

Injunction granted in Japanese Whaling Case

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Introduction

The Federal Court has declared Japanese whaling in Australia's Antarctic waters is unlawful under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and granted an injunction restraining it. The result is the culmination of a series of decisions since 2004 in the Japanese Whaling Case that have navigated the complex interplay between international law and Australian domestic law applying to Antarctica and whaling.²

Despite the declaration and injunction issued in this case, ultimately enforcement of the prohibition against whaling in the Australian Whale Sanctuary (AWS) under the EPBC Act rests on the shoulders of the new Australian Government. The Australian Government could stop the whaling by the respondent Japanese company by ordering an Australian customs or fisheries vessel to arrest the Japanese whaling company's vessels operating in the AWS adjacent to Antarctica. Prior to being elected and prior to the injunction being issued by the Federal Court, the Australian Labor Party committed itself to "enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary", stating:³

- It is illegal under the Environment Protection and Biodiversity Conservation Act 1999 ... to kill or injure a whale within the Australian Whale Sanctuary. Since 1999, more than 400 whales have been killed in the Australian Whale Sanctuary without a single prosecution, despite these actions being illegal under Australian law.
- The Attorney-General, Phillip Ruddock, tried to block an action by the environment group Humane Society International to get Federal Court enforcement of Australian law, arguing that the prosecution of Japanese whalers would "create a diplomatic disagreement with Japan".
- A Federal Labor Government will enforce Australian law prohibiting whaling within the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory, penalising any whalers found to have breached Australian law.

In January 2008 the Australian Government dispatched the customs vessel, *Oceanic Viking*, to monitor Japanese whaling but stopped short of intercepting and arresting the Japanese vessels. The new Attorney-General also removed of the previous government's opposition to HSI's litigation but it remains to be seen whether the new Australian Government will fulfil its election commitment to enforce Australian law against the whalers.

The litigation

The case began in late 2004 when the Humane Society International Inc (HSI) commenced proceedings in the Federal Court against the Japanese company that conducts whaling in waters adjacent to Antarctica, including in the Australian Whale Sanctuary

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² The primary citations of the series of decisions in this case are: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3; [2008] FCA 36. Background documents for this case, including court documents, submissions, affidavits and maps, are available at <http://www.envlaw.com.au/whale.html> (viewed 23 January 2008).

³ Rudd K and Garrett P, "Federal Labor's Plan To Counter International Whaling" (ALP Media Statement, 19 May 2007), available at <http://www.alp.org.au/media/0507/msehnl00190.php> (viewed 23 January 2008).

(AWS) adjacent to the Australian Antarctic Territory (AAT). As the Japanese company has no registered office in Australia, to proceed against it HSI needed the permission (“leave”) of the Federal Court in accordance the *Federal Court Rules* and the principles of private international law.

Justice Allsop refused to grant leave to serve the originating process after the then Attorney-General, Phillip Ruddock MP, submitted to the Court that allowing the case to proceed would cause a diplomatic incident.⁴ HSI succeeded in its appeal against this refusal and was granted leave to serve the originating process. The Full Court held that diplomatic and political considerations were irrelevant where, as here, the Parliament has provided that the action is justiciable in an Australian court.⁵ The majority of the Full Court, Black CJ and Finkelstein J, also set out important principles for “public interest injunctions”. Broadly speaking the principle that emerges from the majority judgment is that the Federal Court may grant an injunction under section 475 of the EPBC Act even if it may prove impossible to enforce where it serves the public interest objects of the Act by having an educative effect.⁶ These principles ultimately bound the trial judge in the case, Allsop J,⁷ and led to the declaration and injunction being granted despite his earlier concerns about the diplomatic and political implications of the proceedings and his findings on the futility of the relief sought.⁸

After being granted leave to serve the originating process, HSI sought to effect service through the diplomatic channel as normally required by the *Federal Court Rules*. However, this failed due to the Government of Japan refusing to serve the respondent company because of the government’s non-recognition of Australia’s jurisdiction over Antarctic waters. HSI then sought and was granted an order for substituted service of the originating process by post and personal service.⁹

