

WHEN IS A WHALE SANCTUARY NOT A WHALE SANCTUARY? JAPANESE WHALING IN AUSTRALIAN ANTARCTIC MARITIME ZONES

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This article concerns the case of Humane Society International v Kyodo Senpaku Kaisha Ltd, in which the Humane Society, a non-governmental organisation, attempted to sue a Japanese company conducting whaling in the Southern Ocean in an area claimed as an exclusive economic zone by Australia. The Humane Society failed to convince the Federal Court to allow it to serve proceedings on the Japanese company outside Australia, after the judge agreed with the arguments provided by the Australian Attorney-General. These submissions included the possibility of an embarrassing international incident that could arise if a Japanese company were to be served with proceedings enforcing a law that Japan considers to be inconsistent with the freedom of navigation on the high seas. Underpinning the whole case was the issue of sovereignty over Antarctica, which Australia and other countries have disputed for many decades. The author evaluates Australia's claim to an exclusive economic zone around its Antarctic territorial claim, and its use of the Environment Protection and Biodiversity Conservation Act 1999 to declare a whale sanctuary in that part of the world. The author suggests that it might be possible for the Australian courts to read the whale sanctuary legislation in line with international law, potentially relying on the New Zealand Sellers case, to exclude overseas companies from the effects of the legislation. However, the author concludes it would not be desirable for the Australian Government to rely on such a possibility to avoid potential international repercussions from its domestic legislation.

I INTRODUCTION

When is a whale sanctuary not a whale sanctuary? This is the question that must have been going through the minds of the members of the Australian Humane Society on 27 May 2005. On

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that day Allsop J of the Federal Court of Australia denied the Humane Society permission to serve proceedings on a Japanese company. The proceedings alleged that the Japanese company breached Australian legislation prohibiting whaling in the Southern Ocean off Antarctica.¹

The Humane Society's case was probably doomed to fail from the outset. However, it provides a useful illustration of Australia's creative use of domestic policy to complement its international political agenda. It also raises interesting questions about how the Australian Federal Court would have dealt with the situation if the Japanese company had had a presence in Australia and was able to be sued in Australian law.

The story begins with Australia's claims to maritime zones off the Australian Antarctic Territory, continues with the declaration of a whale sanctuary in those waters, and concludes with the creative attempt by an NGO to halt action covered by an international treaty through the Australian domestic courts. The story is not entirely finished, however. The case is on appeal to a full bench of the Federal Court of Australia. In addition, as long as Australia maintains claims to maritime zones off the coast of Antarctica and sovereignty issues are not resolved, it is foreseeable that similar tensions may arise in the future. Given slightly different facts, it is possible that the outcome of a similar case could cause the courts, and the Australian government, considerable discomfort.

After outlining the case brought by the Humane Society, I will explore the basis for Australia's claim to an Exclusive Economic Zone (EEZ) in Antarctica. This EEZ provides the alleged legal basis for the whale sanctuary, and also the basis on which Australia can purport to extend the coverage of its legislation to foreign vessels. I will also ask whether the New Zealand case of *Sellers v Maritime Safety Inspector* could provide the basis for an interpretation of the Australian legislation that avoids the potential tensions suggested by the *Humane Society* case.² Ultimately however, the legislation appears destined to cause difficulty for the Australian government in its current form. I conclude by comparing the Australian and New Zealand approaches to Antarctic maritime zones. Some issues are beyond the scope of this article, including the conflict of laws principles relied on by the Humane Society and Australia's broader approach to scientific whaling under the International Whaling Commission.

II THE HUMANE SOCIETY CASE

A The 2004 Decision

At first glance, the argument seems simple. Since 1995 Australia has claimed an EEZ adjacent to the area of Antarctica over which it claims sovereignty – the Australian Antarctic Territory

1 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (*Humane Society 2005*).

2 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

(AAT).³ Under international law an exclusive economic zone conveys on the coastal state sovereign rights to exploit the living resources in the zone, including whales.⁴ Under the auspices of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) Australia has declared the existence of a whale sanctuary in its EEZ, including that off the AAT.⁵ Under Australian federal law, killing or injuring whales in the EEZ is prohibited and attracts penalties including imprisonment or fines.⁶ Much of the Japanese scientific whaling programme takes place in Australia's EEZ off the AAT, prima facie breaching Australian law. The EPBC Act's predecessor, the Whale Protection Act 1980, also applied to foreign persons and vessels. However, section 6(3) provided that the provisions were subject to Australia's international law obligations, meaning that there was an express "out-clause" for courts who could refuse to enforce the Act where enforcement would breach international law rules.⁷ No similar provision exists in the EPBC Act.

On the basis of the above argument, the Humane Society filed proceedings in the Federal Court seeking an injunction against a Japanese company preventing it from conducting whaling in the Australian Whale Sanctuary.⁸ Because the defendant was not present in Australia, the Court had to consider whether to grant permission to serve the proceedings outside Australia. Allsop J agreed that there appeared to be a prima facie case of a breach of the EPBC Act.⁹ However, he also recognised that the whaling was taking place pursuant to a permit issued to the company by the government of Japan. There was no evidence indicating that the permit was unlawful at international law, nor that the company was not complying with its terms.

