IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. NSD 1519 of 2004

HUMANE SOCIETY INTERNATIONAL INC

Applicant

KYODO SENPAKU KAISHA LTD

Respondent

APPLICANT'S SUPPLEMENTARY ARGUMENT FOR FINAL RELIEF

INTRODUCTION

1. These submissions supplement the applicant's outline of argument for final relief filed on 17 September 2007 and address three issues:

   (a) Enforcement of any relief granted by the Court;

   (b) The Attorney-General's submissions; and

   (c) Leave to serve sealed orders.

ENFORCEMENT

General principles and context

2. The applicant notes, and will not repeat here, its previous submissions in relation to the principles to applied to the exercise of the discretion to grant an injunction and to make a declaration set out in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430-433 [10]-[29].

3. To simplify the matters that the Court may be required to resolve, as noted in the applicant's previous submissions:

   (a) The applicant accepts that an injunction is a non-monetary order that the applicant will be unable to enforce through the Japanese courts.

   (b) The applicant also accepts that it does not have the support of the current Australian executive government to enforce the provisions of the *Environment Protection and Biodiversity Act* 1999 (Cth) ("EPBC Act") or any injunction granted by the Court against the respondent's vessels operating within the Australian Whale Sanctuary ("AWS") adjacent to Antarctica.

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(c) While 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,[1] 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.

4. Given the possibility of the respondents' vessels entering Australian ports, the applicant's ability to enforce an injunction or subsequent orders for contempt by arrest or seizure of the respondent's vessels is relevant to the exercise of the Court's discretion to grant the injunctive relief sought.

The 1952 and 1999 Arrest Conventions

5. At the trial the Court requested further submissions in relation to the enforcement of any relief granted against the respondent and raised particularly the implications for enforcement of the *International Convention on Certain Rules Relating to the Arrest of Sea-Going Ships 1952*[2] and the *International Convention on Arrest of Ships 1999*[3] ("the Arrest Conventions"). While Australia has not ratified the Arrest Conventions, they are relevant to the interpretation of the *Admiralty Act* 1988 (Cth) due to its legal and historical context in international maritime law.[4]

6. Broadly stated, the Arrest Conventions allow arrest of ships in respect of "maritime claims" in the jurisdiction of any of the contracting parties.[5] The definition of "maritime claim" in the 1952 Arrest Convention does not specifically include claims relating to damage to the environment or similar subject matter.[6] However,

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[1] See paragraphs 19-22 of the affidavit of Nicola Jane Beynon affirmed 27 October 2006.

[2] Done at Brussels on 5 October 1952. Entry into force 24 February 1956. Australia and Japan are not parties to this Convention. The text of the Convention is available at http://www.admiraltylawguide.com/conven/arrest1952.html (viewed 26 October 2007).

[3] Done at Geneva on 3 December 1999. Not yet in force. Australia and Japan were parties to the negotiation of the Convention and signed the Final Act of the parties but have not ratified it. The text of the Convention and Final Act of the Diplomatic Conference agreeing to the text is available at http://www.unctad.org/en/docs/imo99d5.pdf (viewed 26 October 2007).

[4] *Owners of MV 'Iran Amanat' v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 at 138 [20] (Gleeson CJ, McHugh, Gummow, Kirby, and Hayne JJ); *Tisand (Pty) Ltd v Owners of the Ship MV 'Cape Moreton' (ex 'Freya')* (2005) 143 FCR 43 at 60 [63]-[65] (Ryan and Allsop JJ); *Comandate Marine Corp v Ship 'Boomerang I'* (2006) 151 FCR 403 at 411 [34]-[37] (Allsop J with whom Emmett and Siopis JJ agreed); *Heibrunn v Lightwood PLC* [2007] FCA 1518 at [28] (Allsop J). See generally, Australian Law Reform Commission, *ALRC Report No. 33 – Civil Admiralty Jurisdiction* (ALRC, Canberra, 1986).

[5] Article 2 of the 1952 Arrest Convention provides "a ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claim, but in respect of no other claim …". Article 2(2) of the 1999 Arrest Convention provides "A ship may only be arrested in respect of a maritime claim but in respect of no other claim."

