

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES
DISTRICT REGISTRY**

NO NSD 1519 OF 2004

HUMANE SOCIETY INTERNATIONAL

Appellant

KYODO SENPAKU KAISHA

Respondent

**OUTLINE OF SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH AS
*AMICUS CURIAE***

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INTRODUCTION

1. In response to the judgment of Allsop J of 23 November 2004 [2004] FCA 1510 the Attorney-General seeks leave to appear as *amicus curiae* for the purpose of making the following written submissions. The Attorney-General wishes to rely on the written submissions alone and does not seek to be further heard.

ISSUES RELATING TO THE EXERCISE OF THE COURT'S DISCRETION

Principles of international law relating to jurisdiction

2. Under international law, the right of a State to exercise jurisdiction depends on there being a sufficiently close connection between the subject matter and the State to justify that State in regulating the matter. (See Jennings and Watts, *Oppenheim's International Law* (9th ed, 1992) ('Oppenheim'), vol 1, paragraph 136, pages 457-8). Territoriality is the primary basis for jurisdiction. There are also other bases, eg a State may exercise jurisdiction, within its own territory, over its nationals travelling or residing abroad, since they remain under its personal authority.
3. A State's jurisdiction extends for certain purposes to adjacent maritime zones, even though those zones are not part of the State's sovereign territory. The United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, [1994] ATS 31 ('UNCLOS') provides for an exclusive economic zone (EEZ) extending up to 200 nautical miles from the territorial sea baselines of the coastal State (Article 57 of UNCLOS). In its EEZ, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, and with regard to other activities for the economic exploitation and exploration of the zone (Article 56 of UNCLOS). In the exercise of these rights, the coastal State may take necessary measures in the EEZ to ensure compliance with its relevant laws. Those measures include, for example, boarding, inspection, arrest and judicial proceedings (Article 73 of UNCLOS).
4. The coastal State's jurisdiction in the EEZ is, thus, not as extensive as in its territory. It has only sovereign rights for limited purposes and not full sovereignty.
5. Parts of the sea that are not included in the EEZ, territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State, are the 'high seas'. No State has territorial jurisdiction over the high seas. Under international law, every vessel sailing the high seas has the nationality of the State whose flag it flies. The vessel, and persons and things aboard the vessel, are subject to the law of the flag State, and are in general subject to its exclusive jurisdiction. (Oppenheim, paragraph 287, page 731.)

The Australian Antarctic Territory (AAT) and the adjacent waters under international law

Claims to land territory in Antarctica

6. Australia considers that it has sovereignty over the Australian Antarctic Territory. Australia and six other States¹ have territorial claims in Antarctica. None of these claims is recognised by more than a limited number of other States. Only four States formally recognise Australia's territorial claim. These States are Norway, France and New Zealand, whose claims are adjacent to Australia's, and the United Kingdom.
7. In order to form a legal framework for activities in Antarctica to proceed unencumbered by arguments over the validity of claims to territorial sovereignty, the Antarctic Treaty (Washington, 1 December 1959) [1961] ATS 12, was concluded in 1959 and entered into force in 1961.
8. Article IV of the Antarctic Treaty provides that nothing in the Treaty shall be interpreted as a renunciation of a claim, or as prejudicing the position of any Party as regards its recognition or non-recognition of any other State's claim, to territorial sovereignty in Antarctica. In addition, while the Treaty is in force, no new claim, or enlargement of an existing claim, may be asserted and no acts or activities taking place while the Treaty is in force shall constitute a basis for asserting, supporting or denying a claim. Thus, the Antarctic Treaty in effect provides for a balance between potentially competing interests, by preserving the status quo as it was at the time of the Treaty's completion. Australia's claim precedes the entry into force of the Antarctic Treaty.
9. Twenty-one of the 28 Consultative Parties to the Antarctic Treaty have made no claims to Antarctic Territory to date and do not recognise the existing claims. There are currently 45 Parties (consultative and non-consultative) in total. Japan is a Consultative Party to the Antarctic Treaty. Japan does not recognise Australia's claim to the AAT.
10. As a matter of practice, issues relating to territorial sovereignty in Antarctica are avoided by each Antarctic Treaty Party regulating the activities of its own nationals in Antarctica and the conduct of its scientific expeditions.