The judge was very conscious of the fact that the issues raised questions of international law as well as domestic law, and was careful to state clearly that he was not purporting to enforce "in any way obligations or rights under public international law".¹⁰ It must not have escaped his attention,

3 Seas and Submerged Lands Act 1973 (Cth), s 10B; and Gazette No S 290 (29 July 1994).

4 United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, art 56. Article 65 allows states to regulate the exploitation of marine mammals more strictly than other resources.

5 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 225.

6 The penalty depends on the nature of the offence. Reckless killing of a cetacean under the Act attracts a penalty of up to 2 years imprisonment or a fine of up to 1,000 penalty units, or both. Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 229.

7 Stuart Kaye and Donald R Rothwell "Australia's Antarctic Maritime Claims and Boundaries" (1995) 26 *Ocean Development and International Law* 195, 210-211.

8 Section 475(1) of the EPBC Act allows an "interested person" to apply to the Federal Court for such an injunction.

9 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 (23 November 2004) paras 14 and 62 Allsop J (*Humane Society 2004*).

10 *Humane Society 2004*, above n 9, para 74 Allsop J.

however, that there was the potential for an outcome that held the Japanese company to be in breach of Australian domestic legislation and yet in compliance with the requirements of international law.

The question for the judge then became whether he should grant leave to serve proceedings on the Japanese company. Under conflict of laws principles, a judge has discretion to allow proceedings when the defendant is outside the jurisdiction. Ultimately, Allsop J decided to require that the Australian Attorney-General be notified to allow him to make submissions on the issues raised. Somewhat diplomatically, the judge left the extent of the submissions up to the Attorney-General, although suggesting that they "may go to the proper construction and interpretation of the treaties in question, the municipal law in question and aspects of discretion."¹¹

B The Attorney-General's Submissions

The Attorney-General's office did make submissions on the case as *amicus curiae*, largely pertaining to the exercise of the judge's discretion to allow service on the defendant. The Attorney-General accepted that the EPBC Act provisions do apply to foreign vessels in the AAT EEZ.¹² However, he argued that the Court should not exercise its discretion to serve the proceedings on the defendant for three reasons.

First, Japan does not recognise Australia's claim to sovereign rights over the exclusive economic zone off the AAT.¹³ Only a few countries including New Zealand, France, the United Kingdom and Norway formally recognise Australia's claim to territory in Antarctica. Unsurprisingly, these are countries that also have sovereignty claims in Antarctica. Under the Antarctic Treaty, all claims to sovereignty are suspended.¹⁴ Because Japan does not recognise Australia's claim to territory, it does not recognise any of Australia's claims to maritime zones related to that territory. Instead, Japan regards the waters off Antarctica to be the high seas, in which it has exclusive jurisdiction over Japanese vessels.¹⁵

Because Japan does not recognise Australia's right to legislate with respect to living resources in the AAT EEZ, any attempt to enforce jurisdiction over Japanese vessels would draw a sharp diplomatic response. Japan and other states would be likely to consider Australia's exercise of jurisdiction as contrary to international law. The Attorney-General pointed out that the goal of the

11 *Humane Society 2004*, above n 9, para 72 Allsop J.

12 "Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*" (Court document, Canberra, 2005) para 19, available at <<http://www.hsi.org.au>> (last accessed 3 November 2005) (A-G's submissions).

13 A-G's Submissions, above n 12, para 9; *Humane Society 2005*, above n 1, para 5, Allsop J

14 Antarctic Treaty (1 December 1959) 402 UNTS 71, art 4.

15 United Nations Convention on the Law of the Sea, above n 4, art 92; regarding Japan's view see *Humane Society 2005*, above n 1, para 14 Allsop J; A-G's Submissions, above n 12, para 13.

Antarctic Treaty's suspension of sovereignty claims was to avoid escalating the dispute over sovereignty. The Humane Society's case could lead to submission of the dispute to international adjudication, which would undermine the status quo as well as Australia's "long term national interests".¹⁶

In recognition of the disagreement about sovereignty, Australia has not attempted to enforce national laws against Japanese vessels seen whaling in the AAT EEZ.¹⁷ Rather, it follows the practice of other states under the Antarctic Treaty system in only exercising jurisdiction over its own nationals or those who have subjected themselves to Australian law.¹⁸

The second main reason the Attorney-General gave for not exercising discretion in favour of the applicant was the difficulty in enforcing any decision against the Japanese company. The defendant is not present in Australia and has no assets there, and the Japanese courts are unlikely to give effect to the Court's decision.¹⁹

Finally, the Attorney-General argued that it was up to the Executive to decide when action should be taken in complex cases such as this.²⁰ In this particular instance, he submitted, the substantive hearing of the case "would be expected to harm Australia's relations with Japan as well as other Antarctic Treaty Parties".²¹

