

**HUMANE SOCIETY INTERNATIONAL INC**

Applicant

**KYODO SENPAKU KAISHA LTD**

Respondent

**APPLICANT'S OUTLINE OF ARGUMENT FOR FINAL RELIEF**

**INTRODUCTION**

1. The applicant moves on the Amended Application filed 9 August 2005 and the Amended Statement of Claim filed 1 August 2005 for a declaration and a prohibitory injunction against the respondent's whaling activities in the Australian Whale Sanctuary ("AWS") contrary to the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act").
2. The issues for determination in the proceedings may be summarised as:
  - (a) Whether the applicant has established on the balance of probabilities that the respondent has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the EPBC Act;<sup>1</sup> and
  - (b) If so, whether the Court should exercise its discretion to grant the relief sought.
3. The applicant accepts that even if an offence or contravention is established on the balance of probabilities, the Court retains a discretion whether to grant any relief and, if so, the form of the relief that should be granted. Black CJ and Finkelstein J examined the principles to be applied in relation to the grant of leave to serve the proceedings in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430-433 [10]-[29].
4. After noting as preliminary matters the applicant's standing and details of the service of the originating process on the respondents, these submissions will consider the statutory structure, evidence of whaling in the AWS, and the principles for the exercise of the Court's discretion in the circumstances of this case.

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<sup>1</sup> Pursuant to the terms of s 475 of the EPBC Act, noting also s 479(1).

## STANDING

5. The evidence of the applicant's standing under s 475(7)(b) of the EPBC Act is set out in the affidavit of Michael Kennedy.<sup>2</sup> The applicant is incorporated in Australia. During the 2 years immediately before the conduct and making the application its objects or purposes have included the protection or conservation of, or research into, the environment and it has engaged in a series of activities related to the protection or conservation of, or research into, the environment.

## SERVICE

6. The applicant sent a letter of demand by registered post to the respondent at its registered business address outlining the nature of its complaint concerning the respondent's activities said to contravene the EPBC Act and seeking an undertaking to refrain from any further whaling activity in the AWS on 28 September 2004.<sup>3</sup> No response has been received to that correspondence.
7. The applicant has effected service in accordance with the Court's orders for substituted service made on 2 February 2007.<sup>4</sup> Personal service was effected at the respondent's registered place of business on 21 February 2007.<sup>5</sup> The applicant has also advised the respondent that the matter has been set down for hearing at 10.15am on Tuesday 18<sup>th</sup> September 2007 as ordered by the Court at the directions hearing on 24 July 2007.<sup>6</sup> Considerable time has elapsed since service was effected. No response has been received from the respondent. The respondent does not appear to intend to enter an appearance to defend the proceedings.<sup>7</sup>

## STATUTORY STRUCTURE

8. It is unnecessary to consider the relevant statutory structure in detail here as the Court has considered the relevant provisions and international treaties in detail in previous judgments in these proceedings.<sup>8</sup> The applicant submits that the Court's previous analysis of the EPBC Act, related Commonwealth legislation, and relevant international treaties was correct. However, brief outline of the main provisions relevant to the proceedings are noted here for completeness.
9. The objects of the EPBC Act, stated in s 3, include promoting the conservation of biodiversity. In order to achieve its objects the Act enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions, amongst other measures, to establish an Australian Whale Sanctuary to ensure the conservation of

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<sup>2</sup> Affirmed 18 October 2004.

<sup>3</sup> See exhibit NJB-4 to the affidavit of Jessica Bernadette Simpson (affirmed 19 October 2004), pp 39-43. The letter of demand was provided in both English and Japanese.

<sup>4</sup> See the affidavit of Mikio Hisamatsu (affirmed 24 March 2007) and the affidavit of Emily Lucienne Besser (affirmed 6 August 2007). The Court's reasons for granted substituted service were stated in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

<sup>5</sup> See the affidavit of Mikio Hisamatsu (affirmed 24 March 2007).

<sup>6</sup> See the affidavit of Diana Beaton (affirmed 31 August 2007).

