case notes international

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2004] FCA 1510

Chris McGrath* – Barrister

"On the morning of 16 December 2001 the [Japanese whaling] fleet located a polynya (i.e. a large expanse of open water in the middle of fast ice or pack ice, and a haven for whales) at Latitude 63° 0'6" South, Longitude 051° 32'7" East, approximately 40 nautical miles within the Australian Whale Sanctuary. ... our helicopter ... located the [Japanese vessel] Yushin Maru hunting an Antarctic minke whale ... the gunner took aim and fired but missed the whale. The Yushin Maru continued its chase for 40 minutes and fired six times but missed on each occasion. Finally, on the seventh attempt the harpoon found its mark and the whale was killed, hauled to the surface and tied alongside."[1]

Introduction

The Humane Society International Inc ("**HSI**") has commenced proceedings in the Federal Court of Australia against Kyodo Senpaku Kaisha Ltd ("**Kyodo**") for illegally whaling within the Australia Whale Sanctuary adjacent to Antarctica.[2] HSI seeks a declaration and injunction under section 475 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("**EPBC Act**") against Kyodo for contravening sections 229-230 of the EPBC Act. These sections prohibit the killing, taking, interfering with, treating or possessing whales within the Australian Whale Sanctuary.

The evidence presented in the case is that Kyodo has killed approximately 428 whales within the Australian Whale Sanctuary since the Sanctuary was declared on 16 July 2000 and that Kyodo intends to continue to whale there.

HSI must initially seek leave from the Federal Court to serve the originating process on Kyodo before proceeding in the litigation.[3]

In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, Justice Allsop delivered a preliminary judgment but adjourned making the order sought pending the Australian Government being given the opportunity to make submissions on the case. [4]

The legal issues in this case involve a fascinating inter-play between international and Australian domestic law.

Background to the Australian Whale Sanctuary adjacent to Antarctica

The Australian Antarctic Territory ("**AAT**") was proclaimed by Australia in 1936 as a result of a transfer of title from the United Kingdom and the pioneering work of Australians in the area of Antarctica directly to Australia's south and south-west.[5] The AAT covers a sector of the Antarctic mainland and islands lying

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* Junior counsel for HSI in the case discussed in this article The facts are stated as at 24 November 2004

1 Extract from the affidavit of Kieran Mulvaney, who was the expedition leader of a Greenpeace voyage to the Antarctic to protest against the whaling in 2001/2002 For an excellent and graphic account of the Greenpeace voyages, see Kieran Mulvaney, *The Whaling Season An Inside Account of the Struggle to Stop Commercial Whaling* (Island Press, Washington, 2003)

2 The pleadings, affidavits, maps and other documents associated with the case are available at http //www hsi org au/

3 To commence court proceedings against a person who is not present in Australia, leave must be obtained from the relevant court to serve the originating process (i e the court documents setting out the nature of the case) on the person outside the jurisdiction, thereby commencing the litigation

4 Available at http //www austlii edu au/au/cases/cth/federal_ct/2004/1510 html (23 November 2004)

5 Following British expeditions dating from the 1830s, Douglas Mawson's 1911-1914 Australasian Antarctic Expedition and 1929-1931 British, Australian and New Zealand Antarctic Research Expedition (BANZARE) discovered and mapped much of the coast of (what became) the AAT

south of Latitude 60° South (to the South Pole) and between Longitudes 45°East to 136°East and 142° East to 160° East.

Sovereignty over Antarctica is a sensitive international topic and only the United Kingdom, France, Norway and New Zealand officially recognise Australian sovereignty over the AAT.