C The 2005 Decision

Allsop J considered the Attorney-General's submissions to be relevant because they helped the Court "to understand the views of the Executive Government in weighing the possible consequences" of serving the proceedings on the defendant.²² The judge accepted that Japan would see the proceedings as based on "an impermissible claim by Australia to the Antarctic Territory".²³ The Court could have regard to Japan's opposition in considering the exercise of its discretion whether to allow service, although the judge doubted that this point could assist if the defendant was subject to the Court's jurisdiction.²⁴

16 *Humane Society 2005*, above n 1, para 15, Allsop J; A-G's Submissions, above n 12, para 17

17 *Humane Society 2005*, above n 1, para 15; A-G's Submissions, above n 12, para 20.

18 A-G's Submissions, above n 12, para 16.

19 A-G's Submissions, above n 12, para 25.

20 A-G's Submissions, above n 12, para 28.

21 A-G's Submissions, above n 12, para 29

22 *Humane Society 2005*, above n 1, para 20 Allsop J.

23 *Humane Society 2005*, above n 1, para 27 Allsop J.

24 *Humane Society 2005*, above n 1, para 27 Allsop J.

Allsop J also referred to the fact that the dispute is of a highly political nature, involving matters governed by the International Whaling Commission. The case contrasts with those involving private rights of property or liberty.²⁵ He also noted the fact that it would be difficult, if not impossible, to enforce an injunction against the defendant.²⁶

The judge refused to allow service on the defendant:²⁷

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

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

Despite deciding against the applicants, the Court indicated that there were at least two situations in which the outcome might very well be different. First, Allsop J suggested that if the applicant was able to demonstrate that any injunction would be able to be enforced, he might be persuaded to grant leave to serve the proceedings.²⁸ Second, the judge was clear that if the defendant was present in Australia, Japan's objections to Australia's exercise of jurisdiction would be irrelevant.²⁹

At the time of writing, this case is on appeal to a full bench of the Federal Court of Australia.³⁰ The case raises a number of interesting issues, including the conflict of laws jurisprudence relied on by the Attorney-General and the Court, as well as policy matters surrounding the International Whaling Commission and Japan's scientific whaling programme. However, this case note focuses on the tension created between Australia's approach to its maritime jurisdiction in Antarctica and its domestic legislation.

25 *Humane Society 2005*, above n 1, para 29 Allsop J.

26 *Humane Society 2005*, above n 1, para 28, 33 Allsop J.

27 *Humane Society 2005*, above n 1, paras 34-35 Allsop J.

28 *Humane Society 2005*, above n 1, para 39 Allsop J: "Nothing that I have said would necessarily determine the question of the grant of leave if there were revealed material upon which I could conclude that the grant of leave was likely to bring the respondent to the Court in circumstances tending to show that any orders made would be able to be enforced and thereby be effectual to enforce the EPBC Act."

29 *Humane Society 2005*, above n 1, para 29 Allsop J.

30 Details of the appeal are available at Humane Society International "Whale Case – HSI Lodges Appeal to the Full Bench of Federal Court" (17 June 2005) Press Release. See generally <<http://www.hsi.org.au>> (last accessed 3 November 2005).

III AUSTRALIA'S CLAIMS TO MARITIME ZONES OFF ANTARCTICA

The Humane Society case has raised the issue of whether Australia has a right under international law to claim maritime zones off the Antarctic coast. In addition to the EEZ claimed off the AAT, Australia has recently lodged a submission with the Commission for the Delimitation of the Continental Shelf, claiming an extended continental shelf off the AAT.

Australia has had a claim to sovereignty over part of Antarctica since 1933. The claim covers 6.24 million km² and is located in the area of the continent south of Australia.³¹ New Zealand also claims sovereignty over part of the Antarctic continent, although a large portion of New Zealand's claim covers the Ross Ice Shelf rather than land mass.

A *The Legality of Australia's Maritime Zones in the Antarctic*

Since 1959 the claims to Antarctic territory have been "frozen" by article 4 of the Antarctic Treaty. The treaty parties, including Australia and New Zealand, have agreed not to pursue their sovereignty claims while the Antarctic Treaty is in force. The relevant part of article 4 reads:

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.

The purpose of article 4 is to prevent disputes over sovereignty from interfering with the international governance of Antarctica. Article 4 does not eliminate the sovereignty claims, but allows states to cooperate without causing concern about the impact of their actions on the claims. Article 4 is the pivot on which the Antarctic Treaty turns: without it, it is unlikely that the international community would have been able to reach agreement regarding important principles such as non-militarisation of the continent and the primacy of scientific research.³²

The suspension of claims to territorial sovereignty in Antarctica is reflected in the other treaties that make up the Antarctic Treaty System. Most notably, the 1980 Convention for the Conservation of Antarctic Marine Living Resources, stipulates that article 4 of the Antarctic Treaty binds parties to the later Convention.³³

31 Kaye and Rothwell, above n 7, 196.

32 Arthur Watts *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992) 126. Article 4 has also been described as the "'flexi-glove' which permits the agreement to operate": Christopher C Joyner *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, 1992) 62.