<sup>7</sup> Order 32 rule 2 of the *Federal Court Rules* provides that when a proceeding is called for trial (of which a party has proper notice) the Court may proceed with the trial in the absence of a party and determine any claim for relief in the proceeding.

<sup>8</sup> See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; (2004) 212 ALR 551; and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664. Note also *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2004) 154 FCR 425.

whales and other cetaceans.<sup>9</sup> Section 225, which established the AWS, reiterates that its purpose is to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters.

10. Section 5 of the EPBC Act provides that the Act extends to each external Territory and that the provisions of the Act apply to all persons (including persons who are not Australian citizens) and all vessels (including vessels that are not Australian vessels) within the outer limits of the Australian exclusive economic zone (“**EEZ**”).<sup>10</sup>
11. Subsection 9(2) of the EPBC Act states that nothing in the Act affects the operation of subs 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (“**ATEP Act**”). The applicant submits that the Court’s previous analysis of the effect of subs 7(1) of the ATEP Act was and remains correct.<sup>11</sup> As a consequence, the right to commence and maintain these proceedings is not extinguished by a permit issued by the Government of Japan to the respondent to conduct whaling adjacent to Antarctica under Article VIII of the *International Convention for the Regulation of Whaling 1946*.<sup>12</sup>
12. Since the Court gave its earlier judgments in these proceedings considering the operation of subs 7(1) of the ATEP Act the legislature has amended some important definitions in the Act. The definition of “recognised foreign authority” in s 3 has been amended for the purposes of subs 7(1) of the ATEP Act.<sup>13</sup> The definition now includes not only a permit, authority or arrangement issued, given or made under the Madrid Protocol<sup>14</sup> but also one under the *Convention for the Conservation of Antarctic Seals 1978*. The definitions of “native mammal” and “whale” in the ATEP Act have also been deleted. The explanatory notes explain the reason for the repeal of the definition of “whale” (in item 10 of the amending Act) as follows:<sup>15</sup>

The purpose of this item is to repeal the definition of “whale”. As the Act does not deal with whales, it is not necessary to define “whale”. Whales are protected by the *Environment Protection and Biodiversity Conservation Act 1999*.

13. The amendments to the definition of “recognized foreign authority” and repeal of definition of “whale” in the ATEP Act suggest the limited scope of “recognised

<sup>9</sup> Section 3(2)(e)(ii) of the EPBC Act.

<sup>10</sup> Section 5(1) and (4) of the EPBC Act.

<sup>11</sup> See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; (2004) 212 ALR 551 at [25]-[62]; and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [40]. The applicant maintains its earlier submission, at least provisionally accepted by the Court, that the permit issued by the Government of Japan does not have effect as a permit under Article 3 of Annex II of the Madrid Protocol. See paragraphs 13-26 of the “Applicant’s Outline of Submissions for Leave to Serve Outside the Jurisdiction” filed on 12 November 2004 and paragraphs 12-16 of the “Applicant’s Reply to the Submissions of the Attorney-General and to the Court’s Questions” filed on 10 February 2005.

<sup>12</sup> Reference is made to such an authority being granted in the research plans issued by the Government of Japan and the cruise reports co-authored by the respondent’s employees annexed to the affidavits of Nicola Jane Beynon affirmed 18 October 2004, 29 July 2005, 27 October 2006 and 10 September 2007.

<sup>13</sup> By the *Environment and Heritage Legislation Amendment (Antarctic Seals and Other Measures) Act 2006* (No 164 of 2006), commencing generally on 11 June 2007.

<sup>14</sup> *Protocol on Environmental Protection to the Antarctic Treaty 1991*, set out in Sch 3 of the ATEP Act.

<sup>15</sup> For the earlier history of these definitions in the ATEP Act, see paragraphs 15-28 of the “Applicant’s Further Submissions for Leave to Serve Outside the Jurisdiction” filed on 22 November 2004.

foreign authority” previously adopted by the Court was correct for three reasons. First, the amendment of the definition of “recognised foreign authority” indicates that the scope of the exemption in s 7(1) of the Act is intended to be limited to activities regulated by the specific treaties referred to in the definition. Second, when making the amendment the legislature has not sought to alter the definition of “recognised foreign authority” or subs 7(1) to avoid the conclusion reached by the Court that s 7(1) did not prevent proceedings in an Australian court against whaling activities undertaken contrary to the EPBC Act. Third, the explanatory notes specifically recognise that the ATEP Act is not meant to apply to whales and that whales are intended to be protected under the EPBC Act.

