



Maritime regulation, surveillance and enforcement challenges in Australia's Southern Ocean Whale Sanctuary

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Australia and Whaling

- History of Commercial Whaling since 1805
- Party to the 1931 Whaling Convention
- Report of the Frost Inquiry – 1978
- Closure of the Whaling Industry - 1978
- Opposition to commercial whaling - 1979
- Development of Whale Conservation Policies
- Report of the National Task Force on Whaling - 1997
 1. Australia should seek a permanent international ban on whaling via the IWC
 2. Australia should work towards adoption of a Global Whale Sanctuary within EEZ and high seas areas



International Whaling Regime

- 1946 International Convention for the Regulation of Whaling
- Industry-centred regime to promote whaling
 - Little emphasis on conservation
 - Evolution over time
 - Importance of the Schedule



International Conservation of Whales

- 1982 Moratorium adopted
- 1985/86 Moratorium operational
 - All commercial whaling prohibited
- Southern Ocean Whale Sanctuary
- Indian Ocean Whale Sanctuary
- Commercial whaling only permissible under amendment to the Schedule



The Scientific 'loophole'

ICRW, Article 8 (1)

“any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research”



JARPA II

2005 Japan announces JARPA II

- 2 year feasibility study
- Full program commences 2007/08
- Projected catches
 - Antarctic Minke whales : 850 +/- 10%
 - Fin whales : 50
 - Humpback whales: 50



Australia and the IWC

- Australia original ICRW party in 1948
- Position has evolved to strongly support conservation and the moratorium
- Australian support for Southern Ocean Whale Sanctuary
- Australian/NZ proposal for a South Pacific Whale Sanctuary
- Coalition Ministers have strongly supported the moratorium on whaling
- Minister Turnbull at IWC 59 - Anchorage



IWC Response to JARPA II

Resolution 2007-1

RECALLING that the Commission has repeatedly requested Contracting Parties to refrain from issuing special permits for research involving the killing of whales within the Southern Ocean Sanctuary, has expressed deep concern at continuing lethal research within the Southern Ocean Sanctuary, and has also recommended that scientific research involving the killing of cetaceans should only be permitted where critically important research needs are addressed

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FURTHER CALLS UPON the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary

[40 votes in favour; 2 against; 1 abstention; 28 not participating]



