

ECO-WARRIORS: AN INVISIBLE LINE?

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1 Introduction

One of the most controversial environmental issues in the Southern hemisphere is the Japanese whaling in Antarctic waters. What was once an acceptable practice has become a divisive issue, and has at times strained diplomatic relations between the Australian and Japanese Governments.¹ There is little chance that an avid follower of current affairs can avoid whaling news throughout the whaling season, given the level of public and media interest.² Prominent in the news regarding whaling are the clashes between the Japanese whaling fleet and the Sea Shepherd Conservation Society.³

In the past, the Australian Government has been slow to respond to the Japanese whaling in waters that the government considers part of Australia's dominion. The government has been moving on this issue more decisively of late,⁴ yet legal proceedings are moving at a rate that is far too slow for environmental activists.⁵ The slow pace of administrative action has led to environmental advocates taking the law into their own hands. In particular, the Sea Shepherd Conservation Society has been consistently harassing the Japanese whaling fleet in an attempt to disrupt the maiming and killing of whales.⁶

The purpose of this paper is to examine the techniques employed by the Sea Shepherd Conservation Society, and to determine the legality of the role that the environmental organisation has taken upon itself. In order to do this, an overview of whaling will first be discussed, with emphasis placed on diplomatic and legal attempts to end the practice. Following this, the environmental protestors will then be discussed, along with the techniques they use. The legality of all techniques and a discussion on how far the eco-warriors can go before action is taken will then be considered in the context of the *Navigation Act 1912* (Cth) and the *Crimes Act 1961* (NZ). A brief discussion of the Japanese Fisheries Agency will conclude the body of the paper, outlining recent developments within that government department. The focus of this paper is not on the legality of whaling, but rather the consequences the Sea Shepherd Conservation Society face if they continue to employ the techniques they use.

The intention of this paper is to give the reader an understanding of the boundaries that exist for environmental activists. It would appear on first glance that the line itself is invisible, to both the Japanese whaling fleet and the Sea Shepherd Conservation Society.

2 Overview

To be able to understand the underlying reasons for environmental activists employing controversial and potentially illegal techniques to stop whaling, an overview of Japanese whaling must first be discussed. The Japanese have been whaling for over one thousand years, with evidence that the first emperor of Japan, Emperor Jimmu, had whale meat in his diet.⁷ Traditionally, the Japanese would use the whale to gain many resources,

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¹ Coopes, A, 'Australia Sues Japan Over Whaling', *The Sydney Morning Herald* (online) 28 May 2010 <<http://news.smh.com.au/breaking-news-world/australia-sues-japan-over-whaling-20100528-wkz0.html>>.

² Ibid. Also see any newspaper during the whaling season.

³ Edwards, M, 'Japan Calls on Australia to Stop Sea Shepherd', *ABC News* (online) 18 February 2011 <<http://www.abc.net.au/news/2011-02-18/japan-calls-on-australia-to-stop-sea-shepherd/1949078>>.

⁴ Kelly, J, 'Environment Minister Says International Legal Action Still an Option', *The Australian* (online) 17 February 2011 <<http://www.theaustralian.com.au/news/nation/environment-minister-says-international-legal-action-still-an-option/story-e6frg6nf-1226007626272>>.

⁵ AFP, 'Anti-Whaling Environmentalists Blamed for Suspension of Ocean Hunting', *The Australian* (online) 16 February 2011 <<http://www.theaustralian.com.au/news/anti-whaling-environmentalists-blamed-for-suspension-of-ocean-hunting/story-e6frg6nf-1226007097118>>.

⁶ Sea Shepherd Conservation Society, *Who We Are* (2011) <<http://www.seashepherd.org/who-we-are/>>.

⁷ Japanese Government, *History of Japanese Whaling* (2011) Facts About Japan <<http://www.facts-about-japan.com/whaling-history.html>>.

such as oil and animal proteins. The Japanese used as much of the whale as possible, with little waste: 'There's nothing to throw away from a whale except its voice.'⁸ During the early 1900s, the rate of Japanese whaling decreased.⁹ However, during World War II, whaling became a staple food source for protein due to access to traditional fisheries being severely restricted, and whaling once again increased in frequency.¹⁰

In 1946, the International Whaling Commission (IWC) was set up to manage a sustainable level of hunting whales.¹¹ While the organisation is criticised by pro-environmentalists for being in favour of whaling, in 1982 the IWC issued a Moratorium on Commercial Whaling that took effect in 1986. The Moratorium allows the killing of whales for scientific research, and Japan issues itself with permits for this. The Japanese, under the guise of scientific research, have killed more than 25,000 whales since 1986, which has resulted in environmental activists being outraged. However, it has been claimed that there is no evidence of this 'scientific research' appearing in any reputable journals.¹² It should be noted at this point that, despite environmentalists using the *Convention for the Conservation of Antarctic Marine Living Resources* to argue that the Japanese have no right to whale even for scientific research, the *Convention* does not extend to whales.¹³

The Japanese believe that whaling is entrenched in their culture, and find it offensive that other countries aim to change this. Matayuki Komatsu, from Japan's Fisheries Agency, stated that, 'No one has the right to criticise the food culture of another people.'¹⁴ However, very few Japanese people have ever tried whale meat and this argument is lacking in substance. This issue will be discussed later in the paper.¹⁵

