IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. NSD 995 / 2005

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

BETWEEN: **HUMANE SOCIETY INTERNATIONAL INC**

Appellant

AND: **KYODO SENPAKU KAISHA LTD**

Respondent

APPELLANT'S OUTLINE OF ARGUMENT

PART A

1. This is an appeal, by leave, against part of an interlocutory judgment of Allsop J, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, in proceedings No NSD 1519 of 2004 ("**the proceedings**"). The proceedings involve an application for a declaration and an injunction to restrain a Japanese company from whaling in the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory in contravention of the ss 229-230 of the *Environment Protection and Biodiversity Conservation Act 1999* ("**EPBC Act**").[1] In the interlocutory judgment, as relevant to this appeal, Allsop J dismissed an application for leave to serve originating process outside the Commonwealth pursuant to Order 8, rule 2 of the *Federal Court Rules 1979* ("**the Rules**").[2]

2. A particularly important question that is raised by the appeal is whether political and diplomatic issues are relevant to the exercise of discretion under Order 8, rule 2 of the Rules in proceedings between private litigants that are regularly brought, do not infringe the principle of international comity, and are consistent with Australian domestic law and international law?

PART B

3. This outline of argument addresses the grounds of appeal in the order set out in the Notice of Appeal.

4. The appellant accepts, from the outset, that the normal principles for an appeal against an exercise of discretion apply to this appeal. For the appeal to be allowed,

[1] A summary of relevant facts and a chronology are provided in the Appeal Book, Part C, pp 1-8.
[2] Allsop J also made an order under s 190(3) of the *Evidence Act 1995*; however, that part of the judgment is not subject to appeal.

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it must appear that some error has been made in exercising the discretion or that the exercise of the discretion is unreasonable or plainly unjust, not merely that another judge might have exercised the discretion differently.[3] The Court should exercise particular caution in considering the appeal as it concerns a decision on a matter of practice and procedure.[4] While no rigid and exhaustive criteria have been laid down, "the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration."[5]

Ground 1: Failure to consider *prima facie* right to exercise of jurisdiction

5. A party who has regularly invoked the jurisdiction of a competent court has a *prima facie* right to insist upon its exercise and to have its claim heard and determined.[6] This forms only one factor for the Court's consideration of whether to grant leave to serve outside the jurisdiction and undue emphasis should not be given to it,[7] but it is the correct starting point for the exercise of discretion under Order 8, rule 2 of the Rules.

6. Allsop J's failure to even consider this principle meant that his Honour began at the wrong starting point for the exercise of discretion under Order 8, rule 2. This is a significant error that could have materially affected exercise of discretion under Order 8, rule 2 of the Rules.

Grounds 2 and 3: Failure to consider legislative intention to apply law to foreign nationals

7. The exercise of the discretion under Order 8, rule 2 of the Rules is inherently linked to the law that is said to be contravened for the purpose of establishing that rule 1 applies to the proceeding.[8] In particular for Order 8, rule 1(l), where the proceeding concerns the construction, effect or enforcement of an Act of the Commonwealth, the intention of Parliament evident in that Act is relevant to the exercise of the discretion under Order 8, rule 2.

8. Allsop J concluded, consistently with the submissions of the appellant and the Attorney-General, that as a matter of Australian municipal law, the provisions of the EPBC Act apply to foreigners and foreign flagged vessels (such as the respondent and its vessels) in the waters concerned.[9]

9. Despite this finding, his Honour appears not to have considered the clear legislative intention in ss 5 and 224-230 of the EPBC Act to prohibit whaling by

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[3] *House v The King* (1936) 55 CLR 499 at 504-505.
[4] *Contender I Ltd v LEP International Pty Ltd* (1988) 82 ALR 394 at 397; 63 ALJR 26 at 28; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 551E.
[5] *Contender I Ltd v LEP International Pty Ltd* (1988) 82 ALR 394 at 397; 63 ALJR 26 at 28.
[6] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 238-239 per Brennan J and 241 per Deane J; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554. As Gleeson CJ, McHugh and Heydon JJ recently pointed out in *BHP Billiton Ltd v Schultz* [2004] HCA 61; (2004) 211 ALR 253 at [11], the "emphasis upon the need for justification of a judicial refusal to exercise a jurisdiction that has been regularly invoked underlay the selection of the 'clearly inappropriate forum' test [in *Oceanic* and *Voth*], in contrast to the modern English test [in *Spiliada*]."
[7] *Henry v Henry* (1996) 185 CLR 571 at 588-589.
[8] Order 8, rule 2(c) of the Rules.
[9] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [4] and [26].

