

HUMANE SOCIETY INTERNATIONAL INC

Applicant

KYODO SENPAKU KAISHA LTD

Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS FOR SUBSTITUTED SERVICE

1. The Full Court granted leave to serve the respondent in Japan¹ and the applicant attempted to effect service through the diplomatic channel in accordance with Order 8; however, the Government of Japan has declined to effect service.² The reason stated by the Ministry for Foreign Affairs is:

The request for service of documents with regards to Kyoto [sic] Senpaku Kaisha Ltd cannot be processed because this issue relates to waters and a matter over which Japan does not recognise Australia's jurisdiction.

2. The applicant, therefore, applies for substituted service. The provision for substituted service under Order 8, rule 9 of the Rules is not applicable to these circumstances; however, Order 7, rule 9 provides a general power to allow substituted service "where for any reason it is impractical to serve a document in the manner set out in the Rules".
3. Order 7, rule 9 applies to service outside the jurisdiction in addition to service in Australia.³ Once leave to serve outside the jurisdiction has been obtained the Court's discretion to order substituted service under Order 7, rule 9 is enlivened.⁴

¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116.

² The correspondence from the Government of Japan is annexed to a letter on the Court's file, dated 21 December 2006, from the Australian Attorney-General's Department to the Registrar.

³ *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* (1998) 82 FCR 25; (1998) 153 ALR 377 (Goldberg J); *Swan Brewery Co Ltd v Atlee* [1998] FCA 277 (Nicholson J); *Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd* [1998] FCA 896 (Nicholson J); *Immerman v London Pie Co Pty Ltd* [2000] FCA 97 at [17] (Carr J).

⁴ *Mondial Trading Pty Ltd v Interocean Marine Transport* (1985) 65 ALR 155 at 157 (Dawson J); *Rice Growers Co-operative Ltd v ABC Containerline NV* (1996) 138 ALR 480 at 483 (Tamberlin J); *Commissioner of Taxation v Ma* [1999] FCA 1093 at [14] (Emmett J); *ASIC v Sweeney (No 2)* (2001) 38 ACSR 743; [2001] NSWSC 477 at [40]-[41] (Austin J); *ACCC v Chaste Corp Pty Ltd (in liq)* [2002] FCA 1183 at [11] (Drummond J).

APPLICANT'S OUTLINE OF
SUBMISSIONS FOR
SUBSTITUTED SERVICE
Filed on behalf of the applicant

Environmental Defenders Office (NSW) Ltd
Level 1, 89 York Street
Sydney NSW 2000
Tel: (02) 9262 6989
Fax: (02) 9262 6998
Email: edonsw@edo.org.au

“Impracticability” should be interpreted as inability following reasonable efforts or evidence of obvious futility.⁵

4. Allsop J considered the basis for substituted service outside the jurisdiction where service through the diplomatic channel failed to be effected promptly in *Tiezone Pty Ltd v Schenker Stinnes Logistics* [2004] FCA 847 at [19].
5. Nicholson J recently summarised the principles for substituted service in *Hadgkiss v Aldin* [2006] FCA 1164 at [3]:

The substituted service must be based on a reasonable probability that it will inform the person served as a result of the form of service identified: cf *Ginnane v Diners Club Ltd* (1993) 42 FCR 90 at 92 citing *Re Mendonca*; ; *Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261 per Gibbs J. In order to establish impracticality some attempt, at least, should be made to effect service in accordance with the Rules, or evidence should be led that it is so obviously futile as not to warrant an attempt at service: *Rice Growers Co-Operative Ltd v ABC Container Line NV* (1996) 138 ALR 480 at 482 per Tamberlin J.

Mode of substituted service

6. Service of originating process on a corporation in Australia is normally required to be served personally at the company’s registered office.⁶ Service of originating process on a corporation by posting it to the company’s registered office is permitted for a proceeding to which the *Federal Court (Corporations) Rules 2000* apply, which is not the case in the present proceedings.⁷
7. Service by registered post can be effected on the respondent’s registered business address obtained from a company registration certificate, issued by the Tokyo Legal Affairs Bureau in 2004.⁸ This form of service is reasonably probable to bring the proceedings to the attention of the respondent.

Stephen Gageler SC and Chris McGrath
Counsel for the applicant
31 January 2007

⁵ *Foxe v Brown* (1984) 58 ALR 542 at 546-548 (Mason J); *Ricegrowers Cooperative Ltd v ABC Containerline NV* (1996) 138 ALR 480 at 482 (Tamberlin J); *ASIC v Sweeney (No 2)* (2001) 38 ACSR 743; [2001] NSWSC 477 at [67] (Austin J).

⁶ O 7, rr 1 and 2(1)(b) of the Rules.

⁷ O 7, r 2(4) of the Rules allows for service of originating process under the *Federal Court (Corporations) Rules 2000* in a manner consistent with s 109X(1)(a) of the *Corporations Act 2001*, which provides, “for the purposes of any law, a document may be served on a company by leaving it at, or posting it to, the company’s registered office ...”. Proceedings under the *Federal Court (Corporations) Rules 2000* are limited to applying “to a proceeding in the Court under the Corporations Act, or the ASIC Act ...” (r 1.3). The proceedings in this case are under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), rather than the Corporations Act or ASIC Act.

⁸ See annexure JBS-1 to the affidavit of Jessica Bernadette Simpson, affirmed 19 October 2004.