The current position

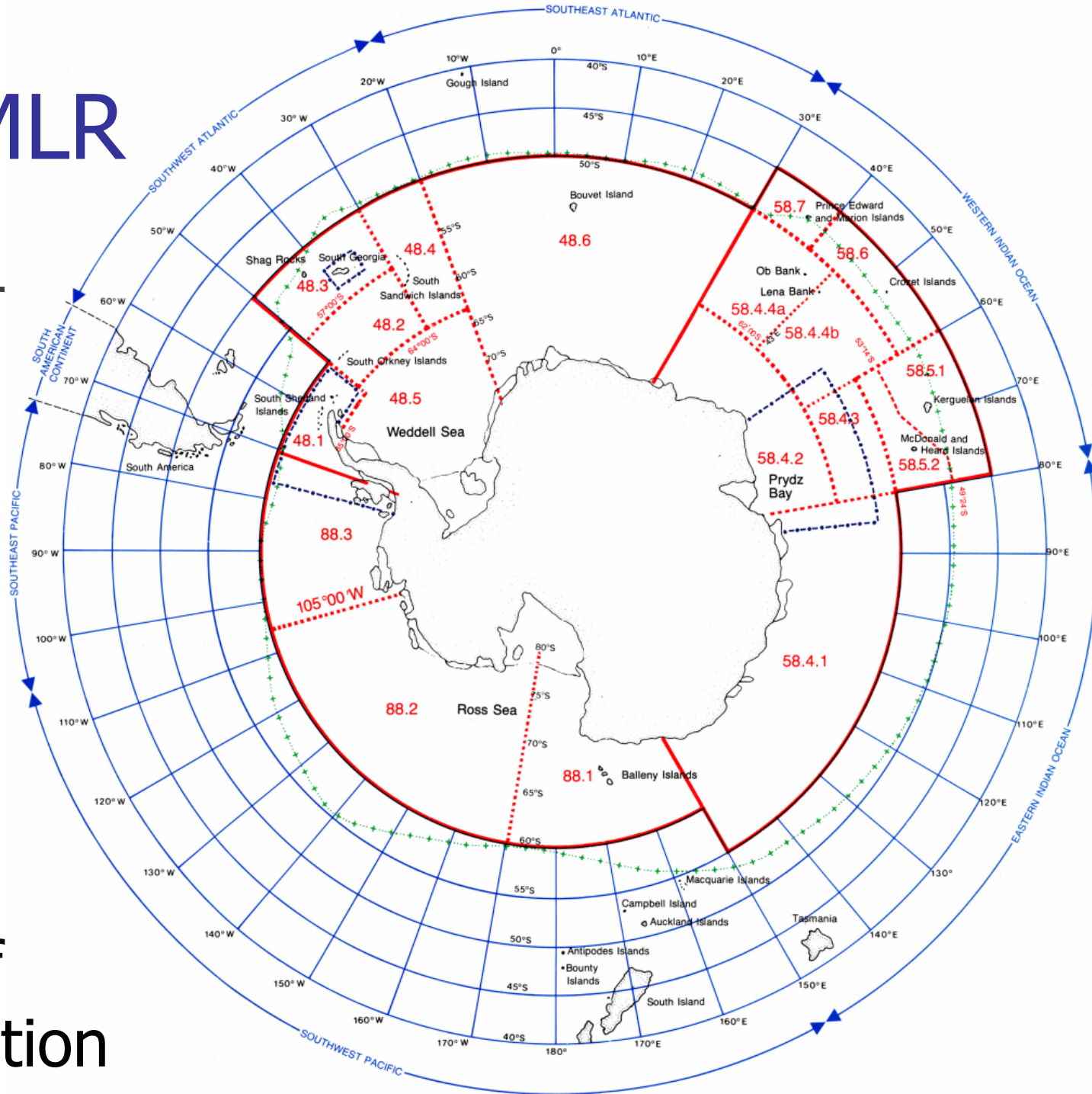
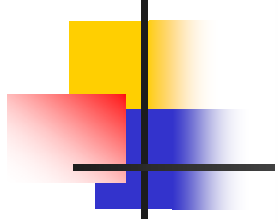
- Japan insists upon its right to continue to conduct 'special permit' whaling under Art 8, ICRW
- Majority of IWC members oppose the conduct of 'special permit' whaling
- Some IWC members oppose all forms of whaling
- Voting blocs within IWC are variable



Australian Law in the Southern Ocean

- Australia is a party to all relevant treaties
 - 1959 Antarctic Treaty
 - 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)
- Australian law has limited application on the continent and offshore
- Australian law can apply on and adjacent to Southern Ocean islands
 - Territory of Heard and McDonald Islands
 - Macquarie Island (Tasmania)