14. Whales and other cetaceans are protected within the AWS under Division 3, Part 13, Chapter 5 of the EPBC Act. Section 224 confirms<sup>16</sup> the application of the provisions to foreign nationals and foreign vessels within the AWS.<sup>17</sup>
15. Section 225 established the AWS to, relevantly, include waters within the EEZ. As noted previously, s 5 states the application of the EPBC Act extends to each external territory. The Australian Antarctic Territory (“AAT”) is an external Territory of Australia<sup>18</sup> and the EEZ was proclaimed by the Governor-General under s 10B of the *Seas and Submerged Lands Act 1973* on 29 July 1994 to include waters within 200 international nautical miles from the baselines established under international law of the external Territories.<sup>19</sup> The application of Australian law to foreign nationals and vessels operating within 200 nautical miles of the AAT followed a 1992 recommendation by the House of Representatives Standing Committee on Legal and Constitutional Affairs.<sup>20</sup> A map of the EEZ is provided as exhibit NJB-7 to the affidavit of Nicola Jane Beynon affirmed 18 October 2004.<sup>21</sup>
16. Killing, injuring, taking or interfering with a whale or other cetacean<sup>22</sup> in the AWS is prohibited by ss 229, 229A, 229B and 229C of the EPBC Act. Treating or possessing any such whale (including any part or processed product<sup>23</sup>) killed or taken in the AWS is prohibited by ss 229D and 230 of the Act. Such activities may be permitted or authorised under ss 231, 232 or 238 of the Act.
17. As ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act involve criminal offences, parts of which are specified to impose strict liability, they must be construed with reference to Chapter 2 of the *Criminal Code*. In order for a person to

<sup>16</sup> Section 5 of the EPBC Act has a similar effect.

<sup>17</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [4] and [26].

<sup>18</sup> Section 17 of the *Acts Interpretation Act 1901* defines “External Territory” to mean “a Territory, not being an internal Territory, for the government of which as a Territory provision is made in any Act”. The Commonwealth declared the AAT to be a Territory under the authority of the Commonwealth on the commencement of the *Australian Antarctic Territory Acceptance Act 1933* in 1936. The *Australian Antarctic Territory Act 1954* provides for the government of the AAT.

<sup>19</sup> *Gazette* No. S 290, Friday, 29 July 1994. The proclamation was declared to commence on 1 August 1994.

<sup>20</sup> 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), pp 15-18.

<sup>21</sup> The EEZ, and hence the AWS, is shown as a cream coloured band extending out from the coastline.

<sup>22</sup> Cetacean is defined in s 528 of the EPBC Act to mean a member of the sub-order Mysticeti or Odontoceti of the Order Cetacea. The taxonomy of the Order Cetacea (whales, dolphins and porpoises) is shown in exhibit NJB-8 of the affidavit of Nicola Jane Beynon affirmed 18 October 2004 (pp 118-121).

<sup>23</sup> The definition of cetacean in s 528 includes any part or any product derived from a cetacean.

be found guilty of committing an offence the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt and one of the fault elements for the physical element must be proved.<sup>24</sup> In relation to the fault elements, a person has intention with respect to conduct if he or she means to engage in that conduct and a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.<sup>25</sup> If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.<sup>26</sup> If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.<sup>27</sup> If a law that creates an offence provides that the offence is an offence of strict liability there are no fault elements for any of the physical elements of the offence.<sup>28</sup> As a corporation, criminal liability is attributed to the respondent for acts taken by its employees within the actual or apparent scope of their employment.<sup>29</sup>

