



# “See you in court!”: Whaling as a two level game in Australian politics and foreign policy

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## ABSTRACT

Until recently, successive Japanese and Australian governments have contained disputes over whaling within the International Whaling Commission. Domestic political circumstances and the national interest imperatives of the Japan–Australia relationship clearly have played an important role in shaping Australia's anti-whaling policy from its inception, and Australian policy makers traditionally have sought to balance both sets of interests in the implementation of this bi-partisan policy position. But in 2010 the Australian government launched international legal action against one its oldest and most important regional partners and allies, thereby abandoning the long-held “agree to disagree” approach between Australia and Japan to managing the whaling issue within the broader bi-lateral relationship. This paper explains this dramatic shift by characterising whaling policy in Australia as a two level game in which the then Kevin Rudd-led Labor government exploited the strong and stable nature of Australia's bi-lateral relations with Japan to manage several important electoral and political challenges it faced domestically.

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## 1. Introduction

Since 1979, successive Australian governments have sought to isolate their opposition to whaling from Australia's bilateral relationship with Japan by limiting exchanges on the issue to the International Whaling Commission's (IWC) annual meetings. But this long practised, mostly successful bi-partisan approach to keeping domestic anti-whaling sentiment from tainting Australia's economic and political relations with its most important regional partner came to an abrupt end in the lead up to the 2007 Australian Federal election. When then opposition leader Kevin Rudd announced that the Labor party would, if elected, take international legal action against Japan over its scientific whaling program in the Antarctic if a diplomatic solution could not be found, he signalled that the era of “agreeing to disagree” on the whaling issue was over.

The Australian Federal Government inquiry into whales and whaling that informed the then Fraser government's decision to unconditionally oppose whaling in 1979, known as the Frost Report, cited primarily ethical and economic justifications (i.e., Australia no longer held any significant economic interest in whaling), in addition to uncertainty over whale numbers, in support of its recommendation for a whaling ban. The findings of the Frost Report, however, were contradicted by the United Nations' Food and Agriculture Organization (FAO) and the

International Whaling Commission's Scientific Committee (SC). Both the FAO and the SC argued a blanket ban on all species was the wrong approach to cetacean management [1,2]. The SC had maintained this view since the idea of a moratorium was first raised in 1972, and upheld this position in 1982 when the moratorium was finally adopted by the International Whaling Commission (IWC) with Australia's strong support. But given the many uncertainties over critical management data that still remained – whale numbers, fertility and recruitment rates, and stock identification – a compelling, science-based case for a moratorium nevertheless existed in the view of many IWC members. And it was on these grounds that a *temporary* ban, or “pause” on commercial whaling was finally adopted by the IWC in 1982.<sup>1</sup>

<sup>1</sup> Accompanying the moratorium's entry to the Schedule to the Convention was a clause stating that:

- (a) .... This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision [i.e., the imposition of zero catch limits] on whale stocks and consider ... an in-depth evaluation of the status of the stocks in the light of management objectives and procedures. This could include examination of current stock size, recent population trends, carrying capacity and productivity. In order to achieve this the Committee agreed that it would need to:
  - review and revise assessment methods and stock identity; review data quality, availability requirements and stock identity;
  - (b) plan and conduct the collection of new information to facilitate and improve assessments;
  - (c) examine alternative management regimes.

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Throughout the 1980s and the 1990s, and in spite of the high political profile anti-whaling campaigns attracted during this time [3], successive Australian governments continued to support the moratorium, but prioritised Australia's growing trade and political relationship with Japan above their still mostly science-based opposition to Japanese whaling in the IWC. But, as uncertainty arguments over numbers and safe catch limits for minke whales became more difficult to defend following the SC's unanimous endorsement of a new management procedure known as the Revised Management Procedure (RMP) in 1993, anti-whaling arguments by the mid-1990s now were being justified almost entirely on ethical arguments about the "specialness" of whales [4,5]. By the late 1990s, the whaling issue was being eclipsed by climate change, and was soon marginalised even further as a policy issue in Australia by the 9/11 attacks, transnational terrorism, the Iraq war, and later, the global financial crisis.

Yet, it is at this juncture, a time when whaling was being overshadowed by other policy issues and Japan was being surpassed by China as Australia's biggest two-way trade partner, that the Australian Labor Party under Kevin Rudd signalled the adoption of a more aggressive stance against whaling, one that would allow long running differences between Japan and Australia to spill over from the confines of the IWC. In 2007 when Rudd announced Labor's intention to take legal action against Japan over its scientific whaling – the year China replaced Japan as Australia's largest overall trading partner – the scientific case against either commercial or scientific whaling remained as controversial as ever, as did both the ethical and legal arguments. Not only had the legal advice on offer in 2007 failed to become more compelling – since the prospects for prosecuting a successful international case against Japan remained unlikely at best [6–8] – on scientific grounds it actually had become weaker due to the commission's acceptance of the RMP in 1994, which, unlike earlier management approaches, explicitly manages uncertainty issues and limits the kind of data it requires to information that is obtainable [9–12].

