

**HUMANE SOCIETY INTERNATIONAL INC**

Applicant

**KYODO SENPAKU KAISHA LTD**

Respondent

**APPLICANT'S SUBMISSIONS ON DIRECTIONS FOR SERVICE  
FOR JUDGMENT**

**Introduction**

1. The applicant applies for directions<sup>1</sup> regarding the mode and sufficiency of service of the sealed orders<sup>2</sup> having regard to the requirements of Orders 7, 8 and 37 of the *Federal Court Rules* ("the Rules"). The inter-relationship between Orders 7, 8 and 37 is complex and unclear in the circumstances of this case.
2. If the Court considers it necessary, the applicant applies under Order 7, rule 9 for leave to effect service of the sealed orders in a similar manner to that prescribed by the Court for substituted service of the originating process.<sup>3</sup> There are two reasons for requiring substituted service. First, the urgency of serving the injunction as the respondent is currently conducting whaling in the Australian Whale Sanctuary.<sup>4</sup> Second, service through the diplomatic channel is impractical due to the circumstances noted by the Court when ordering substituted service of the originating process.

**Service of the injunction in Japan**

3. Order 7 of the Rules deals with the general requirements for effecting service and Order 8 deals with service outside Australia. If for any reason it is impractical to serve a document in the manner set out in the Rules, the Court may order substituted service under Order 7, rule 9 in another manner as occurred for the service of the originating process in this case.

---

<sup>1</sup> Pursuant to Order 10, rule 6 of the Rules.

<sup>2</sup> Made in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (Allsop J).

<sup>3</sup> In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 (Allsop J).

<sup>4</sup> Affidavit of Kirsty Ruddock (affirmed and filed 17 January 2007).

---

APPLICANT'S SUBMISSIONS ON  
SUBSTITUTED SERVICE FOR  
JUDGMENT

Filed on behalf of the applicant

Environmental Defenders Office (NSW) Ltd  
Level 1, 89 York Street  
Sydney NSW 2000

Tel: (02) 9262 6989

Fax: (02) 9262 6998

Email: edonsw@edo.org.au

---

4. The requirements for service under Orders 7 and 8 have changed since the commencement of the litigation in this case.<sup>5</sup> There appears, however, be an implied requirement by the current Order 8, rule 4 to obtain leave of the Court to effect service where service outside the jurisdiction is not done in accordance with an international convention or the laws of the country in which service is sought to be effected. Order 8, rules 4-6 of the Rules now provide as follows:

**4 Service of other documents**

- (1) The Court may give leave to a party to serve a document issued by the Court (other than an originating process) on a person in a foreign country in accordance with a convention or the law of the foreign country, on such terms and conditions as it considers appropriate.

*Note* The law of a foreign country may permit service through the diplomatic channel or service by a private agent.

- (2) The evidence on an application for leave under subrule (1) must include the information mentioned in paragraphs 3 (3) (a) to (c).<sup>6</sup>
- (3) If a document (other than an originating process) was served on a person in a foreign country without the leave of the Court, the Court may confirm the service if the Court is satisfied that:
- (a) the service was permitted by:
    - (i) if a convention applies — the convention; or
    - (ii) in any other case — the law of the foreign country; and
  - (b) the failure to apply for leave is sufficiently explained.

**5 Application of other rules**

The other Orders of these Rules apply to service of a document on a person in a foreign country in the same way as they apply to service on a person in Australia, so far as they are:

- (a) relevant and not inconsistent with this Order; and
- (b) not inconsistent with:
  - (i) if a convention applies — the convention; or
  - (ii) in any other case — the law of the foreign country.

**6 Method of service**

A document that is to be served on a person in a foreign country need not be served personally on the person if it is served on the person in accordance with the law of the foreign country.

5. Order 8, rule 7 allows for substituted service of documents where a foreign court or government advises that attempts to serve a document have failed; however, if the Government of Japan refuses to serve the sealed orders as it did for the originating process, this procedure is not applicable.
6. Order 8, rule 9 sets out the procedure to be followed where a person is granted leave to serve a document in a foreign country through the diplomatic channel or by transmission to a foreign government in accordance with a convention. The refusal of the Government of Japan to serve the originating process suggests that service through

---

<sup>5</sup> Paragraphs 14 and 22 of the Applicant's Supplementary Submissions for Final Relief (settled by junior counsel only) dated 2 November 2007 and filed in the proceedings were wrong to refer to a now repealed version of Order 8, rule 3, which required leave of the Court to be obtained for service outside the jurisdiction. The version of the rule referred to was repealed on 1 August 2006, as was Division 3 (Service in non-convention countries). Counsel apologizes to the Court for this error.