18. Section 475 of the EPBC Act provides standing for the Minister or an interested person to apply to the Court for an injunction to restrain an offence or other contravention of the Act. Due to the conferral of original jurisdiction by s 475 of the EPBC Act, the Court also has jurisdiction to make a declaration under s 21 of the *Federal Court of Australia Act 1976*.
19. While proceedings under s 475 of the EPBC Act are civil proceedings to which the civil standard of proof applies,<sup>30</sup> the applicant accepts that due to the seriousness of the matters involved in the proceedings, the fact that the cause of action involves alleged breaches of criminal laws, and the gravity of the consequences flowing from a finding that the respondent has contravened the Act, the civil standard of proof is at the high end of the balance of probabilities.<sup>31</sup>

## EVIDENCE OF WHALING IN THE AUSTRALIAN WHALE SANCTUARY

20. Reports of the respondent's whaling activities since 2000 are annexed to the affidavits of Nicola Jane Beynon ("**the cruise reports**").<sup>32</sup> The cruise reports set out the nature, duration and location of the research undertaken, including reporting the number and location of whales killed. The representations regarding the nature, duration and location of whaling activity contained in the cruise reports are admissible as admissions made by the respondent as it is reasonably open to find that the authors of the reports include employees of the respondent and the representations made in the reports related to a matter within the scope of the person's employment or authority.<sup>33</sup> There appears to be no real question that the

<sup>24</sup> Section 3.2 of the *Criminal Code*.

<sup>25</sup> Section 5.2 of the *Criminal Code*.

<sup>26</sup> Section 5.6(1) of the *Criminal Code*.

<sup>27</sup> Section 5.6(2) of the *Criminal Code*.

<sup>28</sup> Section 6.1 of the *Criminal Code*.

<sup>29</sup> Sections 12.2 and 12.3 of the *Criminal Code*.

<sup>30</sup> Section 140 of the *Evidence Act 1995*.

<sup>31</sup> *Employment Advocate v Williamson* (2001) 111 FCR 20 at [65]-[69] (Branson J, Kenny J agreeing); *Hadgkiss v Sunland Constructions Pty Ltd* [2007] FCA 346 at [11] (Kiefel J).

<sup>32</sup> Affirmed 18 October 2004, 29 July 2005, 27 October 2006 and 10 September 2007.

<sup>33</sup> Pursuant to ss 87 and 88 of the *Evidence Act 1995*.

respondent intends to conduct its activities and to bring about the results described in the cruise reports within the meaning required by the *Criminal Code*.

21. The respondent is the primary entity responsible for carrying out the whaling. The respondent is the owner<sup>34</sup> of five vessels used to conduct the whaling.<sup>35</sup> The respondent employs the crews of five vessels used to conduct the whaling. The respondent's 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.
22. The cruise reports indicate that the general location of the respondent's whaling activity alternates biennially between two broad areas:<sup>36</sup>
  - (a) 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
  - (b) 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**").
23. Both of these areas have at least some overlap with the AWS when cross-referenced with the EEZ shown in the map of Australia's Maritime Zones provided as exhibit NJB-7 to the affidavit of Nicola Jane Beynon affirmed 18 October 2004. However, Area IV and Area IIIE contain much more overlap with the AWS than the Area V and Area VIW.
24. The affidavits of Nicola Jane Beynon<sup>37</sup> provide estimates of the number of whales killed within the AWS based on a comparison of the boundaries of the AWS with the location of the whales admitted to have been killed in the cruise reports of the whaling. Between December 2000 and 2007 employees of the respondent aboard 5 vessels owned by the respondent killed approximately 1,253 Antarctic minke whales (*Balaenoptera bonaerensis*) and 9 fin whales (*Balaenoptera physalus*) within the AWS.<sup>38</sup> Table 1 summarises the estimated number of Antarctic minke whales and fin whales killed by the respondent within the AWS since 2000.<sup>39</sup>

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<sup>34</sup> See exhibit JBS-2 to the affidavit of Jessica Bernadette Simpson affirmed 19 October 2004.

<sup>35</sup> A sixth vessel, apparently not owned by the respondent, joined the respondent's whaling fleet in the 2005/2006 whaling season. See the affidavit of Nicola Jane Beynon (27 October 2006) at [20]-[22].

<sup>36</sup> See the cruise reports and research plans annexed to the affidavits of Nicola Jane Beynon.

