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Abstract

On 14 July 2006 the Full Federal Court declared that Humane Society International ('HSI') could commence proceedings against Japanese whalers for alleged violations of the Australian Whale Sanctuary in Antarctica. 1 The decision was a significant victory for the public interest organisation, which had originally been denied leave to serve originating process on the Japanese defendant on the grounds that the action could be contrary to Australia's national interests. 2 In its amended statement of claim³ HSI alleged that between February 2001 and March 2005, the respondent Kyodo Senpaku Kaisha Ltd ('Kyodo') had unlawfully killed or interfered with around 385 Antarctic Minke whales in the Australian Whale Sanctuary located off the coast of the Australian Antarctic Territory ('AAT'). HSI also gave particulars of a permit issued to Kyodo by the Japanese Government for an ongoing whale research program. This permit indicated that the killing of whales would continue. This note briefly examines the background to the litigation. It then goes on to consider the progress of the case through the Federal Court, highlighting the various factors that have attracted the Court's attention at each stage. It first considers the judgment of Allsop J, and his unusual invitation to the Australian Government to make submissions regarding aspects of the case. It then analyses the decision of the Appeal Court, concluding with a consideration of the case's broader Antarctic context and possible implications for environmental litigation more generally.

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Taking on Japanese Whalers: The Humane Society International Litigation

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Introduction

On 14 July 2006 the Full Federal Court declared that Humane Society International ('HSI') could commence proceedings against Japanese whalers for alleged violations of the Australian Whale Sanctuary in Antarctica.¹ The decision was a significant victory for the public interest organisation, which had originally been denied leave to serve originating process on the Japanese defendant on the grounds that the action could be contrary to Australia's national interests.²

In its amended statement of claim³ HSI alleged that between February 2001 and March 2005, the respondent Kyodo Senpaku Kaisha Ltd ('Kyodo') had unlawfully killed or interfered with around 385 Antarctic Minke whales in the Australian Whale Sanctuary located off the coast of the Australian Antarctic Territory ('AAT'). HSI also gave particulars of a permit issued to Kyodo by the Japanese Government for an ongoing whale research program. This permit indicated that the killing of whales would continue.

This note briefly examines the background to the litigation. It then goes on to consider the progress of the case through the Federal Court, highlighting the various factors that have attracted the Court's attention at each stage. It first considers the judgment of Allsop J, and his unusual invitation to the Australian Government to make submissions regarding aspects of the case. It then analyses the decision of the Appeal Court, concluding with a consideration of the case's broader Antarctic context and possible implications for environmental litigation more generally.

Background

Whaling is regulated at international law through the International Whaling Commission ('IWC'), established under the *International Convention for the Regulation of Whaling 1946*. Australia and Japan are

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¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 (Unreported, Black CJ, Moore and Finkelstein JJ, 14 July 2006) ('*HSI Case*').

² [2005] FCA 664 (Unreported, Allsop J, 27 May 2005)

³ Available at <<http://www.hsi.org.au>> at 21 November 2006.

both parties to the Convention. The IWC has maintained a moratorium on commercial whaling since the mid-1980s. However Japan has continued to engage in limited whaling pursuant to the exemption for scientific research under Article VIII of the convention. At the time of the alleged offences, the respondent, Kyodo, was whaling pursuant to a special research permit issued by the Japanese Government.

In its application to the Federal Court, HSI sought the enforcement of sections of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') that protect whales within the Australian Whale Sanctuary. HSI also sought a declaration that the activities of Kyodo in the Australian Whale Sanctuary were illegal.⁴

The Australian Whale Sanctuary ('AWS') was established under section 225 of the *EPBC Act*, 'in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters.'⁵ The location of the AWS is defined principally by reference to Australia's exclusive economic zone ('EEZ').⁶ It includes the waters offshore the AAT, up to 200nm from baselines.⁷

A broad range of activities affecting whales are declared to be offences under Part 13 Division 3 of the *EPBC Act*. These include killing or injuring a cetacean, taking or interfering with a cetacean, possessing a cetacean, and treating (ie processing) a cetacean.⁸ Penalties are substantial and vary depending upon whether the offence is fault-based or one of strict liability.⁹

The Case at First Instance

Procedural issues

Application of the provisions of the *EPBC Act* depends upon the location of the relevant offence. Outside the AWS, they apply only to Australian citizens, permanent residents, Australian companies, the Commonwealth and its agencies, Australian aircraft and vessels, and members of the crew of Australian vessels and aircraft.¹⁰ Within the AWS they apply to *all*

⁴ Pursuant to the *Federal Court of Australia Act 1977* (Cth) s 21.

⁵ *EPBC Act* s 225(1).

⁶ *EPBC Act* s 225(2).

⁷ Proclamation of 26 July 1994 under the *Seas and Submerged Lands Act 1973* (Cth) in *Commonwealth Gazette* No S290, 29 July 1994.