<sup>6</sup> Paragraphs (a) to (c) of Order 8, subrule (3) state: "The evidence on an application for leave under subrule (2) must include the following: (a) the name of the foreign country where the person to be served is or is likely to be; (b) the proposed method of service; (c) a statement that the proposed method of service is permitted by: (i) if a convention applies — the convention; or (ii) in any other case — the law of the foreign country."

the diplomatic channel is unlikely to be successful and is impractical; thereby enlivening the Court's power to order substituted service under Order 7, rule 9.

### Requirements for service under Japanese law

7. Order 8, rules 4-6 of the Rules make the procedures for service in Japan a relevant matter to consider. Japan is not a convention country and the Attorney-General's Department has previously advised that:<sup>7</sup>

The Japanese Government considers the service of documents issued by a foreign court directly upon a person residing in Japan to be an impermissible exercise of jurisdiction in its territory. Thus service by an agent or by mail is not recommended if the party in Australia intends to seek recognition and enforcement of the Australian judgment in Japan.

8. MacDonald has provided a general explanation of the rules for service of Australian originating process in Japan (footnotes in original):<sup>8</sup>

Service of an originating process in Japan fundamentally differs from that in common law countries because in Japan service is considered to be an act of the court. This is, simply put, why service of an Australian originating process on a Japanese person by mail from Australia or in some other manner of service initiated by the plaintiff generally is ineffective under Japanese rules.

Service of an originating process in Japan on a Japanese company is frequently first attempted by a special postage method which can only be initiated by a court. (Technically, the postman acts as an officer of the court in making the delivery of the writ.) The addressee is sent a notice<sup>9</sup> to the effect that a foreign judicial document has been received and that the addressee should come to the court to collect it. The notice briefly describes the nature of the document. ... Whether or not there is a translation, if the addressee then collects the document, the service is effective. ...

If the addressee refuses to collect the document or otherwise fails to respond within the specified time (about three weeks), the Court then serves the document as though it were a Japanese judicial document, in accordance with the Code of Civil Procedure. ... The Court bailiff or clerk then physically attempts to serve the document on the individual or at the head office of the corporation, as an authoritative act of the Court, rather than as the act of the plaintiff.

9. Gamertsfelder has summarised the rules for service in Japan in a similar way (footnotes in original):<sup>10</sup>

... Australia's legal system and Japan's legal system conceptualise service differently.

Service in Japan is "an authoritative (koken-teki) and verifying act (kosho-teki) act, emanating from the judicial authority (saibanken), to give the addressee, in a special formality, an opportunity to understand the contents of the particular document"<sup>11</sup> and not an act of the parties as it is in common law countries.<sup>12</sup>

<sup>7</sup> See advice from the Attorney-General's Department annexed as JBS-3 to the affidavit of Jessica Bernadette Simpson, affirmed 12 November 2004.

<sup>8</sup> MacDonald AJ, "Service of Australian originating process in Japan" (1992) 66 ALJ 810 at 816. While this article was written in 1992, my research indicates that it remains materially correct.

<sup>9</sup> The notice is called a *bunsho-juryōno saikokusho*, it bears a special stamp, called *tokubetsu sōtatsu*. The postman submits proof of delivery to the court.

<sup>10</sup> Gamertsfelder L, "Cross border litigation: exploring the difficulties associated with enforcing Australian money judgments in Japan" (1998) 17 *Australian Bar Review* 161 at 171.

<sup>11</sup> Fujita Y, "Service of American process upon Japanese national by registered airmail and enforceability of resulting American judgments in Japan" (1979) 12 *Law in Japan: An Annual* 69 at 73.

<sup>12</sup> In common law countries the doctrine of party autonomy prescribes that most procedures are initiated by the parties to the action.

Given that service is a judicial act, service executed by a party, eg, service by direct mail will be ineffective. Australians seeking to serve documents on Japanese defendants usually effect service [through the procedure established by the Commonwealth Attorney-General's Department via the diplomatic channel].

10. In summary, Japan is not a party to any relevant convention relating to service of court documents such as the sealed orders and Japanese law does not recognise service by post or personal service of documents from a foreign court. There appears to be an implied requirement by the current Order 8, rule 4 to obtain leave of the Court to effect service of the sealed orders in this case. The requirements for service in Orders 7 and 8 are further complicated by Order 37 of the Rules.