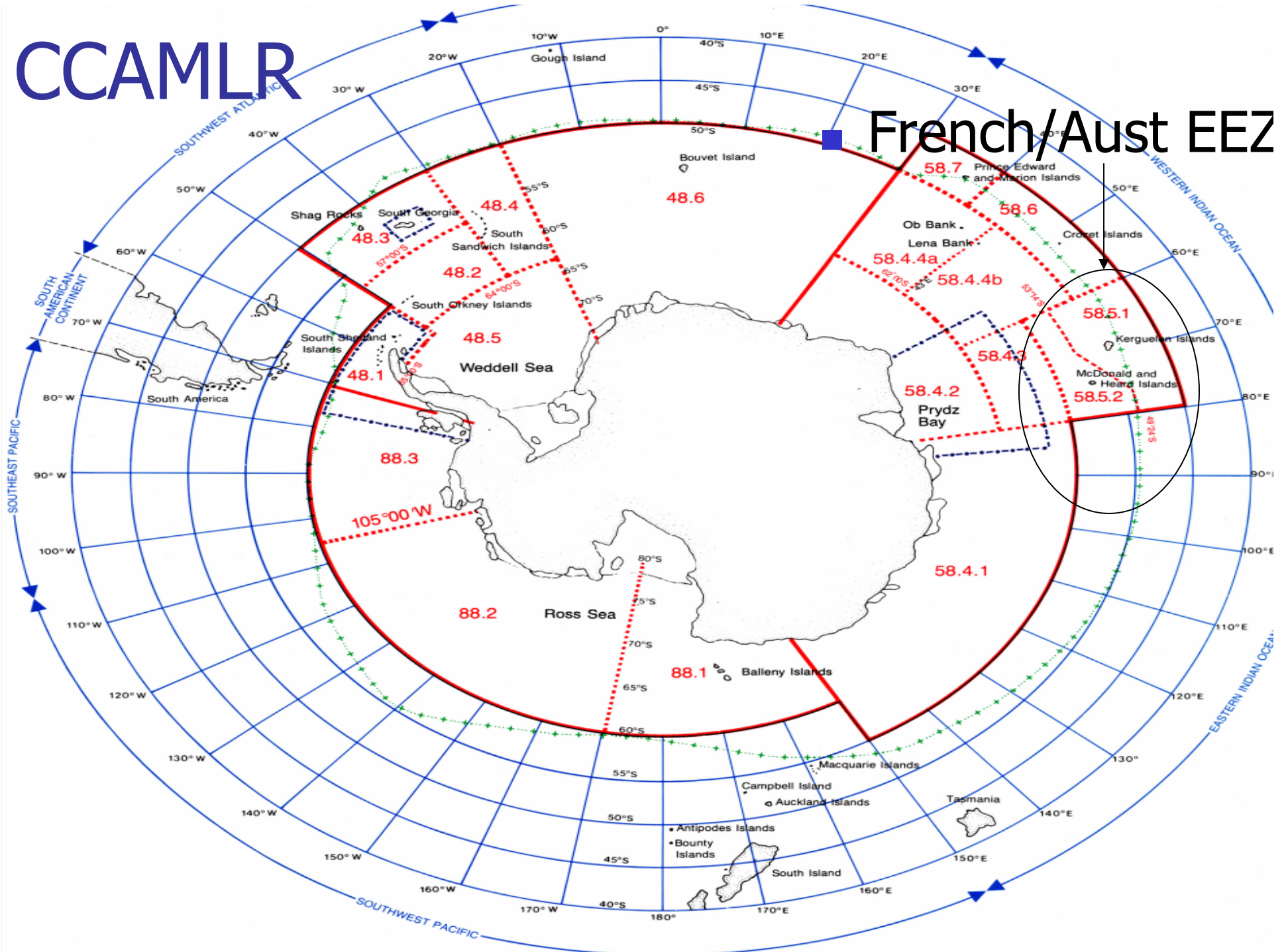
CCAMLR



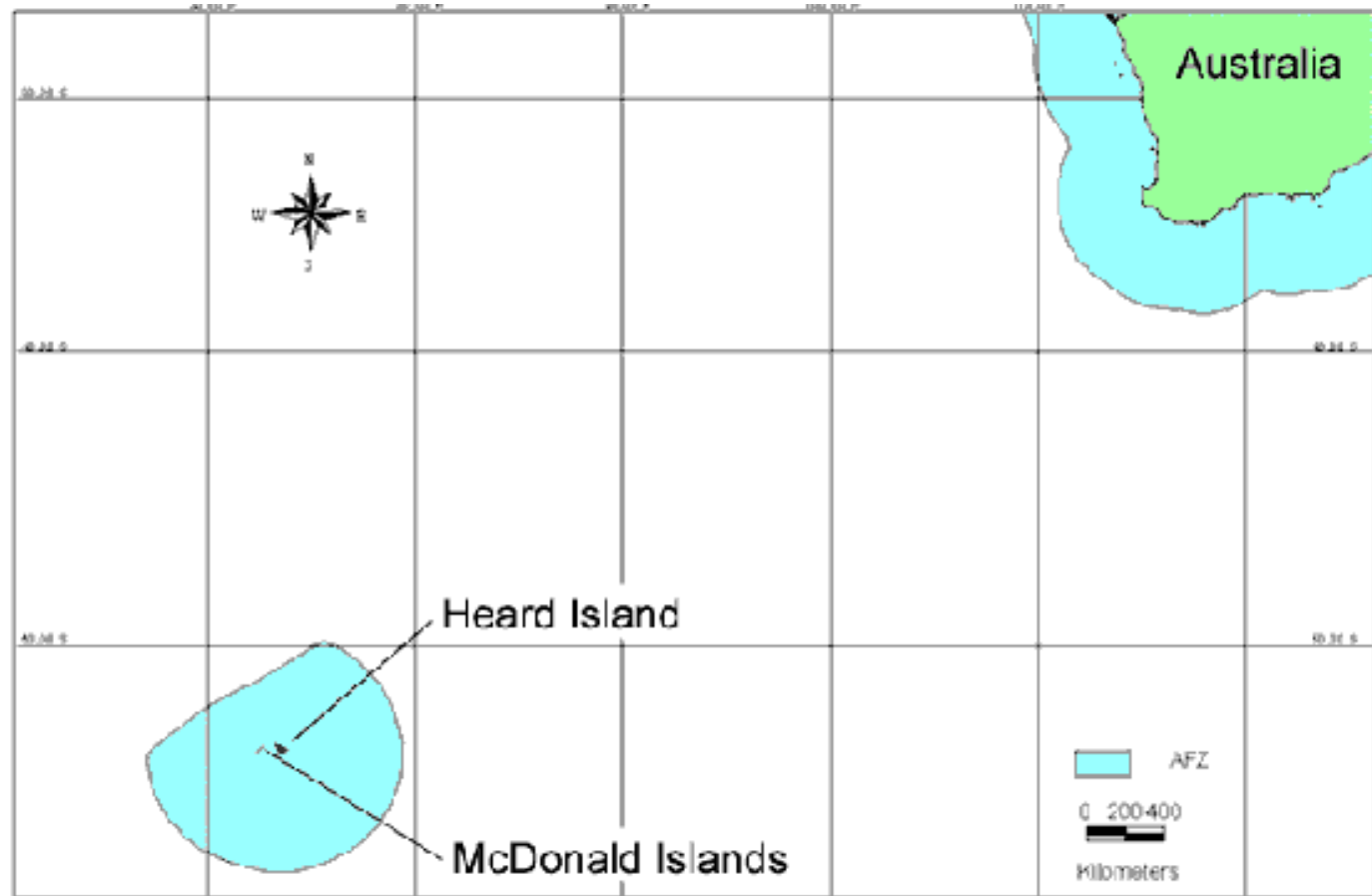
Area of
Application

CCAMLR

French/Aust EEZ



Australian HIMI EEZ





Australian Fisheries Laws

- Need to operate within the framework of Antarctic Treaty and CCAMLR
- Cannot apply to non-nationals with respect to fishing offshore the continent
- Can apply to the EEZ of sub-Antarctic islands (both within and beyond the CCAMLR area of operation)
- Enforcement has proven to be a key challenge
- There is no permanent Australian enforcement capacity in HIMI EEZ

Patagonian Toothfish (*Dissostichus Eleginoides*)