In Australia, the issue of whaling is extremely controversial, with the Government seeking diplomatic and possible legal means to end the practice.¹⁶ The Japanese hunt whales in Antarctic waters that the Australian Government claims to be part of the country's exclusive economic zone (EEZ). This claim holds little weight in the international community as few countries recognise Australia's jurisdiction in these Antarctic waters.¹⁷ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) bans the killing or injuring of a cetacean in Australian waters.¹⁸ In 2008, the Federal Court declared that this Act does extend to the Antarctic waters and that the Government is entitled to restrain the killing, injuring, interfering or capturing of whales in those waters.¹⁹ Around the same time the Labor Party was elected (2007), with one of its election pledges being against Japanese whaling. At first, the Government was reluctant to take legal action against the Japanese whalers, preferring to apply diplomatic pressure on the Japanese Government and relying on international pressure to change the embedded culture within Japan.²⁰ The Australian Government changed its approach on the 28 May 2010 announcing it was going to take legal action against whaling.²¹ The reason given was that:

the response of the whaling countries has not been positive. Recent statements by whaling countries in the Commission have provided Australia with little cause for hope that our serious commitment to conservation of the world's whales will be reflected in any potential IWC compromise agreement.²²

On 1 June 2011, the International Court of Justice announced that Australia had bought legal proceedings against Japan. The basis of this was that the Japanese were whaling for commercial purposes, contrary to their

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Muller, G, *Whaling Facts Summary* (2007) <<http://www.cgeorgemuller.com/summary.htm>>.

¹² *Ibid.*

¹³ *Convention for the Conservation of Antarctic Marine Living Resources*, 1980, 1329 UNTS 47.

¹⁴ Animal Planet, *Whale Wars* (2011) <<http://animal.discovery.com/tv/whale-wars/whaling/why-japanese-hunt-whales.html>>.

¹⁵ For a discussion on the lack of demand for whale meat, see section 6 of this paper.

¹⁶ McManus, G, 'Kevin Rudd Maintains Anti-Japan Whaling Stance', *The Telegraph* (online), 12 June 2008 <<http://www.dailytelegraph.com.au/news/indepth/rudd-stands-firm-on-whaling/story-e6frev90-1111116609733>>.

¹⁷ Whales in Danger, *Whales on the Net* (2002) <<http://www.whales.org.au/news/antarctic.html>>.

¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 299.

¹⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

²⁰ AAP, 'No Guarantee of Legal Action Against Whaling', *News.com.au* (online), 8 January 2010 <<http://www.news.com.au/national/govt-cant-guarantee-legal-action-against-japanese-whaling/story-e6frfkvr-1225817484318>>.

²¹ Smith, S, Garrett, P, and McClelland, R, 'Government Initiates Legal Action Against Japanese Whaling' (Media Release, 28 May 2011).

²² *Ibid.*

claim that it was for scientific research.²³ These proceedings are likely to go on for some time before a decision is reached.

The apparent failure of the Government to prevent whaling in Australian-claimed waters and to come to a diplomatic agreement with the Japanese, has frustrated the 'eco-warriors' who are taking the law into their own hands. Due to the Japanese continuing to hunt whales, the 'eco-warriors' have been attempting to prevent this practice. Disregarding the argument as to whether whaling in Antarctic waters is legal or not, a vital question is whether the actions environmental protestors use to disrupt whaling are legal. The emergence of anti-whaling environmental protestors will now be discussed.

3 Environmental Protesters

There are two main environmental groups that actively campaign against Japanese whaling. They are the Sea Shepherd Conservation Society and Greenpeace. Greenpeace does not take a directly active role in preventing whaling, as opposed to the Sea Shepherd Conservation Society. Greenpeace is not discussed in detail in this paper.

3.1 Sea Shepherd Conservation Society

The Sea Shepherd Conservation Society (SSCS) was established in 1977 and is a non-profit organisation that seeks to protect marine wildlife.²⁴ The organisation is widely known in Australia, as are their efforts to prevent whaling. Equally known is the founder of the SSCS, Captain Paul Watson.²⁵ Captain Watson was one of the original members of Greenpeace, who became disgruntled with their passive techniques and formed the SSCS.²⁶ The SSCS has been criticised for occasionally going too far in attempts to prevent whaling.²⁷ It has even been stated that the SSCS is a 'terrorist organisation'.²⁸ The SSCS harasses the Japanese whaling ships through the use of their three main vessels; *Steve Irwin*, *Bob Barker*, and the *Brigitte Bardot (Gojira)*. One of the most controversial events involving the SSCS was the *Ady Gil* collision.

3.1.1 Ady Gil Collision²⁹

The *Ady Gil* was a vessel employed by the SSCS to accost the Japanese whalers in the Antarctic waters. On the 6 January 2010, the *Ady Gil* was using methods to prevent the Japanese ships from whaling by attempting to destroy the propellers of the ships. A Japanese ship, the *Shonan Maru No 2*, was being used by the Japanese whalers as a sentry ship (to protect the whaling vessels). These two ships had a collision that resulted in injuries to those on board the *Ady Gil*, as well as the ship itself sinking.³⁰ The Australian Maritime Safety Authority (AMSA) attempted to investigate the collision and find who was to blame. The final report was inconclusive, as AMSA could not verify the claims made by those on board the *Sea Shepherd*, and the Japanese Government refused to co-operate.³¹ The collision did not occur within Australia's EEZ, and as such was not within

²³ International Court of Justice, *Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whaling* (1 June 2010) <<http://www.icj-cij.org/docket/files/148/15953.pdf>>.