⁸ *EPBC Act* ss 229, 229A, 229B, 229C, 229D and 230.

⁹ Penalties are up to two years imprisonment and/or \$111,000 fine for standard offences, and a maximum of \$55,000 fine for strict liability offences (s 4AA(1) *Crimes Act 1914* (Cth) currently provides that 1 penalty unit is \$110).

¹⁰ *EPBC Act* s 224(2).

persons, *all* aircraft and *all* vessels.¹¹ According to HSI's statement of claim, Kyodo whaled within two different sectors of Australia's Antarctic whale sanctuary during alternate seasons.¹²

If certain conditions are met, the EPBC Act permits an 'interested person' (who may be an individual or an organisation) to obtain an injunction restraining conduct in contravention of its provisions.¹³ An individual or organisation may be an 'interested person' because they have interests that are affected by the relevant conduct, or by virtue of environmental research, protection or conservation activities undertaken by them in the previous two years.¹⁴

HSI fulfilled the requirements for an interested person under the *EPBC Act* and was therefore entitled to bring enforcement proceedings under the Act.¹⁵ Because the respondent is located in Japan, however, the *Federal Court Rules* required HSI to seek the leave of the Court before it could serve its originating process. The relevant rule states that:

The Court may, by order, give leave to serve originating process outside the Commonwealth ... if the Court is satisfied that:

- (a) the Court has jurisdiction in the proceeding; and
- (b) rule 1 applies to the proceeding; and
- (c) the party seeking leave has a prima facie case for the relief sought by the party in the proceeding.¹⁶

There are therefore three questions that the Federal Court must answer in the affirmative before allowing an application to proceed. They deal with jurisdiction, the application of rule 1 (grounds for service), and prima facie case.

In the present case, the Federal Court has clearly been granted jurisdiction under section 475(1) of the *EPBC Act*. This section states that an 'interested person ... may apply to the Federal Court for an injunction' in circumstances where 'a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations ...'.

The second question, that of grounds for service, must be answered by reference to the grounds set out in Order 8 Rule 1 of the *Federal Court Rules*. Rule 1 allows an originating process to be served outside Australia

¹¹ *EPBC Act* s 5(4).

¹² The AAT is divided into two sectors, separated by the French-claimed Adelie Land. At various times, Kyodo is alleged to have conducted whaling operations in the waters offshore each sector.

¹³ *EPBC Act* s 475(1).

¹⁴ *EPBC Act* s 475(6) and (7).

¹⁵ [2004] FCA 1510 (Unreported, Allsop J, 23 November 2004) [15].

¹⁶ *Federal Court Rules* O8 r2(2).

in various circumstances, principally where various actions or circumstances are located ‘in the Commonwealth’, but also more generally where the proceedings concern ‘the construction, effect or enforcement of an Act’.¹⁷ Allsop J found that this particular ground was satisfied, thereby providing a basis for service outside the jurisdiction.¹⁸

On the third question, and subject to various questions of statutory interpretation,¹⁹ Allsop J was satisfied that affidavits filed on behalf of the applicant provided sufficient evidence of a breach of the *EPBC Act* to satisfy the requirement for a *prima facie* case.²⁰ There were therefore no serious doubts that HSI could meet the three requirements in Order 8 Rule 2(2). Instead, the case ultimately turned on the issue of whether or not the Court had a residual discretion, after these three conditions had been met, which would allow a judge to nevertheless refuse leave to proceed.

Political circumstances

Allsop J gave his first instance judgment in two stages – a preliminary judgment that is expressed to be ‘subject to hearing and considering any submissions to the contrary from the Attorney-General’,²¹ and a subsequent decision that takes the Attorney-General’s *amicus* submissions into account.²²

From the outset, Allsop J indicated that, in his opinion, external circumstances would impact on the outcome of the case.

At the hearing of the application ... I expressed the view that it may be that the Australian Government would wish to put submissions on the proper construction and interpretation of the legislation and treaties involved, in particular in the light of what might be seen to be Australia’s national interest, including inter-governmental relations between Australia and Japan.²³

¹⁷ *Federal Court Rules* O8 r1(l).

¹⁸ [2005] FCA 664 [42].

¹⁹ In particular, whether or not the permit to conduct scientific whaling issued by the Government of Japan to Kyodo was a ‘recognised foreign authority’ under s 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth), thereby overriding the operation of the *EPBC Act*: *EPBC Act* s 9.

²⁰ [2004] FCA 1510 par 24. Evidence filed by the applicant is available at <<http://www.hsi.org.au>> at 21 November 2006.

²¹ [2004] FCA 1510 [6].

²² [2005] FCA 664.

²³ [2004] FCA 1510 [3].

