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The Great Whale Debate: Australia's Agenda on Whaling

Julia Jabour, Mike Iliff and Erik Jaap Molenaar

Introduction

The great whale debate has been ongoing since whaling acquired a strong public perception of being cruel, unsustainable and unnecessary during the middle of the 20th century. A *volte face* by whaling States including Australia, Canada, the Netherlands, New Zealand, Peru, South Africa, the United Kingdom and the United States of America culminated in the adoption of a moratorium on commercial whaling from 1985-86 to conserve whale stocks, some of which were thought to be close to extinction. The moratorium is still in place today.

In November 1978, Australia's last coastal whaling company, Cheyne's Beach at Albany, Western Australia, closed down, effecting shortly thereafter a complete policy reversal for the Australian Government on what has since become an intensely emotive and highly politicised international issue. The closure was purported to be for economic reasons, putting over 100 people out of work. However, two years later whaling activities carried out by Australian citizens were criminalised. Thereafter a whole of government approach existed that was fundamentally and intractably anti-whaling. Today, all that remains of the Cheyne's Beach operation is a slipped whaling vessel and a few chattels for tourists to photograph.

Relics like the Cheyne's Beach complex – known in tourist brochures as Whale World – serve as a reminder of what official government rhetoric today calls "the bad old days" (Campbell 2005a). Whaling, Australians are told, is no longer in the country's national interest. The government has taken on the role of a "moral entrepreneur" (Nadelman 1990: 482), proselytising its view to both its domestic constituents and its international contemporaries.

This chapter will illustrate that, in relation to whaling, Australia's national interests are, indeed, representative of the "cosmopolitan moral

view" (Nadelman 1990: 484) that lethal activities like whaling are anachronistic and therefore have no place in modern civilised society, prompting the evolution of customary practice in this regard. There is evidence, however, that this is not a view universally shared.

The aim of this chapter is to illustrate how Australia pursues its global anti-whaling agenda. It investigates the nature of Australia's whaling policy and how this is implemented in domestic legislation. It also examines the international legal situation with respect to whales and whaling, to ascertain whether Australia has other options available to it in the pursuit of its policy goals. In so doing, this chapter also locates the sources of rights of pro-whaling States within the international legal regime, and examines the robustness of Australia's policy in that context. It concludes by speculating about possible future directions. The fact that the locus of much of the contentious whaling activity is the Southern Ocean makes this an Antarctic issue, despite profound reluctance by the Antarctic Treaty Parties to address the matter as part of usual Antarctic business.

Current Australian Policy

The Frost Report and its Legacy

Australian policy has been zealously anti-whaling since the publication of the Frost Report in 1978 (Frost 1978). A number of key policies, both domestic and international, were derived from it and the later findings of the government-commissioned National Task Force on Whaling in 1997. These included:

- to maintain a permanent ban on commercial whaling in the maritime zones of Australia, to apply to both Australians and non-nationals; and
- to pursue a permanent international ban on commercial whaling (in the short term) by amending the convention on whaling (in the long term). (Environment Australia 1997: xi-xii)

The report also recommended that the government work within the International Whaling Commission (IWC) and ensure that delegates to meetings "should be selected not only for their expertise but also because they are personally committed to supporting Australia's anti-whaling policy" (Environment Australia 1997: 15).

The first of the two key policies is now entrenched in Australian domestic law and until recently was thought to be relatively unproblematic for the government. However, the ongoing action by Humane Society International (HSI) in the Federal Court (see also Rothwell and Scott, Stephens and Boer this volume) has challenged the utility of an Australian Whale Sanctuary in Antarctica, given that HSI's action insists on the legal application of Australian law to non-nationals. The second policy,

while partially achieved through the International Convention for the Regulation of Whaling's (ICRW)[1] moratorium on commercial whaling, is also problematic, particularly in terms of its permanency.

The Task Force report was used to formulate and strengthen government policy and today it underpins the aggressive pursuit of a permanent international ban on commercial whaling, including whales taken by lethal scientific research. Australia is a fervent participant in the annual meetings of the IWC as the States with an interest in whaling routinely duel with those that have an interest in banning whaling completely. Scattered around both sides are a retinue of middle-minded States that, for various reasons, align themselves with one bloc or the other, or choose to remain non-aligned. Australia has achieved some success in its strategic policy: It was a proponent of the establishment of the Southern Ocean Whale Sanctuary, and the moratorium has remained in place for over 20 years. But it has not achieved its ultimate goal of a permanent global ban on commercial whaling entrenched in an amended Convention.