²⁴ Sea Shepherd Conservation Society, *Who We Are* (2011) <<http://www.seashepherd.org/who-we-are/>>.

²⁵ *Ibid.*

²⁶ Sea Shepherd Conservation Society, *Captain Paul Watson* (2011) <<http://www.seashepherd.org/who-we-are/captain-watsons-biography.html>>.

²⁷ Tung, S, 'Top 10 Clashes at Sea', *Time Magazine* (online), 3 June 2010 <http://www.time.com/time/specials/packages/article/0,28804,1993709_1993708_1993699,00.html>.

²⁸ High North Alliance, *Sea Shepherd's Record of Violence* (1994) <http://www.highnorth.no/library/movements/Sea_Shepherd/se-sh-re.htm>.

²⁹ Michael White discusses this collision in detail in the previous issue of the *Australian and New Zealand Maritime Law Journal*.

³⁰ Darby, A, 'Ady Gil and Whalers Both at Fault For Collision: Inquiry' *Sydney Morning Herald* (online), 18 November 2010 <<http://www.smh.com.au/environment/whale-watch/ady-gil-and-whalers-both-at-fault-for-collision-inquiry-20101118-17y8u.html>>.

³¹ Australian Maritime Safety Authority, *Fact Finding Report Into the Reported Collision Involving the New Zealand Registered Craft Ady Gil and the Japanese Registered Whaling Ship Shonan Maru No. 2 in the Southern Ocean on 6 January 2010* (2010).

Australia's jurisdiction. Australia could not pursue legal action against either party, as the ships were flagged to other countries.³²

However, as the *Ady Gil* was a New Zealand-registered vessel, the New Zealand Government did have jurisdiction to investigate the incident and make adverse findings against a party if applicable. Maritime New Zealand (MNZ) found that both vessels were to blame in the incident. The report found that neither vessel deliberately caused the collision, but failed to take appropriate measures to avoid it.³³ The report also found that both vessels failed to comply with the *International Regulations for the Prevention of Collisions at Sea 1972*.³⁴

Peter Bethune, the former Master of the *Ady Gil*, disputed the findings from MNZ that he was partly to blame for the incident. A month after the collision, on 15 February 2010, Mr Bethune boarded the *Shonan Maru No 2* and attempted to make a citizen's arrest aboard the vessel for the injuries sustained by his crew during the collision. The political stunt backfired on Mr Bethune, as he was taken to Japan to face trial on the charges of trespass, assault, illegal possession of a knife, destruction of property and obstruction of business.³⁵ On 7 July 2010 Mr Bethune was given a two year suspended sentence, as well as being banned from Japan for five years.³⁶ During the trial the SSCS distanced themselves from Mr Bethune, which later caused friction between Bethune and Captain Watson.³⁷

A question arises as to whether Mr Bethune should have been prosecuted under the *Maritime Transport Act 1994* (NZ) (*MTA*) by a New Zealand Court for his apparent involvement in the *Ady Gil* collision. Section 65 of the *MTA* is the relevant provision:

65 Dangerous activity involving ships or maritime products

- (1) Every person commits an offence who—
 - (a) operates, maintains, or services; or
 - (b) does any other act in respect of—any ship or maritime product in a manner which causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs.
- (2) Every person commits an offence who—
 - (a) causes or permits any ship or maritime product to be operated, maintained, or serviced; or
 - (b) causes or permits any other act to be done in respect of any ship or maritime product,—in a manner which causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs.
- (3) Every person who commits an offence against subsection (1) or subsection (2) is liable,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 12 months or a fine not exceeding \$10,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$100,000;
 - (c) in any case, to an additional penalty under section 409.

It can be seen that, if Mr Bethune was deemed to have caused, or have permitted, the *Ady Gil* to collide with the *Shonan Maru No 2*, he would be liable under this provision, given that the collision resulted in injuries and property damage. Section 65(3)(a) states that Mr Bethune could then be imprisoned for up to twelve months, or be liable for a fine of up to \$10,000. It should be noted that s 409 of the *MTA* would not apply here for sentencing as this is only relevant when the collision is perpetrated for commercial gain.

³² *Ibid.*

³³ Maritime New Zealand, *Ady Gil and Shonan Maru No 2: Collision on 6 January 2010* (30 September 2010) <<http://www.maritimenz.govt.nz/AdyGil/Investigation-report-Ady-Gil-Shonan-Maru-Lo-rez.pdf>>.

³⁴ *Ibid.*

³⁵ Lewis, L, 'Anti-Whaling Activist Peter Bethune Gives Evidence', *The Sunday Times* (online), 1 June 2010 <<http://www.timesonline.co.uk/tol/news/world/asia/article7140996.ece>>.

³⁶ Wallace, R, 'Sea Shepherd Activist Peter Bethune Gets Suspended Sentence in Japan Court', *The Australian* (online), 7 July 2010 <<http://www.theaustralian.com.au/news/world/anti-whaling-activist-peter-bethune-gets-suspended-sentence-in-japan-court/story-e6frg6so-1225889019682>>.

³⁷ Associated Press, 'Sea Shepherd Expels Peter Bethune Over Weapons' *Guardian* (online), 8 June 2010 <<http://www.guardian.co.uk/environment/2010/jun/08/sea-shepherd-expels-peter-bethune>>.

