

On appeal from a single judge of the Federal Court of Australia.

BETWEEN: **HUMANE SOCIETY INTERNATIONAL INC**

Appellant

AND: **KYODO SENPAKU KAISHA LTD**

Respondent

### **SUMMARY OF RELEVANT FACTS**

This summary of relevant facts is in 2 parts:

PART A – Relevant facts at the hearing of the motion for leave to serve the originating process outside the Commonwealth

PART B – Minor correction to facts and subsequent facts not before the primary judge

Note that the appellant does not place reliance on the facts set out in Part B of this summary for the purposes of establishing any ground of the appeal. The facts set out in Part B are not intended to be relied upon as further evidence not placed before the primary judge. These facts are provided for the Full Court's reference to understand subsequent factual developments relevant to the proceedings and which are necessary to understand the current version of the pleadings (found in the Amended Application and Amended Statement of Claim) filed in the primary court (proceedings No. NSD 1519/2004).

#### **PART A – RELEVANT FACTS AT THE HEARING OF THE MOTION FOR LEAVE TO SERVE THE ORIGINATING PROCESS OUTSIDE THE COMMONWEALTH**

##### **The Australian Antarctic Territory and Australian Whale Sanctuary**

1. In 1933 the limits of the Australian Antarctic Territory (“AAT”) were fixed by an Order in Council (UK) and proclaimed in 1936 when the *Australian Antarctic Territory Acceptance Act 1933* commenced. The AAT is an external Territory of Australia.<sup>1</sup>
2. On 29 July 1994, and commencing on 1 August 1994, the Governor General proclaimed under s 10B of the *Seas and Submerged Lands Act 1973* the exclusive economic zone (“EEZ”) of Australia to include “in relation to the external Territories, the lines that are

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<sup>1</sup> Section 17(pd) of the *Acts Interpretation Act 1901* defines an external Territory to mean “a Territory, not being an internal Territory, for the government of which as a Territory provision is made by any Act.” The *Australian Antarctic Territory Act 1954* provides for the government of the AAT.

200 international nautical miles seaward of the baselines established under international law.”<sup>2</sup>

3. On 16 July 2000 the Australian Whale Sanctuary (“AWS”) was established on the commencement of s 225 of the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”). The AWS comprises, amongst other areas, the waters of the exclusive economic zone. Sections 229-229C of the EPBC Act prohibit the killing, injuring or taking of a cetacean within the AWS. Sections 229D-230 of the EPBC Act prohibit the treating or possession of a cetacean killed in contravention of ss 229-229C.
4. A map titled, “Australia’s Maritime Zones” (2<sup>nd</sup> ed, Commonwealth of Australia, 2002) is exhibit NJB-7 to the affidavit of Nicola Jane Beynon (18 October 2004). It shows Australia’s EEZ as a cream coloured band extending out from the coastline.

### **Japanese whaling in the Australian Whale Sanctuary**

5. An international moratorium on all commercial whaling was declared under the *International Convention for the Regulation of Whaling (International Whaling Convention) 1946* (“**International Whaling Convention**”)<sup>3</sup> by the International Whaling Commission (“IWC”) in 1982, and took effect in 1985/86.<sup>4</sup>
6. Despite the official moratorium on commercial whaling the Government of Japan continues to permit “research” involving the killing of whales and ultimate sale of the whale meat in Japan.
7. The whales killed are Antarctic minke whales (*Balaenoptera bonaerensis*), which are classified within the Order Cetacea (whales, dolphins and porpoises), Sub-order Mysticeti (baleen whales or mysticetes),<sup>5</sup> and hence are “cetaceans” under the EPBC Act.
8. The killing of Antarctic minke whales in Antarctic waters is conducted under the Japanese Whale Research Program under Special Permit in the Antarctic (“JARPA”) and has occurred every year since the 1987/88 season in purported compliance with Article VIII of the International Whaling Convention.
9. Pursuant to paragraph 3 of Article VIII of the International Whaling Convention, cruise reports are submitted to the Scientific Committee of the IWC annually by persons involved in the whaling. The cruise reports for the 2000/2001, 2001/2002, 2002/2003 and 2003/2004 whaling seasons are exhibits NJB-2 to NJB-5 of the affidavit of Nicola Jane Beynon (18 October 2004). These reports set out the nature, duration and location of the research undertaken, including reporting the number and location of whales killed. Five vessels and an unspecified number of personnel are involved in this whaling activity. The reports list their authors as being employees of the respondent, the Institute of Cetacean Research (“ICR”) and staff of various Japanese universities.
10. The respondent is the primary entity responsible for carrying out the whaling under the JARPA and subsequently selling the whale meat and other products obtained from the whaling in Japan, noting that:<sup>6</sup>

<sup>2</sup> Commonwealth Gazette No. S 290, Friday, 29 July 1994.

<sup>3</sup> ATS 1948 No. 18.

<sup>4</sup> The moratorium remains in place under paragraph 10(e) of the Schedule to the International Whaling Convention (see p 17 of Exhibit NJB-1 to the affidavit of Nicola Jane Beynon (18 October 2004)).

<sup>5</sup> See exhibit NJB-8 to the affidavit of Nicola Jane Beynon (18 October 2004), p 119.

