



The **Asialink** Essays 2010

Volume 2
Number 1

Published by Asialink, Sidney Myer Asia Centre
The University of Melbourne Parkville 3010 Australia

www.asialink.unimelb.edu.au
enquiries@asialink.unimelb.edu.au

WHALES APART

Tensions in Japan–Australia relations

Trevor Wilson

Australia and Japan have been at loggerheads over Japan’s “scientific” whaling program since the International Whaling Commission (IWC) set aside its temporary moratorium on commercial whaling in 1986 and allowed a small annual catch of more common whales in the name of scientific research. This was consistent with the IWC’s primary purpose of managing whale resources, rather than just conserving them.

Whaling has often been identified as one of two main issues over which Australia and Japan differ, the other being agricultural protection, but until recently there has been an informal consensus that neither side will make whaling the central issue for bilateral relations. Both Prime Ministers now have entered the debate: Japan’s new Prime Minister, Yukio Hatoyama, stated publicly he “hated” whale meat, though did not vary his party’s support for whaling; and Kevin Rudd this week warned that Australia would commence legal action if Japan does not stop Southern Ocean whaling by the end of 2010.

And so, with politicians and officials continuing to exchange heated words, exaggerated posturing by conservation groups, and sensational media treatment, a solution seems more remote than ever.

TREVOR WILSON lived and worked in Japan for 12 years, in that time fulfilling three diplomatic assignments to the Australian Embassy in Tokyo. As Minister, Australian Embassy, Tokyo from 1996–2000, he participated in negotiations on Japanese agriculture policy and market access issues for Australian business. His knowledge of contemporary Japan covers politics, and foreign and trade policy. Since March 2004, he has worked as Project Manager at the Australia–Japan Research Centre at the ANU. He speaks and reads Japanese.

The great differences in public attitudes to whaling

The issues at play are overwhelmingly emotional and subjective, clothed in rational and objective disguise. In Australia, conservation groups argue that whales deserve exceptional measures for their preservation. In Japan, whales are just another marine resource available for exploitation. The inability of science to support either case has been a longstanding failure at the heart of the controversy.

Polls show that most Japanese cannot understand why whales should be accorded total protection by the international community. In fact, a Greenpeace-commissioned survey of Japanese attitudes to whaling, using the reputable Nippon Research Centre, found 35 per cent of respondents agreed with the idea of resuming commercial whaling, 26 per cent disagreed, and 39 per cent neither agreed nor disagreed.¹ Although Japanese conservation groups take a similar anti-whaling position to their international counterparts, their political influence in Japan is weak, and not just on whaling. As a consequence, Japanese policymakers determining whaling policy are not at all influenced by conservation factors. When conservationists argue for a ban on whaling, but not other animal or marine species, one Japanese response is to point to some growing whale populations and to claim the numbers are threatening the ecological balance.

Nowadays in Japan, whaling is driven by its supporters inside the government, who have converted it into a priority for government policy. Underlying this is the tendency to see whaling as a matter of national pride and dignity. As one Japanese scholar explains, this is the result of a widespread view in Japan that international criticism of Japan's whaling practice is a form of Japan-bashing based on cultural imperialism and double

standards.² When asked whether they support the Japanese government's policy of "scientific" whaling, a majority of Japanese respond positively – a corollary of a tendency in Japan for people to trust their governments on issues not of direct concern to them.

Japanese politicians and bureaucrats justify whaling because of its "cultural" significance in Japanese society, but this has little empirical basis. Whaling features in Japanese historical traditions much as it does in other developed countries, and eating whale meat has never been a nationwide, common practice. The cultural argument can be a basis for preserving traditional or coastal whaling, but not as the grounds for Japanese government funding of factory ships now engaged in Antarctic whaling. It is significant that Japan does not seek a quota for "traditional" whaling under the IWC.

There are no powerful economic reasons for Japan to continue whaling. Whale products have long been replaced by substitute products, and Japan's pelagic – or open sea – whaling fleet operates from a few small fishing ports which have no economic or political influence. The whaling vote is very small and would not influence election outcomes, and the industry's contribution to both the local and national economy is likewise minimal. No significant commercial interest groups in Japan are active in supporting whaling, nor is the powerful Japanese fishing industry meaningfully engaged.

