

**Whales, Antarctica, Diplomacy and the Law:
Humane Society International v Kyodo (or Australia v Japan)
Monday 4 September 2006, 3.30 - 7.15pm, Law Link Theatre**

This seminar will consider the case of *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116, a recent decision of the Full Bench of the Federal Court, and the important issues it raises. The case involves an attempt by Human Society International Inc (HSI) to enjoin Kyodo Senpaku Kaisha Ltd (Kyodo), a Japanese whaling company, from whaling in waters adjacent to the Australian Antarctic Territory in which Australia has claimed an Exclusive Economic Zone (EEZ) and declared a whale sanctuary. The legality of Australia's claim to an Antarctic EEZ and to jurisdiction in these waters is internationally contentious and is not recognised by Japan. The Australian Executive Government made representations to the Federal Court that allowing the case to proceed would result in a diplomatic incident. A single judge refused to grant HSI leave to proceed against Kyodo based, *inter alia*, on the ground of non-justiciability. The Full Bench overturned this decision and granted leave to serve and HSI is now proceeding to serve Kyodo.

In this context, the seminar will consider specific and broader issues raised by the case, including:

- how best to effectively protect the Antarctic marine environment and the Antarctic environment more broadly;
- how the Environment Protection Biodiversity Conservation Act applies in the EEZ that Australia claims off the Australian Antarctic Territory;
- the potentially serious politico-legal implications of the case within the present Antarctic regime;
- the relationship between foreign affairs and the courts from the standpoint of justiciability of Executive pursuit of external affairs; and
- broader international legal and policy responses to 'scientific whaling' by Japan.

Program

Welcome – *Kim Rubenstein*, Director CIPL & Member, ANZSIL Executive Council

Introduction - *Rosemary Rayfuse* (moderator), Associate Professor, UNSW (3:30 – 3:35)

Chris McGrath, Barrister, Junior Counsel for Humane Society International (3.35 – 3.55)

Legal and evidentiary basis of the Japanese whaling case

McGrath will set the stage by explaining the legal and evidentiary basis for Humane Society International's case against Kyodo Senpaku Kaisha Ltd. His main theme will be respect for the rule of law. He will argue that the declaration and enforcement of the Australian Whale Sanctuary adjacent to Antarctica is lawful under international law, including the Antarctic Treaty System. He will summarise the evidence of whaling occurring inside the Australian Whale Sanctuary. He will suggest that the onus should be placed on Japan and Japanese nationals to respect Australian law, rather than placing an onus on Australia or the Humane Society International to justify the enforcement of Australian law.

Alan D. Hemmings, Senior Fellow, Gateway Antarctica, University of Canterbury (3.55 – 4.15)

Effects within the Antarctic regime of purported application of claimant domestic law beyond its own nationals

Hemmings will examine the likely consequences within the Antarctic Treaty System, setting this in a context of international reaction to other perceived expressions of sovereignty. The likely diplomatic and political reactions, not only of Japan, but of states which ordinarily share Australia's position of opposition to whaling, are canvassed. Possible implications for the willingness of other states, particularly claimant states, to either project positive domestic environmental legal developments into Antarctica, or grant standing to non-state entities in such legislation, are explored.

Henry Burmester AO, QC, Chief General Counsel, Australian Government Solicitor (4.15 – 4.35)

Foreign Affairs and the Courts

Burmester will consider the way in which the courts seek to deal with foreign affairs sensitivities in matters that come before them and the reasons why in some cases they are prepared to assume jurisdiction but not in others. He will consider in particular the use of the political questions doctrine and the reluctance of Australian courts to embrace it, as well as the difficulties of proving the foreign relations impact of a case, which were both issues raised by the Humane Society International case.

Rachel Baird, Lecturer in Law, University of Queensland (4.35– 4.55)

The International Regulation of Antarctic Marine Living Resources (including Whales)

Baird will address the international legal regime applicable to the Antarctic under the umbrella of the Antarctic Treaty System. The extent of recognition of Australia's claim to the AAT EEZ will be addressed. Primary focus will be on regional management with reference to the management of Antarctic marine living resources under the Convention for the Conservation of Antarctic marine Living Resources 1980. The dynamics of the specific regulation of all whales (regardless of location) under the International Convention for the Regulation of Whaling 1946 (thus excluding the application of CCAMLR) will be examined with a view to determining whether (as an alternative to unilateral action) the framework of governance created under the Antarctic Treaty System creates an obligation on Antarctic Treaty parties to act collectively to enforce obligations, to protect the marine resources and the Antarctic environment, against Japan (a member of both CCAMLR and the AT). It will be noted even if such obligations can be argued to exist, the application is limited to the Antarctic treaty area.