Domestic responsibility for whales is currently with the Commonwealth Department of the Environment and Water Resources. Since the late 1970s responsibility for whales has rested within the environment portfolio and traditionally ministers have been extremely active in supporting and promoting government policy. This is particularly so in those few months around the annual IWC meeting and the activities of the research fleet in the Southern Ocean when the issue is artificially inflated in importance by constant media attention, providing numerous opportunities for a minister to collect no-cost electoral points. Despite the ICRW being a multilateral treaty, the Department of Foreign Affairs and Trade keeps a low profile in whaling matters compared, for example, to their role as head of delegation to Antarctic Treaty Consultative Meetings. This solitary approach to whaling responsibility is at odds with the way in which Australia has handled other international issues, for example its opposition to Antarctic mining in the 1980s (see Hemmings *et al* this volume). Then, a whole of government solidarity helped to secure a successful outcome, that is by overturning the minerals convention. Of course this may have been driven by the implications for Australian sovereignty and the allocation of unowned resources. On the other hand, Australia's opposition to whaling in the IWC is argued from a basis of sustainability, for which there is little empirical evidence.

The government has funded a new $AU2.5 million marine mammal research centre, hosted by the Australian Antarctic Division of the Department of the Environment and Water Resources. The aim of the Australian Centre for Applied Marine Mammal Science is to conduct research that fills gaps in existing knowledge about marine mammals (including cetaceans), including within the broad framework of Australia's Antarctic Science

1 161 UNTS 74.

Program Science Strategy 2004/05 to 2008/09 (AAD 2007a). This official strategic science document includes the following statement: "[A] significant research capability in cetacean biology will be developed to provide scientific data to support Australia's policy position in the International Whaling Committee [sic]" (AAD 2007a: 5). This approach was reinforced on the Centre's website (AAD 2007b).

Domestic and International Perceptions of Our Policy

In formulating its anti-whaling policy, Australia canvassed public opinion through the public enquiries of 1978 and 1997. There is no empirical evidence, however, that the majority of Australians currently support the government's policy (as may well be the case for public opinion on any government policy). The government has also relied heavily on the support and advice of representatives of environmental non-government organisations (NGOs), in particular The World Conservation Union (IUCN), the International Fund for Animal Welfare (IFAW) and Humane Society International (HSI). NGO representatives are sometimes included in the annual Australian IWC delegation.

Australia is aware of its international position and the effect its policies have on its neighbours and trading partners. Japan, in particular, is in Australia's sights over its lethal research in the Southern Ocean, despite being Australia's major trading partner for 40 years (Truss 2006). In this respect it must be said that the public disagreement between the two States in the IWC context does not appear, publicly at least, to have upset relations between them in other areas. For example, they are proceeding with negotiations on a bilateral Free Trade Agreement worth more than an estimated $AU50 billion in two-way trade (Truss 2006) while having just signed a bilateral security declaration (ABC 2007a).

The Australian Government has been reluctant to acknowledge that a position on whaling other than its own is legitimate and that it can be in accordance with international law. However, it has publicly recognised the need for subsistence catches of whales by some indigenous cultures to meet genuine traditional, cultural and dietary needs. Notwithstanding, at the announcement of Iceland's resumption of commercial whaling in November 2006, Australia was one of 26 States to sign a *démarche* condemning the Icelandic decision. The group clearly did not perceive Iceland's actions as synonymous with an indigenous culture meeting a genuine traditional need by whaling. The *démarche* came about because even though Iceland re-joined the IWC in 2002, it did so with a reservation to the moratorium. A number of States, including Australia, objected to the reservation at the time but the IWC ruled that it did not have competence to decide on the legal status of reservations and the matter is unresolved.

How robust are Australia's strategic policy goals? Whaling and the conservation of whales are regulated by a specific convention, the ICRW. Other aspects of the activity, such as international trade in whale products,

are subject to separate regimes. Australia's domestic legal framework will be examined first. However, the manner in which Australia pursues its strategic policies within the IWC is not just a matter of aligning with its national interest and domestic obligations. It also depends on rights and obligations States have under the international law relevant to whaling and the conservation of whales.

