

Case Note

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2008] FCA 3

The Environmental Defender's Office (NSW) successfully represented the Humane Society International Inc (HSI) in their case against Japanese whaling company, Kyodo Senpaku Kaisha Ltd (Kyodo).

His Honour Justice Allsop granted HSI an injunction under s 475(7) of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), to restrain Kyodo from whaling in the Australian Whale Sanctuary in breach of ss 229-330 of the EPBC Act.

The judgment is the culmination of over four years of legal action by HSI to prevent whaling in the Sanctuary. Due to the inherent difficulties of conducting international litigation, the case involved numerous preliminary Court appearances to establish the jurisdiction of the Court and the right of HSI to serve documents on Kyodo.

[Humane Society International Inc v Kyodo Senpaku Kaisha Ltd\[2004\] FCA 1510](#)
[Humane Society International Inc v Kyodo Senpaku Kaisha Ltd\[2005\] FCA 664](#)
[Humane Society International Inc v Kyodo Senpaku Kaisha Ltd\[2005\] FCA 678](#)
[Humane Society International Inc v Kyodo Senpaku Kaisha Ltd \[2007\] FCA 124](#)

This was the second time the matter had come before Justice Allsop. His Honour had previously denied leave for HSI to serve pleadings on Kyodo. The Full Court, in overturning His Honour's previous judgment, found "political" issues did not preclude the Court from exercising its jurisdiction to grant an injunction.

Kyodo is the owner of a number of ships that have conducted whaling in the Australian Whale Sanctuary pursuant to the Japanese Whale Research program. The evidence presented to the Court was that Kyodo had killed 3558 minke whales and 13 fin whales since 2000/2001. The evidence also indicated that Kyodo intended to commence whaling humpback whales in the 2007/2008 season.

The Court concluded that most of killings had occurred in the Australian Whale Sanctuary and Kyodo had no permit under the EPBC Act authorising these acts. This is a clear breach of sections 229-230 of the EPBC Act which make it an offence to kill, injure, take or possess a cetacean. Kyodo did not attend the Court hearing to contest these matters and the matter proceeded in their absence.

While the Court admitted that the lack of presence of Kyodo in Australia may make it difficult to enforce the orders sought unless the company entered Australia, His Honour found there was still a basis for making the orders. In particular, there is an important effect in ensuring the EPBC Act is enforced, despite the contentious jurisdictional issues. He also accepted that there was a range of remedies for enforcing an order of contempt, which may result from a breach of the injunction.

The EPBC Act has wide terms and applies to all of Australia including its external territories. This includes persons and vessels within waters claimed as Australia's

Exclusive Economic Zone (EEZ). The Australian Whale Sanctuary is found in the EEZ adjacent Australia's Antarctic Territory. Controversially, Australia's Antarctic Territory is formally recognised by only four nations, New Zealand, France, Norway and the United Kingdom. His Honour found that despite the fact that Japan disputed Australia's jurisdiction, the EPBC Act remained valid and applicable, as the sovereign claim by Australia was not a matter capable of being questioned in the Court: cf *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

The Court declared that Kyodo had killed, injured, taken and interfered with Antarctic minke whales and fin whales and injured, taken and interfered with humpback whales in the Australian Whale Sanctuary in contravention of ss 229, 229A, 229B and 229C of the EPBC Act, and had treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of ss 229D and 230 of the Act. The Court ordered that Kyodo be restrained from continuing such conduct unless permitted or authorised under ss 231, 232 or 238 of the EPBC Act. HSI will be serving the orders on Kyodo and seeking to ensure that the injunction is enforced.

The EDO and HSI are grateful for the assistance of Stephen Gageler SC and Chris McGrath of Counsel who argued the case before the Court on a pro bono basis.