On the Australian side, there is no doubt that the Australian public has been effectively captured by the emotional arguments of the conservation movement to adopt fairly extreme attitudes to whaling.³ The arguments put forward by international conservation groups are not supported by irrefutable scientific

...a widespread view in Japan (is) that international criticism of Japan's whaling practice is a form of Japan-bashing based on cultural imperialism and double standards.

1. See Nippon Research Centre opinion polls commissioned by Greenpeace. The NRC is a highly respected polling company, recognised by Gallup Polls, and has been used by the Australian Government to conduct opinion polls about Japanese attitudes towards Australia.

2. Keiko Hirata, "Why Japan Supports Whaling", *Journal of International Wildlife Law and Policy*, 8:129–149, 2005.

3. How this happened is documented by Geoff Mosely, former head of the Australian Conservation Foundation in his account *Let the Whales Swim Free!* (Project Jonah Australia, Richmond, 2004).

evidence, which is partly why the IWC is unable to permanently ban commercial whaling, yet Australian public opinion is strongly behind anti-whaling.⁴ Australian governments of both political persuasions have supported a ban on whaling,⁵ and in Australian election campaigns opposition parties have felt obliged to adopt a high moral position on whaling, which they have then carried into government. Neither of the major Australian political parties has been prepared to adopt a lesser policy, reflecting the overwhelming 70 per cent support that a ban on whaling has in public opinion polls. Thus they have allowed themselves to be effectively tied down by groups like Greenpeace. Accounts from prominent members of the Australian conservation movement tell how, after the first UN Conference on the Environment in 1972, they deliberately set out to make whaling the highest symbol of conservation campaigns worldwide.

The Australian Labor Party's 2009 platform is, not surprisingly, uncompromising. "Labor will use all available means to end the slaughter of whales for all time, including the option of legal action against whaling nations before international courts and tribunals".⁶ In government, the Liberal Party pursued the whaling issue vigorously, but stopped short of action that might provoke Japan. In opposition, the Liberal Party has been more adventurous, calling for Japan to abandon commercial whaling by 30 June 2010.⁷

The role of the IWC and Japan's part

The IWC is the principal — but not the only — international legal mechanism for managing whales and whaling. The key legal instrument, the International Convention for the Regulation of Whaling, has no implementation regime, a role that is consciously left to the IWC. Nations that continue whaling outside the IWC or in spite of the moratorium include Canada, Iceland and Norway. However, unlike Japan, whaling in these countries is carried out by small indigenous communities and is not for commercial purposes. Japan has not sought an IWC quota for "aboriginal whaling", as is possible under the IWC, but has sought a special quota only for the four small communities which have some tradition of whaling and now experience economic hardships.⁸ Although the IWC has recognised the special situation of these communities, it has not yet been prepared to grant permission for "coastal whaling".

Unlike other dissenting countries, Japan has remained an active, and even vigorous, participant in the IWC, despite having great reservations about the shift in the IWC agenda away from managing whaling to conservation of whales. Japan has complied with IWC rulings, even those it did not like, such as the temporary moratorium on commercial whaling, and has overtly and quite legitimately, sought to use the IWC to further its own interests in continuing whaling of some kind. For example, in 1992 Japan obtained qualified IWC agreement to its proposal to begin "scientific" or research whaling, so it is quite wrong to describe Japan's scientific whaling as being permitted by a "loophole" in the IWC or ICRW, as some conservation groups and the media claim.

Disagreements among scientific experts are particularly fierce within the IWC's Scientific Committee. Scientists have been unable to agree on data that would win

Accounts from prominent members of Australian conservation movement tell how... they deliberately set out to make whaling the highest symbol of conservation campaigns worldwide.

4. Hanson, Fergus. *Australia and the World: Public Opinion and Foreign Policy*, Lowy International 2008 Poll.

5. Through the Fraser Government's *Whale Protection Act* of 1980. Rebecca Grey's article 'The Successful Anti-Whaling Campaign in Australia' explains how this conservationist triumph came about.

6. Para 115, Chapter 9, *Tackling Climate Change and our Environmental Challenges*.

7. Greg Hunt, Shadow Minister for the Environment. Media Release: "The Time Has Come on Whaling Action", January 4, 2010.