[6] 1952 Arrest Convention, Art 1. The ALRC, n 4 at [165], stated, "'The figurative phrase "damage done by a ship" is a term of art in maritime law whose meaning is well settled by authority': *The Eschersheim* [1976] 1 All ER 920, 926 (Lord Diplock). … While the jurisdiction conferred by this phrase has been found in other countries to be too narrow, the legislative reaction has been to add further heads of jurisdiction to fill perceived gaps rather than to alter the wording of the hallowed phrase." Cf. the discussion in *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439 at 460-463 [80]-[89] (Allsop J). It is arguable, but unnecessary to resolve in these proceedings, that the killing of whales constitutes "damage done by a ship" as, adopting the reasoning in *The Eschersheim*, it is the direct result of something done by those engaged in the navigation of the respondent's ships and the ships are the actual instrument by which the damage is done. Whales killed or injured within the AWS are the property of the Commonwealth: s 246 of the EPBC Act.

the 1999 Arrest Convention specifically included claims arising from damage to the environment caused by a ship in the categories of "maritime claim".[7]

7. The current proceedings arise out of the respondent's whaling activity undertaken by its fleet of vessels, currently the *Nisshin Maru*, *Yushin Maru*, *Kyo Maru No.1*, *Kyoshin Maru No. 2*, and *Yushin Maru No. 2*. The whaling constitutes "damage or threat of damage by the ship to the environment"[8] and, consequently, the current proceedings are a "maritime claim" at least for the purposes of the 1999 Arrest Convention.

8. At the trial the Court requested submissions on whether the Arrest Conventions, as reflecting general international practice, might affect arrest of the ships in contempt proceedings noting that both conventions define "arrest" to exclude the seizure of a ship in execution or satisfaction of judgment. The 1952 and 1999 Arrest Conventions define "arrest" virtually identically, respectively, as follows:

> "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.[9]
>
> "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.[10]

9. Francesco Berlingieri, the leading international jurist on the Arrest Conventions, explains that the conventions reflect the civil law distinction between provisional arrest to secure a maritime claim pending judgment (*saisie conservatoire*) and attachment or seizure of a ship following judgment (*saisie exécutoire*).[11] The Arrest Conventions govern only the former category and do not prohibit seizure, appraisal and sale of a ship following judgment to satisfy or enforce the judgment.[12]

10. The applicant, therefore, submits that the Arrest Conventions do not prohibit seizure, appraisal and sale (i.e. sequestration) of the respondent's ships following judgment to enforce an injunction or to satisfy a fine imposed for contempt.[13]

Admiralty jurisdiction

11. While the claim in these proceedings is brought under s 475 of the EPBC Act, the applicant notes the Court's jurisdiction under the *Admiralty Act* 1988 (Cth). The claim in these proceedings and any subsequent proceedings for contempt of an injunction, involving unlawful operation of the respondent's vessels for whaling in

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[7] Art 1(d) of the 1999 Arrest Convention.

[8] The 1999 Arrest Convention does not define "the environment" but its plain meaning includes biodiversity, not merely the abiotic aspects of the environment. For examination of this issue in an Australian domestic context, see *R v Murphy* (1990) 71 LGRA 1; 95 ALR 493; 64 ALJR 593 at ALR 498-499 per Mason CJ, Brennan, Deane, Gaudron and McHugh JJ.

[9] 1952 Arrest Convention, Art 1(2).

[10] 1999 Arrest Convention, Art 1(2).

[11] Berlingieri F, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (4th ed, Informa, London, 2006), pp 87-88.

[12] See generally on the question of interim and final relief for maritime claims involving arrest and sale of a ship: Jackson DC, *Enforcement of Maritime Claims* (4th ed, LLP, London, 2005), Pt III and IV, particularly Ch 15 and 25, pp 369, 376, 377, 647-649, 662-664; and Meeson N, *Admiralty Jurisdiction and Practice* (3rd ed, LLP, London, 2003), pp 17 and 151-152.

[13] Cf. *Redhead v Admiralty Marshal, WA District Registry* (1998) 87 FCR 229 (Rares J).

the AWS, is a "general maritime claim" and, hence, a "maritime claim" as defined in s 4 of the Admiralty Act.[14] The claim arises out of an act of the owner of a ship being an act in the navigation or management of the ship (i.e. the respondent's whaling using its fleet of ships).[15] Consequently, while the current proceedings are brought *in personam* against the respondent under the EPBC Act, the applicant has a right to proceed *in rem* under s 17 of the Admiralty Act against the respondent's vessels for the respondent's liabilities for whaling in the AWS.[16] Service of the proceedings and arrest of the respondent's vessels may occur at any place in Australia, including a place within the limits of the territorial sea of Australia.[17] If service or arrest were effected while the respondents vessels were within the territorial sea of Australia for the purpose of whaling, the prohibition on service or arrest while exercising a right of innocent passage would not apply.[18]

Punishment for contempt

12. Separate to the Admiralty jurisdiction to proceed *in rem*, the applicant submits that the Court's power to punish the respondent for contempt under s 31 of the *Federal Court Act 1976* and Order 40 of the *Federal Court Rules* extends to making an order for seizure and sequestration of the respondent's vessels to enforce the injunction and to satisfy any fine imposed by the Court for the contempt.[19] Section 31 provides the Court has the same power to punish contempt as is possessed by the High Court. Rule 11.04.1(b) of the *High Court Rules 2004* provides the High Court has power to order, where the contemnor is a body corporate, that the contemnor pay a fine and some or all of the property of the contemnor be sequestrated.