However, as stated above, Maritime New Zealand found that both vessels were to blame for the incident. MNZ deemed that it was a result of negligence, as opposed to a deliberate act. Given this finding, it is not surprising that Mr Bethune was not prosecuted in a New Zealand Court. New Zealand does not have any jurisdiction in relation to the *Shonan Maru No 2*, and as the Japanese Government did not commence any action against that vessel or those aboard, prosecuting Mr Bethune would have been a gross injustice (not to mention a long and arduous process, given that the MTA does not have a provision that clearly applies). The *Ady Gil* collision epitomises the controversy surrounding the SSCS and the Japanese whaling vessels, and it is evident that the law is not clear in this regard.

3.1.2 Techniques Employed

The SSCS makes the claim that it is enforcing international law pursuant to the memorandum on hunting whales given by the International Whaling Commission. The tactics the SSCS employ to enforce the law include disabling the propellers of the whaling vessels using entangling lines, throwing stink-bombs aboard whaling vessels that cause nausea, and ramming their vessels into the Japanese whaling ships. The organisation claims to have sunk ten whaling vessels without any loss of human life (these were not Japanese whaling vessels).³⁸ The SSCS has never been convicted in a court or successfully sued. So how has the organisation managed to avoid liability for sinking ten vessels? The most likely reason is that the vessels in question had also been engaged in criminal activities, so the owners would be reluctant to take legal action against the SSCS.³⁹

However, the techniques of disabling propellers, throwing stink bombs and ramming into Japanese whaling vessels would surely create some legal consequences. But, as stated before, the SSCS has never been convicted in a court of law. Watson himself states that there has never been a successful legal action against the organisation because 'we [the SSCS] have the legal authority to do what we do'.⁴⁰ The more likely reason, as will be discussed later, is that international law on this issue is comparatively weak. Further, whenever faced with legal action, Watson says, 'I demand to be charged and put on trial and offer to pay my own airfare. They know that I'm going to bring a lot of international media with me [T]hey decide it's better to keep quiet and do nothing.'⁴¹ This could potentially explain why the Australian Government has not commenced legal proceedings against the SSCS for their actions in the Antarctic waters that the government claims to be part of the country's EEZ. Furthermore, the Federal Court in the case of *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* stated that the Government is legally entitled to enforce the ban on whaling in the Antarctic waters as they are part of Australia's EEZ.⁴² It can be concluded from this decision that the Australian Courts recognise Australia's legal jurisdiction within those Antarctic waters. However, as the vessels are not Australian flagships, jurisdictional hurdles arise that will be discussed in s 4 of this paper.

On the 23 February 2012, the *Steve Irwin* and *Yushin Maru No 3* engaged in 'combat' in the Antarctic Ocean. The SSCS fired paint bombs, smoke flares and stink bombs at the Japanese vessel, which responded with a water cannon. This kind of exchange between Japanese whaling vessels and the ships employed by the SSCS has apparently become routine.⁴³

So why has the SSCS never appeared in an Australian court before? Early last year Federal Police boarded and searched the vessels used by the SSCS when they docked into Hobart. It is the third year running that the police have executed such a search.⁴⁴ The leader of the Australian Greens Party, Bob Brown, alleged that the police

³⁸ The Telegraph, 'Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts' *The Telegraph* (online), 17 April 2009 <<http://www.telegraph.co.uk/earth/5166346/Paul-Watson-Sea-Shepherd-eco-warrior-fighting-to-stop-whaling-and-seal-hunts.html>>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

⁴³ Comment, 'Sea Shepherd attacks Japanese whalers again', *Herald Sun* (online) 23 February 2012 <<http://www.heraldsun.com.au/news/breaking-news/sea-shepherd-attacks-japan-whalers-again/story-e6frf7jx-1226279775048>>.

⁴⁴ Caruana, P, 'Sea Shepherd Sails Into More Controversy', *Sydney Morning Herald* (online) 6 March 2011 <<http://news.smh.com.au/breaking-news-national/sea-shepherd-sails-into-more-controversy-20110306-1bj8y.html>>.

search was done at the request of the Japanese Government.⁴⁵ The search proved fruitless, with no ensuing legal action.

4 Legal Consequences

As discussed above, the techniques employed by the SSCS are controversial and potentially give rise to a tortious claim. The answer to the question as to why the SSCS has never been successfully convicted remains elusive, and one can only speculate as to the answers. It could be because criminal action taken against vessels is rare, as civil liability is the main course of action taken in shipping collisions. This is owing to the fact that the affected shipowner wishes to gain damages to compensate them for their loss.⁴⁶

If an action were brought against the SSCS by the Australian Federal Government, it would be difficult for a Court to justify jurisdiction. Neither the Japanese vessels nor the main SSCS vessels are 'flagged' in Australia. The State in which the vessel is registered has jurisdiction over criminal matters committed on the high seas.⁴⁷ Whilst it has already been established that the Australian Government has jurisdiction within Australia's EEZ,⁴⁸ Australia does not have the jurisdiction to commence criminal proceedings against individuals on another country's ship, unless the criminal act was committed against an Australian flagship.⁴⁹ The few Acts that could be used against the SSCS by the Australian Government do not have jurisdiction in the EEZ over foreign vessels. The Commonwealth *Crimes at Sea Act* is not applicable in this case as its jurisdiction is only 200 nautical miles off the coastline.⁵⁰ Secondly, the Commonwealth *Admiralty Act* is not applicable as its jurisdiction is also restricted (it being a civil Act).⁵¹ To add to the uncertainty, there is no possible criminal action that can be taken against the SSCS at a Federal level. This is because the Commonwealth *Criminal Code* only deals with Commonwealth entities in the relevant provisions.⁵²