Australia's Domestic Legal Framework

The recommendations made by the Frost Inquiry in 1978 led to the repeal of the *Whaling Act* 1960 (Cth) in 1979 and its replacement by the *Whale Protection Act* 1980 (Cth). The latter Act was eventually repealed by the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act).

Section 225 of the EPBC Act establishes the Australian Whale Sanctuary, which comprises the Exclusive Economic Zone (EEZ) of continental Australia and its External Territories, including the Australian Antarctic Territory (AAT). Sections 229-232 contain various offences in relation to whales in the Australian Whale Sanctuary, which are also applicable to non-nationals. As Section 225 does not exclude application to Australia's Antarctic EEZ, the Australian Whale Sanctuary applies to non-nationals anywhere in the EEZ.

Under Australia's domestic legislation therefore, Japanese scientific research by lethal means (also known colloquially as "scientific whaling") in the EEZ off the AAT is illegal under this Act. However, in view of the delicate balance of sovereignty maintained through Article IV of the 1959 Antarctic Treaty,[2] Australia has never enforced its legislation against foreign vessels. The HSI case discussed below (and elsewhere in this volume) challenges that situation.

Humane Society International and Kyodo Senpaku Kaisha Ltd

In November 2004 HSI took action in the Australian Federal Court against a Japanese company, Kyodo Senpaku Kaisha Ltd, for killing whales in the Antarctic section of Australia's Whale Sanctuary in breach of the EPBC Act (see also Rothwell and Scott, Stephens and Boer this volume). HSI essentially sought a declaration from the Court that the Japanese activities were illegal.

It is useful to note that:

- HSI had standing to bring the action to restrain the offences in the absence of government action;
- a breach of the EPBC Act did occur;

2 402 UNTS 71.

- Japan is conducting its scientific research by lethal means in the EEZ off the AAT;
- Japan does not recognise Australia's sovereignty over the AAT (Government of Japan 2005) and thus does not acknowledge the existence of an EEZ; and
- Japan is conducting its scientific research as permitted by the ICRW.

The Australian Government was invited to submit its views to the Court. The Attorney-General's submission agreed there was no dispute as to the application of the EPBC Act to non-nationals and non-Australian flagged vessels in the AAT's EEZ. However, in acknowledgement of Japan's non-recognition of Australia's Antarctic claim (*ergo* the EEZ also), the Attorney-General submitted that the AAT claim is not one of sovereignty in the full sense but rather is one of limited entitlement. Justice Allsop concluded therefore, that the Japanese government would regard any attempt by Australia to enforce Australian law against Japanese vessels and nationals in the Antarctic EEZ to be a breach of international law on Australia's part and would give rise to an international disagreement with Japan. Furthermore, any attempt at enforcement could be "reasonably expected to prompt a significant adverse reaction from other Antarctic Treaty Parties" and any such action would also "be contrary to Australia's long term national interests" ([2005] FCA 664 at [13]-[14]).

In his decision that leave to serve be denied, Justice Allsop confirmed his agreement with the government's opinion that it was more appropriate to pursue diplomatic solutions to activities of this kind ([2005] FCA 664 at [16]). That this view was of doubtful validity was supported by HSI's successful appeal. It could be argued, for example, that the court should not have dealt with Australian-Japanese relations with regard to Antarctic claims or Australia's long-term national interest, as these are not juridical matters. Whether or not the application of the EPBC Act in this case would jeopardise the delicate Antarctic diplomatic balance should have been irrelevant.

Accordingly, when HSI lodged an appeal to the Full Bench of the Federal Court on 17 June 2005 they did so on the basis of the Court's:

- failure to exercise *prima facie* right to exercise of jurisdiction;
- failure to consider legislative intention to apply to non-nationals;
- erroneous consideration of political and diplomatic issues;
- consideration of irrelevant issues; and
- erroneous finding that proceedings are futile.[3]

HSI won the appeal (*Humane Society International Inc v Kyodo Senpaku Kaisga Ltd* [2006] FCAFC 116) and the documents have been served on

3 Notice of Appeal # NSD995/2005, dated 17.06.05.

Kyodo Senpaku Kaisha in Japan. While it will have little or no effect on the international regulation of whaling, the determination that weight was erroneously attached to the political rather than the legal aspects of the case will endure.

