

Labor's policies place it on international tightrope

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The election of the Rudd Government resulted in a flurry of international diplomatic and legal activity ranging from the ratification of the Kyoto Protocol to surveillance of the Japanese whaling fleet in Antarctica. These two actions have quickly symbolised the stark policy differences between the Howard and Rudd governments, but also highlight some of the issues the new Government faces because of certain Howard legacies plus its own policy platforms. Ratification of the Kyoto Protocol had a number of immediate ramifications. It meant that Australia could attend and take part in the Bali climate change summit and play its role in the first formal negotiations to a Kyoto successor treaty. But it also carries with it certain legal obligations that Australia work towards meeting Kyoto emissions targets. These are no longer just aspirational targets but ones that are legally binding and which could carry international legal consequences if Australia fails to meet the mark.

It is accordingly significant that the Rudd Government dispensed with one of the essential conditions of treaty

Ratification that has been followed for at least the past 15 years and did not seek the enactment of new federal law to give effect to Kyoto. The legislative deficiency can, however, be rectified and if, as is being suggested, the Government is keen to have an emissions trading regime in place by 2010, then it would seem essential that eventually there be some form of federal Kyoto law enacted by 2009. In the case of Australia's opposition to whaling, the Government outlined a range of measures on December 19, including the commissioning of external legal advice to review the options of challenging Japan's whale hunt in international courts. These actions have also brought into focus Australia's position on its Antarctic claim. In recent years, Australia has been sharply reminded that its Antarctic claim to more than 42 per cent of the continent has little widespread support. This is the clearly articulated position of the United States, Russia, the Netherlands, Germany, Japan and

India. Australia, therefore, needs to begin to strategically assess whether it will persist with an Antarctic claim that lacks international recognition, or whether it will think about different management options for Antarctica as a whole. As the price of oil continues to rise there is a looming inevitability that Antarctic oil and gas will begin to figure in global calculations. Australia needs a well-defined strategic legal and policy position on this issue. The Rudd Government has come to office with a commitment to establish a coastguard and this will have implications for the offshore enforcement of Australian laws, especially as they relate to illegal fishing in northern waters and the Southern Ocean. This will bring under the spotlight the consistency of Australian laws and regulations with the 1982 Law of the Sea Convention. As the enforcement of these offshore laws depends on the certainty of Australia's maritime boundaries, the Rudd Government may need to give attention to working through with Indonesia why

the 1997 Perth Treaty, drawing sea boundaries through the Timor Sea and Indian Ocean, is still not yet in force. By March this year, Australia will also receive back recommendations from the UN Commission on the Limits of the Continental Shelf on Australia's extended continental shelf. This will provide the basis for a considerable extension of Australian maritime sovereignty beyond 200miles. Human rights, both at home and abroad, proved troublesome for the Howard government and will probably prove to be the same for the Rudd Government. In opposition, Labor frontbencher Jenny Macklin indicated the party would move to support the UN Declaration on the Rights of Indigenous Peoples and it must be anticipated that Australia will now register that position with the UN General Assembly. On the question of the death penalty, there was support at one stage for a Rudd Government encouraging neighbouring states to adopt the Second Optional Protocol to the International Covenant on

Civil and Political Rights, which prohibits capital punishment. This aspect of Labor policy remains uncertain after comments by the party's leader, Kevin Rudd, in early October. Nevertheless, the Government will be forced to clearly articulate its position on the death penalty relatively quickly if Indonesia move towards executing the condemned Bali bombers. There is also the not insignificant international legal challenges raised by the plight of the six Bali Nine members now on death row. While there remains some time to run on the various appeals within the Indonesian courts, in addition to requests for presidential clemency, Australia may ultimately be faced with the prospect of challenging Indonesia's imposition of the death penalty in an international court. There is precedent for such action, and the Howard government came very close to pursuing such a claim against Singapore in the 2005 case of drug trafficker Van Tuong Nguyen. If the Bali cases reach this stage, it will have been important that the Government fully considered a wide range of legal options and that it be prepared to act as short notice. Under the Howard government, Australia was a strong supporter of international criminal courts and tribunals. However, there is limited acceptance for the Rome Statute of the International Criminal Court within our region and Australia, through Foreign Minister Stephen Smith, may choose to take the lead in promoting the court regionally. On the other hand, the new Attorney-General, Robert McClelland, will face the challenges of working through the recommendations of the recent NSW coronial inquiry into the 1975 deaths in Indonesia of the five Australian journalists known as the Balibo Five. The recommendations that war crimes charges be laid under Australian law have the potential to become a significant thorn in Australian-Indonesian relations, and may become inevitably linked to any diplomatic settlement that may be proposed in the case of the Bali Nine members on death row. Don Rothwell is professor of international law at the Australian National University's College of Law.

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