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 OUTLINE OF SUBMISSIONS FOR LEAVE TO SERVE OUTSIDE THE JURISDICTION

INTRODUCTION

1. The applicant applies for leave to serve the originating process on the respondent outside the jurisdiction in Japan in an application for a declaration and a prohibitory injunction against the respondent's whaling activities in the Australian Whale Sanctuary ("**AWS**").

ISSUES FOR DETERMINATION BY THE COURT

2. In deciding whether to grant leave to serve outside the jurisdiction the Court must be satisfied, in accordance with Order 8, rule 2(2) of the Rules, that:

   (a) the Court has jurisdiction in the proceedings;
   (b) rule 1 applies to the proceedings because the case falls within one or more of the relevant grounds of service outside of the jurisdiction;
   (c) the applicant has a *prima facie* case for the relief sought.

3. In addition, the Court must be satisfied that it should not exercise its discretion to refuse to assume jurisdiction because it is a *forum non conveniens* or for some other reason: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564.

JURISDICTION IN THE PROCEEDINGS

4. Section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* ("**EPBC Act**") confers original jurisdiction on the Court in proceedings for an injunction to restrain an offence or other contravention of the Act. The proceedings involve an application for a prohibitory injunction to restrain offences against ss 229-230 of the EPBC Act. Consequently, the Court has original jurisdiction in relation to the injunction that is sought in the proceedings.

5. 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*.

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GROUNDS OF SERVICE OUTSIDE OF THE JURISDICTION

6. Four grounds of service *ex juris* are relevant under Order 8, rule 1(a), (b), (j) and (l):

   (a) the proceeding is founded on a cause of action arising in the Commonwealth;
   (b) the proceeding is founded on a breach of an Act committed in the Commonwealth;
   (j) the proceeding is for an injunction against the doing of an act in the Commonwealth; and
   (l) the proceeding concerns the construction, effect or enforcement of an Act.

7. "In the Commonwealth" includes the waters of Australia's exclusive economic zone ("**EEZ**") adjacent to the Australian Antarctic Territory ("**AAT**").[1] The AAT is an external Territory of Australia[2] 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.[3] Sections 5 and 224-225 of the EPBC Act extend the application of the Act to the EEZ of the external Territories.[4] The Court will ordinarily accept the boundaries of the Commonwealth as defined by the Executive Government.[5]

PRIMA FACIE CASE

8. A *prima facie* case for relief is made out if, on the material before the Court, inferences are open which if translated into findings of fact, would support the relief claimed.[6] A lesser level of scrutiny is called for than when considering a no-case submission at the end of an applicant's case.[7]

9. As a preliminary issue in relation to whether the applicant has a *prima facie* case, the applicant has standing to commence the proceedings. Section 475 of the EPBC Act confers widened standing on organisations to apply to the Court for an injunction to restrain an act or omission that constitutes an offence or other contravention of the Act. The evidence of the applicant's standing is set out in the affidavit of Michael Kennedy (18 October 2004).

10. Turning to the evidence of the alleged contraventions of the EPBC Act, the evidence of the intentional killing, injuring, taking, interfering with, treating and possessing Antarctic minke whales within the AWS by the respondents is clear from the affidavits of Nicola Jane Beynon (18 October 2004) and Kieran Paul Mulvaney (9 November 2004). Between December 2000 and March 2004 employees of the respondent aboard 5 vessels owned by the respondent killed approximately 428 Antarctic minke whales within the AWS.[8] At no time has the respondent held a permit or authority under ss 231, 232 or 238 of the EPBC Act and therefore these activities contravened ss 229-230 of the EPBC Act.

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[1] Order 1, rule 4 of the Rules defines the "Commonwealth" to mean "the Commonwealth of Australia and includes a Territory", and "Australia" or "the Commonwealth" to mean "the Commonwealth of Australia and when used in a geographical sense includes the external territories".

[2] 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.

[3] *Gazette* No. S 290, Friday, 29 July 1994. The proclamation was declared to commence on 1 August 1994.

[4] These provisions over-ride s 15B of the *Acts Interpretation Act 1901*, which deems that "any reference in any Act … to Australia or the Commonwealth shall be read as including a reference to the coastal sea of Australia."