<sup>37</sup> Affirmed 18 October 2004, 29 July 2005, 27 October 2006, and 10 September 2007.

<sup>38</sup> Based on the estimates made by Nicola Jane Beynon in her affidavits, summarised in a table at paragraph 9 of her affidavit affirmed 10 September 2007.

<sup>39</sup> Taken from the affidavit of Nicola Jane Beynon affirmed 10 September 2007, para 9.

**Table 1: Summary of the number of Antarctic minke whales and fin whales killed generally under the JARPA I and JARPA II and the approximate number killed specifically within the AWS**

<b>YEAR</b>	<b>Total of Antarctic minke whales killed under the JARPA and JARPA II</b>	<b>Approximate number of Antarctic minke whales killed within the AWS</b>	<b>Total of fin whales killed under the JARPA and JARPA II</b>	<b>Approximate number of fin whales killed within the AWS</b>
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
2006/2007	505	0	3	0
<b><u>TOTAL</u></b>	<b><u>3,558</u></b>	<b><u>1,253</u></b>	<b><u>13</u></b>	<b><u>9</u></b>

25. At no time since the commencement of the EPBC Act has the respondent held a permit or authority under ss 231, 232 or 238 of the Act and, therefore, the killing and associated treating and possessing of the whales summarised in Table 1 contravened ss 229-230 of the EPBC Act.

26. Paragraphs 14-26 of the affidavit of Kieran Paul Mulvaney<sup>40</sup> provide direct evidence of the killing of approximately seven Antarctic minke whales by the respondent's vessels within the AWS on 16 and 17 December 2001.<sup>41</sup> For example, this witness' observations include:

On the morning of 16 December 2001 the 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. The respondent's fleet began whaling activity in the polynya ... I observed through binoculars several whales killed by the respondent's vessels in the polynya ....

27. Further direct evidence of the respondent's vessels being present within the AWS comes from an encounter between an Australian government vessel, the *Aurora Australis*, and the respondent's whaling fleet on 1 January 2002. The Australian vessel ordered the respondent's fleet to leave the area but the vessels refused to comply.<sup>42</sup>

<sup>40</sup> Affirmed 9 November 2004.

<sup>41</sup> Note that these are included within (not additional to) the total number of whales killed in 2001/2002 shown in Table 1.

<sup>42</sup> See paragraph 12 and exhibit NJB-6 (pp 111-114) of the affidavit of Nicola Jane Beynon affirmed on 18 October 2004.

28. The evidence indicates that the respondent intends to return its vessels and employees or agents to Antarctic waters for whaling in future years and, unless restrained by the Court, to kill whales within the AWS. The research plan submitted by the Government of Japan for the *Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic* (“JARPA II”) indicates that the whaling is intended to continue for an indefinite period.<sup>43</sup> The plan indicates that JARPA II is “designed as a long-term research program of undertermined duration.”<sup>44</sup> The plan states that “a comprehensive review will be conducted following completion of the first 6 years of the research”,<sup>45</sup> which began in 2005/2006 and is about to commence its third year of operation. Following completion of the “feasibility study” in the first two years of operation, in the coming season the JARPA II program proposes to kill up to 935 Antarctic minke whales, 50 fin whales, and 50 humpback whales (*Megaptera novaeangliae*).
29. The whaling in the coming 2007/2008 season is proposed to occur in Area IV and Area IIIE and, based on an estimate of 90% of the whaling occurring in the AWS in 2005/2006,<sup>46</sup> approximately 842 Antarctic minke whales, 45 fin whales and 45 humpback whales will be killed within the AWS in the coming season.
30. The applicant submits that the evidence establishes to the required standard of proof the respondent is contravening ss 229-230 of the EPBC Act and intends to continue to do so in the future unless restrained by the Court.