This paper argues that this shift in *how* Australia now opposes whaling largely can be explained in terms of elite perceptions of the importance and strength of the Australia–Japan relationship, and also the domestic political and electoral circumstances faced by the newly elected Rudd government, in particular the difficulties it faced in implementing climate change related policies promised by Rudd during the 2007 election campaign. This paper argues that Rudd, based on his own calculations on the strength and relative import of the Australia–Japan relationship, developed a strategy intended at first only to exploit domestic opposition to Japan's whaling as an election issue against the Howard government's "agree to disagree" approach. But as the Rudd government's policy failures began to mount and domestic criticism increased, Rudd found himself in a position where he needed to *act* on his earlier threat to take legal action against Japan in order to avoid further criticism, especially from his political opposition in parliament, for yet another failed or unimplemented policy. In effect, the tactic of using the whaling issue for political advantage in the election campaign had been now turned against his government, and Rudd was forced to again calculate the strength of Australia's bi-lateral relationship with Japan. This time, however, the calculation involved the unprecedented step of taking international action against Australia's most important diplomatic and economic partner in the region.

Rudd's decision under political duress at home to take legal action against Japan in 2010 was, as expected, popular among the Australian public and provided some relief from the pounding the government had been taking in the polls. But for some the potential cost of the political breathing space gained by taking legal action against one of Australia's most important economic and diplomatic partners was of great concern. Rudd's decision caused controversy and some alarm within his cabinet over the potential for damage to relations with Japan in other areas, in particular trade and security cooperation, and also among legal experts both within and outside the government who believed the Australian case would likely fail, thereby weakening the legitimacy of Australian opposition to whaling in the future.

## 2. From containment to confrontation: Whaling policy as a two level game

Australian policy, like that of other anti-whaling nations, has struggled to find a scientific basis for continuing an indefinite blanket ban on whaling, other than on grounds of uncertainty [12–14]. Since the early 1990s, the uncertainty arguments originally invoked by anti-whaling advocates to justify the adoption of the current moratorium on commercial whaling have become more difficult to sustain as a result of the efforts by the SC to manage the uncertainty issues that remain. Tensions between the SC and advocates of maintaining the moratorium, such as Australia, came to a head at the 1993 IWC meeting in Kyoto when the anti-whaling block voted down the adoption of the RMP, which had the SC's unanimous support and had been devised at the commission's request. Following the RMP's adoption by the commission the following year, science-based arguments against whaling became less persuasive in the commission, which led Australian governments and other opponents to increasingly focus on ethical arguments against whaling as the basis for their continued opposition to any return to commercial whaling [10].

Legal arguments against Japan's research whaling in the Antarctic and North Pacific – which began in 1987 following Japan's adoption of the moratorium on commercial whaling in the 1986 season and condemned Japanese research as "exploiting a loophole" in the IWC convention – also were raised by some academics and NGOs [7,12,15–17]. Legal action against Japan's research program, however, was rejected as a policy option by the Hawke, Keating, and later Howard governments. According to a senior ministerial source, Department of Foreign Affairs and Trade (DFAT) advice has consistently opposed the option of international legal action against Japan's scientific research whaling in the Antarctic [18].

The specialist advice used to inform Australian policy on whaling over the last three decades, and in particular the process by which conflicting sources of advice have been prioritised by the executive as the basis for policy decisions, remains unclear. Indeed, considerable tension often has existed between the Australian policy position and both the International Convention for the Regulation of Whaling and the SC's management advice since Australia adopted a protectionist position on whaling. More recently, the Rudd and Gillard government's resort to legal action against Japan also has contradicted the advice of its own bureaucracy since DFAT maintained its opposition to taking legal action against the Japanese government over whaling in its advice to both the Rudd and Gillard governments, according to media reporting on US diplomatic cables released by Wikileaks [19].

Domestic political circumstances and pressures clearly have played an important role in shaping Australia's whaling policy from its inception, and have been the main drivers of government policy despite the absence of compelling scientific or legal advice

(footnote continued)

See "Report of the Special Meeting of the Scientific Committee on Planning for a Comprehensive Assessment of Whale Stocks", in Donovan (ed.), *The Comprehensive Assessment of Whale Stocks: the early years*, p. 3.

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