8. IWC 60 Report 2008. "Japan again referred to the hardship suffered by its four community-based whaling communities (Abashiri, Ayukawa, Wadoura and Taiji) since the implementation of the commercial whaling moratorium. While in previous years Japan had requested a vote on its proposal to relieve this hardship, this year, because of the progress it saw in the discussions related to the future of the IWC it had decided not to do so." See http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC60.pdf

the necessary political and diplomatic support to provide an enduring basis for the IWC's policy decisions. Despite the IWC's best efforts, attempts over many years to develop satisfactory monitoring and management regimes have failed with one scheme after another being adopted and quickly dropped.

Conservation still does not take priority over whaling in IWC deliberations. Japan has strenuously opposed initiatives to strengthen the IWC'S conservation mandate, the creation or extension of whale “sanctuaries”, and denies that there is an international consensus against whaling, arguing that various international conventions explicitly permit some form of whaling.⁹ Japan has employed a variety of tactics in the IWC, aimed at resuming whaling in one form or another, and has openly sought to persuade pro-whaling countries to become IWC members. Most of these attempts have been perceived as seeking to resume commercial whaling by stealth.

For some years now, the IWC has been the locus of a competition for votes among its relatively small number of members, reflecting Japan's continuing hopes that it could muster sufficient support to overturn unappealing IWC policies through the normal processes.¹⁰

On more than one occasion Japan has threatened to leave the IWC when it has not got its way there, most recently at the 2007 IWC meeting.¹¹ The IWC has been the subject of persistent, but vain, efforts to reform its operations. Both Australia and Japan are currently participants in the IWC “Small Working Group” initiative to resolve these differences and to map a way out for the IWC. After so many years of gridlock, it is hard to be optimistic about the prospects for such an initiative resolving these differences inside the IWC. High-level bilateral diplomacy, also involving the United States, might still be a better option.

Why is whaling a lost cause for science

The inability of “science” to have much impact over the debate about the appropriateness or otherwise of continued whaling seems surprising, but partly reflects the sheer difficulty of conducting research on species which move such enormous distances, which are difficult to monitor because of their size and because they inhabit the oceans, and about which opportunities for learning just from observation are limited. But scientists from different backgrounds have also been singularly unable to compromise in order to reach agreement on methods for estimating stock levels, and were frequently unable to endorse each other's technical approaches to research when these approaches were at odds. Japan's research whaling proposal was supposedly designed to remedy such shortcomings.

The IWC does not conduct or commission its own scientific research, for which it has no independent budget, but is forced to rely on member states or other organisations to carry out any scientific research on whales. After about 1970, moreover, there was a significant gap in the amount of scientific research on whales being undertaken.

Japan has consistently accused anti-whaling nations of using conservation arguments to support a ban on commercial whaling without basing their arguments on “sound science”. Yet, the Japanese Government-controlled International Cetacean Institute, which is the central organising point for Japan's research efforts on whaling, publishes a surprisingly small number of scientific reports. Numerous prominent scientists, including members of the IWC Scientific Committee, have castigated Japan's cetacean research as being grossly deficient.¹² Conservation groups and anti-whaling governments have criticised the reliance on killing whales for alleged

Japan has employed a variety of tactics in the IWC, aimed at resuming whaling in one form or another, and has openly sought to persuade pro-whaling countries to become IWC members.

9. Briefing Note: by Joji Morishita, Delegation of Japan, for IWC 60, 2008.

10. In recent years, the senior Japanese Fisheries Agency spokesman, Joji Morishita, has begun issuing “briefing notes” before each IWC meeting setting out Japan's aims and strongly criticising opposing arguments. Briefing Notes by Joji Morishita, Alternate Whaling Commissioner for Japan for IWC 60 and 61.

11. Bloomberg “Japan Fails to Get Support for Whaling, May Quit IWC” 1 June 2007

12. “Whaling as Science” http://www.baleinesendirect.net/pdf/Whaling_as_Science-Clapham.pdf

research purposes, maintaining that Japan's insistence that non-lethal methods would not guarantee reliable data is not convincing. And the poor quality of Japan's own research, combined with excessive Japanese secretiveness about the results it obtains, has meant continuing disagreement among scientists about the status of various species of whales.