#### DISCRETIONARY ISSUES

31. As noted above, the applicant accepts that even if an offence or contravention is established to the required standard of proof, the Court retains a discretion whether to grant any relief and, if so, the form of the relief that should be granted.
32. Black CJ and Finkelstein J examined the principles to be applied to the exercise of the discretion to grant an injunction to make a declaration in the circumstances of this case in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430-433 [10]-[29]. Their Honours stated at 431-432 when considering the question of futility of granting injunctive relief:

There is another way of considering the question of futility. The injunctive relief that the appellant seeks is relief by way of statutory injunction under s 475 of the EPBC Act. That section authorises the grant of what has been called a public interest injunction: see *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 256. Section 475 and the related provisions in Div 14 of Pt 17 of the EPBC Act have their counterpart in s 80 of the *Trade Practices Act 1974* (Cth) (the TP Act) upon which they appear to have been largely modelled.

Parliament has determined that it is in the public interest that the enforcement provisions of the EPBC Act should be unusually comprehensive in scope. Section 475 of the EPBC Act and its related provisions form part of a much larger enforcement scheme contained in the 21 divisions of Pt 17. The provisions include the conferral of powers of seizure and forfeiture, powers to board and detain vessels and authority to continue a pursuit on the high seas.

<sup>43</sup> See annexure NJB-15 to the affidavit of Nicola Jane Beynon affirmed 29 July 2005, pp 37-61.

<sup>44</sup> See annexure NJB-15 to the affidavit of Nicola Jane Beynon affirmed 29 July 2005, pp 39.

<sup>45</sup> See annexure NJB-15 to the affidavit of Nicola Jane Beynon affirmed 29 July 2005, pp 39.

<sup>46</sup> The last occasion when the respondent conducted whaling in Area IV and Area IIIE.

It is an important and distinctive feature of Div 14 of Pt 17 of the EPBC Act that, like s 80(4) of the TP Act, the Federal Court is expressly empowered to grant an injunction restraining a person from engaging in conduct whether or not it appears to the Court that the person intends to engage again in conduct of that kind and, even, whether or not there is a significant risk of injury or damage to the environment if the person engages or continues to engage in conduct of that kind: see s 479(1)(a) and (c).

The public interest character of the injunction that may be granted under s 475 of the EPBC Act is also emphasised by other elements in Div 14 of Pt 17. Thus, as we have noted, standing is conferred upon “an interested person” to apply to the Court for an injunction. Likewise, the traditional requirement that an applicant for an interim injunction give an undertaking as to damages as a condition of the grant is negated. Indeed, s 478 provides, expressly, that the Federal Court is *not* to require such an undertaking. These modifications to the traditional requirements for the grant of injunctions have the evident object of assisting in the enforcement, in the public interest, of the EPBC Act. This does not of course mean that the traditional requirements are irrelevant: see *ICI Australia Operations Pty Ltd* at 256-257.

Although “deterrence” is more commonly used in the vocabulary of the law than “education”, the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. Thus, there being a “matter” (see [28]), the grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the EPBC Act. Indeed, some of those objects are expressed directly in the language of “promotion”, including the object provided for by s 3(1)(c), namely to promote the conservation of biodiversity, which is an object that the legislation links to the establishment of an Australian Whale Sanctuary “to ensure the conservation of whales and other cetaceans”: s 3(2)(e)(ii).

Consistently with this view it has been said in relation to s 80(4) of the TP Act that whilst the Court should not grant an injunction unless it is likely to serve some purpose, it may be that in a particular case an injunction will be of benefit to the public by marking out the Court’s view of the seriousness of a respondent’s conduct: see *Hughes v Western Australian Cricket Assn (Inc)* [1986] ATPR 48,134 (40-748) at 48,135 and *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296 at 300.

Similarly, it has been said, again in the context of s 80 of the TP Act, that the purpose of an appropriately drafted injunction may be merely to reinforce to the marketplace that the restrained behaviour is unacceptable: *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491 (*ACCC v 4WD Systems*) at [217]. That is to say, a public interest injunction may have a purpose that is entirely educative. In *ACCC v 4WD Systems*, the enjoined behaviour had ceased and there was little likelihood of repetition and yet it was considered appropriate to grant an injunction.

