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 REPLY TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL AND TO THE COURT'S QUESTIONS

PART 1: REPLY TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL

1. The Attorney-General, in effect, concedes that the applicant has a valid legal basis for service of the proceedings on the respondent under Order 8 rule 2(2) of the Rules,[1] but submits that the Court should not allow service of the proceedings on the respondent for diplomatic reasons.[2] The Attorney-General submits that allowing the applicant to enforce the prohibition of whaling in the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory ("**AAT**") "would be likely to give rise to an international disagreement with Japan."[3] The Attorney-General submits further that, "similar disputes could also arise with other countries that do not accept Australia's claim to the AAT" which may "be contrary to Australia's long term national interests."[4]

2. No findings of fact as to the impact of the proceedings on Australia's international relations or national interests can be based on the submissions of the Attorney-General because they are not supported by any evidence and are not admitted by the applicant.[5] No affidavit is filed in support of the submissions. No certificate with respect to a matter of international affairs is tendered by the Attorney-General.[6] Nor are the impacts on international relations or Australia's national interests matters of common

[1] See paragraphs [19], [31], [32] and [35] of the Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*, filed on 25 January 2005.
[2] Ibid, paragraphs [14]-[17] and [28]-[30].
[3] Ibid, paragraph [17].
[4] Ibid, paragraphs [17].
[5] The submissions of the Attorney-General go beyond what would normally be the role of an *amicus curiae*; however, the applicant has no objection to the Attorney-General being given leave to intervene for the purpose of making submissions in response to the questions raised by the Court.
[6] See *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 148-149, paras [51]-[55], noting s 145 of the *Evidence Act 1995*.

Environmental Defenders Office (NSW) Ltd
Level 9, 89 York Street
Sydney NSW 2000
Tel: (02) 9262 6989
Fax: (02) 9262 6998
Email: edonsw@edo.org.au

knowledge that the Court may take judicial notice of in accordance with s 144 of the *Evidence Act 1995*.[7] At their highest, the submissions contain bare assertions unsupported by any evidence.

3. The peculiar effect of the assertions advanced by the Attorney-General is that the *making* of the laws prohibiting whaling by foreign nationals in the Australian Whale Sanctuary adjacent to the AAT by the Parliament of the Commonwealth does not give rise to international disagreement or harm Australia's international relations, but the *enforcement* of those laws will do so.

4. The applicant's response to the Attorney-General's submissions is that the Parliament of the Commonwealth, by prohibiting whaling by foreign nationals within the Australian Whale Sanctuary adjacent to the AAT, clearly contemplated that those laws would be enforced against foreign nationals and that this would be acceptable to Australia's international relations. To do otherwise is to subvert the clear intent of the Parliament displayed in ss 5 and 224-230 of the *Environment Protection and Biodiversity Conservation Act 1999* ("**EPBC Act**").

5. In 1992, in reporting on Australian law in Antarctica to the Parliament, the House of Representatives Standing Committee on Legal and Constitutional Affairs stated that (emphasis added):[8]

> "2.31 The Committee is of the view that there exists a strong misconception about the scope of Article 4(2) of the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees … that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.
>
> 2.32 **It is both in Australia's sovereign interests and consistent with Australia's obligations under the Antarctic Treaty to extend and apply Australian law to foreign nationals in the Australian Antarctic Territory** who are not otherwise exempted by Article 8(1) of the Antarctic Treaty.[9]
>
> 2.33 This conclusion is consistent with the stated intention of the Australian Government at the time of implementing the Antarctic Treaty obligations in Australian legislation. In speaking on the second reading of the *Antarctic Treaty Bill* 1960 the Hon Fredrick Osborne, the then Minister for Air, stated:
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> > In exercise of her sovereignty Australia has applied a complete code of law to the Australian Antarctic Territory. That law is, in our view, applicable to all persons in the Territory, and a breach of the criminal law, for example, would be punishable in an Australian court.[10]
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> RECOMMENDATION 1
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> **The Committee recommends 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.**
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> …

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[7] Section 144 has replaced the common law doctrine of judicial notice in proceedings to which the *Evidence Act 1995* applies: *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247 at [14].

[8] 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), pp 15-18.

[9] Article 8(1) of the *Antarctic Treaty* provides for designated observers & scientific exchange personnel.

[10] House of Representative Debate, 28 September 1960, p 1432.

> 3.10 **The Committee is greatly concerned at the practice of not applying to foreign nationals Commonwealth legislation expressly relating to the Australian Antarctic Territory, particularly in relation to legislation which implements Australia's international obligations in Antarctica. Not only is it in contravention of the express intentions of the Parliament but it, as least arguably, sits ill with Australian claims to sovereignty over the Territory.**
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> …
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> RECOMMENDATION 2
>
> The Committee recommends that the *Fisheries Management Act* 1991 be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the Australian Antarctic Territory, so as to extend Australian jurisdiction to the activities of non-Contracting Parties to the Antarctic Treaty.[11]
>
> 3.12 The Committee considers that Australia's claims to sovereignty are not diminished by Australia allowing other Contracting Parties to enforce their laws against their own nationals in the Australian Antarctic Territory, **however, where offences occur and such law enforcement is not applied Australia should enforce its own jurisdiction in the Territory.**"

6. This report may be referred to as extrinsic material in interpreting the intended application of ss 5 and 224-230 of the EPBC Act as a relevant report of a committee of the Parliament that was made before the time when the Act was enacted: s 15AB(2)(c) *Acts Interpretation Act 1901*.

