THE LAWS OF WHALING: *HUMANE SOCIETY INTERNATIONAL INC V KYODO SENPAKU KAISHA LTD* (2008) FCA 3 (15 JANUARY 2008)

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I INTRODUCTION

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2008) FCA 3[1] ('*Humane Society v Kyodo*') is the culmination of a series of cases beginning in 2004.[2] These cases relate to Humane Society International's (HSI) [3] claim of 'killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*)' occurring in the Australian Whale Sanctuary,[4] specifically in contravention of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act).[5] This case note attempts to explain the reasoning of the court throughout the case series, and to point out some anomalies that question the coherency of the law in this area.

As the respondents in this case were a Japanese company, Kyodo Senpaku Kaisha Ltd, an element of international law was also involved throughout the case series in relation to the interpretation of the phrase 'recognised foreign authority' within the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) (the AT(EP) Act) as well as an assessment of Australia and Japan's relevant obligations under the 'Madrid Protocol'.[6] The AT(EP) Act makes use

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1 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) FCA 3; 165 FCR 510; 99 ALD 534; 244 ALR 161 ('*Humane Society v Kyodo*').

2 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2004) 212 ALR 551; FCA 1510, (2005) FCA 664, (2006) 154 FCR 425; 232 ALR 478; FCAFC 116, (2007) FCA 124 and (2008) FCA 36..

3 A society dedicated to the conversation and preservation of animals. For example, see Humane Society International (Australia) <http://www.hsi.org.au/>.

4 HIS's original application to the Federal Court of Australia, accompanying the Statement of Claim, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd,* NSD 1519/2004, filed with the Federal Court of Australia New South Wales District Registry on 19 October 2004. Available online at <http://www.envlaw.com.au/whale1.pdf>. Note that while this website has a clear agenda, the documents reproduced therein are unaltered, appearing in full.

5 *Humane Society v Kyodo* (2008) FCA 3; 165 FCR 510; 99 ALD 534; 244 ALR 161, [40]. Those sections being 229, 229A, 229B, 229C, 229D and 230.

6 *The Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, (1998) ATS 6 (entered into force 14 January 1998) art 3. Dedicated to 'the protection of the

of the phrase 'recognised foreign authority' in allowing whaling to be carried out when a permit is issued from such an authority.[7] It was claimed by the applicant that 'JARPA[8] is not a recognised foreign authority for the purposes of subsection 7(1) of the [AT(EP) Act]', and so no permit issued by JARPA could make the whaling legal under the EPBC Act.[9] The actual act of taking whales from the Australian Whale Sanctuary contrary to the provisions of the EPBC Act was never in issue before the court.

The history of litigation that led to this trial primarily concerned both the application of political considerations and the doctrine of non-justiciability, as voiced in the Attorney-General's submission to the court,[10] and again the impracticality in servicing court orders on a foreign and uncooperative party.[11] Representatives for the Japanese company were not present at any stage throughout the proceedings.

In particular, this series of cases examined the futility in serving a prohibitive injunction upon respondents who deny that the Federal Court of Australia has any jurisdiction over the issue, as well as the Court's approach to issues of non-justiciability.[12] (It is these issues that will be emphasised most.) In the final case in this series, the principal case, Allsop J considered what circumstances should allow a seemingly futile injunction to be served despite its inability to be properly enforced, including consideration of what is non-justiciable.[13]

As it is necessary to a degree to examine the entire case series in some detail, effort has been made to present the cases as clearly as possible. Nonetheless, a true chronology is foregone in the interests of comparing the court's decisions with others in the same chain of cases.

Antarctic environment and dependent and associated ecosystems'. This is a protocol made under the *Antarctic Treaty* System, established in 1959 and coming into effect 23 June 1961.

7 *Antarctic Treaty (Environment Protection) Act 1980* (Cth) s 7(1).

8 JARPA is the 'Japanese Whale Research Program under Special Permit in the Antarctic … conducted between 1987/88 and 2004/05'. See Government of Japan, *Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources* (20 June 2005) Environmental Law Publishing <http://www.envlaw.com.au/whale18.pdf>

9 *Humane Society v Kyodo* (2008) FCA 3, [29].