World Wide Web ver., v. 01-09-96

RFE Team: Tenge, Barnett, Savary, Rogers, Dang

RFE Funding: OS/CFSAN and ORA

RFE contact: btenge@fdaem.ssw.dhhs.gov

RFE WWW coord.: F. Fry (CFSAN)

Internet: frf@fdact.ssw.dhhs.gov



Species: *Dissostichus eleginoides* Smitt, 1898

Common Name: AFS-Patagonian Toothfish

RFE Code (this specimen): disseleg 194-001

Photographer: W. Savary (SAN-DO)

Date: 09-12-94

Image #: 267

Scanner: DTS-103AI Drum

Filename: prrd001.tif

Date: 08-09-95

Original File: 12Mb, 400dpi

Orig. Image arch.: SEA-DO

Tissue arch.: SEA-DO/SAN-DO

Fish Provided by: USDC

No Authentication



HMAS Canberra and *Volga*





Legal Issues from Southern Ocean Operations: Enforcement

- Enhanced bilateral/multilateral cooperative enforcement regimes
 - Within CCAMLR area of operation
 - Within adjacent EEZ waters
- Greater collaboration concerning
 - Intelligence & Enforcement
 - Asset sharing
- Recent Initiatives
 - Enhanced air and sea surveillance patrols
 - Cooperation between A/NZ/France/SA/UK



Legal Issues from Southern Ocean Operations: Enforcement

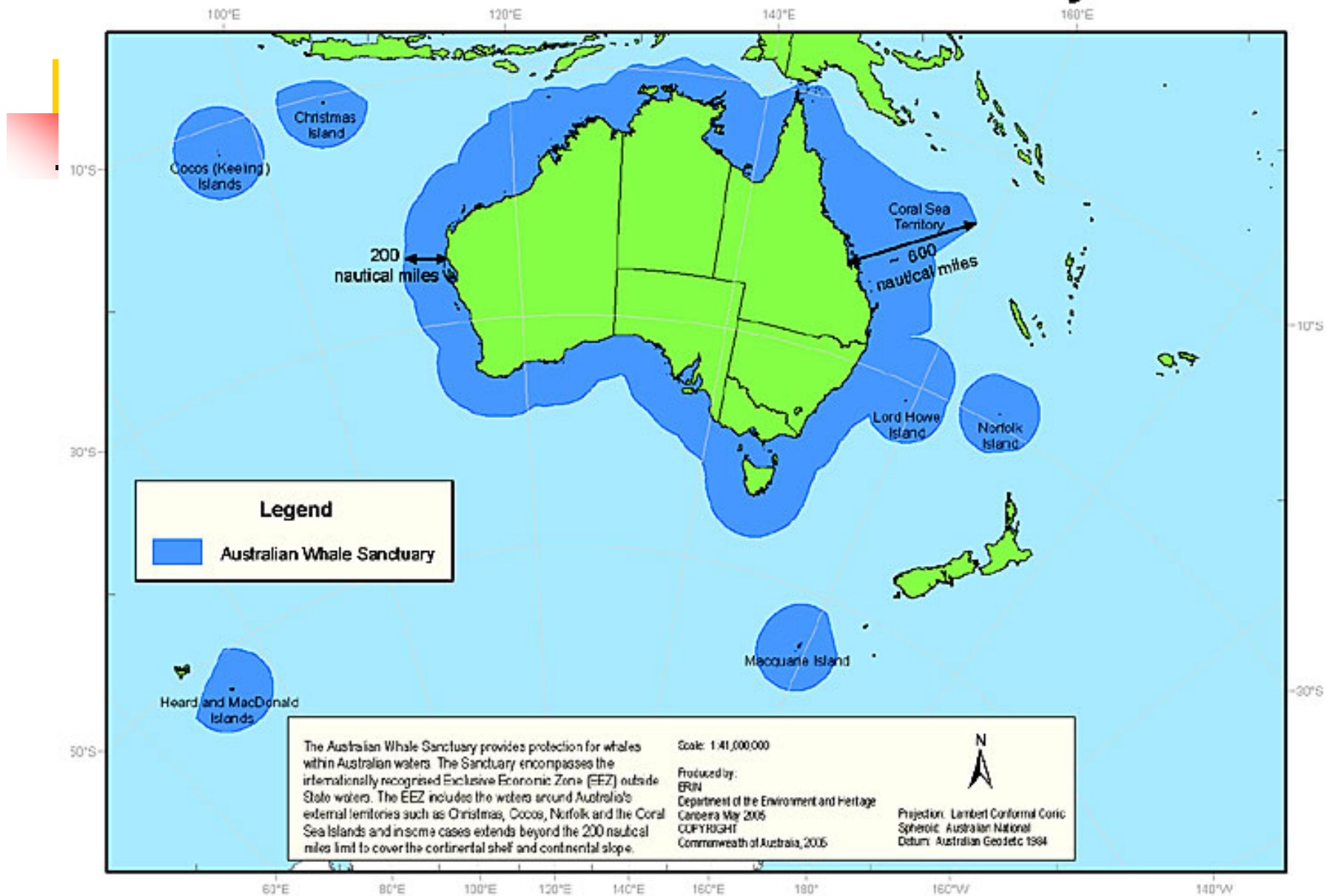
- 2005 Australia-France Surveillance Treaty
 - Enhance cooperative surveillance
 - Assistance when engaged in hot pursuit
 - Hot pursuit through other party TS once informed
- 2006 Australia-France Cooperative Fisheries Enforcement Treaty
 - Officer exchange on French and Australian patrol vessels allowing Australian vessel to apprehend in French waters