Discussion – 4:55 – 5:20
Tea: 5:20 – 5:45

Don Anton, Senior Lecturer in Law, ANU College of Law (5.45 – 6.05)

Protecting Antarctica's Marine Environment: Between Sovereign Rights and Common Heritage

Anton will address two competing legal visions for protection of the marine environment in Antarctica. He will consider the advantages and disadvantages of the unilateral approach to protection reflected in the *HSI v Kyodo* case. He will compare and contrast those advantages and disadvantages with an approach to protection anchored in the principle of Common Heritage. He will argue that the effectiveness of norms designed to protect the Antarctic marine environment and their supervision requires a strong, cooperative, multilateral foundation and that unilateral measures or enforcement of jurisdiction based on sovereign claims in Antarctica are likely to be counterproductive in the long run.

Joanna Mossop, Lecturer in Law, Victoria University of Wellington (6.05 – 6.25)

Comparing Australian and New Zealand Approaches

Mossop will take a comparative approach to the issue of declaring and enforcing maritime boundaries in the Antarctic region. She will evaluate the Australian government position in light of the domestic and international law implications of *HSI v Kyodo*. She will compare the New Zealand and Australian approaches in Antarctica and assess whether environmental goals in the Southern Ocean would be better achieved by a more assertive unilateral approach to whaling and environmental issues or a cooperative and less confrontational approach.

Donald R. Rothwell, Professor of International Law, ANU College of Law (6.25 – 6.45)

Japan's 'Scientific Whaling' Program in the Southern Ocean: Diplomatic, Legal and Policy Responses

In the 2005/06 season Japan commenced the JARPAII program of scientific whaling. This whaling program will when fully implemented result in a take of more than 800 minke whales and a smaller number of fin and humpback whales. JARPA II represents a doubling of the previous annual take under the JARPA program which ran for 20 years. It raises significant legal issues as to whether the program is consistent with the Article VIII exemption for 'scientific whaling' under the International Convention for the Regulation of Whaling and an ongoing challenge to the Australian Whale Sanctuary in the Southern Ocean. Rothwell will explore these issues and consider the ongoing Australia diplomatic and policy response to JARPA II and the potential legal options open to Australia to challenge Japan's whaling program

Discussion 6.45 – 7.15

Close – *Tim Bonyhady*, Director, ANU Australian Centre for Environmental Law

The Speakers

Donald K Anton is a Senior Lecturer at the ANU College of Law. Anton's teaching and research interests lie at the intersection of international law and the environment. Most

recently he has completed: *International Environmental Law: Cases, Materials, Problems* (LexisNexis)(in press)(with J.I. Charney, P. Sands, T. Schoenbaum & M. Young).

Rachel Baird is a fellow of the Centre for Public, International and Comparative Law at the University of Queensland. Her research interests lie in international law of the sea and particularly IUU fishing and Southern Ocean and Antarctic issues. She is currently working on a publication titled '*Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean*' which is in press with Springer (Kluwer).

Henry Burmester AO, QC is Chief General Counsel with the Australian Government Solicitor. He has advised the Australian Government over many years in the areas of international and constitutional law, and has also written in the area of the relationship of international and domestic law. He was among the legal advisers to the Australian Government in relation to its response to the Humane Society International's court case.

Alan D. Hemmings is a Canberra-based Consultant specialising on Antarctic policy issues and a Senior Fellow at Gateway Antarctica Centre for Antarctic Studies and Research at the University of Canterbury. He has attended the annual Antarctic Treaty Consultative Meeting and Commission for the Conservation of Antarctic Marine Living Resources since 1989, and has been Senior Adviser to the Antarctic and Southern Ocean Coalition (ASOC).

Joanna Mossop is a lecturer at Victoria University of Wellington. She researches and teaches in law of the sea, international environmental law and Antarctica. She recently published a note on the *HSI v Kyodo* case: "When is a Whale Sanctuary not a Whale Sanctuary: Japanese Whaling in Australian Antarctic Maritime Zones" (2005) 36 VUWLR 757.

Chris McGrath is the junior barrister for the Humane Society International Inc. He practises at the private bar in Brisbane. His website provides background documents for the case at <http://www.envlaw.com.au/whale.html>.

Donald R. Rothwell is Professor of International Law at the ANU College of Law, Australian National University. He is a specialist in Antarctic and law of the sea issues, and is currently a Legal Advisor to the International Fund for Animal Welfare (IFAW) campaign to halt Japan's JARPA II whaling program.

Moderator:

Rosemary Rayfuse is an Associate Professor at the University of New South Wales and the Director of International Law Programs. She is an expert on the law of the sea and has recently written on *Non-Flag State Enforcement in High Seas Fisheries*, in *Publications on Ocean Developments* (Leiden: Martinus Nijhoff Publishers, 2004)

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