- (a) the respondent is the owner<sup>7</sup> of the five vessels used to conduct the whaling;
- (b) the respondent employs the crews of the five vessels used to conduct the whaling;
- (c) 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; and
- (d) the respondent sells the whale meat and other products obtained from the whaling in Japan.
11. The general location of the respondent's whaling activity alternates biennially between two broad areas:
- (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**").
12. Both of these areas have at least some overlap with the AWS (when cross-referenced with the Australian EEZ shown in the map of Australia's Maritime Zones); however, Area IV and Area IIIE contain much more overlap with the AWS than the Area V and Area VIW.
13. Paragraphs 17-30 of the affidavit of Nicola Jane Beynon (18 October 2004) set out the principal evidence of whaling specifically within the AWS. Table 1 (at paragraph 30) provides the following summary the approximate number of Antarctic minke whales killed within the AWS (note that a "total" row has been added):

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

<b>YEAR</b>	<b>Total of Antarctic minke whales killed under the JARPA</b>	<b>Approximate number of Antarctic minke whales killed within the AWS</b>
2000/2001	440	36
2001/2002	440	215
2002/2003	440	13
2003/2004	440	164
<b><u>TOTAL</u></b>	<b><u>1760</u></b>	<b><u>428</u></b>

14. Paragraphs 14-26 of the affidavit of Kieran Paul Mulvaney (9 November 2004) provide direct evidence of the killing of approximately 7 Antarctic minke whales by the

<sup>6</sup> See generally the affidavit of Nicola Jane Beynon (8 November 2004).

<sup>7</sup> See exhibit JBS-2 to the affidavit of Jessica Bernadette Simpson (19 October 2004).

respondent's vessels within the AWS on 16 and 17 December 2001; however, these whales are included in, rather than additional to, the total figure of 215 whales killed in 2001/2002 shown in Table 1.

15. Paragraphs 31-35 of the affidavit of Nicola Jane Beynon (18 October 2004) set out the evidence of future whaling within the AWS. Only part of the area proposed for the coming whaling (Area IV and Area III E) corresponds with the AWS; however, based on the evidence of the location and number of whales killed in the 2000/2001 and 2002/2003 whaling seasons (which were also in Area IV and Area III E), it is likely that in the order of 13 to 36 Antarctic minke whales will be killed within the AWS from late February 2005 to early March 2005. The killing of Antarctic minke whales is expected to continue in essentially the same manner and same areas in subsequent years.

### **PART B – MINOR CORRECTION TO FACTS AND SUBSEQUENT FACTS NOT BEFORE THE PRIMARY JUDGE**

16. As noted in the introduction, the following facts were not before the primary judge and are not intended to be relied upon as further evidence. This summary is provided for the Full Court's reference to understand subsequent factual developments relevant to the proceedings and the current version of the pleadings (found in the Amended Application and Amended Statement of Claim) filed in the primary court (proceedings No. NSD 1519/2004).

#### **Minor changes to facts**

17. An affidavit of Nicola Jane Beynon (29 July 2005) (filed in proceedings NSD 1519 / 2004 subsequent to the judgment dismissing the motion for leave to serve) made minor corrections to the numbers of whales killed in the AWS. The corrected totals of whales killed each year since the commencement of the EPBC Act are shown in Table 2.

**Table 2: Summary of the evidence of the number of Antarctic minke whales killed generally under the JARPA and the approximate number killed specifically within the AWS**

<b>YEAR</b>	<b>Total of Antarctic minke whales killed under the JARPA</b>	<b>Approximate number of Antarctic minke whales killed within the AWS</b>
2000/2001	440	65
2001/2002	440	215
2002/2003	440	21
2003/2004	440	164
2004/2005	440	20
<b>TOTAL</b>	<b><u>2,200</u></b>	<b><u>485</u></b>

18. An Amended Application and Amended Statement of Claim were filed reflecting these minor amendments and subsequent developments in the whaling activity proposed by the respondent.

**Changes in proposed whaling activities by the respondent**

19. As set out in the affidavit of Nicola Jane Beynon (29 July 2005), in May 2005 the Government of Japan announced an expansion of the whaling undertaken by the Respondent. The proposed expansion is set out in the *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 (“JARPA II”)*.
20. In summary, the JARPA II proposes a continuation and expansion of the “scientific whaling” programme undertaken under Article VIII of the *International Convention for the Regulation of Whaling*. The areas in which whaling will occur will be broadly similar to the original JARPA and will include areas within the AWS.
21. Under the JARPA II a total of 850 ( $\pm 10\%$ ) Antarctic minke whales are proposed to be taken annually, which is approximately double the whales killed annually under the JARPA.
22. In the coming whaling season, December 2005 – March 2006, the whaling will occur in Areas III E, IV and V. Doubling the number of Antarctic minke whales killed in the AWS in Areas III E and IV during the 2001/2002 and 2003/2004 seasons (of 215 and 164), it is likely that in the order of 300-450 Antarctic minke whales will be killed in the AWS in the coming whale season.
23. The JARPA II also sets out an intended expansion of the species of whales that are killed to include fin whales (*Balaenoptera physalus*) and the humpback whales (*Megaptera novaeangliae*) in addition to Antarctic minke whales. Both of these species are cetaceans for the purpose of the EPBC Act. Both species have also been listed as threatened species in the Vulnerable category under section 178 of the EPBC Act.

Dated: 8 November 2005

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Jessica Simpson (Solicitor)