The Antarctic seas and claims to maritime zones in Antarctica

11. Article VI of the Antarctic Treaty provides that nothing in the Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within the region below 60° South. Under the Antarctic Treaty no provision has been made for controlling whaling in the maritime areas below 60° South. The Convention on the Conservation of Antarctic Marine Living Resources, (Canberra, 20 May 1980) [1982] ATS 9 ('CCAMLR'), which deals with fishing activities in the area, specifically preserves the operation of the International Convention for the Regulation of Whaling, (Washington, 2 December 1946) [1948] ATS 18 ('Whaling Convention').

¹ Argentina, Chile, France, New Zealand, Norway, and the UK.

12. Under UNCLOS, maritime zones are attributable to any territory, including in the Antarctic. Accordingly, Australia has established maritime zones off the AAT. Australia considers that this is consistent with Article IV of the Antarctic Treaty. Other States need not recognise this action. If a State does not recognise Australia's claim to the AAT, it follows that it will not recognise the related EEZ.
13. Japan does not recognise Australia's claim to the AAT or its assertion of an adjacent EEZ. Accordingly, it considers that the waters adjacent to the AAT are part of the high seas, and that Australia therefore has no sovereign rights in relation to these waters (ie no jurisdiction over non-Australian vessels or non-Australian citizens in those waters). Rather, it considers that Japan, as the flag State, has exclusive jurisdiction over Japanese vessels, and persons and things on those vessels, while they are in the waters concerned.
14. Japan would consider any attempt to enforce Australian law against Japanese vessels and its nationals, in the waters adjacent to the AAT, to be a breach of international law on Australia's part.
15. Japan's response would reflect the fact that, in the present case, Australia would be treating as criminal conduct which the Government of Japan not only does not regard as an offence, but which it specifically authorised under Japanese law, in accordance with what Japan considers to be its rights under the Whaling Convention. (The Australian Government does not consider that, even if the authorisation is consistent with the Whaling Convention, this overrides the rights of a coastal State in its EEZ, but Japan does not recognise that Australia has those rights in the area concerned.)
16. Further, enforcement of Australian law against foreigners in Antarctic waters, based on jurisdiction deriving from Australia's territorial claim to the AAT and associated EEZ, can reasonably be expected to prompt a significant adverse reaction from other Antarctic Treaty Parties. To this point, the Australian Government has not enforced its laws in Antarctica against the nationals of other States which are Parties to the Antarctic Treaty, except when such persons have voluntarily subjected themselves to Australia law (for example, by applying for permits under the applicable Australian laws), as each Party has responsibility for the activities of its own nationals under the Antarctic Treaty.
17. Japan has indicated that enforcement of Australian law against Japanese vessels would be likely to give rise to an international disagreement with Japan. Similar disputes could also arise with other countries that do not accept Australia's claim to the AAT. To this point, Australia's claim to the AAT, although not widely recognised, has not been the subject of a dispute in an international court or tribunal. The object of Article IV of the Antarctic Treaty was to avoid such disputes, by preserving the status quo with respect to Antarctic claims. Provoking a disagreement in this instance may undermine the status quo, which would be contrary to Australia's long term national interests.

The AAT and adjacent waters under Australian law

18. In accordance with Australia's claim under international law, as a matter of Australian law, the AAT has been accepted as a territory of the Commonwealth (section 2 of the *Australian Antarctic Territory Acceptance Act 1933*). Similarly, in accordance with Australia's claim under international law, waters adjacent to the AAT have been proclaimed as part of Australia's EEZ under the *Seas and Submerged Lands Act 1973*.
19. As a matter of Australian law, therefore, the AAT is an external territory, and the relevant waters off the AAT are part of Australia's EEZ. Accordingly, the relevant provisions of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) apply to foreigners and foreign vessels in the waters concerned (section 5 of the EPBC Act).