both Australian and foreign nationals in the Australian Whale Sanctuary, when exercising the discretion under Order 8, rule 2 of the Rules.[10]

10. His Honour also did not consider the intention of the Parliament expressed in a relevant report of a committee of the Parliament, that, "as a matter of principle, Australian law be extended and applied to those foreign nationals in the Australian Antarctic Territory who are not otherwise exempt under Article 8(1) of the *Antarctic Treaty*."[11] Based on the clear recommendations of this report, the prohibition contained in the EPBC Act against whaling by foreign nationals in waters within the Australian exclusive economic zone ("**EEZ**") adjacent to the Australian Antarctic Territory ("**AAT**") can be seen as deliberate and not a mere oversight or error with unforeseen diplomatic implications.

11. His Honour's failure to consider the intention of the Parliament was a material error in the exercise of the discretion.

Grounds 4: Erroneous consideration of political and diplomatic issues

12. Allsop J erred by considering political and diplomatic issues incidentally associated with proceedings between private litigants, which are regularly brought, do not infringe the principle of international comity, and are consistent with Australian domestic law and international law.[12]

13. As stated by Gummow J in *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 373,[13] simply because a matter touches foreign relations does not place the matter beyond the cognisance of the Court. In that case Gummow J treated the Commissioner's claim of non-justiciability with scepticism and ultimately rejected it. As in *Re Ditford*, the issues in these proceedings can be resolved by the application of judicial and manageable standards, under Australian domestic law and international law, without requiring the Court to review the transactions of any foreign state, any non-justiciable issues or political questions.

14. Allsop J's exercise of discretion under Order 8, rule 2 brings into sharp relief the concerns expressed by Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 47 ("the Spycatcher Case"), that:

> "… it would be subversive of the role of the courts and of the constitutionally entrenched position of the judicature of this country if the enforceability of a claim were made, by a general rule of the common law, to depend on an Executive decision whether a plaintiff should be able to obtain the judicial relief which it seeks."

15. The proceedings do not infringe or touch upon the principles of international comity as stated in the Spycatcher Case at 40-41, also referred to as the "act of

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[10] Noting *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [26] and [30]-[31].
[11] 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), p 15, Recommendation 1.
[12] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [5]-[27], [31]-[32] and [35].
[13] Adopting the reasoning in *Baker v Carr* (1961) 369 US 186 at 211.

state doctrine", because the proceedings concern the actions of a private foreign corporation in Australian territory and do not challenge any action by the Government of Japan.

16. In particular, international comity is not infringed by the proceedings because the issues in the proceedings (as defined by the Statement of Claim) do not challenge the conduct of the Government of Japan or the validity of the Japanese Whale Research Program under Special Permit in the Antarctic ("**JARPA**").[14] The JARPA is issued by the Government of Japan to the respondent under Article VIII of the *International Convention for the Regulation of Whaling 1946* for "scientific research" whaling in the Antarctic. The only issue raised in the proceedings regarding this matter is that the JARPA is not a "recognised foreign authority" for the purpose of s 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth). Allsop J accepted this proposition for the purpose of the application for leave to serve the respondent.[15]

17. With the exception of sovereign and diplomatic immunity cases, there appears to be no precedent in common law jurisdictions where a court has refused to exercise jurisdiction to apply its own law[16] to foreign nationals in its own territory because of the political and diplomatic implications of doing so. With one exception that will be noted in the following paragraph, the cases cited by Allsop J do not assist his Honour's reasoning in this regard.[17] For example, the decision in *Buttes Gas and Oil Co v Hammer* [1982] AC 888 concerned whether a stay should be granted in a defamation action involving competing claims of sovereignty over territory in the Middle East by four foreign sovereigns. Lord Wilberforce, with whom the other Lords agreed, held that where issues involving an act of state are raised in private litigation, the court should exercise judicial restraint and abstain from deciding the issues raised.[18] This decision clearly has no application to the proceedings brought by the appellant because the whaling occurs in Australian territory and the boundaries of Australian sovereignty (or sovereign rights), as defined by the Executive, cannot be challenged in an Australian court.[19]

