

***Humane Society International v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664  
(27 May 2005) Leave to serve out of jurisdiction refused  
- international political nature of issues**

**By Wayne Gumley**

In Case Notes for the December 2004 Issue, Chris McGrath described the preliminary judgment in these proceedings concerning allegations of illegal whaling within the waters of Australian Whale Sanctuary. In that decision, Justice Allsop declined to make a ruling on an application to serve process out of jurisdiction until he had heard submissions from the Australian government. Since that ruling, the Attorney General of the Commonwealth has made a submission to the judge as *amicus curiae*. The submissions of the Attorney-General raised a number of issues:

- (a) the nature of Australia's sovereignty over the Australian Antarctic EEZ and the grounds available under the relevant provisions of Order 8 Rule 1 of the Federal Court Rules, including the meaning of the phrase "in the Commonwealth" therein;
- (b) the nature of Australia's claims to the Australian Antarctic Territory and the adjacent EEZ and the lack of international recognition of those claims;
- (c) the likely consequences of any attempted curial enforcement of the EPBC Act upon Australia's international relations with Japan and other countries;
- (d) the Commonwealth Government's views as to the appropriate means of dealing with activities in the Antarctic EEZ, such as those apparently conducted by the respondent, which may be seen to be in contravention of the EPBC Act; and
- (e) the futility of any order permitting service in Japan.

His Honour noted that it is relevant to the exercise of the judicial power of the Commonwealth in that respect to understand the views of the Executive Government in weighing the possible consequences thereof. The issues before him were not only whether there appeared to be a contravention of the EPBC Act, but also whether he should exercise a discretion to permit service of proceedings under the EPBC Act which seek a declaration and an injunction under domestic legislation dealing with these issues of international political controversy. It was relevant to suggest that Japan would view the assumption of jurisdiction as baseless by international law, which would probably render the action futile, or at best, make it the subject of an international dispute. In all the circumstances, he declined to grant leave to serve originating process in Japan.