International Law Relevant to the Conservation of Whales and Whaling

International Convention for the Regulation of Whaling

Australia was among the original States that signed the ICRW on 2 December 1946 and became a Party upon its entry into force in 1948. There are 73 Parties to the Convention, which are also members of the IWC established under Article III. An integral part of the ICRW is its attached Schedule, which contains the agreed definitions and technical conservation and management measures. For example, paragraph 10(e) of the Schedule contains the moratorium on commercial whaling on all whale stocks, which has been in effect since 1985-86.

The ICRW applies to "factory ships, land stations, and whale catchers under the jurisdiction of the Contracting governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers" (Article I.2).

Article VIII(1) entitles Parties to grant its nationals permits to engage in scientific research. This right is not subject to the approval of the IWC. At the time of writing, only Japan was exercising this right. As there is no accepted definition of scientific research, and no exclusion for the taking of whales by lethal means, this activity is not in breach of the Convention *per se*. Furthermore, Article VIII(2) requires that whales taken under special scientific permit shall be processed (if practicable) and the proceeds dealt with according to directions from the permitting government. That the whale meat from Japanese scientific research ends up in the market place is therefore not inconsistent with the right granted in this provision, despite protests to the contrary.

In 1994 the IWC adopted the Revised Management Procedure (RMP) which seeks to ensure that once the moratorium is lifted, sufficient account is taken of the high risks of over-exploitation and thereby loss of marine biodiversity. The Revised Management Scheme (RMS), which complements the RMP on matters of supervision, control and data gathering to ensure that catch limits are not exceeded, has not yet been adopted. While the lifting of the moratorium is not formally linked to the adoption of the RMS, within the IWC there is broad support for a RMS package between three elements: the moratorium, scientific research by lethal means and compliance (IWC Chairman 2005: 3).

The process of decision-making under the Convention is of crucial importance to the stalemate on this package.

Decision-making Under the ICRW

The making of decisions is governed by specific procedures: a three-quarters majority is required for decisions on the core regulations contained within the Schedule; a simple majority for all other decisions (Article III.2). When proposals require a three-quarters majority, members can avoid becoming legally bound through the objection or "opting-out" procedure (Article V.3). By invoking this procedure, Norway and the Russian Federation have not become bound to the moratorium on commercial whaling and Japan has not become bound to the Southern Ocean Sanctuary to the extent that it relates to Antarctic minke whales (Schedule paragraphs 7(b) and 10(e) footnotes).

As simple majority is the general rule rather than the exception, this also applies when the IWC has to determine whether or not it has competence (*compétence de la compétence*). This, for instance, occurred during the 53rd and 54th IWC Meetings (2001 and 2002) and the 5th Special IWC Meeting (2002) in relation to Iceland's instrument of adherence to the ICRW, by which it made a reservation to the moratorium. At the 5th Special Meeting, the IWC eventually ruled it had no competence to determine the legal status of reservations made by States when acceding to the ICRW (Molenaar 2003: 44). Australia and various other IWC members objected to the Icelandic reservation and Australia accepts Iceland as a member of the IWC but not its reservation (Embassy of Australia 2003).

One of the most significant problems with decision-making and general behaviour on the part of IWC Members is the fact that the Convention does not have its own dispute settlement procedure. However, compulsory dispute settlement under the United Nations Convention on the Law of the Sea (LOS Convention;[4] see below) in cases of a breach of good faith, for example, cannot be ruled out (Triggs 2005). As proposals relating to whales within the IWC are extremely politically charged, there is often pressured block-voting and efforts by the pro- and anti-whaling camps to encourage like-minded States to obtain membership in order to influence decision-making. As a consequence of the qualified majority used within the IWC and the present sizes of the opposing blocks, it has become very difficult to alter the core status quo in relation to whales. But there may be recourse through other international legal avenues.

In the absence of specific provisions in the ICRW, contracting Parties can only amend the Convention with the unanimous agreement of all (Birnie 1985: 193; Brownlie 1990: 625). It is unclear whether any IWC Member has ever proposed an amendment to Article VIII to define "scientific research" in a way that excludes lethal techniques, thereby putting an end to activities by Japan under this Article. Despite a resolution being passed by the Scientific Committee in 1957 to limit the extent of the scientific "catch" (Tønnessen and Johnsen 1982: 579-80), the most common action the

4 1833 UNTS 396.

