective, regime for the environmental protection of Antarctica, despite fundamental disagreements over questions of territorial sovereignty.

The attempt by HSI to enforce Australian whale protection laws against Japanese whalers in Antarctica is a challenge to this traditional approach to Antarctic law enforcement. Examining the provisions of the *EPBC Act* that are the subject of the HSI Litigation, two conclusions can be drawn. First, although it is not unusual for legislation to be drafted so as to apply to foreigners in Antarctica, it stands in marked contrast to Australian fisheries laws in this respect. Second, it has been the practice of Australian governments not to enforce Australia’s Antarctic laws against non-nationals, even where those laws, on their face, apply. The provisions of the *EPBC Act* which allow it to be enforced by third parties have removed the government’s discretion as to whether or not to enforce the laws against non-nationals in the Australian Antarctic Territory.

It is curious that this situation has arisen in the first place. The current legislative regime for whale protection appears to have developed in an ad hoc fashion, perhaps without a full appreciation of where the various changes might lead. It seems likely that continuation of the HSI Litigation will at some point lead to an international response, at least by Japan and possibly by other parties to the *Antarctic Treaty*.<sup>114</sup> If Australia’s submission to the UN Commission on the Limits of the Continental Shelf is anything to go by, the attempts to enforce Australian environmental laws against foreign whalers will not go unchallenged.

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<sup>113</sup> *EPBC Act 1999* (Cth) s 475.

<sup>114</sup> Recent developments support this contention. On 2 February 2007, Allsop J granted HSI’s application of substituted service, having concluded that it was not possible for the originating process to be served in Japan using the usual diplomatic channels. Justice Allsop referred to diplomatic correspondence from the Japanese Ministry of Foreign Affairs which declined the Australian Embassy’s request for assistance. In a note from the Japanese Ministry to the Australian Embassy, the Ministry states that it cannot assist ‘because this issue relates to waters and a matter over which Japan does not recognise Australia’s jurisdiction’: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 (Unreported, Allsop J, 16 February 2007) [2]–[3]. On 26 February 2007, HSI reported that the originating process had finally been served on Kyodo, both in person and through registered mail: HSI, ‘No Escape from Court for Whalers’ (Press Release, 26 February 2007), available from <<http://www.hsi.org.au>> at 18 May 2007.