18. While not referred to by Allsop J, as these proceedings are *ex parte* and to comply with our duty to assist the Court, counsel for the appellant draw the Court's attention to a statement by Brennan J in the Spycatcher Case. In the context of

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[14] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at [65], [71] and [73]. The Amended Statement of Claim (filed 1 August 2005) proceeds on the same footing against a second phase of this whaling programme, announced by the Government of Japan in May 2005, known as "JARPA II".

[15] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [40].

[16] In private international law terminology, the law of the forum or *lex fori*. It can be observed that the question of jurisdiction and choice of law are distinct: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 521 [25]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 498-499 [7]-[10].

[17] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [19]-[21]. The submissions filed on behalf of the Attorney-General in the proceedings (see Appeal Book, Part C, pp 23-32) cited no authority in support of this proposition and the research of counsel for the appellant has not located any relevant authority.

[18] *Buttes Gas v Hammer (No 3)* [1982] AC 888 at 931-938. Note the development of the principles in this case in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1078-1081 per Lord Nicholls, at 1101-1102 per Lord Steyn and at 1108-1110 per Lord Hope.

[19] *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 388; *Petrotimor Companhia de Petroleos Sarl v Commonwealth* (2003) 126 FCR 354 at 361-362.

explaining the need for a general rule against allowing proceedings involving the enforcement of governmental interests of foreign states, Brennan J stated:[20]

> "The public policy of the law throughout Australia precludes an Australian court from enforcing a claim which is damaging to Australian security and foreign relations."

19. If this statement is taken as a general principle beyond the specific context of the Spycatcher Case, accepting the Attorney-General's submissions on the effect of the enforcement of the EPBC Act against the respondent in this case, then it supports the approach of Allsop J in refusing to grant the application for service.

20. However, the Court faces a further dilemma because Brennan J went on to state in the Spycatcher Case (at 53) that:

> "It is for the Parliament, not for the courts, to say whether there are any criteria and procedures which could be employed by the courts so as to avoid embarrassment to the Executive in discharging its responsibilities with respect to national security and foreign relations."

21. The dilemma for the Court that arises from this is that, while the Executive may regard it as embarrassing and damaging to foreign relations, the Parliament has provided a clear prohibition on whaling in the Australian Whale Sanctuary adjacent to the AAT by foreign nationals, including the respondent.[21] The Parliament has also provided the appellant with a statutory right to enforce the prohibition without the traditional, common law requirement of obtaining the Attorney-General's *fiat* to enforce a law protecting the public interest.[22] The relevant criteria and procedures provided by the Parliament, therefore, support the enforcement of the EPBC Act against the respondent in the manner sought by the appellant.

22. The dilemma and ultimate question for the Court is whether it follows the intention of the Parliament stated in the EPBC Act, or the views of the Executive.

23. A corollary of the point that the Parliament has provided clear criteria and procedures that support the enforcement of the EPBC Act, is that the approach taken by Allsop J in this case is contrary to the principle that the courts will not decline to exercise jurisdiction in disputes that can be resolved by judicial and manageable standards without needing to resolve any non-justiciable issues or political questions.[23] As Black CJ and Hill J noted in *Petrotimor Companhia de*

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[20] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 50.

[21] Sections 5 and 229-230 of the EPBC Act. Note the express application of the Act to foreign nationals and foreign vessels in the exclusive economic zone in s 5(4) of the Act.

[22] Section 475 of the EPBC Act.