When questioned as to why the SSCS has never faced legal action within Australia, the Australian Federal Attorney-General's Department stated the following:

The Australian Government takes the issue of safety at sea seriously, and has repeatedly called for calm and restraint by the masters of all vessels in the Southern Ocean. The Australian Government does not condone the strategies adopted by Sea Shepherd and they are not the way to resolve differences over whaling. The Australian Government seeks a permanent, legal resolution of the whaling dispute, which is why it has commenced proceedings in the International Court of Justice.

...Some activities of Sea Shepherd have taken place in the Exclusive Economic Zone (EEZ) adjacent to Australian Antarctic Territory. However, the EEZ is not a source of general criminal jurisdiction. Australia has international legal obligations in respect of safety at sea, including under the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* as implemented through the *Crimes (Ships and Fixed Platforms) Act 1992*. Under that Convention and Act, Australia has limited jurisdiction over Sea Shepherd activities in the Southern Ocean by virtue of its position as flag State or port State of some of the vessels involved.

In this context, Australia continues to monitor Sea Shepherd's activities and conduct investigations concerning the Sea Shepherd in whaling seasons. These are undertaken by the Australian Maritime Safety Authority and the Australian Federal Police (AFP) in accordance with Australian law. The decision to investigate events in the Southern Ocean is an operational matter for the AFP, as is the decision about whether to prosecute any cases in Australian courts.⁵³

⁴⁵ *Ibid.*

⁴⁶ *Chorley and Giles Shipping Law* (7th Ed, 1980), 277.

⁴⁷ *UN Convention on the Law of the Sea*, arts 91, 92.

⁴⁸ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

⁴⁹ *UN Convention on the Law of the Sea*, art 94(5).

⁵⁰ *Crimes at Sea Act 2000* (Cth), pt 3.

⁵¹ *Admiralty Act 1988* (Cth), pt 2.

⁵² *Criminal Code Act 1995* (Cth).

⁵³ Letter from Michael Johnson, Principal Legal Officer of the Attorney General's Department (Cth), to Jackson Brown, 16 September 2011.

As this letter confirms, Australia has limited jurisdiction over the SSCS's activities in Australia's EEZ. The Federal Government's current position appears to be that, given Australia has little jurisdiction, the best way to combat the techniques used by the SSCS is to prevent the Japanese whaling through the International Court. The stance by the Attorney-General's Department reinforces the argument presented later in this paper that the only nations that can ensure the SSCS abide by the law are the flag States. It should also be noted that this letter displays the Government's strong opposition to the techniques employed by the SSCS.

The one and apparently only potential avenue for Australian legal action against the SSCS is through the *Navigation Act 1912* (Cth). This Act will be discussed below. However, the fact still remains that neither vessels are registered in Australia. The *Ady Gil* was a New Zealand-registered vessel,⁵⁴ and any criminal acts committed by crewmembers on this vessel are subject to prosecution within New Zealand. The offences of common assault and intentional damage under New Zealand law will also be discussed below.

4.1 Navigation Act 1912 (Cth)

The only potential way the Australian Government can take legal action against the SSCS is under the *Navigation Act 1912* (Cth). The *Navigation Act* gives legal authority to the *International Regulations for Preventing Collisions at Sea 1972* within Australia's jurisdiction.⁵⁵ Given that the SSCS employs the technique of ramming into Japanese whaling vessels, the SSCS is breaching these international regulations. However, this occurs outside Australia's territorial jurisdiction. Further, the vessels involved in the collisions are not registered in Australia. As this occurred on the high seas, jurisdiction solely lies with the countries where the ships are registered.⁵⁶ Even though it occurred within Australia's EEZ, art 92 of the *United Nations Convention on the Law of the Sea 1982 (UNCLOS)* states that jurisdiction on the high seas is solely within the vessel's flag State, and art 58 states that this rule also applies to a country's EEZ.⁵⁷ The relevance of the flag State is further elaborated on in section 4.2 below.

However, if one of the vessels were registered to Australia, or if the collision occurred within Australian waters, the *Navigation Act* would apply. As stated above, the *Navigation Act* gives authority in s 258(2) to the *International Regulations for Preventing Collisions at Sea 1972 (COLREGS)*. *COLREGS* basically sets out internationally agreed measures on the navigation, management and operation of a ship.⁵⁸ Under *COLREGS*, there are no provisions that exonerate a vessel from causing a collision.⁵⁹ Owing to this, if a registered Australian vessel under the control of the SSCS were to employ the technique of deliberately ramming into a Japanese whaling vessel (causing a collision), there would be no justification or defence for this conduct under *COLREGS*. The SSCS would then be liable for causing a collision, and the Japanese whaling vessels could claim damages.⁶⁰

4.2 New Zealand's Jurisdiction

For crimes committed at sea, jurisdiction lies with the country where the ship is registered. This is in accordance with the *UN Convention on the Law of the Sea* where a ship is required to be registered to one country.⁶¹ This Convention also requires the 'Registry State' (the country where the ship is registered) to ensure precautions are taken for safety on board the vessel, and that the vessel follows international obligations.⁶² Further, the

⁵⁴ Australian Maritime Safety Authority, *Fact Finding Report Into the Reported Collision Involving the New Zealand Registered Craft Ady Gil and the Japanese Registered Whaling Ship Shonan Maru No. 2 in the Southern Ocean on 6 January 2010* (2010).