10 Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, filed with the Federal Court of Australia New South Wales District Registry. Available online at <http://www.envlaw.com.au/whale7.pdf>

11 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124, [8].

12 Ibid [20].

13 CJ Black, A Moore and JJ Finkelstein in *Humane Society International Inc v Kyodo Senpaku Kaisha* [2006] 154 FCR 425; 232 ALR 478; FCAFC 116.

II Social and Political Context

Whaling in Japan dates back as far as the 12th Century, and modern Japanese whaling began as early as 1899.[14] Throughout the past century, however, restrictions have tightened upon the practice as whale stocks have sharply diminished.[15]

In 1994, the International Whaling Commission (IWC) created the Southern Ocean Sanctuary, within which commercial whaling is prohibited.[16] This sanctuary overlaps somewhat with the Australian Whale Sanctuary, covering most of Antarctica's waters.[17] Japanese whalers have avoided the the IWC's ban on whaling in the Antarctic by acquiring research permits from the commission to allow their continued whaling under JARPA and consecutive programmes.[18] Heightened public awareness of Japanese whaling in the Antarctic seems to have coincided with the commencement of JARPA II in 2005, a much more extensive 'research programme' than JARPA.[19]

Humane Society v Kyodo came at a time where, in Australia, the public perception of the Japanese whalers was almost universally negative[20] and in Japan the vast majority of those who actually knew of the whaling within the Australian Whale Sanctuary disapproved of it, instead preferring whaling to be confined to Japanese coastal waters.[21] Despite the unpopularity of Japan's whaling, the principal case garnered only modest domestic media attention, with some international attention.[22] Perhaps these proceedings were

14 Japan Whaling Association, *Chronology of Whaling* <http://www.whaling.jp/english/history.html> (at 28 March 2011).

15 Ibid.

16 International Whaling Commission, *Whale Sanctuaries* (9 January 2009) <http://www.iwcoffice.org/conservation/sanctuaries htm> (at 28 March 2011).

17 International Whaling Commission, *Southern Ocean and Indian Ocean Sanctuaries* <http://www.iwcoffice.org/conservation/images/sanctuaries.jpg> and Department of Sustainability, Environment, Water, Population and Communities, *Map of Australian Whale Sanctuary* <http://www.environment.gov.au/coasts/species/cetaceans/conservation/pubs/sanctuary-map.pdf> (both at 28 March 2011).

18 International Whaling Commission, *Scientific Whaling Permits* (22 June 2010) <http://www.iwcoffice.org/conservation/permits.htm#recent> This is despite resolutions urging lethal research to stop: International Whaling Commission, *Resolution on JARPA* (30 October 2007) <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm#res1> (both at 13 March 2011).

19 Ibid.

20 Lauren Williams and David Barrett, 'Weight of Public Opinion Forces Hunt Backdown', *The Daily Telegraph* (online), 21 December 2007 <http://www.dailytelegraph.com.au/news/indepth/you-saved-our-humpbacks/story-e6frev90-1111115174260> (at 3 March 2011).

21 Greenpeace Australia Pacific, *Opinion Poll in Japan on Whaling* (14 February 2008) <http://www.greenpeace.org/australia/issues/whales/our-work/japanese-opinion-poll> (at 28 March 2011). This poll was conducted by an independent third party, Nippon Research Centre Ltd, a member of Gallup International Association.

22 'Japan Whaling Illegal, court says' (15 January 2008) BBC News Online <http://news.bbc.co.uk/2/hi/asia-pacific/7188674.stm> (at 28 March 2011).

overshadowed by the actions of the Sea Shepherd Conservation Society,[23] a much more dramatic news item involving often-dangerous maritime incidents.

III History of Litigation

A *First Instance*

The case originated before Allsop J in the Federal Court in 2004, and was initiated by the Humane Society International, an organisation dedicated to the protection of animal welfare and conservation.[24] Though his Honour made no decision as to the legality of the whaling, he invited the Attorney-General should he 'wish to put submissions on the proper construction and interpretation of the legislation and treaties involved' forward.[25] Nevertheless, His Honour commented upon the legal issues emerging from the case. The primary concerns he identified were whether the court had jurisdiction over the issue of whaling in the Australian Whale Sanctuary, and whether the case appeared on its face to be a good one.[26] These issues formed the basis for his Honour's later decisions in the case at trial, as discussed in more detail further below.