[23] *South Australia v Victoria* (1911) 12 CLR 667 at 674-675, 708 and 715; *Baker v Carr* (1961) 369 US 186 at 210-214 and 217; *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367-373; *Re Citizen Limbo* (1989) 92 ALR 81 at 85; *Thorpe v Commonwealth* (1997) 144 ALR 677 at 690-692 per Kirby J; *Petrotimor Companhia de Petroleos Sarl v Commonwealth* (2003) FCR 354 at 370 [53]. See generally, Lindell G, "The Justiciability of Political Questions: Recent Developments", Ch 7 in Lee HP and Winterton G, *Australian Constitutional Perspectives* (Law Book Co, Sydney, 1992); Lindell G, "Judicial Review of International Affairs" in Opeskin B and Rothwell D (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997); Kirk J, "Rights, Review and Reasons for Restraint" (2001) 23 Syd LR 19; and Fox H, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", Ch 11 in Evans MD, *International Law* (Oxford University Press, Oxford, 2003).

Petroleos Sarl v Commonwealth (2003) FCR 354 at 370 [53] in relation to whether a dispute involving sovereignty over the Timor Gap was justiciable:

> "if the question was merely one of difficulty the Court would be required, nevertheless, to determine the issue. The question is rather whether the question is justiciable, not whether it is difficult."

24. This principle is consistent with, and complements, the principle (noted above) that a party who has regularly invoked the jurisdiction of a competent court has a *prima facie* right to insist upon its exercise and to have its claim heard and determined.[24]

25. The approach to similar issues in the United States is helpful to consider. The proceedings in this case bear factual and legal similarities with the dispute considered by the United States Supreme Court in *Japan Whaling Association v American Cetacean Society* (1986) 478 US 221 because it involves the issue of whaling by Japanese nationals and "presents a purely legal question of statutory interpretation" of domestic legislation that can be resolved without reference to international relations or politics.[25] White J's statement of principle for the majority[26] in that case applies equally for Australian courts that:

> "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[27]

26. In a similar vein, the Pinochet Case is a very significant rejection by the House of Lords of political issues dictating the result in cases that can be determined by the application of law.[28] Lord Nicholls rejected the argument that an act of state was non-justiciable because, "where Parliament has shown that a particular issue is to be justiciable in the English courts, there can be no place for the courts to apply this self-denying principle."[29] Lord Steyn, in particular, rejected submissions regarding "wide-ranging political arguments about the consequences of the extradition proceedings", by stating, "plainly it is not appropriate for the House to take into account such political considerations."[30]

27. Allsop J acted contrary to this approach by considering political and diplomatic matters that were extraneous to the issues in dispute in the proceedings. The matters referred to by Allsop J regarding diplomatic issues over Antarctica[31] are indeed non-justiciable by an Australian domestic court, but they are also irrelevant

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[24] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 238-239 per Brennan J and 241 per Deane J; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554; *BHP Billiton Ltd v Schultz* [2004] HCA 61; (2004) 211 ALR 253 at [11].

[25] *Japan Whaling Association v American Cetacean Society* (1986) 478 US 221 at 230.

[26] White J delivered the judgment of the Court, joined by Burger CJ, Powell, Stevens and O'Connor JJ. The dissenting judgment of Marshall J, with whom Brennan, Blackmun and Rehnquist JJ joined, inherently assumes the point made by White J without noting it expressly.

[27] *Japan Whaling Association v American Cetacean Society* (1986) 478 US 221 at 230.

[28] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 and *(No 3)* [2000] 1 AC 147.

[29] *Pinochet (No 1)* [2000] 1 AC 61 at 107B. See also Lord Steyn at 117D. In *Pinochet (No 3)*, their Lordships applied this principle but reached a narrower result.

[30] *Pinochet (No 1)* [2000] 1 AC 61 at 117A. See also Lord Nicholls at 111C. The re-hearing in *Pinochet (No 3)* proceeded on a similar basis and ignored political considerations.