⁵⁵ *Navigation Act 1912* (Cth), s 258(2).

⁵⁶ Australian Maritime Safety Authority, *Fact Finding Report Into the Reported Collision Involving the New Zealand Registered Craft Ady Gil and the Japanese Registered Whaling Ship Shonan Maru No. 2 in the Southern Ocean on 6 January 2010* (2010).

⁵⁷ If action were taking under the *UN Convention on the Law of the Sea*, it would occur in the International Tribunal for the Law of the Sea. This is outside the scope of this paper and will not be discussed.

⁵⁸ *International Regulations for the Prevention of Collisions at Sea 1972*.

⁵⁹ *Ibid*.

⁶⁰ See *Navigation Act 1912* (Cth), s 260 for damages if a personal injury results from the collision.

⁶¹ *UN Convention on the Law of the Sea*, arts 91, 92.

⁶² *Ibid*, art 94.

Convention also requires that the Registry State enforces penalties upon the crew if applicable.⁶³ If fatalities or injuries occur on the flagship, the Registry State must hold an inquiry into the incident.⁶⁴ This was seen in s 3.1.1 of this paper, where Maritime New Zealand held an investigation into the *Ady Gil* collision. The investigation was conducted by MNZ as the *Ady Gil* was registered in New Zealand. As such, any criminal acts committed by the SSCS when on a vessel that is registered in New Zealand will be prosecuted in New Zealand. This section of the paper will look at what criminal acts the SSCS is potentially liable for under New Zealand criminal law.⁶⁵

4.2.1 Common Assault

The first possible offence the SSCS is liable for is common assault. Common assault is found in s 196 of the *Crimes Act 1961* (NZ). For assault to occur there must be an actual or a threatened application of force, and there must be no consent.⁶⁶ An application of force is not limited to tangible force.⁶⁷ Heat, light, electrical force, gas and odours all constitute an application of force if it causes injuries or personal discomfort.⁶⁸ The throwing of stink bombs by crew members of the SSCS vessels involves the use of odour. As this odour causes nausea amongst the Japanese whaling vessel crew, it can be concluded that it does constitute an application of force. There would be no argument that consent was given by the Japanese vessels to have stink bombs thrown aboard. It is clear that if a New Zealand court were to prosecute the SSCS under their United Nations obligations, the SSCS would be found guilty of common assault, and the guilty party would be given (approximately) the one year sentence of imprisonment.⁶⁹

4.2.2 Intentional Damage

The second possible offence that the SSCS would be liable for is intentional damage. The provisions for intentional damage are set out in s 269 of the *Crimes Act 1961* (NZ). A person is liable for imprisonment not exceeding ten years if they intentionally or recklessly destroy or damage property with the likelihood of a risk to life.⁷⁰ If a life of another is not put at risk through the destruction or damage of the property, and the person has no claim of right to the property, the person is liable for imprisonment not exceeding seven years.⁷¹ The damage of the property only needs to render it imperfect or inoperative.⁷² The SSCS uses entangling lines to disable the propellers of the Japanese whaling vessels, as well as occasionally ramming the ships. Disabling the propellers is sufficient to amount to damage of property, as it is rendering the ship imperfect and inoperative. Further, this damage is caused intentionally by the SSCS, as the SSCS is attempting to prevent the Japanese whalers from continuing to hunt whales. Owing to this, it is likely that a New Zealand Court would find the SSCS guilty of intentional damage. Depending on whether the Court finds that ramming a ship and disabling propellers risks the safety of those on board, the crew members responsible could receive a sentence as high as ten years imprisonment.

Through the application of New Zealand's *Crimes Act 1961*, it can be seen that the SSCS is guilty of the offences of assault and intentional damage. Given New Zealand's international obligations under the United Nation's *UN Convention on the Law of the Sea*, the Government is obliged to investigate and prosecute for any offences committed on their flagships. Yet as stated before, the SSCS has never been successfully convicted. This leaves unanswered the question of what line exists for the SSCS before legal action occurs.

⁶³ *Ibid*, art 94(5).

⁶⁴ *Ibid*, art 94 (7).

⁶⁵ It has already been established in s 3.1.1 of this paper that s 65 of the *Maritime Transport Act* can be potentially used against the SSCS. If any action were taken against the SSCS, it is likely the prosecution would use the *MTA* in their case.

⁶⁶ *Attorney-General v Beggs* [2002] NZAR 917.

⁶⁷ *R v Hunter* [2010] NSWCCA 54. The reader will note that this is a New South Wales case, which is only persuasive to decisions by New Zealand Courts.

⁶⁸ *Ibid*.

⁶⁹ *Crimes Act 1961* (NZ), s 196.

⁷⁰ *Ibid*, s 269(1).

⁷¹ *Ibid*, s 269(2).

⁷² *Sheehan v Police* [1994] 3 NZLR 592.

