

Lorne K Kriwoken, Julia Jabour & Alan D Hemmings (eds),
Looking South: Australia's Antarctic Agenda (Federation Press,
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REVIEWED BY GILLIAN TRIGGS*

This collection of essays provides an examination of the pursuit by Australia of its Antarctic agenda, both nationally and internationally. The work is particularly timely as it was published only shortly before the unprecedented restraint order against whaling made by the Federal Court of Australia in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (*'Humane Society'*) of 15 January 2008.

Australia has sought to achieve its Antarctic objectives through the Antarctic Treaty System ('ATS') of December 1959, and which, over the last nearly 50 years, has proved to be one of the success stories of international law and institution building. The *Humane Society* case demonstrates, by contrast, that in addition to its international strategy of cooperation, Australian legislation might also be applied directly to the Australian Antarctic Territory ('AAT'), a strategy that has hitherto been avoided in respect of non-nationals. In issuing a restraint order against whaling in Australia's Whale Sanctuary in the Exclusive Economic Zone ('EEZ') of the AAT, Allsop J of the Federal Court applied the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia) ('EPBC Act'). He was able to do so with the imprimatur of a new Australian Government overturning the objections of the former Attorney General that the issue was non-justiciable.

The Federal Court decision, while perfectly valid under the EPBC Act, poses an international dilemma for Australia and illustrates the tension between international law and domestic laws. The central problem for Australia is that its claim to sovereignty in Antarctica, and hence its right to regulate whaling in Antarctic waters, are not recognised by the overwhelming majority of states in the international community. Indeed, only the United Kingdom, New Zealand, France and Norway recognise Australia's claim. The *Antarctic Treaty*¹ and the interlinked system of conventions and recommendations that make up the ATS has proved to be an enduring means of avoiding the sovereignty question, allowing states with interests in Antarctica to engage in scientific research, climate change analysis and environmental management, unhampered by sterile debates about the validity of the seven claims to territorial sovereignty.

The sovereignty issue remains, however, the elephant in the room or more appropriately the elephant seal on the iceshelf. It will not go away, despite Australian

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1 *The Antarctica Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) (*'Antarctic Treaty'*).

policy to work within the ATS and to refrain from applying its domestic legislation to the claimed Antarctic territory, at least in respect of non-nationals. The *Humane Society* case provides a sobering illustration of the often unforeseen consequences of extending *locus standi* to individuals and NGOs, especially in environmental matters where government strategy may be to adopt a different approach for reasons of foreign policy.

Looking South: Australia's Antarctic Agenda provides an excellent source of information and critical analysis of all aspects of Australian Antarctic law and policy. The essay by Julia Jabour, Mike Iliff and Erik Jaap Molenaar, 'The Great Whale Debate: Australia's Agenda on Whaling', examines Australia's efforts to achieve its anti-whaling agenda including the domestic legal framework. As contentious whaling largely occurs in the Southern Ocean, it has become, as the authors observe, an 'Antarctic issue'², despite the fact that the Antarctic Treaty parties have been reluctant to deal with whaling in the general business of the ATS. While the final outcome of the *Humane Society* case was not available until 2007, the essay usefully sets out the history of the litigation up to the successful appeal in 2006. The authors conclude unsentimentally that, while Australia continues its role as a moral entrepreneur in the face of a majority vote in the International Whaling Commission apparently in favour of a resumption of whaling, Australia's efforts are 'likely to remain both heroic and irrelevant'.³

Almost all Antarctic issues return in one way or another to the question of sovereignty. Donald R Rothwell and Shirley V Scott review the history of Australia's territorial claim and argue, in the context of the EEZ and continental shelf, that the validity of the claim is tenuous and 'inherently ambiguous'.⁴ With prescience, the authors recognise that the whaling dispute with Japan is a 'flash point'⁵ that could stimulate Australia to 'get off the fence'⁶ by pursuing its national interests in Antarctica and absorbing any negative impact on international relations. Tim Stephens and Ben Boer take up the limitations imposed by the sovereignty dilemma on enforcement and compliance within the AAT. They argue that compliance is a matter for member states requiring national compliance with the *Antarctic Treaty*, information sharing and inspection. The authors observe that enforcement will necessarily be viewed through the sovereignty lens. They provide a detailed survey of all Australian legislation applicable to the AAT and conclude that, over the last 20 years or so, Australia has asserted a territorial jurisdiction that supports its intent to act as a sovereign in the area. Enforcement of its jurisdiction against non-nationals in the AAT is by contrast notably absent, consistent with Australia's policy of supporting the stability of the ATS. Moreover, Australia wishes to avoid raising the immediate challenge to its sovereignty that will doubtless be the

2 Julia Jabour, Mike Iliff & Erik Jaap Molenaar, 'The Great Whale Debate: Australia's Agenda on Whaling' in Lorne K Kriwoken, Julia Jabour & Alan D Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007) 133 at 134.

3 Id at 148.

4 Donald Rothwell & Shirley Scott, 'Flexing Australian Sovereignty in Antarctica' in Lorne K Kriwoken, Julia Jabour & Alan D Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007) 7 at 19.

5 Id at 20.

6 Ibid.

response to an assertion of legislative jurisdiction over a non-national. Arguing for a more modern internationalised management regime, the authors recognise that a realistic initiative for the future is to improve the existing processes in light of sovereignty constraints.

Marcus Haward, Rob Hall and Aynsley Kellow focus upon the tensions between Australia's international interests and the drivers for formation of domestic policies. In identifying those who comprise the national policy community, the authors argue that evolving domestic concerns continue to shape Australia's responses to global issues such as maritime zones, climate change, tourism and illegal, unregulated and unreported fishing. The means by which domestic Australian policy is developed is also discussed by Stephen Powell and Andrew Jackson who, as advisors to the Federal Environment Minister, provide an 'insider's' perspective of the art of the possible.⁷ They rightly conclude that Australia has maintained a significant influence over the ATS as it has moved from a resources focus to protection of the Antarctic eco-system.

A valuable inclusion in the collection of essays is the discussion by Lorne K Kriwoken and Nick Holmes on the sub-Antarctic islands of Heard, McDonald and Macquarie. They ask whether the current World Heritage coverage might be increased to include marine areas to 200 nautical miles to ensure comprehensive marine planning.

Globalisation now necessarily includes Antarctica. As several essays dealing with the sea birds, science, fishing, tourism and climate change amply demonstrate, Antarctic isolation is at an end. Alan D Hemmings both observes the impact of globalisation on Antarctica and argues that the ATS is in 'relative decline'.⁸ In support of this initially surprising view, he points to that fact no significant regulatory instrument has been negotiated within the system since the *Protocol on Environmental Protection to the Antarctic Treaty* ('*Madrid Protocol*')⁹ in 1991, over 17 years ago. The whaling controversy and global concerns to ensure food and energy security may well stimulate the political will to achieve more effective governance of Antarctica over the coming years.

Looking South: Australia's Antarctic Agenda provides an excellent and accessible source of information about Antarctica along with reasoned analysis of contemporary legal and political issues. The collection will be a valuable foundation for considering future needs for governance of Antarctica as it becomes an increasingly integrated part of the globalised world.

7 Stephen Powell & Andrew Jackson, 'Australian Influence in the Antarctic Treaty System' in Lorne K Kriwoken, Julia Jabour & Alan D Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007) 38 at 38.

8 Alan Hemmings, 'Globalisation's Cold Genius and the Ending of Antarctic Isolation' in Lorne K Kriwoken, Julia Jabour & Alan D Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007) 176 at 189.

9 *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1455 (entered into force 14 January 1998) ('*Madrid Protocol*').