Section 475(1) of the EPBC Act allows 'interested persons' to apply to the court for an injunction to stop any offence under the act from being committed. Allsop J found that s 15C of the *Acts Interpretation Act 1901* (Cth) grants jurisdiction to a court when it is required by legislation (such as the EPBC Act), to deal with any such matter that legislation provides.[27] Thus, the Court has jurisdiction to enforce any law of the Commonwealth and consequently to enforce s 475(1) of the EPBC Act. Any kind of conservation society is an 'interested person'.[28]

However, Allsop J saw no persuasive case in the applicant's arguments and thus 'dealt with the matter only on the basis that the activity of the respondent is in conformity with the permit issued by the Government of Japan',[29] a premise later refuted by the applicant on the basis that JARPA is not a

23 Justin McCurry, 'Japanese Whalers Blame Sea Shepherd for Smallest Catch in Years', *The Guardian* (online), 13 April 2010 <http://www.guardian.co.uk/environment/2010/apr/13/japan-whaling-catch-sea-shepherd> (at 23 March 2011).

24 For example, see Humane Society International (Australia) <http://www.hsi.org.au/>.

25 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] 212 ALR 551; FCA 1510, [3].

26 Ibid [7].

27 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] 212 ALR 551; FCA 1510, [14].

28 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475 (6) (b).

29 Ibid [63].

'recognised foreign authority' and thus was incapable of issuing a legally endorsed permit for the whaling.

B *Second Instance (with the Attorney General of the Commonwealth as Amicus Curiae)*

When the matter returned before him, Allsop J dismissed HIS's case on the basis of, inter alia, 'the difficulty, if not impossibility, of enforcement of any court order'.[30] While the Court is free to consider the futility in providing a remedy,[31] this discretion can create a great deal of uncertainty in that 'futility' is a very general word. Here, Allsop J interpreted the injunction to be futile because it would not be able to be served and would be legally ineffectual. In the appeal that followed, as discussed below, the injunction was considered not to be futile because it still provided features of deterrence and public condemnation. This suggests that the meaning of 'futility' in this context needs greater definition if certainty is to be given to these considerations, both with regard to the EPBC Act and the *Competition and Consumer Act 2010 (Cth)* (formerly the *Trade Practices Act 1974* (Cth).

Nonetheless, Allsop J had regard to the Attorney-General's submission, in particular paragraphs 28–30,[32] alluding to the potential 'non-justiciability' of the case. Non-justiciability is a constitutional doctrine, created by s 61 of the Constitution,[33] which bestows upon the Commonwealth the power to arbitrate and act in those 'spheres of responsibility' necessary for the maintenance and good government of the commonwealth, including international relations, security and related responsibilities.[34] There will be no 'matter'[35] for judicial review where such a review would extend the domain of the courts, or abrogate the rights of the executive, to consider international relations and obligations of the executive.[36] The decision not to hear a matter on this basis remains at the discretion of the court and it was Allsop J's view that such concerns were of great relevance to the principal case. His Honour ultimately declined leave to serve the injunction on this basis, preferring to leave it to the executive to act, and also having regard to the futility of serving the injunction in this instance.

30 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [27, 28].
31 *Marshall v Marshall* (1888) 38 Ch D 330, *Kinahan v Kinahan* [1890] 45 Ch D 78, *Watson v Daily Record* [1907] 1 KB 853.
32 Outline of the submissions of the Attorney General of the Commonwealth, above n 13.
33 *Australian Constitution* s 61: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'
34 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* [1988] 19 FCR 47
35 *Australian Constitution* s 75.
36 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* [1987] 75 ALR 218.