Considerations relating to the enforcement of Australian law in the waters adjacent to the AAT

20. Non-recognition of Australia's claim to the AAT and associated EEZ by other States, as a matter of international law, does not preclude the application of the EPBC Act as a matter of Australian law. However, the Commonwealth considers that it is a key consideration to be taken into account in deciding whether or not to seek to enforce that legislation in relation to persons and vessels with the nationality of the States concerned.
21. The Commonwealth Government considers that it is generally more appropriate to pursue diplomatic solutions in relation to activities by foreign vessels in the EEZ off the AAT.
22. This is consistent with international practice with respect to Antarctica. As explained above, the Antarctic Treaty has successfully operated to date on the basis that each Antarctic Treaty Party is prepared to regulate the activities of its nationals in the region subject to that Treaty.

Issues of practical enforcement: utility of injunction and/or declaration

23. For the reasons discussed above, the Commonwealth has not sought to intercept, board and arrest Japanese vessels engaged in whaling activities in the EEZ adjacent to the AAT. (Attachment A sets out an extract from the brief that is given to each Australian Antarctic Division Voyage Leader, providing instructions as to what they should do in the event of sighting Japanese whalers in the EEZ off the AAT.) This is apart from the significant practical and logistical difficulties of intercepting, and then successfully boarding, fast and well equipped vessels in the remote, vast and hostile Southern Ocean environment.
24. In any case, if it were to do so, the exercise of enforcement powers would be based on contravention of the offence provisions in the EPBC Act, and not on the existence of an injunction and/or declaration.
25. Under Australian law, failure of the respondent to comply with an injunction would constitute contempt of court. However, since the defendant is not located in Australian

territory, and has no assets in Australian territory, probably it will ultimately not be possible to enforce against the defendant any orders made by the Court.

26. It could not be expected that an injunction or declaration would be given any effect under Japanese law. Generally, the courts of a country decline to give effect to the public law, as distinguished from private law, of foreign States unless otherwise required by any relevant treaty. There is no relevant treaty in this case.

Although in such matters courts often base their refusal to enforce foreign public law upon considerations of public policy, in international law a basis for that widespread practice is to be found in the principle of territorial authority, from which it follows that states have no right to perform acts of sovereignty within the territory of other states. For a state's public law to be enforced in another state would in effect involve the performance of acts of sovereignty in foreign states in derogation of their territorial authority. (Oppenheim, paragraph 144, page 490)

27. This is a reflection of the distinction between the jurisdiction to prescribe conduct and the jurisdiction to enforce, which depends on the presence of a person in the jurisdiction of the enforcing State.

Decision on enforcement more appropriately exercised by Commonwealth

28. The Attorney-General submits that in the light of the complex factors relating to the enforcement of Australian law against foreign nationals in relation to activities in the EEZ off the AAT, it should be left to the Commonwealth Executive to decide on the appropriate action to be taken in such cases. This is particularly so where, as in this case, the Commonwealth has deliberately not taken enforcement action in the waters concerned (eg by intercepting and boarding vessels), and where it does not appear that judicial orders would be capable of effective enforcement.
29. The Attorney-General also notes that a substantive hearing of this case, the issue of an injunction and the issue of a declaration would be expected to harm Australia's relations with Japan as well as other Antarctic Treaty Parties. Moreover, as explained above, the international disagreements and challenges that enforcement could prompt could undermine the Antarctic Treaty and, ultimately, Australia's position with respect to the AAT.
30. The Attorney-General asks the Court to take these issues into account in the exercise of its discretion.

OTHER POINTS

'Recognised foreign authority'

31. The Attorney-General does not consider that the Japanese permit for scientific whaling (JARPA) is a 'recognised foreign authority' for the purposes of subsection 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* ('ATEP Act'). Accordingly, the Attorney-General does not consider that the JARPA prevents the application of sections 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act. The Attorney-General considers that, as a matter of Australian law, those provisions of the EPBC Act apply.