[31] *Humane Society International v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [12]-[14] and [19].

to the issues that are, or that it can reasonably be supposed may be, legitimately in dispute in the proceedings. Allsop J accepted the Attorney-General's submissions that the Government of Japan will view Australia's sovereign rights to regulate whaling in the Australian Whale Sanctuary adjacent to the AAT as baseless by international law.[32] This matter is not only inconsistent with the normal acceptance by Australian courts of the boundaries of the Commonwealth as defined by the Executive Government,[33] it is entirely unnecessary for the Court to determine to resolve the issues in dispute between the applicant and the respondent – a private Japanese company. Even if the claim of sovereignty were baseless under international law, this would not affect the constitutional validity of the EPBC Act as a matter of Australian domestic law.[34]

28. In contrast to the factual and legal issues in *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128 at 149, in these proceedings there is no need to construe a "statutory provision which takes as a factum for its operation a matter pertaining to the conduct of foreign affairs".[35] The operation of the EPBC Act, and thereby the connecting factor with the Commonwealth that must exist under Order 8, rule 1 of the Rules, does not take as a factum for its operation a matter pertaining to the conduct of foreign affairs. The provisions of the EPBC Act relate purely to the activities of persons within Australian territory who are, thereby, subject to Australian domestic law.

29. To the extent that is it necessary to consider whether the proceedings are consistent with international law, the application of Australian domestic law to prohibit whaling by foreign nationals in the Australian Whale Sanctuary adjacent to the AAT is consistent with international law. Australian sovereignty in the AAT[36] is based on the principle of effective occupation under customary international law[37] and is not dependent on whether or not the Government of Japan recognises it. Nothing in the *Antarctic Treaty 1959* prohibits Australia from applying Australian law to foreign nationals within the AAT or the adjacent EEZ.[38] Australian sovereignty in the AAT provides sovereign rights over the

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[32] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [32].

[33] *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 388 per Gibbs J; and *Petrotimor Companhia de Petroleos Sarl v Commonwealth* (2003) FCR 354 at 361-2. Similarly, the Supreme Court said in *Baker v Carr* (1961) 369 US 186 at 212, "once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."

[34] *Horta v Commonwealth* (1994) 181 CLR 183 at 195.

[35] Similarly, this case is entirely different from *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in which (at 192-193) Lord Hoffman noted that the courts would not ordinarily question decisions of the executive concerning national security.

[36] The AAT is an external Territory of Australia. 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.

[37] Note particularly in relation to sovereignty over inhospitable, polar territories, the decision of the Permanent Court of International Justice in *Legal Status of Eastern Greenland* (1933) PCIJ Series A/B No. 53, pp 45-46. See generally Jennings R and Watts A, *Oppenheim's International Law* (9th ed, 2 vols, Harlow, Essex, 1992), Vol 2, pp 677-679 and 686-708. The leading academic work on Australian sovereignty over the AAT is Triggs G, *International Law and Australian Sovereignty in Antarctica* (Legal Books Pty, Sydney, 1986), and her conclusions are set out in Chapter 10, pp 322-323.

[38] See the House of Representatives Standing Committee on Legal and Constitutional Affairs, n11, p15.

waters within 200 nautical miles of the AAT under Articles 56 and 57 of the *United Nations Convention on the Law of the Sea 1982*.[39] In summary, the proceedings in this case are entirely consistent with Australia's international legal obligations and this weighs in favour of the grant of leave, not against it, as inferred by Allsop J.[40]

Ground 5: Consideration of irrelevant issues

30. Allsop J appears to have considered "a number of normative and judgmental premisses" as a basis for not applying Australian domestic law to the activities of the respondent in the Australian Whale Sanctuary.[41] This is a surprising practice for an Australian court applying Australian law to activities in Australian territory. These issues are wholly irrelevant to the operation of Australian law and the exercise of discretion under Order 8, rule 2 of the Rules. His Honour manifestly erred in considering those matters in the exercise of the discretion under Order 8, rule 2 of the Rules.

Grounds 6-8: Erroneous finding that proceedings are futile

31. In *Humane Society International Inc v Kyodo Senpaku Kaisha* [2004] FCA 1510 at [70], Allsop J stated:

> "There may or may not be a question of the effectiveness of the orders sought. Perhaps even to raise that issue at this point is to assume matters which should not be the subject of assumption. The Court will not make futile orders. Whether or not they are futile may depend upon many matters, including but far from limited to the attitude of persons who are not present before the Court. This is a matter which is better dealt with in due course, with an understanding of the response to the litigation of the respondent."

