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Abstract

Recently the University of Tasmania Law Review reported on the ongoing litigation by the Humane Society International Inc ('HSI') against Japanese whaling in Australian Antarctic waters. On 15 January 2008, HSI was finally successful: the Federal Court declared that the whalers were in breach of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act') and issued an injunction against them.

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Update: Japanese Whaling Litigation
Humane Society International Inc v Kyodo
***Senpaku Kaisha Ltd* [2008] FCA 3 (15**
January 2008)

RUTH DAVIS*

Recently the University of Tasmania Law Review reported on the ongoing litigation by the Humane Society International Inc ('HSI') against Japanese whaling in Australian Antarctic waters.¹ On 15 January 2008, HSI was finally successful: the Federal Court declared that the whalers were in breach of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') and issued an injunction against them.²

HSI commenced action in the Federal Court in October 2004, seeking to enforce provisions of the EPBC Act that make it an offence to kill or interfere with whales within the Australian Whale Sanctuary.³ As a procedural requirement, HSI had to first seek the Court's permission to serve the originating process on the respondent, Kyodo Senpaku Kaisha ('Kyodo'), in Japan. Referring to an amicus curie submission made by the Attorney-General, Allsop J found that the action would almost certainly be futile, and would place 'the Court at the centre of an international dispute ... between Australia and a friendly foreign power which course ... the Australian Government believes not to be in Australia's long term national interests.'⁴ Allsop J therefore refused to grant HSI the necessary leave, effectively halting the litigation.

HSI overcame this hurdle with a successful appeal to the Full Federal Court. The Full Court unanimously held that 'political considerations' (as the majority of the Court termed those concerns relating to Japanese

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¹ Ruth Davis, Taking on the Japanese Whalers: The Humane Society International Litigation (2005) 24 *University of Tasmania Law Review* 78.

² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (15 January 2008) (Allsop J).

³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') Part 13 Div 3.

⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) (Allsop J) [35].

non-acceptance of Australian jurisdiction over the Australian Antarctic Territory and adjacent maritime zones) should not affect the exercise of the Court's discretion.⁵ A majority of the Court also decided that it was premature to refuse leave to serve outside the jurisdiction based on concerns about the futility of any possible orders for final relief.⁶

Despite now having the Court's authority to proceed, HSI experienced difficulties in actually serving the process documents on the respondent in Japan. Allsop J notes that the Japanese Government, through its Ministry of Foreign Affairs, refused to provide the usual level of assistance: '[A] *note verbale* dated 26 October 2006 [from the Ministry] refused to allow the documents to be accepted for service on the grounds that "this issue relates to waters and a matter over which Japan does not recognise Australia's jurisdiction".'⁷

HSI applied to the Court for an order allowing substituted service.⁸ Twice the applicant attempted to serve the documents by registered post, and each time the envelope was returned, unopened, with a stamp indicating that the respondent refused to receive it. Finally, a lawyer for HSI attended the respondent's offices in person and managed to leave the package of service documents with the respondent's employees. Although there were doubts as to the validity of this method of service under the Japanese legal system,⁹ Allsop J found that 'the applicant has served the relevant documents on the respondent in accordance with the [Federal Court] orders ... and that the respondent was aware of the proceeding against it in this Court.'¹⁰

It was not surprising that Kyodo failed to respond to the service documents and did not appear in Court on the date of the scheduled hearing. The case proceeded in Kyodo's absence. HSI did not seek a default judgment, instead producing evidence to establish the claim in full. In order to demonstrate that whales had been killed, taken or interfered with inside Australia's Antarctic Whale Sanctuary, HSI relied largely on reports of the Japanese research program submitted by Kyodo

⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J), 434-5 (Moore J).

⁶ *Ibid*, 430-432 (Black CJ and Finkelstein J).

⁷ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (15 January 2008) (Allsop J) [20].

⁸ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 4 (2 February 2007)

⁹ Letter dated 12 October 2007 from the Australian Government Solicitor to Ms Ngaire Ballment, Associate to Justice Allsop, available at <http://www.hsi.org.au/> (accessed 18 March 2008).

¹⁰ [2008] FCA 3 [25].

to the IWC.¹¹ On this evidence, Allsop J found that 'the applicant has established on the balance of probabilities that the fleet has engaged in conduct that contravenes ... the EPBC Act, and intends to continue doing so in the future'.¹² Having made this determination, Allsop J then considered the Court's discretion to refuse relief. As with the initial stage of proceedings, political questions and futility were raised as possible grounds for exercising that discretion.