Members take in this regard is the annual ritual of passing a resolution under Article VI (which is non-legally binding) condemning lethal scientific research. This indicates a complete lack of faith in any chance of success at amending the Convention.

United Nations Convention on the Law of the Sea

Australia ratified the United Nations LOS Convention and became a party upon the Convention's entry into force on 16 November 1994. At the time of writing, participation in the Convention was so wide (153 Parties) that it essentially represents universal international law. The LOS Convention's overarching objective is to establish a universally accepted, just and equitable legal order for the oceans involving a fundamental redistribution of rights over marine resources, both living and non-living. On account of their sovereignty within their internal waters, territorial sea and archipelagic waters as well as their sovereign rights in the adjacent EEZ and outer continental shelf (Articles 2, 49, 56 and 77 respectively), coastal States have very extensive authority over marine living resources therein.

The fact that the ICRW predates the LOS Convention by several decades explains why the coverage of the ICRW is not influenced by the LOS Convention's division of the oceans into maritime zones and the rights of coastal States and flag States therein or why it does not in one way or another defer to the LOS Convention. The circumstance that the ICRW is older, however, does not affect the sovereign rights of coastal States over marine mammals in their EEZs under Article 65 of the LOS Convention. This means that whether or not a coastal State such as Australia is a Party to the ICRW, it has a right under Article 65 to regulate the exploitation of marine mammals more strictly than the ICRW (such as Australia declaring its EEZ a whale sanctuary). The reverse is not possible. That is, a Party to the ICRW cannot authorise whaling in its own EEZ by invoking Article 65 of the LOS Convention if it is also legally bound to a moratorium on whaling under the ICRW.

The sovereign rights of a coastal State (less comprehensive than sovereignty) in its EEZ are granted for "the purpose of exploring and exploiting, conserving and managing the natural resources" (Article 56(1)(a)). Articles 61-73 impose further limitations on these sovereign rights. Most importantly, Article 61 requires coastal States to ensure that the harvesting of living resources in their EEZs is aimed at producing the maximum sustainable yield and does not lead to over-exploitation. Article 62(1), on the other hand, requires coastal States to "inter alia … promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to article 61". The superiority of conservation above utilisation is common sense: without measures to avoid over-exploitation, there cannot be long-term utilisation.

Furthermore, Articles 63-67 of the LOS Convention lay down regimes for international cooperation for different categories of species whose

ranges of distribution are not confined to a single coastal State's EEZ. Whales fall within two of these categories: highly migratory species (Article 64 and Annex I(17)) and marine mammals (Article 65).

Section 2 of Part VII of the LOS Convention implicitly recognises that all States have a right to engage in whaling on the high seas, subject among other things to their Treaty obligations as well as general obligations on the conservation (but not optimum utilisation) of the living resources of the high seas. Article 120 on Marine mammals stipulates that "Article 65 also applies to the conservation and management of marine mammals in the high seas".

A key feature of the LOS Convention's Part XV on Settlement of Disputes is compulsory third Party dispute settlement procedures entailing binding decisions, which can be brought unilaterally by a contracting Party against another contracting Party. However, one of the automatic limitations under Section 3 of Part XV covers disputes on the coastal State's regulation of whales within the EEZ (Article 297.3). The ICRW does not have a dispute settlement procedure of its own and Japan has used this absence to support its view that access to the compulsory dispute settlement procedure under the LOS Convention cannot be presumed.[5]

Convention on the Conservation of Migratory Species of Wild Animals

Australia is one of the current 91 Parties to the Convention on the Conservation of Migratory Species of Wild Animals (CMS)[6] (CMS 2007). The CMS aims to conserve migratory terrestrial, avian and marine species throughout their range of distribution. Various forms of regulatory action are possible, for instance prohibitions of intentional taking, habitat protection and the development of agreements that do not merely deal with conservation but also with management, thus encompassing utilisation (Articles I(1)(a), (f), (h) and (i); Articles III, IV and V). Various species of whales are included among the species threatened with extinction that are listed in Appendix I, as well as in Appendix II, which lists species that need or would significantly benefit from international cooperation by means of global or regional agreements.