Despite the general lack of recognition by other states, Australia has established territorial sovereignty in Antarctica under international law through effective occupation of the coastline surrounding its three permanent Antarctic bases (Mawson, Davis and Casey) lying between Longitude 60° East and 120° East.[6] In her leading study of the issue, Professor Gillian Triggs concluded that:[7]

> *"Australia has valid title to those parts of the Australian Antarctic Territory which have been effectively occupied by it. Such areas are the coastal mainland bases of Davis, Casey and Mawson and their surrounding territory and the continental shelves adjacent to them. These coastal areas lie between longitudes 120°E and 60°E. That part of Australia's claim which lies between 160°E and 142°E supports no bases at all. The coastal area however, has been mapped and explored to some extent, and such Australian legislation as extends to the Australian Antarctic Territory has effect there also. It is possible that these facts alone satisfy the requirement of effective occupation. However, there is little evidence to support Australian sovereignty over the vast hinterland of its claimed sector beyond exploratory expeditions and the extension of legislation. It is thus doubtful whether Australia can support its claim to sovereignty over such territory."*

In 1959 Australia and Japan, and other nations concerned with the control and use of Antarctica, agreed to freeze further claims to sovereignty in Antarctica under the *Antarctic Treaty 1959*. Australian sovereignty over the AAT was not lost by entry into this treaty, nor does the treaty prevent Australia exercising jurisdiction over nationals of other parties to the treaty. In recommending that, as a matter of principle, Australian law be extended and applied to those foreign nationals in the AAT who are not otherwise exempt under the *Antarctic Treaty*, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs, noted in 1992 that:[8]

> *"The Committee is of the view that there exists a strong misconception about the scope of ... the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees ... that Australia is not prevented by ... the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory."*

In 1994 Australia proclaimed an exclusive economic zone ("**EEZ**") of 200 nautical miles under the *United National Law of the Sea Convention 1982* ("**UNCLOS**"), including waters adjacent to the AAT. Article 65 of the UNCLOS specifically allows coastal states to regulate whaling within the EEZ. Cetaceans were protected from whaling by Australians or foreign nationals from 1 August 1994[9] to 16 July 2000[10] in the Australian Fishing Zone, which included the EEZ of the AAT under the *Whale Protection Act* 1980 (Cth). Since 16 July 2000 cetaceans have been protected in the Australian Whale Sanctuary ("**AWS**") under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("**EPBC Act**").

Japanese whaling in the Australian Whale Sanctuary

An international moratorium on all commercial whaling was declared under the *International Convention for the Regulation of Whaling (International Whaling Convention) 1946* ("**International Whaling Convention**") by the International Whaling Commission ("**IWC**") in 1982, and took effect in 1985/86.

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6 Mawson was established in 1954, Davis in 1957 and Casey (previously Wilkes Station established by the USA) in 1958

7 Gillian Triggs, International Law and Australian Sovereignty in Antarctica (Legal Books Ltd, Sydney, 1986), pp 322-323

8 House of Representatives Standing Committee on Legal and Constitutional Affairs, Australian Law in Antarctica The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory (AGPS, Canberra, 1992), para 2 31

9 Australian nationals were prohibited from killing whales in this area from 1980, but the laws were not extended to foreign nationals until 1994

10 The date of commencement of the EPBC Act and repeal of the Whale Protection Act 1980 (Cth)

Despite the official moratorium on commercial whaling the Government of Japan continues to permit "research" involving the killing of whales and ultimate sale of the whale meat in Japan.

The whales killed are Antarctic minke whales (*Balaenoptera bonaerensis*), which are classified within the Order Cetacea (whales, dolphins and porpoises), Sub-order Mysticeti (baleen whales or mysticetes), and hence are "cetaceans" under the EPBC Act.

The killing of Antarctic minke whales in Antarctic waters is conducted under the Japanese Whale Research Program under Special Permit in the Antarctic ("**JARPA**") and has occurred every year since the 1987/88 season in purported compliance with Article VIII of the International Whaling Convention. The lethal research is not necessary from a scientific perspective and appears to be an abuse of right under the International Whaling Convention, but those issues is not relevant to the Federal Court case.[11]

Pursuant to paragraph 3 of Article VIII of the International Whaling Convention, cruise reports are submitted to the Scientific Committee of the IWC annually by the Japanese whalers. The cruise reports for the 2000/2001, 2001/2002, 2002/2003 and 2003/2004 whaling seasons are exhibited in the Federal Court. These reports set out the nature, duration and location of the research undertaken, including reporting the number and location of whales killed. Five vessels and an unspecified number of personnel are involved in this whaling activity. The reports list their authors as being employees of Kyodo, the Institute of Cetacean Research ("**ICR**") and staff of various Japanese universities.