13. The applicant submits that the provision in r 39 of the *Admiralty Rules 1988* that an arrest warrant may be applied for in proceedings commenced as an action *in rem* does not limit the Court's power to order the arrest or seizure of the respondent's ships in these *in personam* proceedings for the purpose of sequestration of the vessels to satisfy a fine imposed as punishment for contempt. The applicant submits the procedures set out in the *Admiralty Rules 1988* provide a framework for enforcing an order for arrest or seizure in practice and can be applied *mutatis mutandis* for an order for sequestration of the respondent's vessels to satisfy a fine imposed as punishment for contempt.[20]

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[14] See generally, *Heibrunn v Lightwood PLC* [2007] FCA 1518 at [21]-[54] (Allsop J); *Comandate Marine Corp v Ship 'Boomerang I'* (2006) 151 FCR 403 at 406-411 [11]-[37] (Allsop J with whom Emmett and Siopis JJ agreed); and *Scandinavian Bunkering AS v Bunkers on Board the Ship FV 'Taruman'* (2006) 151 FCR 126 at 149 [96] (Kiefel J with whom Ryan and Tamberlin JJ agreed).

[15] Admiralty Act, s 4(3)(d)(i). See generally, *Elbe Shipping SA v The Ship "Global Peace"* (2006) 154 FCR 439 at 465-466 [101]-[106] (Allsop J). Note for the purposes of s 4(3)(a) of the Act the comments on the phrase, "damage done by a ship", set out above at n 6.

[16] See generally in relation to the nature of proceedings *in rem*, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 74-81 [99]-[128] per Allsop J (with whom Finn and Finkelstein JJ agreed, but Finn J at 51 [3] not considering it necessary to express any view on the correctness or otherwise of Lord Steyn's speech in *Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878).

[17] Admiralty Act, s 22. See the procedures for service and arrest specified in the *Admiralty Rules 1988*.

[18] Admiralty Act, s 22(4).

[19] In relation to the Court's wide powers to punish for contempt, see *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129 at 146 [70]-[74] per North, Goldberg and Weinberg JJ.

[20] Cf. *Redhead v Admiralty Marshal, WA District Registry* (1998) 87 FCR 229 (Rares J).

14. The Court requested submissions on what service will be required in any proceedings for contempt and whether the respondent must be present in Australia to be served.[21] Whether such a breach would be a civil or criminal contempt[22] does not affect the requirements for service. Order 40, r 8 requires personal service for any notice of motion that the respondent be punished for contempt but, on the terms of Order 40, it is not necessary that the respondent be present in the jurisdiction or brought before the Court to be punished for contempt. However, as service of the respondent in Japan would be outside the jurisdiction, Order 8, r 3 requires prior leave of the Court for service to occur.

15. While these submissions have proceeded on the basis that it is possible the respondent's vessels will enter Australian ports and thereby be susceptible to seizure and sequestration, the Court requested submissions on whether there is any mechanism for enforcement of orders made by the Court in this case without the respondent having assets in Australia.[23] The Court also requested submissions on the question of enforcement of a non-monetary personal order where the party is not present in the jurisdiction and has no assets in the jurisdiction.[24] To the extent the respondent does not have assets in Australia and its vessels do not enter Australian ports or other ports where the applicant can seek to arrest or seize the vessels, the applicant submits that there is no practicable mechanism for enforcement of the orders.

Safety of ships and crew

16. The Court requested submissions on how the Court should take account of Australia's international law obligations to give assistance to a vessel on the high seas and having it brought to an Australian port for refuge or for emergency medical treatment of a crew member.[25] While that matter is not directly relevant to the declaratory and injunctive relief that is sought in the application at this stage[26] it would be a relevant matter to consider in any subsequent application for the respondent to be punished for contempt by ordering seizure and sequestration of its ships to secure compliance with an injunction and payment of any fine imposed by the Court for contempt.