The Australian Government's submissions²⁴ indicated a belief that Japan would view any attempt to enforce Australian law in the Antarctic EEZ against Japanese whalers as a breach of international law. Furthermore, because of the sensitive nature of Antarctic sovereignty claims, the enforcement of domestic laws against foreigners would probably also lead to an adverse reaction by other Antarctic Treaty parties.²⁵

Because of uncertainty over Australian sovereignty claims in Antarctica,²⁶ it has been the Government's practice to only enforce Australian law in Antarctica against foreigners who have submitted to the jurisdiction.²⁷ Therefore, although the *EPBC Act* applies as a matter of Australian law, the 'pursuit of diplomatic solutions' has been seen as a 'more appropriate' response to the issues posed by Japanese whaling offshore the Australian Antarctic Territory.²⁸

Allsop J's conclusion

Allsop J ultimately decided to refuse HSI's application to serve originating process in Japan. There were two main reasons for this decision. First, His Honour was concerned that the litigation would be futile, it being unlikely that Kyodo would enter into the proceedings or accept any resulting injunction. "Relevant to such a consideration here are the facts that there is no apparent reason for any of the ships of the respondent (apart from requiring refuge) to call into Australian ports and that there is no place of business of the respondent in Australia. Also, as the issue is one for public law, it cannot be expected that Japanese courts would give effect to an injunction."²⁹

Allsop J's second reason for denying HSI leave to proceed related to the political dimensions of the dispute. He noted that Japan would view the Australian assertion of jurisdiction as without foundation under international law. His Honour stated:

Futility will be compounded by placing the Court at the centre of an international dispute ... between Australia and a friendly foreign

²⁴ *Outline of Submissions of the Attorney General of the Commonwealth as Amicus Curiae*, available at <<http://www.hsi.org.au>> at 21 November 2006, summarised by Allsop J at [2005] FCA 664 [4]-[17].

²⁵ [2005] FCA 664 [14] (Allsop J).

²⁶ None of the territorial claims in Antarctica is widely recognised. Australia's claim to sovereignty is recognised only by Britain, New Zealand, France and Norway: Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica* (Nov 1992) 9.

²⁷ *Outline of Submissions of the Attorney General of the Commonwealth as Amicus Curiae*, above n 24, [16]; see also *Australian Law in Antarctica*, above n 26, 16-23.

²⁸ [2005] FCA 664 [16] (Allsop J).

²⁹ [2005] FCA 664 [33] (Allsop J).

power which course or eventuality the Australian Government believes not to be in Australia's long term national interests... The case is an unusual one, in which futility is deeply intertwined with powerful non-justiciable considerations, tending to make it inappropriate to exercise the discretion [to allow service of process in Japan].³⁰

Judgment on Appeal

HSI appealed against Allsop J's decision on several grounds. These included a failure to consider the EPBC Act's clear legislative intention to prohibit whaling by foreigners in the AWS, the irrelevancy of political and diplomatic considerations to the exercise of the Court's discretion, and the *prima facie* right of any applicant to have their case heard by the court. By a majority of two to one, the appeal was successful. The remainder of this note will analyse the reasoning of the Full Federal Court

Court's 'discretion'

Black CJ and Finkelstein J gave the joint majority judgment. They decided that once the three conditions for service outside the jurisdiction in Order 8 Rule 2 are satisfied, there is no basis upon which the Court could still refuse leave. Allsop J had erred in refusing to grant leave on the basis that there was a residual discretion.³¹

According to Black CJ and Finkelstein J, '[w]e take it to be settled law that provided the jurisdiction of the Federal Court is engaged by an action in respect of a subject-matter with which the Court can deal, and the action is instituted by an applicant who has standing, and the action is not oppressive, vexatious or otherwise an abuse of process and, finally, the Court can assume jurisdiction over the defendant (by service or submission), the Court cannot refuse to adjudicate the dispute.'³²

Political aspects of dispute

While the political difficulties posed by HSI's action were at the heart of Allsop J's concerns, all judges in the Full Court agreed that Allsop J had erred in taking them into account. The majority conceded that in an exceptional case it may be permissible to refer to political issues in

³⁰ [2005] FCA 664 [36], [38] (Allsop J).

³¹ [2006] FCAFC 116 [10].