[5] *Petrotimor Companhia de Petroleos Sarl v Commonwealth of Australia* (2003) 126 FCR 354 at 361-362.

[6] See generally *Western Australia v Vetter Trittler Pty Ltd* (1991) 30 FCR 102 at 110 per French J and *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at 325, para 17 and 340, para 97 per Carr J.

[7] *Merpro Montassa Ltd v Conoco Specialty Products Inc* (1991) 28 FCR 387 at 390 per Heerey J. See also *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 365 at 372-373 per Lindgren J.

[8] See paragraphs 17-30 of the affidavit of Nicola Jane Beynon (18 October 2004).

11. The evidence indicates that the respondent intends to return its vessels and employees or agents to Antarctic waters for further whaling commencing in December 2004 and, unless restrained by the Court, to kill approximately 13-36 whales within the AWS in late February and early March 2005.[9] The evidence also indicates that the respondent intends to continue a similar program of whaling activity in subsequent years.[10]

12. Factually, therefore, the applicant clearly has a *prima facie* case that ss 229-230 of the EPBC Act have been contravened by the respondent, and that these provisions will be contravened by the respondent in the future unless restrained by the Court.

13. One further legal issue that is relevant to determining whether the applicant has a *prima facie* case is whether a permit granted for the respondent's whaling activities by the Government of Japan under the Japanese Whale Research Program under Special Permit in the Antarctic ("**JARPA**") provides a defence to the application.[11]

14. The only possibly relevant provision of Australian domestic law to which the JARPA could provide a defence to the proceedings is s 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* ("**ATEP Act**"),[12] which provides that:

> "Notwithstanding any other law, but subject to the regulations, no action or proceeding lies against any person for or in relation to anything done by that person to the extent that it is authorized by a permit or by a recognised foreign authority."[13]

15. There are no relevant regulations[14] and "permit" is defined in s 3 of the ATEP Act to mean "a permit in force under Part 2 of this Act." Part 2 of the ATEP Act provides for the conservation of Antarctic fauna and flora and allows the Minister to issue permits in relation to activities affecting the environment within the AAT but is not relevant to the present case.

16. "Recognised foreign authority" is defined in s 3 of the ATEP Act to mean:

> "***recognised foreign authority*** means a permit, authority or arrangement that:
> (a) authorises the carrying on of an activity in the Antarctic; and
> (b) has been issued, given or made by a Party (other than Australia) to the Madrid Protocol that has accepted under that Protocol the same obligations as Australia in relation to the carrying on of that activity in the Antarctic."

17. The "Madrid Protocol" is also defined in s 3 of the ATEP Act to mean "the Protocol on Environmental Protection to the Antarctic Treaty". Both Australia and Japan have ratified[15] the Madrid Protocol unconditionally and therefore have identical obligations under it.

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[9] Paragraphs 31 and 32 of the affidavit of Nicola Jane Beynon (18 October 2004).
[10] Paragraphs 32-35 of the affidavit of Nicola Jane Beynon (18 October 2004).
[11] See references to JARPA in exhibits NJB-2 to NJB-5 of the affidavit of Nicola Jane Beynon (18 October 2004).
[12] Noting that s 9(2) of the EPBC Act provides, "To avoid doubt, nothing in this Act affects the operation of subsection 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* or regulations made for the purposes of that subsection." Note also that in relation to s 7(2) and (3) of the ATEP Act, there are no Commonwealth reserves affected by the whaling activity and therefore those subsections are not relevant to this case.
[13] This version commenced on 1 March 1998 (Act No 156 of 1992). The original version of s 7(1) (Act No 103 of 1980 in force from 6 June 1980) provided, "Notwithstanding any other law, but subject to the regulations, no action or proceeding lies against any person for or in relation to anything done by that person to the extent that it is authorized by a permit or by an authority of another Contracting Party." Section 3 provided that, "**authority of a Contracting Party** means a permit or authority issued or given, or an arrangement made, by another Contracting Party for purposes of, and in accordance with, the Agreed Measures;" and "**Agreed Measures** means measures for the conservation of Antarctic fauna and flora approved by Australia under Article IX of the Treaty, and includes any measures for like purposes so approved after the commencement of this section".
[14] Noting the *Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations 1993* and the *Antarctic Treaty (Environment Protection) (Waste Management) Regulations 1994*.
[15] Australia ratified the Madrid Protocol on 6 April 1994. Japan ratified it on 15 December 1997.