Australia is one of the signatories to the non-legally binding Memorandum of Understanding (MOU) for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region (CMS 2007), within the framework of Article IV(4) of the CMS. The MOU does not have a utilisation component (MOU paragraph 1). Among the reasons for Australia and New Zealand participating in, and probably even driving the negotiations

5 *Australia and New Zealand v Japan*, Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award on Jurisdiction and Admissibility of 4 August 2000 at 38(i).

6 1651 UNTS 355.

of this MOU, is that its comprehensive approach to the conservation of whales in the Pacific is in part an alternative to the designation of a South Pacific Sanctuary under the Schedule to the ICRW (which would solely concern directed take). A proposal for such a Sanctuary failed to get the required three-quarters majority at the 56th Annual IWC Meeting (2004) and was not submitted again in 2005 or in 2006. As participation in the CMS by States in the Pacific is currently minimal, the MOU may eventually help to broaden participation in the CMS. While this could also affect voting patterns within the Conference of the Parties to the CMS, there is no indication that this is a major driver for the MOU initiative.

Convention on International Trade of Endangered Species of Wild Fauna and Flora

Australia is one of the current 168 Parties to the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES),[7] the main objective of which is the protection of endangered species against over-exploitation through the regulation of international trade. Whales caught on the high seas are regarded as "trade" under CITES Articles 1(c) and (e). International trade in endangered species is regulated by means of listing species on three different Appendices, each requiring different regulation. All species of whales are listed on Appendix I or II. Norway, Japan and Iceland are all Parties to CITES. However, as each has exercised its right to use the objection procedure (Article XXIII), in relation to *Balaenopteridae* species (for example, minke, humpback, fin), they are exempt from trade restrictions on these whales. These reservations essentially keep the market for whale meat open among States that wish to trade.

Customary International Law

Can Australia rely on the development of customary international law to support its policy positions? While custom is nowadays a relatively minor source of international law, it has certainly not become obsolete. It can therefore not be ruled out that gradually more and more States take the view that they are under an international obligation not to engage in commercial whaling, or even any type of whaling. At a certain time State practice could become sufficiently uniform and widespread to transform this into a rule of customary international law, binding all States that have not persistently objected to it during the rule's formation. As the IWC still has several prominent pro-whaling members as well as a group of States that pursue a more pragmatic middle course, and in view of the fact that several non-Parties to the ICRW are currently engaged in whaling activities, this process is not likely to be completed in the near future, if ever.

7 993 UNTS 243.

In this respect, the principle of good faith, which is not laid down in the ICRW, is arguably a rule of customary international law. While IWC Resolution 2001-1 on Transparency within the International Whaling Commission focuses in particular on transparency, it does so in tandem with the principle of good faith (IWC 2001). While this resolution was adopted as a consequence of alleged vote-buying by pro-whaling States, it is intended to have a more general application. Accordingly, the IWC:

> STRESSES in particular the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC. (IWC 2001)

The resolution also makes reference to the *pacta sunt servanda* rule in Article 26 of the 1969 Vienna Convention on the Law of Treaties,[8] which is in fact directly linked to performance in good faith (Preamble). Perhaps even more important is the reference to Article 300 of the LOS Convention on 'Good faith and abuse of rights', which has significant implications for compulsory dispute settlement under the LOS Convention.

Current Considerations

The IWC in 2006

In 2006 the IWC was at a crossroads. The moratorium had been in place for 20 years, and membership recruitments meant that voting on the various issues, which had effectively become proxies for a vote on the moratorium itself, moved closer to a balance between the pro- and anti-whaling groupings. In 2006, for the first time in 24 years, the pro-whaling group gained a simple majority (by one vote) in the Meeting, resulting in the adoption of the St Kitts and Nevis Declaration which effectively confirmed the original (1946) IWC role as that of conservation rather than preservation of whale stocks (IWC 2006a). While the Declaration has no immediate consequences for the role or function of the Convention or the IWC, it can legitimately be claimed to be a contemporary statement of the intent of the majority of IWC Members. It is also an important indicator that Australia, the anti-whaling group and the moratorium on which they pin their hopes may be under significantly greater pressure in the future.