Whaling Convention

32. The Attorney-General agrees with the conclusion of the Court that
- whatever the rights in public international law that Japan enjoys under Article VIII of the Whaling Convention, the content of the relevant Australian municipal law can be seen to be such as to prohibit the killing of whales for any purpose ...
- in the Australian Whale Sanctuary. (For the reasons already given, the Attorney-General considers that the reference in the judgment to 'Australian territory, including the Antarctic EEZ' is not accurate.)
33. Australia has consistently opposed the Japanese 'scientific' whaling program, in the International Whaling Commission established by the Whaling Convention. However, the Whaling Convention does not authorise any Party to take enforcement action against another Party for breach of the Convention. Accordingly, Australia cannot claim jurisdiction over Japanese whaling vessels on the basis of the Whaling Convention. The appropriate way to deal with activities which Australia considers to be contrary to the Whaling Convention is by diplomatic action, in particular in the International Whaling Commission.
34. Australia's jurisdiction to prohibit the killing, taking etc of whales by foreign nationals in Australia's EEZ does not depend on the activities in question being inconsistent with the Whaling Convention. Rather, it relies on Australia's rights in relation to the natural resources of the EEZ and the protection and preservation of the marine environment, as provided for by UNCLOS. These rights arise by virtue of Australia's territorial claim over the AAT which, as explained above, is not widely recognised.

Meaning of 'in the Commonwealth' in the Federal Court Rules

35. The Attorney-General agrees that the case falls within the scope of rule 1(l) of Order 8 of the Federal Court Rules.
36. However, the Attorney-General submits that the expression 'in the Commonwealth', in rules 1(a), (b), and (j) of Order 8, does not include the EEZ outside the territorial sea (12 nautical miles). Order 1 rule 4 of the Federal Court Rules provides that, in the Rules, unless the contrary intention appears, *Australia* or *the Commonwealth* means the Commonwealth of Australia and when used in a geographical sense includes external territories.
37. Paragraph 15B(1)(b) of the *Acts Interpretation Act 1901* provides that, except so far as the contrary intention appears, a reference to 'Australia' or to 'the Commonwealth' shall be read as including a reference to the 'coastal sea'. The 'coastal sea' is defined in subsection 15(4) as including the territorial sea of Australia and sea landward of the territorial sea, but it does not include the EEZ outside the territorial sea.
38. The presumption created by paragraph 15B(1)(b), that a reference to 'Australia' or 'the Commonwealth' includes the territorial sea, expands, rather than restricts, the ordinary meaning of those words. That ordinary meaning does not include the EEZ. The EEZ is not part of the territory over which Australia has sovereignty as a matter of

international law. Rather, Australia may exercise in the EEZ sovereign rights in relation to certain matters.

39. Where a contrary intention appears, displacing the operation of paragraph 15B(1)(b) of the *Acts Interpretation Act*, therefore, generally the effect will be that 'Commonwealth' or 'Australia' is to be interpreted as not including the territorial sea, not that those terms are to be interpreted as including the EEZ. Those terms would encompass the EEZ, only if it is clear from the terms, or the context, of the provision in which they appear, that they are intended to have that (unusual) meaning.
40. The *Australian Antarctic Territory Acceptance Act 1933*, and the *Australian Antarctic Territory Act 1954*, do not have the effect of extending the meaning of 'Australia' or 'the Commonwealth' to include an EEZ off the AAT. They do not refer to the EEZ; the concept of an EEZ was not recognised at the time those Acts were passed. Section 10B of the *Seas and Submerged Lands Act 1973* (Cth) and the proclamation of the EEZ on 29 July 1994 also do not affect the meaning of 'Commonwealth' and 'Australia'. They establish the proclaimed area as part of Australia's EEZ, for the purposes of Australian law. Section 10A of the *Seas and Submerged Lands Act* provides that the rights and jurisdiction of Australia in its EEZ are vested in and exercisable by the Crown in right of the Commonwealth. However, none of these provisions declares the EEZ to be part of the Commonwealth, or part of Australia, geographically speaking.
41. Some provisions of the EPBC Act, including those relating to the Australian Whale Sanctuary, expressly apply to the EEZ. The application of the EPBC Act to certain activities in the EEZ brings those activities within the scope of rule 1(i) - 'where the proceeding concerns the construction, effect or enforcement of an Act' - since that rule is not limited geographically. However, the Attorney-General submits that the scope of application of the EPBC Act does not affect the interpretation of the expression 'in the Commonwealth' in rules 1(a), (b), and (j).
42. An interpretation of 'in the Commonwealth' as not including the EEZ is also consistent with the extent of Australia's jurisdiction as a matter of international law. Australia's sovereign rights in the EEZ are restricted to certain matters. Australia cannot, consistently with international law, apply its law on other matters to non-Australian nationals in the EEZ, except by agreement with the State of nationality. For Australian courts to exercise jurisdiction generally over actions in its EEZ, on the basis that there was jurisdiction in relation to 'anything to be done in the Commonwealth or ... the doing of any act in the Commonwealth' (rule 1(j)) by foreign nationals, would not be consistent with international law.