5 The Line

Determining where the line exists for the SSCS is not an easy task. As the SSCS has never been convicted for any techniques it employs against Japanese whaling vessels, no legal authorities exist for how far they can go. The Australian Government and the Australian media are generally united against whaling in the EEZ, as is the Australian public.⁷³ Because of this, no official Australian documents available exist that sets out how far the SSCS can go before running into legal trouble. Despite these hurdles in finding where the line exists, it is clear that some boundaries exist for the SSCS.

As discussed above in 3.1.1, one clear line is boarding the Japanese vessels. When the captain of the *Ady Gil*, Mr Bethune, boarded a Japanese vessel for a political stunt, the Japanese captured him and took him back to Japan to be convicted. This shows that once a SSCS member boards a vessel, they are subject to the laws of its flag State.

A recent example highlights where a line was certainly crossed. On the 7 January 2012, three men from Western Australia illegally boarded the *Shonan Maru II* off the coast of Bunbury. According to the SSCS, the aim was to stop the vessel tailing the *Steve Irwin*. A spokesman for the Japanese whaling program said the incident occurred 40 kilometres off the West Australian coast, which is outside Australian territorial waters. In a statement contrary to this, Paul Watson said the incident actually occurred 16 nautical miles from Australia which would mean that it occurred within the 24 mile zone where some Australian laws apply.⁷⁴

The Attorney-General for Australia at the time of writing this paper, Nicola Roxon, stated that, 'If people do take action — take the law into their own hands — the rules that apply are sometimes ones that you can't as a government change. There will be consequences.'⁷⁵ It was clear at the time that the political stunt by the SSCS was not going to receive the support of the Federal Government. Through the illegal boarding, the protesters had crossed a clear line.

Despite the Government's public statements, the three protesters were taken back to Australia courtesy of an Australian customs boat, *Ocean Protector*, which is said to have cost the taxpayer hundreds of thousands of dollars. Instead of being taken back to Japan and charged, the protesters were allowed to return to Australia with no charges being laid, after diplomatic negotiations between the Japanese and Australian governments.⁷⁶ One can conclude from this that the protesters did cross a line, but the Japanese Government realised that there would be an onslaught of bad publicity if charges were laid.

The techniques that the SSCS use on board their vessels, including the use of throwing stink-bombs and damaging propellers, has never resulted in a Japanese crewperson receiving serious injuries or a Japanese vessel becoming permanently inoperable. It could potentially be argued that the line for the SSCS exists between using intrusive and harassing techniques that cause little harm, and using techniques that cause real harm. If a Japanese vessel was to become seriously damaged, or a crewperson were to be seriously injured, then it is likely that a legal authority would be forced to act. The damage or injury would become headline news. Given the rule of law, legal action would have to take place.⁷⁷

⁷³ Alford, P, 'Australia Takes Japan to Court on Whaling', *The Australian* (online) 28 May 2011 <<http://www.theaustralian.com.au/politics/australia-takes-japan-to-court-on-whaling/story-e6frgczf-1225872445926>>. See poll taken through this article on the Australian public's support for legal action against Japanese whaling.

⁷⁴ Vasek, L, 'Attorney-General Nicola Roxon has said Australian whaling activists would face the consequences of their actions', *The Australian* (online) 9 January 2012 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/attorney-general-nicola-roxon-has-said-australian-whaling-activists-would-face-the-consequences-of-their-actions/story-fn59niix-1226239673528>>.

⁷⁵ *Ibid.*

⁷⁶ Guest, D, 'From whale boat to jail for protester Simon Peterffy', *The Australian* (online) 17 January 2012 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/from-whale-boat-to-jail-for-protester/story-fn59nm2j-1226245871693>>.

⁷⁷ Mann, T, (ed), *Oxford Australian Law Dictionary* (2010).

However the fact remains that this section is purely speculation. If any action were to take place against the SSCS, the matter would eventually end up in the relevant country's highest Court. The decision of the Court would clearly show to all 'eco-warriors' where the line exists, and how not to cross it.

6 New Developments in the Japanese Fisheries Agency

It is important to note recent developments in the Japanese Fisheries Agency, given that any change in policy by this body will result in a reaction from the SSCS. The Japanese Fisheries Agency is part of the Japanese Ministry of Agriculture, Forestry and Fisheries. The agency is responsible for the Japanese whaling program.⁷⁸ In a recent development, the Japanese Fisheries Agency has stated that it is considering abandoning its Antarctic whaling program. One of the members of the official panel that released the report about the abandonment, Hisa Anan, believes that the SSCS will not stop its harassment, and it is too risky to continue whaling in the Antarctic. Ms Anan also argues that, owing to the March tsunami of last year, funding should be diverted from the whaling program to the rebuilding of Japan. However Ms Anan is in the minority on the panel on this issue. Other panel members advocate keeping the program running as is, or scaling back operations. Masayuki Komatsu, a prominent panel member, argues that whaling is not illegal, and abandoning the program is akin to a capitulation to the 'eco-terrorism' of the SSCS. The Agency is likely to take into account the dwindling demand for whale meat (with 50,000 tonnes of whale meat left in freezers due to a lack of demand). This is resulting in the program being a drain on government resources, which are in short supply given the recent tsunami.⁷⁹

Whaling was continued this year, and the Japanese Fisheries Agency must make a decision on whether to continue with the program in the long term.⁸⁰ Owing to the efforts of the SSCS, the whaling fleet suspended operations for this year on 7 March. The Japanese whalers caught 266 minke whales, which is reportedly less than a third of their quota.⁸¹ In a controversial move, the Japanese Fisheries Agency increased the budget of the Japanese whalers by 30 million dollars this year to defend against the SSCS. This caused outrage amongst the Japanese population given the recent tsunami and costs associated with rebuilding.⁸² Given the combined facts that it is increasingly difficult for the whalers to catch whales, that very few Japanese enjoy whale meat, and that the budget for the whalers is increasing rapidly, the future of Japanese whaling is not certain.