33 Convention for the Conservation of Antarctic Marine Living Resources (15 August 1983) 1424 UNTS 73, art 4.

The question is whether Australia's claim to an EEZ and extended continental shelf is consistent with article 4's requirement that states not make a "new claim or enlargement of an existing claim to territorial sovereignty". Despite some arguments to the contrary, the majority of commentators consider that article 4 does not proscribe claims to maritime zones off Antarctica.

Arguments against the power to claim maritime zones are largely based on an interpretation of the Antarctic Treaty and the fact that the sovereignty claims to the continent are not widely accepted.

One important objection to maritime claims relies on article 6 of the Antarctic Treaty. Article 6 provides that the Treaty applies to "the area" south of 60° South latitude which includes the ocean, ice shelves and the continent. However, article 6 also states that nothing 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 that area." One interpretation of this latter statement is that all the seas found below 60° South are considered to be the high seas.³⁴ On the other hand, it could be argued that the article does not state *which* seas are considered to be high seas. Instead, the article can be "interpreted as merely seeking to preserve rights in those high seas, wherever they might be".³⁵

Joyner argues that the issue is very simple. The existence of maritime zones under the United Nations Convention on the Law of the Sea (UNCLOS) is reliant on the existence of a coastal state. Without a recognised state (an impossibility due to article 4 of the Treaty), there can be no corresponding maritime zone.³⁶ However, this ignores the fact that the claim to a maritime zone is generally seen as simply a claim. It is unlikely that states would recognise a claim to an EEZ without a concurrent recognition of the territorial claim. Without recognition of a claimant state's right to a maritime zone, third party states can and will continue to treat the area as part of the high seas.

Those in favour of allowing claims to maritime zones base their position on a number of arguments. However, the common theme is that there is a fundamental difference in nature between a claim to territorial sovereignty and a claim to a maritime zone. First, the wording of article 4 appears to limit the prohibition on new or enlarged claims to the continent – as indicated by the

34 Davor Vidas "The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the Protocol" in Olav Schram Stokke and Davor Vidas (eds) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, Cambridge, 1996) 69; Philippe 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* (Graham & Trotman, London, 1992) 126.

35 Kaye and Rothwell, above n 7, 199.

36 Joyner, above n 32, 75.

reference to "*territorial sovereignty*". Leaving aside the issue of the existence of a "territorial sea" under international law, the usual understanding of "territory" relates to land rather than the ocean.³⁷

Second, Watts claims that the states negotiating the Antarctic Treaty would have been aware of contemporary claims to ocean space that were not claims to full "sovereignty" as mentioned in article 4.³⁸ In particular, states had recently negotiated the 1958 Geneva Convention on the Continental Shelf that distinguished between sovereignty and sovereign rights.³⁹ Therefore, he argues, the parties to the Antarctic Treaty would not have intended to prevent states from claiming "sovereign rights" – the lesser form of rights that exist with regard to the EEZ and continental shelf.⁴⁰ Arguing along similar lines, Kaye contends that the key point is that a "claim" refers to territory, and so the prohibition does not extend to the "assertion of *jurisdiction* over a maritime area".⁴¹

Third, some authors emphasise that the right to the resources of the continental shelf attaches automatically to states that exercise sovereignty over a coastal area.⁴² This right existed in 1961. Therefore, the enlargement of the area is not as a result of a new or enlarged claim by the claimant state, but by operation of international law, and so falls outside the restriction in article 4.⁴³ This argument is not as strong in the case of exclusive economic zones as these must be claimed by the state rather than coming into existence automatically. However, it is also arguable that international law has developed so that the right to claim an EEZ attaches to territory even though the principle did not exist in 1961.⁴⁴

The precise legal situation under article 4 is ambiguous but the Antarctic Treaty probably does not prevent states from adding claims to maritime zones to their existing claim to territory. However, by claiming an EEZ *and* enacting domestic legislation purporting to exercise its rights against foreign nationals, Australia risks forcing the sovereignty debate once more to the forefront in

37 See Kaye and Rothwell, above n 7, 200.

38 Watts, above n 32, 133

39 Geneva Convention on the Continental Shelf (29 April 1958) 499 UNTS 311.

40 Watts, above n 32, 133.

41 Stuart Kaye *Australia's Maritime Boundaries* (Centre for Maritime Policy, Wollongong, 1995) 198.

42 See for example Gautier, above n 34, 121 and 126. A variation on this point is made in Emilio J Sahurie *The International Law of Antarctica* (New Haven Press/Martinus Nijhoff Publishers, Dordrecht, 1991) 487 and 544.