Kyodo is the primary entity responsible for carrying out the whaling under the JARPA and subsequently selling the whale meat and other products obtained from the whaling in Japan. It is the owner of the five vessels used to conduct the whaling and employs the crews. Its employees physically carry out the killing of the whales using explosive harpoons as the primary killing method and a large calibre rifle as the secondary killing method when required. It sells the whale meat and other products obtained from the whaling in Japan.

The general location of Kyodo's whaling activity alternates biennially between two broad areas:

- Area IV and the eastern part of Area III, which is located south of Latitude 60° South to the ice edge between Longitude 35° East to Longitude 130° East ("**Area IV and Area IIIE**"); and
- Area V and the western part of Area VI, which is located south of Latitude 60° South to the ice edge between Longitude 130° East to Longitude 145° West ("**Area V and Area VIW**").

Both of these areas have at least some overlap with the AWS; however, Area IV and Area IIIE contain much more overlap with the AWS than the Area V and Area VIW.

As noted previously, the evidence indicates that Kyodo killed approximately 428 Antarctic minke whales within the AWS during 2000-2004. The evidence indicates that in the order of 13-36 whales will be killed by Kyodo in the Australian Whale Sanctuary between late February and early March 2005. HSI has made an application for an interlocutory injunction to restrain this whaling occurring, but given the difficulty of securing *ex parte* relief (i.e. relief granted in the absence of the other party), HSI needs to serve Kyodo before proceeding with the application for interlocutory relief.

The preliminary decision of the Court

The legal issues at this stage in the case revolve around whether the Federal Court should grant HSI leave to commence proceedings against Kyodo by serving the originating process on the company in Japan. These issues, which are normal for any international litigation, arise under Order 8 (Service outside of the jurisdiction) of the *Federal Court Rules*. The preliminary decision of Justice Allsop is well set out and there is no need to repeat it here. It is suffice to say that the case involves complex issues of the inter-play between the international law and Australian domestic law.

11 See Gillian Triggs, "Japanese Scientific Whaling An Abuse of Right or Optimum Utilisation?" (2000) 5(1) Asia Pacific Journal of Environmental Law 33

Section 7(1) of the *Antarctic Treaty (Environment Protection) Act* 1980 (Cth) is of particular significance in the case. It links Australian domestic laws applying to Antarctica to a system of international agreements applying to Antarctica known as the Antarctic Treaty System. Section 7(1) provides:

> **7 Application of other laws**
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> (1) Notwithstanding any other law, but subject to the regulations, no action or proceeding lies against any person for or in relation to anything done by that person to the extent that it is authorized by a permit or by a recognised foreign authority.

"Recognised foreign authority" is defined in s 3 of the Act to mean:

> "**recognised foreign authority**" means a permit, authority or arrangement that:
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> (a) authorises the carrying on of an activity in the Antarctic; and
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> (b) has been issued, given or made by a Party (other than Australia) to the Madrid Protocol that has accepted under that Protocol the same obligations as Australia in relation to the carrying on of that activity in the Antarctic;

The "Madrid Protocol" is also defined in the Act to mean:

> "**Madrid Protocol**" means the Protocol on Environmental Protection to the Antarctic Treaty, a copy of the English text of which (apart from Annex IV to it) is set out in Schedule 3, being the Protocol done, and opened for signature, at Madrid on 4 October 1991 to which, in accordance with Recommendation XVI-10 adopted by the XVIth Antarctic Treaty Consultative Meeting at Bonn on 18 October 1991, the Annex attached to that Recommendation has been added as Annex V to the Protocol."

HSI argues that section 7(1) does not prevent the application proceeding because whaling is not regulated under the Madrid Protocol, and therefore the JARPA issued by the Government of Japan is not a "recognised foreign authority".

Conclusion

The preliminary decision of Justice Allsop appears to indicate that he agrees that section 7(1) of the *Antarctic Treaty (Environment Protection) Act* 1980 (Cth) does not prevent the case proceeding. However, he wishes to hear from the Australian Government of any contrary view or any issue that he should take into account in exercising his discretion to allow the litigation to proceed. The resolution of these issues will be fascinating for conservationists and environmental lawyers alike.