### **Requirements for service or notification prior to enforcement for contempt**

11. Service and enforcement of the injunction are interlinked as enforcement can only occur once the respondent has been served or notified of the injunction in accordance with the Rules. Order 37, rule 2 of the Rules provides (emphasis added):

#### **2 Service before committal or sequestration**

- (1) Subject to the Rules, an order shall not be enforced by committal or sequestration unless:
  - (a) the order or a certified or office copy thereof is served personally on the person bound; and
  - (b) if the order requires the person bound to do an act within a specified time, the order or a certified or office copy thereof is so served before that time expires.
- (2) Subject to the Rules, where the person bound by an order is a corporation or organisation the order shall not be enforced by committal of an officer of the person bound or by sequestration of the property of an officer of the person bound unless, in addition to service under subrule (1) on the person bound:
  - (a) the order or a certified or office copy thereof is served personally on the officer; and
  - (b) if the order requires the person bound to do an act within a specified time, the order or a certified or office copy thereof is so served before that time expires.
- (3) An order or a certified or office copy thereof served under this rule must bear a notice (naming the persons concerned) that the person served is liable to imprisonment or to sequestration of property if:
  - (a) where the order requires the person bound to do an act within a specified time, the person bound refuses or neglects to do the act within that time; or
  - (b) where the order requires the person bound to abstain from doing an act, the person bound disobeys the order.
- (4) Subject to the Rules, where:
  - (a) an order requires the person bound to do an act; and
  - (b) another order specifies the time in which the act is required to be done;
 each order or a certified or office copy thereof shall be served on the person bound before the expiry of that time as so abridged or extended.
- (5) Where a person liable to committal or sequestration of his property by way of enforcement of a judgment or order has notice of the judgment or order:
  - (a) by being present when the judgment is pronounced or when the order is made;
  - or
  - (b) by being notified of the terms of the judgment or order whether by telephone, telegram or otherwise;the judgment or order may be enforced by committal of that person or by sequestration of his property notwithstanding that service has not been effected in accordance with this rule.
- (6) The Court may dispense with service under this rule.

12. Order 37, subrule 2(5)(b) indicates that the minimum requirements that the applicant must comply with prior to the respondent being liable for contempt proceedings for failing to comply with the injunction are to be “notified of the terms of the judgment or order ... by telephone, telegram or otherwise.”
13. The sealed orders and a translation in Japanese were faxed to the respondent on 17 January 2007.<sup>13</sup> While notification by fax appears to satisfy Order 37, subrule 2(5)(b), the importance of effecting personal service of the orders as a pre-requisite to punishment 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. Service by registered post is an additional means of service that can easily be done although the respondent has returned previous correspondence.<sup>14</sup>
14. However, the requirements for service in Order 37 must be read in conjunction with Orders 7 and 8. In particular, Order 8, rule 5 states that “The other Orders of these Rules apply to service of a document on a person in a foreign country in the same way as they apply to service on a person in Australia, so far as they are relevant and not inconsistent with this Order ...”. The apparent requirement for the Court’s leave to serve documents outside the jurisdiction in Order 8, rule 4 appears to be inconsistent with the lesser requirements of Order 37.

#### **Substituted service**

15. Allsop J summarised the principles for the making of an order for substituted service under Order 7, rule 9 of the Rules in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124. In addition, Nicholson J summarised the principles for substituted service in *Hadgkiss v Aldin* [2006] FCA 1164 at [3]:

The substituted service must be based on a reasonable probability that it will inform the person served as a result of the form of service identified: cf *Ginnane v Diners Club Ltd* (1993) 42 FCR 90 at 92 citing *Re Mendonca*; ; *Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261 per Gibbs J. In order to establish impracticality some attempt, at least, should be made to effect service in accordance with the Rules, or evidence should be led that it is so obviously futile as not to warrant an attempt at service: *Rice Growers Co-Operative Ltd v ABC Container Line NV* (1996) 138 ALR 480 at 482 per Tamberlin J.

16. Service of the sealed orders through the diplomatic channel has not been attempted but is impractical due to the urgency of effecting service. In addition, the previous refusal of the Government of Japan to effect service on the respondent appears to make service through the diplomatic channel so obviously futile as not to warrant an attempt.
17. Service by registered post and personal service can be effected on the respondent’s registered business address obtained from a company registration certificate, issued by the Tokyo Legal Affairs Bureau in 2004.<sup>15</sup> It is reasonably probable that these forms of service will bring the injunction to the attention of the respondent.

**Chris McGrath**  
**Junior counsel for the applicant**<sup>16</sup>  
**17 January 2008**

---

<sup>13</sup> Affidavit of Kirsty Ruddock (affirmed 17 January 2008).

<sup>14</sup> Affidavit of Emily Lucienne Besser (affirmed 6 August 2007) and affidavit of Diana Beaton (affirmed 31 August 2007).

<sup>15</sup> See annexure JBS-1 to the affidavit of Jessica Bernadette Simpson (affirmed 19 October 2004).

<sup>16</sup> Mr Gageler SC is currently on annual leave.