D *The Appeal (Against Refusal to Grant Leave to Serve Injunction)*

HSI appealed to the Full Court. In that instance, Black CJ and Finkelstein J, in the majority, concluded that Allsop J 'was in error in attaching weight to what we would characterise as a political consideration'.[37] Their Honours distinguished the non-justiciable element of the issue from the legal issue, insisting those things that are non-justiciable are so because they require the application of 'non-judicial norms'.[38] The case could be better described as a legal issue within a political context, in their Honours' view. To allow political considerations of this sort to influence the court would be to contradict the doctrine of separation of powers, of course, and render the courts ineffectual, particularly in cases where a plaintiff claims the Commonwealth has interfered with some right of theirs. However, there remains uncertainty as to how one characterises a case or public issue as a legal issue in a political context, or a political issue entirely within the realm of the executive pursuant to s 61 of the Constitution. Black CJ's and Finkelstein J's reasoning makes no reference to s 61, relying entirely on their definition of non-justiciable issues as those requiring something more than the courts can provide in order to remedy a claim. This definition is problematic when its subject is the domain of the courts and their capacity, rather than the domain of the executive, which is the subject of s 61, making the application of the principle an uncertain one that remains detached from the constitutional provision that gives rise to it.

In allowing the appeal, Black CJ and Finkelstein J suggested that where parliament has legislated that legal action should be available for a grievance, such as in the present instance, the complaint is justiciable. Their Honours also explained that 'the court should not necessarily contemplate that [an injunction] would be disobeyed'[39] when deciding whether to grant one, citing with approval a series of English cases.[40] They also examined the importance of 'deterrence' and 'education' to 'advancing the regulatory object[ive]s of the EPBC Act'[41]. Their Honours determined that an injunction should be granted, despite its unenforceability, due to its potential to educate the community or deter others from doing the same thing. This reasoning indicates how the Court may use its discretion in deciding what is educative and 'of benefit to

37 *Humane Society International Inc v Kyodo Senpaku Kaisha* [2006] 154 FCR 425; 232 ALR 478; FCAFC 116, [12].

38 Ibid.

39 Ibid [16].

40 *In re Liddell's Settlement Trusts* [1936] Ch 365, *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, *Republic of Haiti v Duvalier* [1990] 1 QB 202, *South Bucks District Council v Porter* [2003] 2 AC 558.

41 *Humane Society International Inc v Kyodo Senpaku Kaisha,* above n 22.

the public'[42] thus leaving great scope for the Court to decide what matters may permit an injunction to be granted under the Act *without* requiring it to be capable of enforcement.

This argument parallels those made in '[p]roceedings under the Trade Practices Act [that these proceedings] have a special character in that the Act deals with the protection of the public interest',[43] warranting an injunction to be granted where it would be in this 'public interest' (whatever that may be). In this case, the EPBC Act can be seen as legislation designed to protect the public interest, both in ethical terms (in that whaling is seen by Australians as a generally abhorrent and out-dated practice) and economically, in that human industry depends on a strong and abundant environment. Thus, it seems, where law can be categorised as in the public interest, an otherwise ineffectual injunction may be granted for reasons of deterrence, or simply as condemnation of the offending conduct, for it is seen as not entirely futile. This raises two questions.

First, what is the definition of futility to be applied in these cases and is it consistent and capable of producing certain results? The difference in the definition of futility and the reasoning applied by Allsop J and that by Black CJ and Finkelstein J in the appeal, suggests the results are not currently certain and predictable. Secondly, all legislation is supposed to be in the public interest, and so should conceivably allow the court to grant an unenforceable injunction. It is not logical to be able to distinguish legislation on the basis of 'public interest'.

Dissenting in the HSI appeal, Moore J approached the issue in a far more conservative fashion:

> The jurisdiction of courts created under Chapter III of the Australian Constitution is centrally concerned with the determination of 'matters'. It has been said that a legally enforceable remedy is as essential to the existence of a 'matter' as the right, duty or liability which gives rise to the remedy …[44]

Moore J therefore thought the present matter was questionable as one, given the difficulty in enforcing its remedy. If something is not a 'matter', then it cannot come before the court, and for it to be a matter it should have a legally enforceable remedy. Moore J's reasoning is not too dissimilar from the majority's in that both accept that for a complaint to be justiciable it must

42 Ibid [23].

43 *World Series Cricket Pty Ltd v Parish* [1977] 16 ALR 181 per Bowen CJ, cited with approval in *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] FCA 313, [14]. See also *ACCC v Chen* [2003] FCA 897 and *ACCC v Kaye* [2004] FCA 1363.