The longer term outcome from the so-called Tiger Room Meeting of predominantly pro-whaling delegates, which was held in St Kitts and Nevis following the passing of the Declaration, is more difficult to predict. The Japanese delegation has repeatedly used the term "normalise" to describe its agenda for the IWC (IWC 2006b), and its published Mission Statement for the follow-up meeting in February 2007 sets the aim of the conference as to discuss and put forward specific measures to resume the

8 1155 UNTS 332.

function of the IWC as a resource management organisation (Fisheries Agency of Japan 2007). It also notes "discussions at the Conference will be based on the [ICRW] which established the IWC together with the principles of sustainable use, science-based conservation and management, and respect for cultural diversity" (Fisheries Agency of Japan 2007: 1).

In spite of the fact that the tone of the Mission Statement is extremely conciliatory, stressing that the Conference aims to "build confidence and trust among participants" and the outcomes "may include a list of short-term and long-term recommendations to the IWC" (Fisheries Agency of Japan 2007), Australia, together with most of the anti-whaling States, chose to boycott it. Their view was that to attend would suggest tacit support for the normalisation agenda, which clearly includes sustainable harvesting of whales, and this is a step they were not prepared to take. The position of the USA is interesting. After initially announcing they would boycott the conference, Commissioner Hogarth subsequently indicated that the USA would attend, a move which provoked the ire of the NGOs, with one claiming:

> To its allies in the IWC the US decision may be taken as a betrayal … To the media and the public … the decision to attend may be interpreted as providing this unnecessary and misguided conference with a stamp of legitimacy. (Animal Welfare Institute, 2006)

In the event, the USA did not attend the Normalization Conference and the conference recommendations to be presented to the 2007 IWC meeting were extremely bland. The focus of the recommendations was on the achievement of consensus, however unashamedly in the context of sustainable harvesting of whales. It is difficult to see any effect on the IWC as a result of the Normalization meeting.

Australia's Role Within the IWC

If Australia is not prepared to entertain multilateral brokering of a position of normalisation, what will its role be within the IWC? Withdrawal is hardly an option as both Frost and the Task Force recognised the IWC as the most appropriate forum from which to pursue its strategic goals.

In the light of the St Kitts and Nevis Declaration and possible consequent normalising of the IWC, Australia must face the very real prospect that simply attending the annual IWC meeting and lobbying new and existing members to vote for whale preservation may not be enough to hold the anti-whaling position. However, the pro-whaling camp only barely have a simple majority now and is a long way from the three-quarters majority required to lift the moratorium. Therefore, this may not be the direction in which Japan chooses to lead the Tiger Room group. Particularly in view of the boycott by the anti-whaling States, it takes little imagination to see this group declare itself the only legitimate adherents to the ICRW.

Joji Morishita, the public face of the Japanese IWC delegation, has suggested that if the pro and anti-whaling groups within the IWC cannot "agree to disagree" on the cultural values aspects of the whaling issue, and abide by the strict wording of the ICRW, then those who cannot should withdraw from the organisation. He suggests splitting the IWC into two organisations; one to manage sustainable whaling, the other to totally protect whales (Morishita 2006). This seems to be a totally nonsensical idea as the notions are oxymoronic.

The recommendations of the meeting of the Tiger Room Group, and the subsequent debate in the 2007 IWC meeting will determine the next move.

Less-known Threats to Whale Populations

Most Australians would be surprised to hear that the major global threats to whale populations are likely to come from the effects of global warming. While such changes may be capable of eliminating all the great whales through destruction of their feeding habitat, there is little contemporary scientific certainty about the magnitude and temporal aspects of global warming (Branch and Butterworth 2001; Burns 2003). The next most serious threat comes from pollution of the oceans by organochlorines and heavy metals (Busbee *et al* 1999; Barsh 2001; Coghlan 2002). Together, these factors could kill many times the number of whales annually than all whaling operations combined. Ship strikes, accidental netting entanglement and anthropogenic underwater noise probably account for similar numbers of whale deaths as do whaling operations (IWC Bycatch sub-Committee 2004; NOAA 2004; Best *et al* 2005; WDCS 2005). The Conservation Committee of the IWC has identified these issues, but its reports to the main body of the IWC are being lost in the noise of claims and counter claims on Japanese scientific whaling (IWC 2006c, 2006d). The IWC has no mandate to regulate these issues and anti-whaling States such as Australia would achieve more success if they concentrated their efforts in other international fora.