43 Kaye, above n 41, 196.

44 Kaye and Rothwell, above n 7, 201

Antarctic politics. Watts suggests that it is important to maintain the grand compromise in article 4:⁴⁵

At bottom, accordingly, the success in practice of Article IV in defusing the sovereignty disputes in Antarctica has turned on an appreciation by *all* Parties that, while their respective legal position remain intact and protected by Article IV, they have a shared interest in not pressing their own views to extreme limits, and in showing, instead, prudent self-restraint in the exercise of what they each consider to be their rights.

B Australia's Claim to a Continental Shelf off Antarctica

It is worth noting that Australia has pursued an active approach to its continental shelf claim as well as its EEZ. Australia presented submissions to the Commission on the Limits of the Continental Shelf in December 2005, outlining its claim to an extended shelf off the AAT.⁴⁶ The submission relating to the Antarctic continental shelf was the result of a surveying exercise predicted to cost AUD\$30 million.⁴⁷ The extent of the continental shelf claimed by Australia off Antarctica beyond the 200 mile limit is approximately 686,821 km².⁴⁸ Serdy notes that there is some uncertainty about the exact area given outstanding delimitation issues with France and Norway.⁴⁹

Along with its submissions, Australia lodged a note indicating that the claim was made to preserve Australia's position under international law. Australia requested the Commission not to take any action relating to the part of the submission relating to the AAT.⁵⁰

In response to Australia's submission, Russia, the United States, Germany and the Netherlands repeated their position that they do not recognise any sovereignty claims in Antarctica, and so do not

45 Watts, above n 32, 135-136 (emphasis in original).

46 Details of Australia's claim can be found in the law of the sea section of the United Nations website: <<http://www.un.org/>> (Last accessed 18 July 2005). For a summary of Australia's entire claim, see Andrew Serdy "Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf" (2005) 36 *Ocean Development and International Law* 201.

47 Minister for Foreign Affairs and Minister for the Environment and Heritage "Move to Claim Extended Antarctic Continental Shelf" (2 December 1999) Press release.

48 Serdy, above n 46, 208.

49 Serdy, above n 46, 208.

50 Note from the Permanent Mission of Australia to the Secretary-General of the United Nations Accompanying the Lodgement of Australia's Submission (November 2004) available in the law of the sea section of the UN website <<http://www.un.org/>> (last accessed 3 November 2005).

recognise claims to maritime zones.⁵¹ The states expressed appreciation for the fact that Australia had requested the Commission not to take action regarding the claim. Japan also repeated its position that it does not recognise any sovereign claims or maritime zones in Antarctica.⁵²

Australia's claim regarding the AAT was undoubtedly prompted by the fact that UNCLOS requires states to lodge a claim for an extended continental shelf within 10 years of UNCLOS coming into force for that state.⁵³ One perspective is that Australia would lose the possibility of claiming an extended continental shelf if it did not file its claim within the prescribed timeframe.⁵⁴

Whether it was necessary for Australia to do this, however, is open to debate. In light of article 4 of the Antarctic Treaty and the disputed nature of Antarctic territorial claims, it is unlikely that a state whose sovereign claim was revived at some point in the future would be prevented from submitting a claim for an extended continental shelf on the basis that the prescribed time limit had expired. Such territory could be considered analogous to newly acquired territory to which the time limit could not have applied previously.

Australia has sought to tread a fine line in its policy regarding the AAT continental shelf. By submitting its claim to the Commission but simultaneously requesting that the Commission take no action regarding the AAT claim, Australia has emphasised its continuing claim to territorial sovereignty in Antarctica. Those nervous that Australia was risking the creation of a new conflict over Antarctic sovereignty were relieved by the rather mild response by other states. In this instance at least, the delicate diplomatic dance was not disturbed.

IV INTERPRETING THE AUSTRALIAN LEGISLATION CONSISTENTLY WITH INTERNATIONAL LAW

There is a fundamental inconsistency in the Australian government's position in the *Humane Society* case. The structure of the EPBC Act implies that Parliament intended the whale sanctuary to apply to foreigners as well as Australian nationals. If the Japanese company had a presence in Australia, no question of the exercise of discretion would arise. Alternatively, an appeal may allow the Humane Society to serve the proceedings on the Japanese company. In those circumstances, all

51 Diplomatic Note from the United States Mission to the United Nations (3 December 2004); Diplomatic Note from the Permanent Mission of the Russian Federation to the United Nations (9 December 2004); Diplomatic Note from the Permanent Mission of Germany to the United Nations (5 April 2005); Diplomatic Note from the Permanent Mission of the Netherlands to the United Nations (31 March 2005), available in the law of the sea section of the UN website <<http://www.un.org>> (last accessed 3 November 2005).

52 Diplomatic Note from the Permanent Mission of Japan to the United Nations (19 January 2005) available in the law of the sea section of the UN website <<http://www.un.org>> (last accessed 3 November 2005).