Attempts to overcome these disagreements by exchanging data among scientists and to encourage the presence of scientific observers from other countries have been frustrated both by deliberate actions and by inadvertent communication problems. Japan has blocked the release of scientific data that does not support its political objectives. Even Japanese scholars have reported on the extent of "political interference" by Japanese Fisheries Agency bureaucrats in the work of the Institute of Cetacean Research.¹³

Over the years, several leading members of the IWC scientific community have made public their frustration over the inadequate role that science has been able to play. The American former head of the Scientific Committee, Phillip Hammond, resigned because science was not the basis for the moratorium being adopted in 1982; a former IWC Secretary, Ray Gambrell, also expressed frustration at the inability of science to inform either IWC management or scientific stock assessment. The breakdown in the IWC Scientific Committee has several negative knock-on effects in terms of the goal of finding an effective international consensus on whaling management.

Australia's November 2008 initiatives for government funding to undertake non-lethal, rather than lethal, research¹⁴ could therefore significantly and positively impact not only the direction of whale research, but the entire political debate.

Can a legal case against Japan succeed?

The conservation movement and some lawyers maintain that an international court case can be successfully mounted against Japan over its continued whaling, but there is no guarantee legal action will succeed. Governments that support a ban on whaling, such as Australia and the United States, have been reluctant to go to the International Court of Justice because of Japan's diligence in complying with all international legal requirements. The Japanese whaling community has gone so far as to challenge Australia to take Japan to court. There can be no doubt that Japan would leave no stone unturned, and none of its resources untapped, in fiercely defending its position in court. This knowledge should give any would-be litigant pause for thought.

This does not mean that Japan's legal grounds are unchallengeable. Already, Australia's Federal Court on 14 January 2008, in a case brought by the Humane Society International, ordered a Japanese whaling company (Kyodo Sempaku) to stop hunting and killing whales anywhere around Australia's coastline or off Australian Antarctic territory. However, the court noted that there was no practical way the order could be enforced, unless the Japanese whalers entered Australian jurisdiction where they could be seized. "The Australian Whale Sanctuary is a creature of Australian law," said Don Rothwell, professor of international law at the Australian National University. "It's not a zone which is recognised by the international law."¹⁵

Other legal experts have concluded that there is strong evidence that Japan's scientific whaling is unlawful, that options for taking action against Japan under international law were available, and that a case based on breaches of the Antarctic Treaty System offered the best option.¹⁶ Professor Rothwell believes certain legal channels can be used,

Over the years, several leading members of the IWC scientific community have made public their frustration over the inadequate role that science has been able to play.

13. Atsushi Ishii and Ayako Okubo, "An Alternative Explanation of Japan's Whaling Diplomacy in the post-Moratorium Era", *Journal on International Wildlife Law and Policy* 10: 55–87, 2007.

14. Media Release by the Minister for Environment, Heritage and the Arts, Peter Garrett, 17 November 2008. available at: <http://www.environment.gov.au/minister/garrett/2008/mr20081117.html>
Demonstrating the progress made, the Australian Government a year later sponsored their first non-lethal research workshop.

15. Quoted in Agence France Presse, "Australian court orders Japan to stop whaling" Jan 15, 2008.

16. Three panels of eminent lawyers have in recent years been commissioned by the International Fund for Animal Welfare to review the legality or otherwise of Japan's scientific whaling program. See IFAW website for: "Paris Report on Illegal Whaling" Paris, 2006); "'Scientific' Whaling under International Law", (Sydney 2007); and "Japan's 'Scientific' Whaling Program and the Antarctic Treaty System Independent Panel of Legal and Policy Experts", January 2009. (Canberra 2009). Available at: http://www.ifaw.org/assets/Media_Center/Press_Releases/asset_upload_file187_51771.pdf

such as the Environmental Protocol of the Antarctic Treaty, but has himself identified risks associated with using Australia’s Antarctic legislation.¹⁷

So far no country has seen fit to take international legal action, and those organisations and individuals who push Australia in this direction are generally not those who would have to bear the political, financial and legal consequences for such an action. Nor do they press for this option on the grounds of the strength of Australia’s case. Rather, they call for legal action because it suits their other purposes.¹⁸ When the Liberal Party was in office from 1996–2007, then Environment Minister Ian Campbell publicly stated that a legal case might not succeed.¹⁹ Different governments have seemingly agreed on a cautious approach to legal action and the Rudd Government clearly sees it as last resort.²⁰

Could diplomacy be the only way out?