18. As your Honour recently stated in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202 at para 142, subject to any contrary intention revealed by the domestic statute making an international instrument part of domestic law, the ascertainment of the meaning of, and obligations within, an international instrument that is made part of domestic law is to be ascertained by giving primacy to the text of the international instrument, but also by considering the context, objects and purposes of the instrument.

19. To understand the context, objects and purposes of the Madrid Protocol (and hence whether the JARPA is a "recognised foreign authority"), it is necessary to understand that there are two separate systems under international law relevant to whaling and Antarctica.

20. Whaling is regulated internationally under the *International Convention for the Regulation of Whaling (International Whaling Convention) 1946* ("**International Whaling Convention**").[16] In 1982 the International Whaling Commission ("**IWC**") declared a moratorium on all commercial whaling under the International Whaling Convention. The moratorium took effect in 1985/86 and remains in force.[17] Despite the international moratorium on commercial whaling the Government of Japan continues to permit the killing of whales purportedly authorised as "research" under Article VIII of the International Whaling Convention. The JARPA is purportedly conducted under Article VIII and has been conducted every year since the 1987/88 season. Sections 229-230 of the EPBC Act incorporate the international prohibition on commercial whaling into Australian domestic law and s 238 allows for permits to be issued by the Minister for scientific research.

21. In addition to the international and domestic laws regulating whaling, there is an international and domestic system of laws applying to Antarctica and the AAT.

22. The system of international law applying to Antarctica is known as "the Antarctic Treaty System". This system currently comprises the:

    (a) *Antarctic Treaty 1959*;[18]
    (b) *Convention for the Conservation of Antarctic Seals 1972*;[19]
    (c) *Convention on the Conservation of Antarctic Marine Living Resources 1980*;[20]
    (d) *Protocol on Environmental Protection to the Antarctic Treaty 1991* ("**Madrid Protocol**").[21]

23. The Antarctic Treaty System has been enacted into Australian domestic laws under the *Antarctic Treaty Act 1980*, the *Antarctic Marine Living Resources Conservation Act 1981*; and the ATEP Act.

24. Article 7 (Relationship with Other Agreements Outside the Antarctic Treat System) of Annex II (Conservation of Antarctic Fauna and Flora) of the Madrid Protocol expressly excludes the regulation of whaling under the International Whaling Convention from the Protocol by providing that, "Nothing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling."[22]

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[16] ATS 1948 No. 18.
[17] See exhibit NJB-1 to the affidavit of Nicola Beynon (sworn 18 October 2004).
[18] Set out as a Schedule to the *Antarctic Treaty Act 1960*.
[19] Set out in Schedule 1 of the *Antarctic Treaty (Environment Protection) Act 1991*.
[20] Set out as a Schedule to the *Antarctic Marine Living Resources Conservation Act 1981*.
[21] Set out as Schedule 3 to the *Antarctic Treaty (Environment Protection) Act 1991*.
[22] There are three other Annexes currently ratified: Annex I (Environmental Impact Assessment); Annex III (Waste Disposal & Waste Management); and Annex V (Area Protection and Management). Exclusion of whaling from regulation under the Madrid Protocol generally was confirmed by the Contracting Parties in paragraph 7 of the

25. Applying the principles stated by your Honour in *El Grego* to Article 7 of Annex II of the Madrid Protocol:

    (a) the plain and ordinary meaning of Article 7 of Annex II is that the Madrid Protocol does not detract from, lessen, take away or impair any obligations or rights provided under the International Whaling Convention;[23]
    (b) the International Whaling Convention comprehensively regulates whaling for the Parties to it (including Australia and Japan);
    (c) the Contracting Parties clearly intended to keep separate the international systems for whaling and Antarctica and the Madrid Protocol does not regulate the activity of whaling by Parties to the International Whaling Convention;
    (d) Australia and Japan have not accepted under the Madrid Protocol the same (or any) obligations in relation to whaling activity in the Antarctic; and
    (e) the Madrid Protocol does not impose any obligations on Australia or Japan in relation to the carrying on of whaling in the Antarctic.[24]

26. As a consequence of the fact that the Madrid Protocol does not impose any obligations on Australia or Japan in relation to whaling activity in the Antarctic, a permit, authority or arrangement issued by the Government of Japan for the whaling (such as the JARPA) is not a "recognised foreign authority" as defined in the ATEP Act. Consequently, s 7 of the ATEP Act does not apply to these proceedings.