³² *Ibid*, referring to *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 239 (Brennan J).

deciding whether or not an action should proceed.³³ However that was certainly not the case, as here, Parliament had specifically stated that a matter may be brought before an Australian court.³⁴

Moore J agreed with the majority on this point:

The political repercussions of service of the process and, additionally, potentially the litigation of this application in an Australian court, are irrelevant in deciding whether to grant leave. To allow such considerations to influence the resolution of the application for leave denies this Court its proper role in our system of government. Courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject-matter of the proceedings.³⁵

Futility of Action

Futility was the basis upon which Moore J, in the minority, rejected HSI's application for leave. He characterised Kyodo's connection with Australia as 'tenuous', pointed out that the proceedings would almost certainly proceed *ex parte*, and considered that even if the applicant was successful in obtaining relief, that relief was unlikely to be effective. 'Indeed, the position of the appellant appeared to involve an acceptance that no enforceable injunction will be granted but that, at least in part, any declaration would operate to influence the Japanese Government, which is not a party to the proceedings.'³⁶ According to Moore J, this was not a legitimate use of the Court process.³⁷

Although the majority did not need to consider this issue, they nevertheless devoted a considerable part of their judgment to the question of how the Court should deal with these allegations of futility. The first issue Black CJ and Finkelstein J considered was the stage of litigation at which futility should be addressed. In their view it was premature to consider the issue at this early stage of applying for leave to serve process. It was more appropriately dealt with in an application to set aside service, or (preferably) when the primary matter itself is heard.³⁸

³³ [2006] FCAFC 116 [13], referring to *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61.

³⁴ [2006] FCAFC 116 [13].

³⁵ [2006] FCAFC 116 [38].

³⁶ [2006] FCAFC 116 [46].

³⁷ [2206] FCAFC 116 [47].

³⁸ [2006] FCAFC 116 [14].

In particular the Court should not presume at this early stage in proceedings that an injunction, if granted, would in fact be ignored.³⁹

The majority were also concerned that Allsop J's approach inappropriately placed the onus of proof on the applicant. '[I]t seems to us that the judge in effect imposed upon [HSI] the obligation of showing that an injunction would be a useful remedy. In fact the reverse is true. It is the defendant who has the onus of showing that it has no assets within the jurisdiction which could be sequestrated in punishment for contempt'.⁴⁰

Finally, and perhaps most significantly, the majority stated that the nature of the enforcement provisions of the *EPBC Act* was relevant to any assessment of futility. They noted that the relevant provisions are broadly drafted and in the nature of a 'public interest injunction'.⁴¹ Therefore an injunction might not be seen as futile simply because it was likely to be ignored by the defendant, because it could legitimately serve other purposes, for example, educative purposes.

Although 'deterrence' is more commonly used in the vocabulary of the law than 'education', the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. ... [T]he grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the *EPBC Act*.⁴²

Conclusion

The point decided by the *HSI Case* is relatively narrow: in a decision whether or not to grant leave for an applicant to serve process outside the jurisdiction under the Federal Court Rules, the Court is to have regard only to the three conditions set down in Order 8 Rule 2, namely jurisdiction, grounds of service, and *prima facie* case. In particular, political considerations are not relevant to the decision.

When viewed in its broader context, however, the case raises many more interesting issues. One issue relates to the crossover between politics and law, and the question of how and when courts can deal with issues that

³⁹ [2006] FCAFC 116 [16].

⁴⁰ [2006] FCAFC 116 [15].

⁴¹ [2006] FCAFC 116 [18].

⁴² [2006] FCAFC 116 [22].

raise significant political questions. The contrast between the judgment at first instance, and the judgments on appeal, is quite marked on this issue.

In general terms the argument of Moore J is compelling: courts should not be swayed by political considerations in the resolution of disputes that are brought before them. To decide otherwise is to compromise the proper role of the judiciary in a democratic society. However in the particular circumstances of this case, Allsop J was also correct to be concerned about the impact of the litigation. None of the judges on appeal acknowledged the delicate balancing act that has historically taken place in relation to the application and enforcement of laws in Antarctica.⁴³

Two features of the EPBC regime are particularly significant in the context of Australian law for the AAT. The first feature is the lack of any qualification requiring the whaling provisions to be read subject to international law.⁴⁴ The second feature is the importation of broad enforcement provisions, including the capacity for third-party enforcement, that over time have become characteristic of environmental laws but have not previously been part of Australia's Antarctic legal regime.

Allowing for the whale protection laws to be enforced at the behest of an 'interested party' has removed the government's control over the enforcement of laws in Antarctica. This is contrary to the manner in which Antarctic activities have previously been dealt with, and puts at risk the mechanism that has historically been used to diffuse any conflict between Australia's sovereignty claim and its desire to work co-operatively within the Antarctic Treaty System.

At the same time the case provides good news for environmental groups seeking to enforce statutory obligations through public interest litigation. The comments of the majority judges concerning the legitimate purposes for which injunctive and declaratory relief may be sought, and recognition of the broader deterrent and educative goals of environmental legislation, should prove useful more generally where third-party enforcement of statutory provisions is sought.

⁴³ Joanna Mossop charmingly refers to this balancing act as a 'delicate diplomatic dance': Joanna Mossop, 'When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones' (2005) 36 *VUWLR* 757, 767. The application and enforcement of Australian law in Antarctica is discussed at length in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica* (November 1992).

⁴⁴ Cf *Whale Protection Act 1980* (Cth) s 6(3).