After service was effected by substituted service the matter came on for trial before Allsop J. The respondent Japanese whaling company did not appear at the trial and Allsop J proceeded to hear the matter in September 2007. At the trial Allsop J sought confirmation of the Attorney-General’s views on the proceedings. In October 2007 the then Attorney-General, Philip Ruddock MP, confirmed his opposition to the proceedings. However, following the Australian federal election in November 2007, the new Attorney-General, Robert McClelland MP:¹⁰

requested the Court not to place any reliance upon the views conveyed to the Court on behalf of the previous Attorney-General. The Commonwealth Government believes that the matter would best be considered by the Court without the Government expressing a view.

Allsop J did not acknowledge the changed views of the new Attorney-General in his reasons for judgment but ultimately granted the declaration and injunction sought by HSI pursuant to the principles for public interest injunctions stated by the majority of the Full Court. HSI has since effected substituted service of the orders, thereby enlivening the potential for future contempt proceedings should the Japanese whaling company refuse to comply with the injunction.

⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664.

⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425 at 430 [13] per Black CJ and Finkelstein J with whom Moore J agreed on this point (at 434 [38]) though dissenting on the question of futility.

⁶ See McGrath C, “Japanese Whaling Case appeal succeeds” (2006) 23 EPLJ 333 at 333-335.

⁷ In accordance with the docket system used in the Federal Court, after the appeal the matter was returned to Allsop J for hearing of the trial.

⁸ In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664.

⁹ See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

¹⁰ Correspondence, dated 12 December 2007, written on behalf of the new Attorney-General to Allsop J.

Enforcement of the injunction

Enforcement of the injunction against the Japanese whaling company will be difficult and without the help of the Australian Government probably impossible, emphasising the importance of the change in the government's attitude to the case. The company's office is located in Japan and it has no assets outside Japan other than its vessels during whaling voyages. The injunction cannot be enforced in Japan because it is a non-money order and contrary to public policy under Japanese law.¹¹

If, as seems likely, the Japanese whaling company ignores the declaration and injunction and continues to whale within the AWS, HSI can bring contempt proceedings against it under the *Federal Court Rules*. The main penalty that the Court can impose is to fine the company; however, the fine can be enforced through arrest and sequestration (i.e. sale of property to satisfy a judgment) of the respondent's whaling vessels while operating in Australian waters. In practice, arrest and sequestration of the vessels would be effected by a Federal Admiralty Marshal, an officer of the Federal Court acting under the *Admiralty Rules* 1988 (Cth). In the unlikely event that one of the Japanese whaling vessels enters an Australian mainland port, HSI could seek an order from the Federal Court for arrest and sequestration of the vessels. Arrest can occur within Australian waters adjacent to Antarctica, but the practical difficulties of such a course are obviously immense and without the support of the Australian Government impracticable. The Australian Government could stop the whaling by ordering an Australian customs or fisheries vessel to arrest the Japanese whaling vessels operating in the AWS adjacent to Antarctica.¹²

Policy considerations

Despite the admonition of the Full Federal Court against courts considering political and diplomatic considerations and the declaration and injunction ultimately granted by the Federal Court in this case, diplomatic considerations rightly affect the Australian Government's actions in the international arena and in relation to Antarctica.

Consequently, it is necessary to consider at a political and diplomatic level how can Australia pursue its multiple objectives of: maintaining Australian sovereignty in Antarctica; maintaining strong and cooperative diplomatic relationships with other nations concerned with Antarctica; and protecting whales? Australia has historically not enforced its laws against foreign nationals in the AAT or the adjacent exclusive economic zone (EEZ).

Some legal and policy commentators¹³ and, indeed, most other Contracting Parties to the Antarctic Treaty System (ATS) argue that Australia cannot and should not attempt to enforce

¹¹ See generally in relation to service and execution of judgments in Japan, MacDonald AJ, "Service of Australian originating process in Japan" (1992) 66 ALJ 810; and Gamertsfelder L, "Cross border litigation: exploring the difficulties associated with enforcing Australian money judgments in Japan" (1998) 17 *Australian Bar Review* 161.