The Attorney-General was again invited to make submissions in the case. In a letter to the Court dated 12 October 2007,¹³ the Australian Government Solicitor confirmed that the Attorney-General continued to hold the views expressed in the original amicus curie submission, and was of the opinion that the same considerations applied to the granting of final relief. It may be recalled that in his original submission, the Attorney-General stated that the issue of Japanese whaling activity in Australian Antarctic waters was best left to be dealt with through diplomatic channels rather than through the courts.¹⁴ The Attorney-General considered it likely that Japan would view any attempt to enforce the EPBC Act in relation to such whaling as a breach of international law.¹⁵ Further, he expressed concern that enforcement action against Japanese whalers could lead to disagreements with other Antarctic Treaty Parties, by going against the convention that each Party apply its laws in Antarctica only to its own nationals.¹⁶

However in this final stage of the litigation, Allsop J ruled in line with the Full Court's decision. He noted that Australia's claim to sovereignty over the Australian Antarctic Territory is largely unrecognised and that Japan considers the relevant waters to be high seas and thus beyond Australian jurisdiction. He further commented that '[t]hese matters of sovereignty and international recognition (and lack of extensiveness thereof) can be taken to have been before, and well recognised by, Parliament when it enacted the EPBC Act.'¹⁷ He therefore concluded that uncertainty regarding Australian sovereignty in Antarctica and jurisdiction in the Australian Antarctic Exclusive Economic Zone could not be examined by the Federal Court in these proceedings.¹⁸

¹¹ Discussed by Allsop J at [2008] FCA 3 [30]-[44].

¹² Ibid [40].

¹³ Above, note 14.

¹⁴ Outline of Submissions of the Attorney General as Amicus Curiae, Court Document available at <http://www.envlaw.com.au/whale.html> (accessed 12 February 2008). The submissions are summarised in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (27 May 2005) [4]-[16] (Allsop J).

¹⁵ Ibid [14].

¹⁶ Ibid [16].

¹⁷ Ibid.

¹⁸ [2008] FCA 3 [13].

The issue of futility required greater consideration. Allsop J noted that the respondent has ‘no presence or assets within the jurisdiction [and that unless] the respondent’s vessels enter Australia, thus exposing themselves to possible arrest or seizure ... there is no practical mechanism by which orders of this Court can be enforced’.¹⁹ However, these considerations did not automatically require that the Court withhold relief.

Allsop J referred extensively to the majority judgment of Black CJ and Finkelstein J in the earlier appeal to the Full Federal Court. In that case, their Honours stated that futility has to be considered broadly in cases involving public interest injunctions, saying that ‘the 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.’²⁰ Granting an injunction could therefore serve an important purpose, even if the injunction could not be enforced in the usual way. In light of the public interest nature of the proceedings, and the fact that any difficulty in enforcing the Court’s order would be a result of the respondent’s disobedience, Allsop J refused to withhold relief on the grounds of futility.²¹

In general terms, the final decision in the HSI case was unremarkable. The evidence was clear and the application of the relevant legislative provisions straightforward. Taking an essentially dualist view of international law allowed the court to avoid the thorny questions relating to Australian sovereignty in Antarctica and jurisdiction over waters that other nations consider to be high seas.²² From an international lawyer’s point of view, the interesting decision had already been taken by the Full Federal Court – the decision to allow the litigation to proceed despite the Court having the power to block it.

However, even the Full Court’s decision appears unsurprising given the strength of the argument posed so clearly by Moore J: ‘Courts must be prepared to hear and determine matters whatever their political sensitivity

¹⁹ [2008] FCA 3 [46].

²⁰ [2008] FCA 3 [47] quoting (appeal) at [21].

²¹ Ibid [53].

²² Note however the comments of Allsop J in his earlier decision refusing the grant of leave at [2005] FCA 664 [38]: “This course may perhaps be seen as having echoes of the monist (as opposed to dualist) theory of the relationship between municipal and international law (cf Brownlie *Principles of Public International Law* (6th edn) ch 2) or of a notion of *forum non conveniens* leading to the preference of international dispute resolution mechanisms over domestic mechanisms. Neither is a correct explanation for my reasons for refusing to exercise the discretion as asked. 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.”

either domestically or internationally.²³ If the hearing and subsequently favourable (to HSI) determination of this case is expected to undermine Australia's relations with Japan and the other Antarctic Treaty Parties, as the Attorney-General asserted,²⁴ then the most remarkable aspect of this case appears to be that the EPBC Act was drafted in such a way as to allow the action in the first place.