7. In addition, it is significant that the Parliament has provided standing to a class of persons including the applicant in s 475 of the EPBC Act to seek an injunction to restrain a breach or other contravention of the Act, thereby by-passing the Attorney-General's traditional discretion to grant his *fiat* to support a relator action to enforce public laws.[12]

8. As a wider policy consideration, to adopt as a criteria for allowing service of proceedings outside Australia a principle that in cases with diplomatic implications the agreement of the Attorney-General should be obtained that the proceedings are acceptable in terms of Australia's international relations, would be subversive to the role of the Court. As Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ stated in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 47 ("the Spycatcher Case"), after noting the likelihood of international embarrassment if the Attorney-General was required to certify that a foreign State seeking to enforce a government interest in an Australian court is a friendly State:

> "… 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."

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[11] This recommendation was subsequently adopted by Parliament in the *Maritime Legislation Amendment Act 1994* (Act No. 20 of 1994). The extension of the Australian Whale Sanctuary to this area under the EPBC Act follows this recommendation also.

[12] No doubt the Attorney-General and the Commonwealth Director of Public Prosecutions retain a discretion whether to prosecute any person for a breach of Commonwealth law that the courts will not normally question: *Hinchcliffe v Commissioner of Police of the Australian Federal Police* (2001) 118 FCR 308 at [33]-[35] per Kenny J.

9. The Attorney-General's position is, quite simply, entirely contrary to the effect of ss 5, 224-230 and 475 of the EPBC Act and it would be a perverse result if the Court were to exercise its discretion as the Attorney-General submits should occur.

10. In response to the Attorney-General's submissions[13] that the declaration and injunction sought are not capable of practical enforcement, the applicant repeats its earlier submissions[14] that 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.[15] 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 Government of Japan will ignore the declaration by granting further permits to the respondent in such a manner as to allow a contravention of Australian domestic laws. 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.

11. In response to the Attorney-General's submissions[16] regarding the meaning of "in the Commonwealth" in the Order 8 rule 1(a), (b) and (j) of the Rules, the applicant agrees with the Court's findings on this issue.[17]

PART 2: REPLY TO THE COURT'S QUESTIONS

12. The Court has requested further submissions on:[18]

    (a) why, notwithstanding Article 7 of Annex II of the Madrid Protocol, Article 3 of Annex II may be answered by a permit issued under Article VIII of the Whaling Convention; and

    (b) the relationship between Articles 3 and 7 of Annex II of the Madrid Protocol and s 7(1) and the definition of "recognised foreign authority" in the *Antarctic Treaty (Environment Protection) Act 1980* ("**AT(EP) Act**")?

13. While the Attorney-General has not made specific submissions in response to these questions, his submissions note at paragraph [31] that he does not consider that the JARPA is a "recognised foreign authority" for the purposes of s 7(1) of the AT(EP) Act.

14. To provide a specific response to the questions, the first answer is that as a matter of fact the permits issued under Article VIII of the Whaling Convention have not been treated internationally as constituting approval under Article 3 of Annex II of the Madrid Protocol. The Annual Reports for 1999/2000, 2000/2001, 20001/2002 and

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[13] At paragraphs [23]-[28].
[14] In the Applicant's Outline of Submissions for leave to serve outside the jurisdiction (12 November 2004) at [31].
[15] *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.
[16] At paragraphs [35]-[42].
[17] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at paras [19] and [20].
[18] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at paras [51] and [56].

2002/2003 submitted by the Government of Japan under Article 17 of the Madrid Protocol do not include any reference to the respondent's whaling within the Antarctic (i.e. south of Latitude 60º South) during those years.[19] International practice is relevant to interpreting the Madrid Protocol in accordance with Article 31(3)(b) of the *Vienna Convention on the Law of Treaties 1969*.

15. The second answer restates the applicant's primary submission about s 7(1) of the AT(EP) Act. There is no question that the JARPA is not issued under Article 3 of Annex II of the Madrid Protocol or that the JARPA is not intended to be regarded as a permit under that provision. Even if the JARPA were issued under Article 3 of Annex II or the Government of Japan were to issue a separate permit to the respondent for its whaling under Article 3 of Annex II of the Madrid Protocol, that permit would not be a "recognised foreign authority" for the purposes of s 7(1) of the AT(EP) Act. The reason for this is that the Madrid Protocol imposes no obligations on Contracting Parties to the Whaling Convention in relation to whaling in Antarctica. It would require legislative amendment to s 7(1) of the AT(EP) Act for the JARPA or a separate permit issued under Article 3 of Annex II for the respondent's whaling to constitute a "recognised foreign authority."

16. For these reasons (in addition to the concession of this point by the Attorney-General) the JARPA is not a permit under Article 3 of Annex II of the Madrid Protocol and is not a "recognised foreign authority" for the purpose of s 7(1) of the AT(EP) Act.

Purported compliance with Article VIII of the Whaling Convention

17. The Court has also requested clarification on whether leave should be granted to serve the originating process in its present form containing, as it does, the phrase "purported to be done" in paragraph [7] of the statement of claim.[20]

18. It is perhaps sufficient to make clear that the applicant does not allege in these proceedings that:

    (a) the issue of the JARPA by the Government of Japan was not lawfully done under Article VIII of the Whaling Convention; or

    (b) the respondent's whaling is not in conformity with the JARPA.

19. If considered appropriate by the Court, the applicant would of course be prepared to amend the statement of claim by deleting the words "purported to be" in paragraph [7] of the statement of claim.

Stephen Gageler SC and Chris McGrath
Counsel for the applicant
10 February 2005

[19] The Annual Reports of the Government of Japan under Article 17 of the Madrid Protocol between 1999/2000 and 2002/2003 are annexed to the affidavit of Jessica Bernadette Simpson (3 February 2005).
[20] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at para [68].