

Japanese Whaling Case appeal succeeds By Chris McGrath Barrister*

Introduction

The Humane Society International Inc (HSI) has succeeded in its appeal in the Japanese Whaling Case.¹ This article summarises the legal context and facts of this case, and the importance of the decision in the appeal.² Background documents for this case, including court documents, submissions, affidavits and maps, are available at <http://www.hsi.org.au> and <http://www.envlaw.com.au/whale.html>.

Legal context and facts

The legal context of this case is complex but the facts are relatively simple. As a starting point, it is useful to note the background to Australia's Antarctic territory. In 1936 Australia proclaimed the Australian Antarctic Territory (AAT) 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.³ The AAT covers a large sector (42%) of the Antarctic mainland lying south of latitude 60° South (to the South Pole) and between longitudes 45°–136° and 142°–160° East.⁴

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. Japan does not recognise Australian sovereignty. Japan also renounced all claims to Antarctica at the end of World War II. Sovereignty is important in this case because it gives the Australian Government a right to regulate the activities of all people, including Australian nationals and foreigners, within the area over which Australia is sovereign or has sovereign rights.

Separate to issues surrounding sovereignty in Antarctica is the political turmoil created at an international level by whaling. A moratorium on all commercial whaling was declared by the International Whaling Commission (IWC) in 1982 and took effect in 1985. Despite the official moratorium on commercial whaling and repeated resolutions urging it not to do so,⁵ the Government of Japan continues to permit "scientific research" involving the killing of whales and ultimate sale of the whale meat in Japan under Article VIII of the *International Whaling Convention 1946*.

Between 1986-2005 the whaling undertaken by Japanese whalers was done under a program known as the "Japanese Whaling Research Program under Special Permit in the Antarctic" (JARPA). The JARPA initially involved killing 300 (± 10%) Antarctic minke whales (*Balaenoptera bonaerensis*) annually. The take was raised to 400 (± 10%) in 1995. At the 2005 IWC meeting the Government of Japan announced the "Second Phase of the Japanese Whaling Research Program under Special Permit in the Antarctic" (JARPA II).⁶

* The author is the junior counsel for HSI in the Japanese Whaling Case. The law and facts in this article are stated as at 20 July 2006.

1 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 (Black CJ, Finkelstein and Moore JJ). Available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/116.html> (viewed 20 July 2006).

2 For more detailed analysis, see McGrath C, "Editorial commentary the Japanese Whaling Case" (2005) 22 *Environmental and Planning Law Journal* 250, and McGrath C, "Editorial commentary Japanese Whaling Case appeal succeeds" (2006) 23 (5) *Environmental and Planning Law Journal* (in press).

3 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.

4 Maps and background information on the AAT are available at <http://www.aad.gov.au/default.asp> (viewed 20 July 2006).

5 IWC resolutions 1987-1, 1994-10, 1995-8, 1996-7, 1997-5, 1998-4, 1999-3, 2000-4, 2001-7, 2003-2 and 2005-1. Available at <http://www.iwcoffice.org/> (viewed 28 June 2003).

6 Government of Japan, "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources", research plan presented to the 57th IWC conference, Ulsan, South Korea, 2005.

Under this whaling program, Japan proposes to kill 850 ($\pm 10\%$) Antarctic minke whales annually. During a “feasibility study” in 2005-2007, 10 fin whales (*Balaenoptera physalus*) will also be killed annually. After 2007, 50 fin whale and 50 humpback whales (*Megaptera novaeangliae*) will be killed annually.

While Japan permits its nationals to kill whales in international waters, it is not able to permit whaling in the territorial waters of other countries. In 2000 Australia declared an Australian Whale Sanctuary (AWS) within 200 nautical miles of the coastline of the Australian mainland and Australia’s external territories, including the AAT.⁷ The AWS was declared under Australia’s main federal environmental legislation, the *Environment Protection and Biodiversity Act 1999* (Cth) (EPBC Act). A large part, though not all, of the Japanese whaling occurs within the AWS.

By overlaying a map of the AWS on maps presented by the Government of Japan to the IWC when reporting on the Japanese “research”, HSI is able to estimate the number of whales killed within the AWS since it was declared in 2000. These estimates are shown in Table 1.

Table 1: Total number of whales killed and the approximate number killed within the AWS under the JARPA and JARPA II

YEAR	Total of Antarctic minke whales killed under the JARPA and JARPA II	Approximate number of Antarctic minke whales killed within the AWS	Total of fin whales killed under the JARPA and JARPA II	Approximate number of fin whales killed within the AWS
2000/2001	440	65	0	0
2001/2002	440	215	0	0
2002/2003	440	21	0	0
2003/2004	440	164	0	0
2004/2005	440	20	0	0
2005/2006	853	768	10	9
TOTAL	3,053	1,253	10	9

In addition to the evidence from Japanese reports of the whaling, a first-hand account of the whaling inside the AWS on 16 December 2001 was provided by Kieran Mulvaney, the expedition leader of a Greenpeace anti-whaling expedition in 2001/2002. His evidence included the following observations:

On the morning of 16 December 2001 the [Japanese whaling] fleet located a polynya (ie 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.⁸

Kieran Mulvaney also provided photographs of the whaling within the AWS on 16 December 2001.⁹

7 A map of the AWS is available at http://www.ga.gov.au/image_cache/GA3746.pdf (viewed 20 July 2006). The AWS coincides with Australia’s exclusive economic zone (EEZ) shown in this map.