More generally, we agree with the view expressed by Sackville J in *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309 that the fact that an injunction granted under s 80 of the TP Act may prove difficult or even impossible to enforce is not necessarily a bar to the grant of relief, although it is a material consideration to be weighed against other circumstances relevant to the exercise of the Court’s discretion: see at [45], citing Spry ICF, *The Principles of Equitable Remedies* (6th ed, 2001) p 42.

Accordingly, and certainly at the stage of leave to serve out of the jurisdiction, there are added reasons why the Court, at least in a case such as this, should not refuse leave on the ground of futility. To the contrary, it might well be open to the Court, in the proper exercise of its discretion at the trial, to grant the relief sought by way of statutory public interest injunction even though there might be no prospect of the conduct being repeated by the respondent or even where there is no prospect of the injunction being enforced.

The same considerations may operate, perhaps more strongly, in relation to the declaratory relief that is also sought by the appellant.

33. Applying these principles, the applicant accepts that an injunction is a non-monetary order that the applicant will be unable to enforce through the Japanese courts.
34. While Australian government vessels have previously encountered the respondent's vessels within the AWS and ordered them to leave it,<sup>47</sup> the applicant accepts that it does not have the support of the current Australian executive government to enforce the provisions of the EPBC Act or any injunction granted by the Court against the respondent's vessels operating within the AWS adjacent to Antarctica.
35. There is evidence that vessels associated with the respondent's whaling operations on occasion approach Australian ports and may be susceptible to enforcement proceedings for contempt of an injunction in the future.<sup>48</sup> However, the applicant accepts that such events are likely to be rare if they occur at all. The applicant has not located any assets of the respondent in Australia.
36. While an injunction will be difficult if not impossible for the applicant to enforce the applicant submits the principles for the grant of public interest injunctions set out by Black CJ and Finkelstein J provide a strong basis for the grant of an injunction. In particular, the grant of a statutory public interest injunction to mark the disapproval of the Court of respondent's conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the EPBC Act. The grant of an injunction will be of benefit to the public by marking out the Court's view of the seriousness of a respondent's conduct.
37. The applicant submits that this is an appropriate case to grant the relief sought by way of statutory public interest injunction even though there might be no prospect of the conduct being repeated by the respondent or even where there is no prospect of the injunction being enforced.
38. As Black CJ and Finkelstein indicated, the same considerations may operate, perhaps more strongly, in relation to the declaratory relief that is also sought. This adopted the approach of Sheppard J, with whom Foster and Hill JJ agreed, in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 100 in considering proceedings for injunctive and declaratory relief under the *Trade Practices Act 1974*.<sup>49</sup>

The policy of the Act, concerned as it is with the public interest, enables the court, in relation to injunctive relief, to take a course that would not be taken in ordinary civil litigation. That policy, in my opinion, extends into the area of declaratory relief and provides support for the view that the court may, in appropriate cases, exercise its power to grant declaratory relief to mark its disapproval of particular conduct engaged in in contravention of the Act.

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<sup>47</sup> The orders were not obeyed by the respondent's vessels. See paragraph 12 and exhibit NJB-6 to the affidavit of Nicola Jane Beynon affirmed on 18 October 2004.

<sup>48</sup> See paragraphs 19-22 of the affidavit of Nicola Jane Beynon affirmed 27 October 2006.

<sup>49</sup> See also Hill J at 107.

39. Making the declaration sought in this case will mark the Court's disapproval of particular conduct engaged in in contravention of the EPBC Act. In addition, the legal and factual issues involved in this case, particularly the operation of subs 7(1) of the ATEP Act and with reference to the Antarctic Treaty System and International Whaling Convention, are very complex. A declaration will clarify the rights and obligations of the parties, which is the normal purpose and role of a declaration. As a declaration operates without needing to be enforced, no question of futility arises. Weight should not be attached to political and diplomatic considerations in the exercise of the discretion to make a declaration in the circumstances of this case.<sup>50</sup>

**Stephen Gageler SC and Chris McGrath**  
**Counsel for the applicant**  
**17 September 2007**

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<sup>50</sup> The applicant submits that the reasoning in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430 [12] (Black CJ and Finkelstein J) and 434-435 [38] (Moore J) should also be applied to the exercise of discretion for the grant of final relief.