53 United Nations Convention on the Law of the Sea, above n 4, art 4, annex 2.

54 Due to delays faced by many states wishing to make submissions, the deadline for submission of claims to extended continental shelves is now 2009.

of the embarrassing consequences mentioned by the Attorney-General in his submissions would come to pass in the event that the Court found a breach of the EPBC Act.

The Australian government's embarrassment might be avoided if the defendants could argue that the EPBC Act does not apply to them on the grounds that the Act has to be interpreted consistently with international law. It is a well established principle of statutory interpretation that Parliament is presumed to have intended to comply with its international legal obligations unless a clear contrary intention is expressed.⁵⁵ If international law does not permit Australia to exercise jurisdiction over Japanese whaling vessels in the waters off Antarctica, the Court may seek to interpret the EPBC Act accordingly. Could the Court decide that the prohibition on whaling in the Australian EEZ only applies to Australian nationals or other limited classes of persons?

A *The Sellers Case*

An argument along these lines was run in the New Zealand Court of Appeal in the case of *Sellers v Maritime Safety Inspector*.⁵⁶ In that case the Maritime Transport Act 1994 allowed the Director of Maritime Safety to prevent pleasure craft from leaving a New Zealand port without adequate safety equipment. The Director, in an attempt to limit the cost of search and rescue efforts, required all pleasure craft to carry a radio and a locator beacon. Mr Sellers, the master of a cutter registered in Malta, was charged with leaving a New Zealand port without the specified equipment. He argued that the legislation contravened international law relating to freedom of navigation on the high seas because New Zealand was purporting to regulate a foreign flagged vessel. He argued that the legislation should be read down to be consistent with New Zealand's international obligations.

Keith J delivered the judgment of the Court finding that the statute had to be read consistently with New Zealand's international obligations. He noted that the Maritime Transport Act was intended, in part, to give effect to international law including the United Nations Convention on the Law of the Sea 1982. No principles of international law allowed New Zealand to "unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment ... if the requirements are to have effect on the high seas".⁵⁷ The provision of the Act appeared to be in breach of the principle of exclusive flag state jurisdiction over vessels on the high seas.

The plain words of the section stated that the provisions applied to any "master of a pleasure craft".⁵⁸ On a strict interpretation it may have been possible to argue that the legislation was not

55 *Polites v Commonwealth* (1945) 70 CLR 60 (HCA); *R v Keyn* (1876) 2 Ex D 63, 85 Sir Robert Phillimore; *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA) Keith J for the Court.

56 *Sellers v Maritime Safety Inspector*, above n 2.

57 *Sellers v Maritime Safety Inspector*, above n 2, 57 Keith J for the Court.

58 Maritime Transport Act 1994, s 21.

ambiguous and therefore it should be taken that Parliament intended the Act to apply to all pleasure craft regardless of their place of registration. However, the Court did not seem to require any ambiguity in language before turning to international law to assist with interpretation. Rather, Keith J pointed out that the scheme of the Act was intended to implement and be compliant with international law.⁵⁹ The exercise of maritime jurisdiction itself is an area of law "that essentially has been governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law."⁶⁰ Therefore, in exercising his powers, the Director of Maritime Safety was required to act consistently with international law. If international law evolved to allow the New Zealand officials to exercise jurisdiction over non-New Zealand registered vessels, the Director would be able to do so.⁶¹

The Court of Appeal's approach in *Sellers* has been described as the Court reading the legislation and the power it imposed subject to the "gloss that it must be exercised in accordance with relevant rules of international law, as they stand at any particular time".⁶² Geiringer argues that the New Zealand courts are taking a case-by-case approach to deciding whether broadly described legislative wording is amenable to implied limits imposed by international law.⁶³

B Is the Australian Legislation Capable of a Sellers-type Gloss?

Following a *Sellers* line of argument, the Japanese whaling company could argue that exercising jurisdiction over its activities in the oceans off Antarctica, which Japan regards as the high seas, would be inconsistent with international law and therefore the Australian legislation should be interpreted narrowly. It seems arguable that a *Sellers* approach would be acceptable to the Australian courts. Although the courts have often differed on the details, Australian courts will consider international law as an aid to interpreting statutes.⁶⁴ A *Sellers* approach would be consistent with the more liberal uses of international law in Australian cases as well as the Acts Interpretation Act 1901 (Cth).

Australian courts have accepted the general principle that international law may be used as an aid to interpretation of domestic statutes, and that Parliament must be presumed to have not intended

59 *Sellers v Maritime Safety Inspector*, above n 2, 58 Keith J for the Court.

60 *Sellers v Maritime Safety Inspector*, above n 2, 62 Keith J for the Court.

61 *Sellers v Maritime Safety Inspector*, above n 2, 62 Keith J for the Court.

62 Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66, 80.