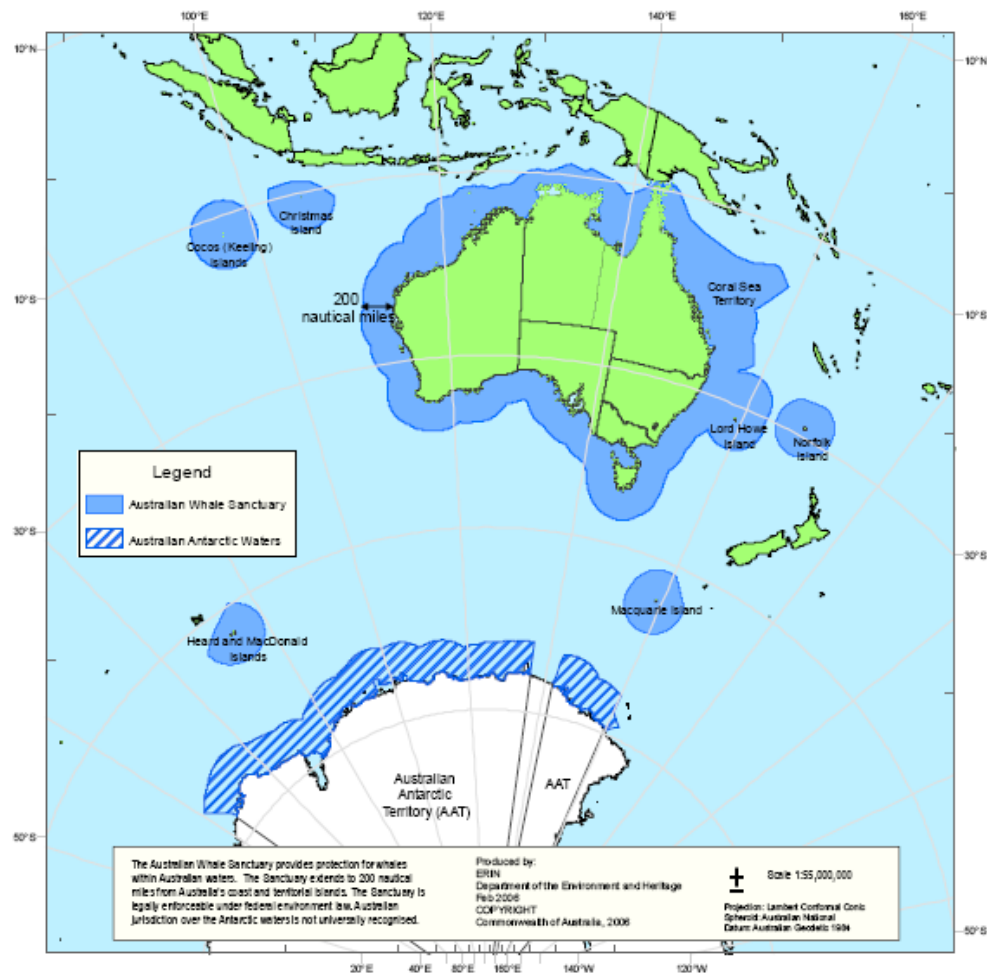
Whaling and Australia's Legal Responses

- Whaling Act 1960
- Whale Protection Act 1980
- Environment Protection and Biodiversity Conservation Act 1999
 - Implementation of 'spirit' of the Whaling Convention
 - Variety of offences relating to the killing, injuring or taking a cetacean
 - Offences for foreign whaling vessels
 - Australian Whale Sanctuary

The Australian Whale Sanctuary



Australian Whale Sanctuary





Humane Society International v Kyodo Senpaku Kaisha

[2005] FCA 664

- Action commenced in Federal Court of Australia
- Kyodo Senpaku Kaisha (Japanese whaler) named as Respondent
- Declaration sought under EPBC Act
- Range of Public and Private International Law Issues
- Leave for service out of jurisdiction



Submission of the Attorney-General

- Only four States formally recognise Australia's Antarctic claims: France, NZ, Norway, UK
- Japan does not recognise Australia's Antarctic claim or its maritime claims
- Japan would consider any attempt to enforce Australian law against Japanese vessels a breach of international law
- Potential adverse reaction from other Antarctic Treaty parties
- Provoking a disagreement would be contrary to Australia's long term national interests



Judgment of Allsop J

- Court was entitled to consider the views of the Attorney-General in the absence of an Executive Certificate [19, 25]
- Japan would view service as an enforcement of rights which it does not recognise under International Law [27]
- Court must decide if there is a breach of Act and also exercise discretion to serve [31]