32. Contradicting this reasoning, in *Humane Society International Inc v Kyodo Senpaku Kaisha* [2005] FCA 664 at [33]-[34], Allsop J concluded:

> "[The making of an injunction will be futile because it cannot be enforced and] … The making of a declaration alone (a course suggested by the applicant) might be seen as tantamount to an empty assertion of domestic law (by the Court), devoid of utility beyond use (by others) as a political statement."

33. The first approach by Allsop J is the correct one for the exercise of discretion under Order 8, rule 2 of the Rules. Just as for the requirement to establish a *prima*

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[39] The Australian 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 (*Gazette* No. S 290, Friday, 29 July 1994). The proclamation was declared to commence on 1 August 1994. Sections 5 and 224-225 of the EPBC Act extend the application of the Act to the EEZ of the external Territories.

[40] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [8]. Allsop J's reference to monism at [38] may also be an obtuse reference to some inconsistency between international and Australian domestic law. If so, the reference is misplaced as there is no inconsistency and, therefore, both monist theory (that international law is supreme over municipal law) and dualist theory (that international law and municipal law regulate two different subject-matters and neither is supreme over the other) would reach the same conclusion. Cf. Brownlie I, *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003), pp 31-32.

[41] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [29]. Note also that Allsop J's statement that "whales … are owned by no one" is incorrect in the context of the proceedings because s 246 of the EPBC Act vests whales killed, injured or taken in contravention of the Act in the Commonwealth.

facie case, which requires a lesser level of scrutiny than when considering a no-case submission at the end of an applicant's case,[42] so too the question of the relief that may ultimately be granted should be considered at a lessor level of scrutiny at this preliminary stage. It is simply not appropriate to conclude at this stage that an injunction will be futile without first hearing from the respondent or, at least, giving the respondent the opportunity to be heard.

34. His Honour's conclusion, that a declaration alone "might be … devoid of utility beyond use … as a political statement" is pure speculation that disregards the ordinary purpose of a declaration – to state clearly the legal rights and duties of the parties before the court. The proceedings involve very complex legal and factual issues and, consequently, a declaration alone of the rights and duties of the parties clearly has utility in clarifying their legal rights and duties. It will be another matter whether the respondent takes notice of, or complies with, a declaration.

35. The fact that an order is likely to 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 to grant relief.[43] The declaration that is sought in these proceedings does not rely upon enforcement in any foreign jurisdiction. It will remove any doubt for the respondent that it breaches Australian law by whaling within the Australian Whale Sanctuary. It should also not lightly be assumed that the respondent will ignore the declaration. Consequently, the relief sought cannot be said to be ineffective or futile and this is not a basis for refusing to grant leave to serve the proceedings.

36. Allsop J erred in finding that the making of a declaration would be futile by failing to consider whether the objects of the EPBC Act, concerning the protection of the public interest in the environment, warrants the court, in appropriate cases, exercising its power to grant declaratory relief to mark its disapproval of particular conduct contravening the Act. This approach has developed under the *Trade Practices Act 1974*[44] and the same approach should apply under the EPBC Act. His Honour erred in failing to consider this matter.

Stephen Gageler SC and Chris McGrath
Counsel for the Appellant
15 November 2005

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[42] *Western Australia v Vetter Trittler Pty Ltd* (1991) 30 FCR 102 at 110; *Merpro Montassa Ltd v Conoco Specialty Products Inc* (1991) 28 FCR 387 at 390; *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 365 at 372-373; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549B-F; *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at 325 [17] and 340 [97].

[43] *ACCC v Chen* (2003) 132 FCR 309 at para [45] per Sackville J in relation to the grant of an injunction under the *Trade Practice Act 1974*. See also the cases cited in *ACCC v Kaye* [2004] FCA 1363 at paras [199]-[202] per Kenny J in relation to declaratory relief, noting the public interest nature of the EPBC Act.

[44] *World Series Cricket v Parish* (1977) 16 ALR 181 at 186; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255, 266-267 and 268; *Tobacco Institute of Australia Ltd v Australian Federation of Consumers Organisations Inc (No 2)* (1993) 41 FCR 89 at 100, 106 and 107; *ACCC v Chen* (2003) 132 FCR 309 at 319-321; *ACCC v Kaye* [2004] FCA 1363 at [199]-[201].