Both the Australian and Japanese Governments have said publicly that they prefer to rely on diplomacy rather than other means to resolve any differences over whaling. But diplomacy can only be effective if political tensions can be reduced – and if circumstances are conducive. Negotiators must have discussions without the distraction or threat of incidents arising between the Japanese whaling fleet and Sea Shepherd vessels.

Protection of Japan’s interests in continuing whaling has come to feature prominently in Japanese diplomacy. Out of character with their normal “good international citizen” role, Japan has established a pattern of bad behavior when it comes to whaling. Japan has allegedly offered financial inducements

to small or developing nations to join the IWC, thereby “stacking” the votes when a majority or three-quarters majority was required. In 2008 and 2009, the Japanese Government over-reacted to Sea Shepherd provocations and dispatched coastguard ships for “protection”, escalating tensions and portraying Japan as the “bad guy”. The presence of the coastguard ship probably increased the level of danger and has made resolution of the dispute more difficult, as it clearly requires a further loss of face in backing down. Also, Japan’s participation in the IWC is the responsibility of Japan’s Fisheries Agency²¹ and these senior officials have become increasingly assertive and combative in countering the anti-whaling debate.²² It would probably not be possible to negotiate a settlement with them.

Both the Japanese Government and Sea Shepherd, as the two main protagonists, must therefore commit to avoiding actions which aggravate confrontation between their vessels on the high seas. The Australian Government has quite correctly called on all parties to avoid actions which will only inflame the other side. If diplomats are to conduct serious dialogue, both Sea Shepherd and the Japanese Government must lower their public criticisms of the other as a gesture of good faith.

The Australian Government has already named a senior (retired) official, Sandy Hollway, as its envoy for whaling, but he needs to be more active in seeking a resolution of bilateral friction over whaling. Japan must name a similarly senior representative who should not be directly involved in Japan’s whaling activities, and who should be empowered to propose means of finding an end to the impasse. Both “special envoys” can only be effective, however, if they have the full and explicit backing of their respective Prime Ministers.

Negotiators must have discussions without the distraction or threat of incidents arising between the Japanese whaling fleet and Greenpeace vessels.

17. Rothwell “Dispute threatens Antarctica claim”, *Sydney Morning Herald* 17 January 2008.

18. For example, the Australian Shadow Minister for the Environment, Greg Hunt, publicly challenged the Australian Environment Minister Peter Garrett to start legal action by 31 January 2010, but did not provide any explanation of how or why this course of action might now be a serious option for Australia.

19. “Legal action won’t stop whaling, says Campbell” November 8, 2005, *Sydney Morning Herald*.

20. See statement “The Future of International Whale Conservation” by Minister for Environment, Heritage and the Arts, Peter Garrett at the Lowy International Institute <http://lowyinstitute.org/Publication.asp?pid=979> and <http://www.petergarrett.com.au/661.aspx>

21. See Hirata, “Why Japan Supports Whaling”. Whales are regarded as fish rather than mammal in Japan, a notion reinforced by Japan’s writing system. The Japanese word for whale (kujira) includes within it a component that means fish (uo-hen).

22. See “Briefing Notes” disseminated by Joji Morishita, Japan’s Alternate Commissioner for the IWC 60, 2008 and 2009.

Conclusion

We must assume no solution will easily be found through science, through legal action or solely through reliance on the IWC. Official negotiators are hampered by intransigence of their respective governments, driven by polarised publics. Japan, we hope, will weigh the costs (financial, political and diplomatic) of continuing whaling against the absence of real or ongoing benefits of any kind. International thinking on whaling has changed: Japan could cease pelagic whaling and win enormous international support. In the mean time, Australia would be wise to stop provoking Japan unnecessarily and allow it to back down with some grace. If the dispute is not resolved soon, but continues to escalate, some damage to bilateral relations is inevitable. Even if this is small, it will not be forgotten on either side.

-