27. In summary, there is a *prima facie* case that the respondent is contravening ss 229-230 of the EPBC Act and the JARPA provides no defence under Australian domestic law.

DISCRETIONARY ISSUES

28. The Court retains a discretion whether to grant leave to serve a respondent outside Australia.[25] Four issues are raised for the Court's consideration in relation to this discretion.

Court's jurisdiction regularly invoked

29. 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.[26] The applicant

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Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting done at Madrid on 3-4 October 1991. The Final Act is relevant (in accordance with Article 31(3)(a) of the *Vienna Convention of the Law of Treaties 1969*) to the interpretation of Article 7 of Annex II to the Madrid Protocol as a later agreement of the Parties as to its interpretation. Similarly, Article VI of the *Convention on the Conservation of Antarctic Marine Living Resources 1980* provides that, "Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals."

[23] *The Oxford English Dictionary* (2nd ed, 1989) defines "derogate" as follows: **derogate**, *ppl.a.* **1.** Annulled or abrogated in part; lessened in authority, force, estimation, etc. … **derogate**, *v.* **1.** To repeal or abrogate in part (a law, sentence, etc); to destroy or impair the force and effect of; to lessen the extent or authority of. … **2.** To detract from; to lessen, abate, disparage, depreciate. … **3.** To curtail or deprive (a person) *of* any part of his rights. … **4.** To take away (something *from* a thing) so as to lessen or impair it. … **5.** To take away a part *from*; to detract, to make an improper or injurious abatement *from*.

[24] It may also be noted that, just as the Madrid Protocol does not regulate whaling, the ATEP Act also does not regulate whaling. Section 3 of the ATEP Act excludes whales from the definition of "native mammal". Due to the exclusion of whales from the definition of "native mammal", whales cannot be protected under the ATEP Act as the term native mammal is used throughout the Act and there are no other specific references to whales.

[25] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564.

[26] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 241; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

accepts that this forms only one factor for the Court's consideration of whether to grant leave to serve outside the jurisdiction and that too undue emphasis should not be given to it.[27]

Forum non conveniens

30. The relevant principles to be applied to *forum non conveniens* issues in Australia were summarised in the leading judgment of Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247-248.[28] The following facts indicate that there is no question that this court is not a *forum non conveniens*:

    (a) the whaling activity the subject of these proceedings occurs in the AWS in breach of ss 229-230 of the EPBC Act, thereby connecting the action to Australia geographically and attracting legal liability in Australia;
    (b) the Court is provided with original jurisdiction to make an injunction to restrain an offence or other contraction against the EPBC Act under s 475 of the Act; and
    (c) the applicant can not obtain relief in any foreign court or forum to restrain the whaling activity the subject of the proceedings.

Effectiveness of the orders sought

31. 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.[29] While any injunction granted in these proceedings will be difficult to enforce against the respondent, the applicant also seeks a declaration that the whaling activity constitutes an offence against ss 229-230 of the EPBC Act. A declaration is a remedy that does not rely upon enforcement in any foreign jurisdiction. Consequently, the relief sought in these proceedings cannot be said to be ineffective or futile.

International Comity

32. The principle of international comity, that, "in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory"[30] does not indicate that the Court should not grant leave to serve the proceedings outside the jurisdiction because the whaling activity in question occurs within Australian territory, not Japanese territory.

CONCLUSION

33. The grounds supporting the exercise of the Court's discretion are made out and the Court should exercise its discretion to grant leave to serve the proceedings outside the jurisdiction.

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Counsel for the applicant
12 November 2004

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[27] *Henry v Henry* (1996) 185 CLR 571 at 588-589.
[28] Confirmed in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564. See also *Dow Jones v Gutnick* (2002) 210 CLR 575 at 596.
[29] *Australian Competition and Consumer Commission v Chen* [2003] FCA 897; (2000) 201 ALR 40 at 50, para 45, per Sackville J in relation to the grant of an injunction under the *Trade Practice Act 1974*.
[30] *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41.