The role of the decision in the resolution of the current international dispute over Japanese scientific whaling is as yet unclear. The Australian political context has changed since late 2007, with the election of the new Federal Government led by Labor's Kevin Rudd. Prior to the final judgment being handed down, the new Minister for Foreign Affairs, Steven Smith MP, and the new Minister for the Environment, Heritage and the Arts, Peter Garrett MP, issued a joint press release stating that the 'Attorney-General has withdrawn the previous Government's submission to the current Federal Court case concerning Japan's whaling activities in the Australian Whale Sanctuary.'²⁵ Given the basis of the Federal Court's final decision, the statement is unlikely to have had a great effect on the case's outcome. However, it does indicate that the new Government is prepared to go beyond diplomatic efforts and consider legal options.

As further evidence of a stronger anti-whaling stance, on 7 February 2008 the Government released photographs taken by customs officers onboard the Australian Customs patrol boat, the *Oceanic Viking*. The pictures were of Japanese whaling activities in the Southern Ocean, and were accompanied by a statement that video and photographic evidence was being collected by the Government to support 'potential international legal action against Japan.'²⁶ Such international legal action, perhaps under the International Convention for the Regulation of Whaling 1946, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) 1973 or the United Nations Convention on the Law of the Sea (UNCLOS) 1982, would not involve the direct enforcement of Australian legislation and would be quite separate to the Humane Society Inc litigation.

²³ (2006) 154 FCR 425, 435.

²⁴ Outline of Submissions of the Attorney General as Amicus Curiae, Court Document available at <http://www.envlaw.com.au/whale.html> (accessed 12 February 2008), [14]-[17].

²⁵ Stephen Smith MP and Peter Garrett MP, Australia Acts to Stop Whaling, Press Release (Canberra, 19 Dec 2007)

²⁶ Bob Debus MP, Whaling Announcement – release of images from the *Oceanic Viking*, transcript of Doorstop interview (Maroubra, NSW, 7 Feb 2008), available at http://www.ministerhomeaffairs.gov.au/www/ministers/ministerdebus.nsf/Page/Transcripts_2008_7February2008-Whalingannouncement (accessed 14 April 2008).

The dispute over Japanese scientific whaling in the Southern Ocean is just part of a broader crisis in the international regulation of whales and whaling. As a precursor to the June 2008 Annual Meeting in Chile, the IWC scheduled an intersessional meeting on the Future of the IWC in London in March. Reflecting that '[t]he IWC has in recent years shown increasing signs of polarisation and has reached something of an impasse',²⁷ IWC Chair Dr Hogarth stated that the aim of the intersessional meeting was to discuss ways to improve IWC practices and procedures.²⁸ Australia participated in the intersessional meeting and proposed various measures to improve IWC management of cetaceans, including the development of conservation management plans, regional collaboration on research and reform of the scientific whaling permit system so that it is centrally managed by the IWC.²⁹

The recent decision of the Federal Court in the HSI case therefore sits in the midst of interesting developments in the regime for the conservation of cetaceans at both the Australian and international levels. On its face, the decision is a relatively straightforward application of the EPBC Act's prohibition on all whaling within the Australian Whale Sanctuary. However, the litigation is based upon an assertive view of Australian jurisdiction that is rejected by Japan and is likely to be objected to by other Antarctic Treaty Parties. The campaign by Australia and other anti-whaling nations against Japanese scientific whaling is gathering momentum and is likely to feature prominently at the upcoming IWC meeting in Chile. Given the sensitive nature of Antarctic sovereignty claims, and the associated uncertainty over maritime jurisdiction in the Southern Ocean, it seems likely that an international solution to the dispute is required rather than a unilateral assertion of domestic jurisdiction.

²⁷ Intersessional Meeting on the Future of IWC , Renaissance London Heathrow Hotel, 6-8 March 2008, available at

<http://www.iwcoffice.org/meetings/intersession.htm#summary> (accessed 21 April 2008).

²⁸ *Ibid.*

²⁹ Whale Conservation and Management: A Future for the IWC, paper presented to the IWC Intersessional Meeting, London, March 2008, available at <http://www.iwcoffice.org/documents/commission/future/IWC-M08-INFO11.pdf> (accessed 21 April 2008)