44 Ibid [44].

have a remedy that the courts can administer. However, the point of difference is that while Black CJ and Finkelstein J suggest a remedy need not be legally enforceable to have a positive and remedial effect, Moore J insists it must have such an effect in order to be called a legal remedy. His Honour's dissent was not found by Allsop J in the later trial to be persuasive.

IV The Trial

The claim presented by HSI at trial, as already suggested in the preceding discussion, was:

(i) that approximately 1,253 Antarctic minke whales and 9 fin whales were killed by the respondents between 2000 and 2007 within the Australian Whale Sanctuary, with supporting affidavit material (including from Kieran Paul Mulvaney, Greenpeace Expedition Leader);
(ii) that the respondent company was responsible for those vessels which conducted the whaling; and
(iii) that the respondents plan to continue this whaling under JARPA II and do so 'for an indefinite period'.[45]

These facts were not disputed by Allsop J, or the respondent (given their absence). However, it was necessary for Allsop J to establish that Australia had jurisdiction over the Australian Whale Sanctuary, and in light of his ruling on this in the case at first instance.[46] He reasoned that the *United Nations of Convention on the Law of the Sea* allows jurisdiction to extend 200 nautical miles out to sea from any Australian territorial land mass.[47] Assuming then, that the Australian Antarctic Territory is such a land mass, Australia has jurisdiction over the waters up to 200 nautical miles from that land, within which is the Australian Whale Sanctuary. Jurisdiction within the sanctuary thus depends on jurisdiction within the Antarctic Territory, a claim of sovereignty only recognised by four other nations, but not Japan.[48] However, as it is not open to the Court to question Australia's claim of sovereignty over the Antarctic land mass,[49] he concluded that it Australia's jurisdiction within the Australian Whale Sanctuary was appropriately founded. Therefore, the laws

45 Applicant's outline of argument for final relief in the Federal Court of Australia, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd,* NSD 1519/2004, filed with the Federal Court of Australia New South Wales District Registry. Available online at <http://www.envlaw.com.au/whale21.pdf>.

46 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] 212 ALR 551; FCA 1510, [14].

47 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

48 *Humane Society v Kyodo* [2008] FCA 3; 165 FCR 510; 99 ALD 534; 244 ALR 161, [13].

49 Ibid. Cf *Mabo v Queensland (No 2)* [1992]HCA 23*;* 175 CLR 1.

of the Commonwealth must be enforced within that Sanctuary, otherwise the courts may paradoxically undermine their own authority.

Having established the Court's jurisdiction and decided it appropriate, or rather mandatory, to apply the EPBC Act, Allsop J turned his attention to the issue of what is a 'recognised foreign authority' for the purposes of the AT(EP) Act. Should the permit issued to the whaling company be deemed to be issued by such an authority, the whaling will be legal regardless of what the EPBC Act says.[50] Otherwise, it is in contravention of the EPBC Act.[51]

The definition of what is a 'recognised foreign authority' is found in s 3(1) of the AT(EP) Act:

> ***"recognised foreign authority"*** means a permit, authority or arrangement that:
>
> (a) authorises the carrying on of an activity in the Antarctic; and
>
> (b) either:
>
> (i) 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; or…

This means that for the permit to whale to be legitimate, the Japanese Government, issuers of said permit, must have accepted the same obligations in relation to whaling in the Antarctic as Australia has under the Madrid Protocol. At first instance, Allsop J took the view that Article 4 of the Protocol incorporated into it the obligations of several other treaties relating to the Antarctic, one of those being the *United Nations Convention on the Law of the Sea* (UNCLOS).[52] Moreover, this treaty,[53] he suggested, implicitly 'contemplates and provides for [domestic] law being passed on the subject matter there identified'.[54] Australia has done so by enacting portions of the EPBC Act, but Japan has not, meaning under the Madrid Protocol, Japan has not accepted the same obligations and is thus not a recognised foreign authority. Though at first instance, His Honour emphasised that his discussion was not in itself a legal decision, yet in his decision in the trial he took it as his reasons for finding the whalers in breach of the EPBC Act and without recourse to the provisions of the AT(EP) Act.[55]

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50 *Antarctic Treaty (Environment Protection) Act 1980* (Cth) s 7(1).