17. The applicant recognises the paramount importance of protecting the safety of the vessels and lives of the crews. The applicant submits that, in practice, the safety of the vessels and the crews would not be endangered by orders granted by the Court in these proceedings as any arrest or seizure of the vessels would be conducted by an Admiralty Marshal appointed under the *Admiralty Rules 1988*. The applicant notes that the Court's website advises that, "The Marshals have maritime skill and experience or have persons with that skill and experience readily available to

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[21] Transcript, p 27, line 48.
[22] Breach of a court order is normally a civil contempt rather than a criminal contempt; however, it is a criminal contempt if it involves deliberate defiance or is contumacious: *Witham v Holloway* (1987) 183 CLR 525 at 530 per Brennan, Deane, Toohey and Gaudron JJ; and 538-539 per McHugh J.
[23] Transcript, p 28, lines 19-20.
[24] Transcript, p 28, lines 3-5.
[25] Transcript, p 15, lines 5-12.
[26] As noted in oral submissions, it ought not be inferred that the Court's order will necessarily be ignored by the respondent: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431 [16] per Black CJ and Finkelstein J.

them."[27] The applicant also notes the Memorandum of Understanding between the Court and the Australian Maritime Safety Authority, signed on 14 August 2002, which identifies for Admiralty Marshals those operations that contain inherent safety considerations and sets out arrangements for the provision of advice on issues relating to the safety of a ship in the Marshal's custody.[28] Further, the applicant notes the provisions for safety, including for arrest of ships at sea, set out in the *Admiralty Marshal's Manual* issued by the Court.[29] Marshals have a duty to take reasonable care in carrying out their duties in relation to an arrested ship.[30] The applicant does not propose to proceed in any arrest or seizure for sequestration of the ships other than by means of an Admiralty Marshal. The applicant submits that the Court may presume a Marshal will not arrest or seize a ship in a way that would endanger the ship or a member of the crew.

THE ATTORNEY-GENERAL'S SUBMISSIONS

18. The correspondence received from the Attorney-General in response to the Court's request, dated 12 October 2007, indicates that the Attorney-General's views are unchanged from those expressed previously.[31] The Attorney-General considers the grant of either the declaration or injunction that is sought by the applicant will have adverse diplomatic implications for Australia and be futile because of various barriers to enforcement.

19. The applicant submits that the Court should not give weight to the political and diplomatic considerations raised by the Attorney-General. The applicant submits that the reasoning in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430 [10]-[13] (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. The Attorney-General's submissions fail to acknowledge or address the reasoning of the Full Court.

20. The Attorney-General's submissions in relation to the use of a private process server and the effect of this under Japanese law fail to acknowledge the service was conducted in this manner pursuant to an order for substituted service made by the Court[32] and that, consequently, service of the originating process in this manner was valid for the purposes of Australian law. The Attorney-General's submissions fail to acknowledge that the applicant originally sought to effect service through the diplomatic channel but that the Government of Japan refused to serve the originating process and it was for that reason that the Court ordered substituted service.

21. As noted earlier, the applicant accepts that an injunction is a non-monetary order that the applicant will be unable to enforce through the Japanese courts. The

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[27] See http://www.fedcourt.gov.au/how/admiralty_organisation.html (viewed 30 October 2007).
[28] See http://www.fedcourt.gov.au/how/admiralty_mou.html#amsa (viewed 30 October 2007).
[29] *Federal Court of Australia Marshal's Manual* (Revised December 2005), section 3.12, p 20, available at http://www.fedcourt.gov.au/pdfsrtfs_a/admiralty_marshals_manual_PUBLICDec2005.pdf (viewed 30 October 2007).
[30] Rule 47(2) of the *Admiralty Rules* 1988.
[31] In the Attorney-General's, "Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*", dated 25 January 2005.
[32] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

applicant does not propose to attempt to enforce any injunction granted by the Court through the Japanese legal system. The views of the Government of Japan are, therefore, not relevant to the question of enforcement.

LEAVE TO SERVE ORDERS

22. Noting the requirements of Order 8, r 3 for the prior leave of the Court to effect service of documents other than originating process outside the jurisdiction, should the Court be minded to grant the injunction sought by the applicant, it may be convenient[33] for the Court at that time to also grant leave to effect service of the sealed orders[34] in a similar manner to that prescribed by the Court for substituted service of the originating process on 2 February 2007.[35] While Division 3 (Service in non-convention countries) of Order 8 applies to service of the sealed orders, which would require service through the diplomatic channel, given the short amount of time until the next whaling season (which commences in December) and the circumstances that led to the Court ordering substituted service, service in accordance with Division 3 appears impractical.[36]

Chris McGrath
Junior counsel for the applicant
2 November 2007

[33] To avoid the need for the applicant to file a separate notice of motion for the Court's leave.
[34] Noting that the applicant will be required to enter the orders made by the Court under Order 36, r 8 of the *Federal Court Rules* and effect personal service of the orders prior to filing a notice of motion that the respondent be punished for contempt in accordance with Order 37, r 2. The importance of effecting personal service of the orders as a pre-requisite to punish for contempt was emphasized in *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129 at 141-148 [45]-[79] per North, Goldberg and Weinberg JJ
[35] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.
[36] Thereby enlivening the Court's power to order substituted service under O 7, r 9 of the Rules.