¹² As has occurred on numerous occasions to enforce Australian fisheries laws in Australia's northern waters and sub-Antarctic islands. For instance, 280 illegal fishing boats, mainly Indonesian, were apprehended by Australian fisheries vessels between 2000 and 2005, including by the *Oceanic Viking* customs vessel: see Baird R, "Australian Government imposes custodial sentence for illegal foreign fishers" (2006) 23 EPLJ 253 at 254. Details of the arrest of the Russian flagged *Volga* for illegally fishing for Patagonian Toothfish in the Australian Heard Island/McDonald Island Exclusive Economic Zone are set out in *Olbers v Commonwealth of Australia (No 4)* (2004) 136 FCR 67; (2004) 205 ALR 432; [2004] FCA 229 (French J), a decision that was affirmed on appeal: *Olbers Co Ltd v Commonwealth of Australia* [2004] FCAFC 262; (2004) 212 ALR 325; (2004) 148 A Crim R 547 (Black CJ, Emmett and Selway JJ).

¹³ E.g. Davis R, "Taking on the whalers: The Humane Society International litigation" (2005) 24(1) UTasLR 78; Blay S and Bubna-Litic K, "The interplay of international law and domestic law: the case of Australia's

Australian laws against foreign nationals within the AAT and adjacent EEZ. However, the stronger legal view is that Australia can lawfully enforce its domestic laws against foreign nationals in the AAT and adjacent EEZ.¹⁴

On the basis that enforcing Australian laws against the Japanese whalers operating within Australia's EEZ adjacent to the AAT does not breach the ATS, it can be justified to other Contracting Parties without destabilising the ATS or jeopardizing their current cooperative approach. There are two reasons for this:¹⁵

- Firstly, the parties themselves excluded whaling from regulation under the ATS.
- Secondly, Australian domestic law recognises foreign authorities granted by parties to the ATS and, therefore, will not be enforced against activities taken pursuant to foreign authorities.

As the regulation of whaling in Antarctic waters was excluded from the ATS by the Contracting Parties themselves and Australian domestic law carefully recognises the general rule that Australian law will not be enforced against foreign nationals operating under an authority granted by a party to the ATS, Australia can justify enforcing its own laws against the Japanese whaling in this case.

To achieve the Government's objectives of maintaining Australian sovereignty in Antarctica, strong and cooperative diplomatic relationships with other nations concerned with Antarctica, and the protection of whales, the Government can base its long-term policy position concerning Japanese whaling in Antarctica on two levels:

- Supporting international cooperation under the ATS and not applying Australian law to matters regulated under the cooperative arrangements of the ATS (e.g. Russian drilling at Lake Vostok); but also,
- Applying Australian laws to matters outside the ATS, such as whaling and the activities of any nationals of non-parties (e.g. fishing vessels operating under flags of convenience).

Enforcing Australian law against Japanese whalers is consistent with this two-pronged approach to protecting the Antarctic environment.

Conclusion

The Japanese Whaling Case raises an intriguing interplay between national and international law, and some very difficult legal issues. The case is important at a number of levels, not least of which is the complete protection of whales in a massive body of ocean adjacent to Antarctica. Sovereignty over Antarctica and international politics simmer in the background. The Australian Government can lawfully fulfil its election commitment to "enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary" while meeting the diplomatic concerns of other Contracting Parties. Whether the Government fulfils its election commitment remains to be seen.

efforts to protect whales" (2006) 23 EPLJ 465; and Davis R, "Enforcing Australian law in Antarctica: the HSI litigation" [2007] MelbJIL 6.

¹⁴ See 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* (Australian Government Printing Service, Canberra, 1992), para 2.31, available at <http://www.aph.gov.au/house/committee/laca/antarctica.pdf> (viewed 26 February 2008); and McGrath C, "The Japanese Whaling Case" (2005) 22 EPLJ 250 at 250-254.

¹⁵ See McGrath, n 14, pp 251-252.