The Role of NGOs

In 1997 the Task Force acknowledged the utility of the networks and expertise of conservation NGOs and recommended that the government promote dialogue and work with them to help achieve their mutually held objectives (Environment Australia 1997: xiii). In fact, since the early 1970s, conservation NGOs have been leading the anti-whaling movement as a flagship for their conservation agenda and have been responsible for shaping government and public opinion in Australia and worldwide. It is also true that whales provide outstanding publicity for fundraising by NGOs and have been exploited in this respect for a considerable period. The activities of the Sea Shepherd Society and Greenpeace vessels in conflict with the Japanese research fleet in the Southern Ocean, from which

the government naturally distances itself (Turnbull 2007), have been well documented by the popular press. While their actions may raise concerns among the more conservative environmental NGOs, they have certainly also raised awareness of the cruelty issues and hardened public sentiment against the Japanese.

Conclusions

With the increase in numbers of whales sighted in Australian waters, and in particular near the coast, there has been rising public awareness of whales and whaling issues. As long as both conservation NGOs and governments focus public attention on the cruelty of whaling and away from the sustainability issue, public opinion will remain strongly anti-whaling, leading to the conclusion that there are a number of possible scenarios available to the factions.

It is possible that the status quo in the IWC will remain, with Japan continuing its scientific whaling, Iceland and Norway continuing commercial whaling under their reservation to the moratorium and some aboriginal subsistence whaling alongside.

Commercial whaling could recommence through a range of scenarios, from a withdrawal from the IWC by pro-whalers to harvest (almost certainly in accordance with the RMP), through to a move within the IWC in which a majority vote of pro-whaling States declares them the only *true* IWC members by remaining faithful to the principles of the ICRW. The former scenario is the one that is least desirable as it could eventuate in unregulated harvesting thereby complicating any chance of the anti-whaling States like Australia achieving their goals. The latter would require a three-quarters majority of Parties succeeding in setting aside the moratorium. The suggested possible removal of minkes and humpbacks from the IUCN Red List of Endangered Species could have an effect on this situation in the medium to long term (IUCN 2007). It is difficult to forecast how the demand for whale meat would be affected by an increase in availability, but it appears unlikely that short-term demand would rise to anywhere near the catch limit under the RMP of some 6000 animals based on current population estimates. In any case, whaling within the limits set by the RMP ensures that population sustainability is assured. Sustainability, however, depends on other factors in addition to harvesting effort.

Some scientific and popular science reports (for example, Burns 2003; Atkinson *et al* 2004; The Royal Society 2005; Kolbert 2006; Ruttimann 2006; Ainley *et al* 2007) indicate that the current rate of climate change, particularly aspects such as ocean acidification and global warming, will alter the marine environment in which cetaceans live. Although there is still a long way to go to achieve the level of certainty desired by policy-makers, early indications are that impacts may be profound in the long term, although with negative niches possibly being filled by opportu-

nistically positive ones (for example, Ainley *et al* 2007). The Australian Government is being proactive in this regard by sponsoring marine mammal and climate change science to support its policy positions.

Australia has substantial domestic law in the form of the EPBC Act to help preserve whale stocks in its jurisdiction, yet it has not enforced the Act against the Japanese in the Antarctic EEZ, preferring instead a diplomatic approach. That approach does not stretch to attending the Japanese-sponsored Normalization Conference, however. Nor does it mean Australia will commence an international dispute settlement procedure against Japan or raise Japanese research (or even whales generally) in Antarctic fora such as Antarctic Treaty Consultative Meetings or the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) meetings, despite the keystone species status of whales in Southern Ocean ecosystems (ASOC 2005b). Even though Australia is an outspoken Antarctic claimant, it would not wish to upset the status quo by broaching the subject of whales in Antarctic Treaty System forums. Here, whales have been legally and diplomatically eschewed through the recognition of high seas rights (Antarctic Treaty Article VI) and by direct reference to the primacy of the ICRW (CCAMLR Article VI). Despite all the main protagonists from the IWC being present at either ATCMs or CCAMLR Commission meetings, the topic is not mentioned as part of usual Antarctic business.

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