8 Extract from the affidavit of Kieran Mulvaney, sworn 9 November 2004, available at <http://www.envlaw.com.au/mulvaney.pdf> (viewed 20 July 2006). For an excellent account of the Greenpeace voyages, see Mulvaney K, *The Whaling Season: An Inside Account of the Struggle to Stop Commercial Whaling* (Island Press, Washington, 2003).

9 Photographs are available from affidavit of Kieran Mulvaney, see n 8, p 9.

The initial litigation and appeal

To summarise this case in a nutshell, HSI commenced proceedings in the Federal Court of Australia in late 2004 for a declaration that the whaling in the AWS was illegal and an injunction to restrain it under the EPBC Act. The action was taken against Kyodo Senpaku Kaisha Ltd, the Japanese company that conducts the whaling. As the company has no registered office in Australia, to proceed against it HSI needed the permission ("leave") of the Federal Court. Allsop J refused to grant leave after the Commonwealth Attorney-General submitted to the Court that allowing the case to proceed would cause a diplomatic incident.¹⁰ HSI appealed this decision and the Full Court of the Federal Court allowed the appeal.

The appeal decision in this case is important for three main reasons. First, from a practical perspective for protecting whales, the decision prises ajar a doorway into a legal process that may lead to the enforcement of Australian law prohibiting whaling in a massive tract of water adjacent to Antarctica. Second, from a private international law perspective, the case confirms that diplomatic and political issues are not relevant to the grant of leave to serve originating process outside the jurisdiction for proceedings that are regularly commenced, do not infringe the principles of international comity, and can be resolved without reference to any non-justiciable issues. Third, from an environmental law perspective, the case sets out broad principles for the grant of public interest injunctions under the EPBC Act. It is the second and third respects in which the decision is important that will be considered further here.

The Full Court was unanimous in holding that diplomatic and political issues are not relevant to the grant of leave to serve proceedings outside the jurisdiction in this case.¹¹ Black CJ and Finkelstein J stated:¹²

We are also persuaded that the primary judge was in error in attaching weight to what we would characterise as a political consideration. It may be accepted that whilst legal disputes may occur in a political context, the exclusively political dimension of the dispute is non-justiciable. It is appropriately non-justiciable because the court lacks competence to resolve disputes and issues of an exclusively political type, the resolution of which will involve the application of non-judicial norms: compare Japan Whaling Association v American Cetacean Society (1986) 478 US 221 at 230.

Even if, in special circumstances, there is occasion for political considerations to be taken into account in deciding whether an action should be permitted to go forward, there is no room, in our view, for those considerations where, as here, the Parliament has provided that the action is justiciable in an Australian court: R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [2000] 1 AC 61 at 107.

Moore J agreed:¹³

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.

The principle that political considerations are not relevant to the grant of leave for service outside the jurisdiction is important from a private international law perspective, but it is the principles stated by the majority for the grant of public interest injunctions under the EPBC Act that will be much more significant in general.

¹⁰ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664

¹¹ See generally in relation to the role of political considerations for courts Lindell G, "The Justiciability of Political Questions Recent Developments", Ch 7 in Lee HP and Winterton G, *Australian Constitutional Perspectives* (Law Book Co, Sydney, 1992), Lindell G, "Judicial Review of International Affairs" in Opeskin B and Rothwell D (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997), Kirk J, "Rights, Review and Reasons for Restraint" (2001) 23 Syd LR 19, and Fox H, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", Ch 11 in Evans MD, *International Law* (Oxford University Press, Oxford, 2003)

¹² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [12]-[13]

¹³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [38]

Leap-frogging on the approach applied under the *Trade Practices Act 1974* (Cth) (TP Act), Black CJ and Finkelstein J stated principles for the grant of injunctions under the EPBC Act that mark a very important development for public interest environmental law in Australia.¹⁴ Broadly speaking the principle that emerges from their judgment is that the Federal Court may grant an injunction under s 475 of the EPBC Act even if it may prove impossible to enforce where it serves the public interest objects of the Act by having an educative effect.

Moore J, in dissent, took a much more limited view of the role of injunctions under the EPBC Act. He saw the grant of an injunction as futile in the circumstances of this case and would, therefore, have refused the appeal. For reasons that are less clear, he also saw the making of a declaration by the court about the illegality of whaling to be inappropriate in the circumstances.¹⁵

The approach of Black CJ and Finkelstein J is the more attractive and likely to prevail in the future.¹⁶ Certainly the principles they set out in their majority decision in this case will be binding on trial judges for injunctions and declarations sought under the EPBC Act in the future. The principles that have emerged in this case are, therefore, important for future public interest litigation under the EPBC Act and, potentially, under other environmental legislation in Australia.

What happens now?

The success of the appeal means that HSI can now proceed with its action against the Japanese whaling company. HSI will now serve the originating process on the whaling company in Japan. The case is listed for a directions hearing on 31 October 2006 before Allsop J in Sydney. The company will have until this date to file an appearance in the Federal Court. If, as is likely, it fails to do so, HSI will seek final relief in the form of an injunction and declaration to restrain the whaling contravening the EPBC Act.

Conclusion

The decision of the Full Court in the Japanese Whaling Case reaffirms the positive progression of environmental law in Australia under the EPBC Act. It remains to be seen whether the litigation will actually result in any whales being protected in the AWS but the principles for public interest injunctions that have emerged are very important in their own right. These principles are likely to characterise future injunctive relief granted under the EPBC Act.

¹⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [18]-[27]

¹⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [47]

¹⁶ Consider the approach taken in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515, 528 and 537 to public interest remedies under the TP Act