63 Geiringer, above n 62, 84.

64 See generally Hilary Charlesworth and others "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423, 457-461; Rosalie Balkin "International Law and Domestic Law" in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds) *Public International Law: An Australian Perspective* (2 ed, Oxford University Press, Melbourne, 2005) 115, 128-131.

to violate international law unless the contrary intention appears.⁶⁵ However, the courts are also willing to accept that there may be some situations where Parliament has intended to breach international law and in such a case "[i]t is not for a court to express an opinion upon the political propriety of [that] action."⁶⁶

The question becomes at what point will the courts conclude that the legislation is able to support an interpretation based on international law. Most cases that have referred to this rule of construction have stated that it is subject to ambiguity or uncertainty in the statute.⁶⁷ However, some judges have mentioned that the requirement for ambiguity should be read broadly. Mason CJ and Deane J in the *Teoh* case stated that "[i]f the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail."⁶⁸ Williams J in *Polites v Commonwealth* also mentioned that the courts will be willing to "limit the scope of general words so as to give effect to the presumption".⁶⁹

The Acts Interpretation Act 1901 (Cth) allows for external material, including treaties, to be considered when interpreting a statute "to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision" or "to determine the meaning of the provision when: (i) the provision is ambiguous or obscure; or (ii) the ordinary meaning conveyed by the text of the provision ... leads to a result that is manifestly absurd or is unreasonable".⁷⁰

The first difficulty is that the EPBC Act does not appear, on its face, to be ambiguous. As noted above, the whale sanctuary is created in section 225 and applies to the exclusive economic zone, including external territories.⁷¹ Offences are committed by any "person" killing, injuring or taking a cetacean.⁷² Section 5 of the Act states that the Act applies to external territories.⁷³ Significantly, section 5 also states that outside of the Exclusive Economic Zone its application is limited to

65 *Polites v Commonwealth*, above n 55, 68 Latham CJ; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (HCA) Mason CJ and Deane J.

66 *Polites v Commonwealth*, above n 55, 73 Latham CJ. See also *Dietrich v Queen* (1992) 177 CLR 292, 305 (HCA) Mason CJ and McHugh J.

67 Charlesworth and others, above n 64, 460.

68 *Minister of State for Immigration and Ethnic Affairs v Teoh*, above n 65, 287 Mason CJ and Deane J.

69 *Polites v Commonwealth*, above n 52, 81 Williams J.

70 Acts Interpretation Act 1901 (Cth), s 15AB(1) and (2).

71 Environment Protection and Biodiversity Protection Act 1999, ss 225 and 2.

72 Environment Protection and Biodiversity Protection Act 1999, ss 229-229D.

73 Environment Protection and Biodiversity Protection Act 1999, s 5(1).

Australian residents, citizens, businesses and vessels.⁷⁴ This last point is a strong contextual indication that inside the Australian Exclusive Economic Zone, the whale sanctuary is to be enforced against *all* vessels and not just those registered in Australia.

The New Zealand Court of Appeal in *Sellers* was similarly faced with a seemingly unambiguous statutory provision and yet still referred to international law as an aid to interpretation. The *Sellers* approach is possible in Australia for several reasons. First, the principle that Parliament does not intend to breach its international obligations applies equally in Australia as in New Zealand.⁷⁵

Second, the Acts Interpretation Act provides a route for consideration of international law when the ordinary meaning leads to a result that is clearly absurd or unreasonable. It may be possible to justify a *Sellers* outcome on that basis. It can be noted that the EPBC Act sets out as one of its objectives to "assist in the co-operative implementation of Australia's international environmental responsibilities".⁷⁶ Although this is not a direct reference to UNCLOS, the Convention is mentioned in an indirect way through the definitions section. The "exclusive economic zone" is given the meaning set out in the Seas and Submerged Lands Act 1973 (Cth),⁷⁷ the interpretation section of which makes it clear that the exclusive economic zone has the meaning given to it in UNCLOS.⁷⁸ Therefore, Gummow J's dicta from *Minister for Foreign Affairs and Trade v Magno* is particularly applicable here.⁷⁹ He held that where a treaty is referred to, "consideration may be given to it not only to determine provisions which are ambiguous or obscure, but for the wider purposes spelled out in s 15AB(1)".⁸⁰ Therefore, international law will be relevant where the result would be absurd or unreasonable and no ambiguity is necessary.

A second difficulty is that courts prefer to use established rules of international law to interpret ambiguous statutes. In this case, the relevant rules of international law are established, but their application is disputed in this case. On the one hand, if Australia's claim to an AAT EEZ is established under international law, then it is entitled to pass legislation regulating the use of living resources in that area and enforce them against all vessels. On the other hand, if the claim is illegitimate at international law, then it may not exercise jurisdiction over Japanese whaling vessels because to do so would violate the principle of exclusive flag state jurisdiction on the high seas. An

74 Environment Protection and Biodiversity Protection Act 1999, s 5(3). This direction is also repeated in section 224, which deals with the application of the sections relating to the Whale Sanctuary.

75 Charlesworth and others, above n 64; Balkin, above n 64.

76 Environment Protection and Biodiversity Protection Act 1999, s 3(1)(e).

77 Environment Protection and Biodiversity Protection Act 1999, s 528.

78 Seas and Submerged Lands Act 1973 (Cth), s 3.

79 *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 (FCA).