51 By reference to his reasoning in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] 212 ALR 551; FCA 1510, [25].

52 Ibid [45].

53 *United Nations Convention on the Law of the Sea*, above n 37, art 57.

54 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] 212 ALR 551; FCA 1510, [55].

55 *Humane Society v Kyodo* [2008] FCA 3; 165 FCR 510; 99 ALD 534; 244 ALR 161, [44].

His Honour's decision was actually quite short, and his account of the history of litigation served as the basis for his decision. He did not return to the issue of justiciability, it now being irrelevant, given leave had been granted and the 'matter was before the court to be resolved'.[56]

Thus, what remained was the issue of whether an injunction should be issued despite the futility in attempting to serve it. On this, HSI acknowledged 'that there is no practical mechanism by which orders of this Court can be enforced'.[57] Should, then, an injunction be issued despite its inability to be enforced? Allsop J concurred with the decision of the majority in the appeal decision,[58] adding the elements of 'education' and 'deterrence' as explained by Hardie, Hutley and Bowen JJA in *Vincent v Peacock*:

> it is not a ground for refusing an injunction that it would not have a practical effect, where its failure to have a practical effect is because the defendant disobeys it.[59]

As a result, the injunction to cease the whaling was granted and it was declared that the respondent whaling company had contravened ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act. No orders as to costs were made. It should be noted here that a further case followed this, and allowed alternative methods of delivering the injunction orders to the respondent..[60]

V Potential Impacts on Conservation Efforts

The application of relevant international law and the discretion to issue an injunction were both issues decided in such a way that will benefit conservation organisations or interested persons in future litigation of this sort. The former allows the courts to refer not only to the directly relevant or applicable international instruments, in this case the Madrid Protocol, but also to international law referenced within that instrument or held to be in such a close relation to the subject matter of that instrument that it is necessary to incorporate them into the court's reasoning. This makes available a much larger body of international law to support organisations producing an argument in favour of conservation or protection.

This case also developed the precedent that the 'the practical difficulty (if not impossibility) of enforcement of an order is not a reason to withhold relief'.[61]

56 Ibid [45].
57 Ibid [46], [53].
58 *Humane Society International Inc v Kyodo Senpaku Kaisha* [2006] 154 FCR 425; 232 ALR 478; FCAFC 116, per Black CJ and Finkelstein J.
59 *Vincent v Peacock* [1973] 1 NSWLR 466, 468.
60 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36.
61 *Humane Society v Kyodo* [2008] FCA 3; 165 FCR 510; 99 ALD 534; 244 ALR 161, [53].

Other factors can be taken into account, such as the educative or deterring effects of such an injunction. This allows a court to exercise its discretion in specifying on a case by case basis what exactly is educative about the granting of injunctive relief in those circumstances.

VI Conclusion

At the time of writing, the Australian Government had commenced proceedings in the International Court of Justice alleging that Japan's whaling practices are 'in breach of obligations assumed by Japan under the *International Convention for the Regulation of Whaling* … as well as its other international obligations for the preservation of marine mammals and marine environment'.[62] This is, of course, an attempt to have the court ban Japan's whaling in the Australian Whale Sanctuary, an attempt that then Prime Minister Kevin Rudd promised to make in the 2007 federal election.[63] It is unclear what the results of this action will be. However, the International Court of Justice is certainly better placed to deal with such an international issue than the domestic judiciary.

This series of cases illustrates the difficulty in enforcing a remedy on an entity that that maintains only a transient presence in waters they refuse to consider as within Australian jurisdiction. It also makes evident the current uncertainty inherent in the interpretation of 'futility' as well as in the application of the doctrine of non-justiciability. Perhaps it also illustrates the need for international courts such as the International Court of Justice, and the legal instruments they enforce.

Humane Society v Kyodo also tells us one other important thing. The story of Jonah and the whale is not to be believed. It is not the whale that swallows the man, but the man, and woman, who swallow the whale.

62 International Court of Justice, 'Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whaling' (Press Release, No. 2010/16, 1 June 2010).

63 Justin McCurry, 'Australia to Ask International Court to Ban Japan Whaling in Southern Ocean', *The Guardian* (online), 28 May 2010 <http://www.guardian.co.uk/environment/2010/may/28/australia-court-ban-whaling-japan> (at 22 March 2012).