- Court elects not to exercise discretion [36]

Leave to Appeal to Full FCA granted



Humane Society International v Kyodo Senpaku Kaisha

[2006] FCFCA 116

2/1 decision upholding application of EPBC Act
to Whale Sanctuary offshore the AAT

- Orders issued for the serving of a writ
- Parliament aware of application of Act
- Action was justiciable in Australian Court
- Allsop J was in error in attaching political considerations



September 18 2007 Hearing

- Service effected upon Kyodo in Japan
- HSI presented evidence of Kyodo's whaling activity
- Allsop J directs HSI to write to A-G re position on relief that has been sought
- Submissions by A-G to be filed by 26 October 2007

The graphic consists of a vertical black line on the left, intersected by a horizontal black line. To the left of the vertical line are three overlapping squares: a yellow one at the top, a red one in the middle, and a blue one at the bottom. The text 'ALP Policy' is written in a blue, sans-serif font to the right of the vertical line.

ALP Policy

Announced in May 2007 and since restated

- To seek to monitor Japanese whaling activities offshore the AAT
- To seek to enforce Australian law within the Australian Fishing Zone
- To further explore the potential of international litigation to halt JARPA II



Does the Emperor have no clothes?

- Australian law prohibits whaling
- Australia has no enforcement capacity both practically AND legally
- Will the HSI case expose the weakness of Australia's position?
- Will a Rudd Labor Government make a difference?
- Is International rather than Domestic litigation the best option?