80 *Minister for Foreign Affairs and Trade v Magno*, above n 79, 535 Gummow J.

answer may be that, because Japan does not recognise Australia's AAT EEZ, the rights and jurisdiction claimed by Australia are not opposable to Japan. In that case, Australia would be breaching international law by attempting to rely on domestic regulation of an area considered by Japan to be the high seas.

A question must also be asked whether the Australian government would support such an interpretation. It is possible that, if this interpretation point was raised by the defendant, the federal government would seek to intervene in the case given the political ramifications involved. Although a *Sellers* interpretation would relieve the political pressure on the government over the whaling sanctuary, the government may not be keen to support an apparent widening of the scope for court intervention in legislation that contains no ambiguity.

It seems open to debate whether the Australian courts would adopt a *Sellers* type argument in order to interpret the EPBC Act. If they did, the Courts would argue that the Act must be interpreted consistently with international law, and the Australian government would be restricted to enforcing the Act against Australian nationals and possibly the nationals of countries that recognise Australia's AAT EEZ. A *Sellers* approach would have the advantage of allowing the policy to be adaptable to changing policies by foreign governments to the AAT EEZ without forcing the Australian government into a potentially embarrassing situation. However, it may not be a jurisprudential direction that the Australian government would be keen to see develop.

V LESSONS FOR NEW ZEALAND

In many respects, the Australian action is understandable and even seductive for a state such as New Zealand. If Australia's claim to an EEZ off Antarctica were recognised by other states it would allow Australia to pursue important national interests. Australia would have an undisputedly significant weapon in its battle against Japan's scientific whaling programme under the International Whaling Commission. A large area of the Southern Ocean would be closed to Japanese whaling vessels. In addition, Australia could undertake enforcement activities against vessels fishing in the EEZ, which would support Australia's efforts to curtail the illegal Patagonian toothfish industry. At present, however, Australia takes a much more circumspect approach to fisheries regulation in the AAT EEZ, cooperating through the Commission for the Conservation of Antarctic Marine Living Resources rather than trying to exercise unilateral jurisdiction.

As already mentioned, New Zealand takes a different approach to maritime zones in Antarctica. Despite having a claim to sovereignty in Antarctica New Zealand has not claimed an EEZ nor a continental shelf. Section 9(3) of the New Zealand Territorial Sea and Exclusive Economic Zone Act 1977 makes provision for an EEZ to be declared off the area of Antarctica claimed by New Zealand. This has not yet occurred.⁸¹ In light of the difficulties surrounding article 4 of the

⁸¹ *Laws of New Zealand* (LexisNexis, Wellington, 2004) Antarctica, para 16.

Antarctic Treaty and the understandable nervousness of non-claimant states to any assertion of sovereignty in the region, this is a sensible approach. A low-key and cooperative attitude to Antarctic marine issues is more likely to reduce tensions in the region and preserve the fragile diplomatic balance in the area.

It is unlikely that, by failing to claim maritime zones off Antarctica, New Zealand could be held to have either given up its sovereignty claims to the continent or to have lost a right to claim the maritime zones established by the United Nations Law of the Sea Convention. Even if article 4 of the Antarctic Treaty could be interpreted to allow the practice of making maritime claims, it does not follow that if a state chooses not to exercise their right at this point it loses that right altogether.

VI CONCLUSION

Presumably the Australian government wanted to send a strong signal to a domestic and international audience when it established the whale sanctuary in its EEZ including that off Antarctica. However, this case demonstrates the danger of creating rights or offences in domestic legislation which conflict with established principles of international law. It is dangerous to rely on the exercise of the court's discretion in what is essentially a procedural case to avoid the sort of embarrassment hinted at in the Attorney-General's submissions. If the Australian Executive really believes that it should be the sole determinant of when to enforce the whale sanctuary, it has a limited range of options. First, it could legislate to remove the right of an interested party to seek an injunction enforcing rights with respect to the AAT EEZ. This is unlikely to be popular, and will highlight the precariousness of the basis for the whale sanctuary legislation. Alternatively, it could amend the legislation to provide that the whale sanctuary only applies to Australian nationals and those submitting to its jurisdiction. It may also be possible to allow for the enforcement of the whale sanctuary against the nationals of states that recognise Australia's claim to an EEZ off the AAT. This would allow for the possibility that states may recognise Australia's claim over time.

The alternative basis for the Australian government is to argue, along the lines of *Sellers v Maritime Safety Inspector*, that the EPBC Act must be read down to be consistent with international law. However, if the matter gets to this stage the success of such an argument is by no means guaranteed.

Without legislative amendment, the Humane Society would do well to bide its time and seek a defendant with closer ties to the Australian jurisdiction. It would also seem that, for now at least, a whale sanctuary is not a whale sanctuary if you are a Japanese whaling company.