7 Conclusion

As stated at the outset, whaling in Antarctic waters is an extremely controversial and divisive issue in the Southern hemisphere. Whilst the Japanese claim that they whale in the Antarctic for scientific research to comply with the International Whaling Commission regulations, it is evident that the whaling occurs for commercial rather than scientific purposes. In response to the Japanese whaling in Antarctic waters that the Australian Government claims to be part of its EEZ, Australia has applied diplomatic pressure on the Japanese. The government deemed the response to diplomacy to be inadequate, and as a result, has started legal proceedings against the Japanese Government in the International Court of Justice. The judgment of the International Court is yet to be delivered, and it will take some time for this to occur.

Owing to this lengthy and fruitless process, the environmental group, the Sea Shepherd Conservation Society, has become a vigilante at sea. The SSCS harasses the Japanese whaling fleet using controversial tactics that include inflicting damage on the Japanese vessels. These methods have undoubtedly been successful, given that the rate of whaling in the Antarctic has decreased dramatically and the Japanese Fisheries Agency is even

⁷⁸ Ministry of Agriculture, Forestry and Fisheries, *Department Home Page* (21 August 2011) <<http://www.maff.go.jp/e/index.html>>.

⁷⁹ Wallace, R, 'Japanese Fisheries Agency Committee Reconsider Whaling', *The Australian* (online) 29 July 2011

<<http://www.theaustralian.com.au/news/nation/japanese-fisheries-agency-committee-reconsider-whaling/story-e6frg6nf-1226103792632>>.

⁸⁰ Willacy, M, 'Japan's Fisheries Float Idea of Ending Whaling', *ABC News* (online) 12 August 2011

<<http://www.abc.net.au/am/content/2011/s3291713.htm>>.

⁸¹ ABC News, 'Sea Shepherd Declares Japan Whaling Victory', *ABC News* (online) 10 March 2012 <<http://www.abc.net.au/news/2012-03-10/sea-shepherd-declares-japan-whaling-victory/3881288>>.

⁸² *Ibid.*

considering suspending its whaling program. Nonetheless, as there are claims that the Sea Shepherd engages in eco-terrorism, the question is if the end justifies the means.

The Australian Government, whilst strongly opposed to Japanese whaling, is equally opposed to the techniques used by the SSCS. These techniques, including disabling propellers, throwing stink-bombs and ramming into Japanese vessels, are offences under the *Crimes Act 1961* (NZ). As shown in this paper, the techniques the SSCS employ do not amount to a breach of law under the *Maritime Transport Act*, the *Navigation Act*, and the *Crimes Act*. The reason as to why the Australian Government has not commenced legal action against the SSCS is because Australia has limited jurisdiction for criminal offences committed within its EEZ. Given the *UN Convention on the Law of the Sea*, the country in which the vessel is registered has sole jurisdiction for prosecuting offences committed in the high seas. This leaves any criminal acts committed by the SSCS using a New Zealand-registered vessel like the *Andy Gil* to be investigated and prosecuted by the New Zealand authorities. However, the New Zealand authorities have not commenced any legal proceedings against the SSCS. This leads to the question as to why New Zealand, given that it has jurisdiction, has not prosecuted the SSCS for crimes committed at sea.

So what will be the future of whaling? The fact that the whaling program is not giving the expected economic returns to the Japanese Fisheries Agency suggests that the program is not viable. Furthermore, the dissent within the whaling panel is likely to build over time, owing to the combination of ‘eco-terrorism’, and legal and diplomatic pressure. However, as pressure builds, the pro-Japanese whalers are likely to become more entrenched in their view that they have a cultural right to continue whaling. When the former Australian Prime Minister John Howard was faced with the decision whether to meet the controversial Dalai Lama, the Chinese Government contacted the Prime Minister and informed him that under no circumstances could he meet with the Dalai Lama. Mr Howard realised that he would now have to meet with the Dalai Lama, or face political embarrassment.⁸³ There is a similar sentiment here. If the Japanese were to stop whaling, it would appear to be a capitulation to the demands of the Australian Government and the Sea Shepherd Conservation Society.

The best result would be for the International Court of Justice to make a mandatory injunction against the Japanese continuing whaling. This would restore faith in the international justice system to protect the environment amongst environmental activists. It could possibly prevent environmental groups resorting to controversial tactics to achieve their aims in the future. It will also provide the Japanese with a means to stop whaling and save face at the same time. By complying with an international decision, the Japanese will be able to abandon their program with dignity whilst gaining the respect of the international community.

If the legal proceedings prove fruitless for the Australian community, the ‘eco-warriors’ may feel forced to cross the invisible line. Such action will inevitably result in legal consequences for the activists, which will escalate an already inflammatory situation.

⁸³ Howard, J, *Lazarus Rising* (2010), 451.