Date: 25 January 2005

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Henry Burmester QC

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Benjamin Dubé
A solicitor employed by
Australian Government Solicitor
Solicitor for the Attorney-General

ATTACHMENT A

Extract from instructions to Australian Antarctic Division Voyage Leaders

6.1.1 *Sightings of whaling or fishing vessels*

Outlined below are the procedures to follow in the event that either whaling or fishing vessels are encountered within the Convention Area of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), or in the vicinity of Macquarie Island. The procedures will vary according to the type of vessel encountered and/or the area in which it is encountered (see categories and procedures outlined below). However, procedures common to all encounters which should be followed as a minimum include:

- video recording any communications with vessels encountered;
- attempts to identify the vessel - this should include asking (by radio) the vessel to provide its name, call sign, Lloyd's registration number (also called the IMO number), home port and Flag State (i.e. the country where the vessel is registered);
- confirming with the vessel its position and course (so that they are on record as knowing where they are) and asking what activities they are licensed to undertake;
- obtaining photographs and video footage (if possible) of the vessel from as many different angles as possible;
- photographing of the overall vessel, with bow, port side, starboard side and stern views and close-ups of any special features (e.g. name, identifying marks, etc), to assist in further identification of the vessel; and
- completing a Vessel Activity Report form at the time of the sighting – that provides prompts about which information is needed.

It is important to provide an accurate and detailed account of any encounters as it is possible that this information may need to be submitted as evidence in legal proceedings at a later date.

The voyage leader, as the official representative of the Australian Antarctic Division, is primarily responsible for communications with any vessels encountered.

6.1.1.1 *A whaling vessel within Australia's Exclusive Economic Zone (including Australia's Exclusive Economic Zone adjacent to the Australian Antarctic Territory)*

The 1946 International Convention for the Regulation of Whaling allows countries that are parties to that Convention to grant special permits to their nationals authorising the killing and taking of whales for scientific research. Scientific permits issued under the Convention can only authorise research on the high seas, i.e. in waters outside any country's Exclusive Economic Zone (EEZ).

Under the international law of the sea, all vessels are entitled to freedom of navigation through a country's EEZ. However, they are subject to that country's laws relating to the exploration, exploitation, conservation and management of the natural resources of the EEZ.

The waters comprising the Australian EEZ – including the EEZ adjacent to the Australian Antarctic Territory - have been declared the Australian Whale Sanctuary under the *Environment Protection and Biodiversity Conservation Act* 1999. It is an offence under that Act to kill or cause injury to a cetacean within the Australian Whale Sanctuary.

Only Japan has issued scientific permits under the above-mentioned Convention to its nationals to allow them to undertake lethal research on whales in Antarctic waters. The Japanese government's position is that these special permits allow Japanese nationals to undertake lethal research on whales throughout all Antarctic waters including in the Australian EEZ off the

Australian Antarctic Territory. This is because Japan does not recognise Australia's territorial claim over the Australian Antarctic Territory and to the EEZ adjacent to it.

The voyage leader should advise any vessels involved in whaling activities within Australia's EEZ that they are whaling within the Australian Whale Sanctuary and in contravention of Australian legislation. They should then be advised that their details have been passed on to the Australian authorities and be asked to leave Australian waters.

Japanese whaling vessels encountered in Australia's EEZ adjacent to the Australian Antarctic Territory are likely to claim that they are whaling on the high seas in accordance with international law (see above paragraphs) and that Australian laws cannot apply to them. As such, they may refuse to leave. If this occurs, no further enforcement action should be taken.

Sightings of whaling vessels in Australia's EEZ should be advised in the first instance via telephone to Tom Kaveney of the Approvals and Wildlife Division on 0409 127 808.² Following this, the Vessel Activity Report form should be emailed to vessel.sightings@aad.gov.au so that other appropriate action can be taken promptly through the Australian Antarctic Division's headquarters in Kingston.

² The Approvals and Wildlife Division of the Australian Government Department of the Environment and Heritage is responsible for whales and whaling issues occurring in Australia's EEZ.