

**FEDERAL COURT OF AUSTRALIA**

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

**HUMANE SOCIETY INTERNATIONAL INC v KYODO SENPAKU KAISHA LTD  
NSD 1519 of 2004**

**ALLSOP J  
27 MAY 2005 (Corrigendum 27 May 2005)  
SYDNEY**

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

**NSD 1519 of 2004**

**BETWEEN:                   HUMANE SOCIETY INTERNATIONAL INC  
                                  APPLICANT**

**AND:                        KYODO SENPAKU KAISHA LTD  
                                  RESPONDENT**

**JUDGE:                    ALLSOP J**

**DATE OF ORDER:        27 MAY 2005 (Corrigendum 27 May 2005)**

**WHERE MADE:            SYDNEY**

**CORRIGENDUM**

1.       The second word “were” in the fourth line of paragraph 22 on page 8 be replaced with the word “was”. Thus the sentence should read “None of these matters was the subject of factual dispute.”

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Corrigendum herein of the Honourable Justice Allsop.

Associate:

Dated:                    27 May 2005

# FEDERAL COURT OF AUSTRALIA

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

**PRACTICE and PROCEDURE** – Service out of the jurisdiction – prima facie case shown within Order 8 rule 1 of the Federal Court Rules – discretionary considerations, including the international political nature of the issues and the question of futility, sufficient not to grant leave – acceptance of statements of views of Executive Government as relevant to discretionary considerations – non-justiciability of expressions of views of Executive Government on foreign affairs.

*Baker v Carr* 369 US 186 (1962) referred to  
*Buttes Gas and Oil v Hammer (No 3)* [1982] AC 888 referred to  
*El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 209 ALR 448; [2004] 2 Lloyd's Rep 537 referred to  
*Gerhardy v Brown* (1985) 57 ALR 472 applied  
*Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2002] 2 AC 883 referred to  
*Minister for Arts, Heritage and Environment v Peko Wallsend Ltd* (1987) 15 FCR 274 applied  
*Petrotimor v Commonwealth* (2003) 126 FCR 354 applied  
*R v Bow Street Magistrates; Ex parte Pinochet No 1* [2000] 1 AC 61 referred to  
*R v DPP; Ex parte Kebilene* [2000] 2 AC 326 referred to  
*Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 47 discussed  
*Secretary of State v Rehman* [2003] 1 AC 153 referred to

Koh “The Exclusive Economic Zone” 30 *Malaya Law Review* 1 in Caminos (Ed), *The Law of the Sea* (Ashgate 2001)

Lindell “Judicial Review of International Affairs” in Opeskin and Rothwell (Eds) *International Law and Australian Federalism*

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**JUDGE:                    ALLSOP J**

**DATE OF ORDER:        27 MAY 2005**

**WHERE MADE:            SYDNEY**

**THE COURT ORDERS THAT:**

1. To the extent necessary Parts 2.2, 3.2 and 3.3 of the *Evidence Act 1995* (Cth) not apply to the submissions filed on behalf of the Attorney-General as *amicus curiae* to prove the facts referred to therein as to the state of non-recognition of Australia's Antarctic Territory and Antarctic EEZ and the conduct of the Australian Executive in dealing with conduct of parties within the Antarctic EEZ and said submissions be marked exhibit 1.
2. The application for leave to serve the originating process on the respondent in Japan be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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

**NSD 1519 of 2004**

**BETWEEN:                   HUMANE SOCIETY INTERNATIONAL INC  
                                  APPLICANT**

**AND:                         KYODO SENPAKU KAISHA LTD  
                                  RESPONDENT**

**JUDGE:                     ALLSOP J**

**DATE:                      27 MAY 2005**

**PLACE:                     SYDNEY**

**REASONS FOR JUDGMENT**

- 1 I refer to my reasons dated 23 November 2004 ([2004] FCA 1510). I will not repeat matters (including definitions) there set out. These reasons should be read in conjunction with those reasons. Since November, I have received submissions made on behalf of the Attorney-General of the Commonwealth as *amicus curiae*. The applicant has responded to those submissions with written submissions of its own.
  
- 2 The submissions of the Attorney-General raised a number of issues with which it is necessary to deal, these being:
  - (a) the nature of Australia's sovereignty over the Australian Antarctic EEZ and the grounds available under the relevant provisions of Order 8 Rule 1 of the Federal Court Rules, including the meaning of the phrase "in the Commonwealth" therein;
  - (b) the nature of Australia's claims to the Australian Antarctic Territory and the adjacent EEZ and the lack of international recognition of those claims;
  - (c) the likely consequences of any attempted curial enforcement of the EPBC Act upon Australia's international relations with Japan and other countries;
  - (d) the Commonwealth Government's views as to the appropriate means of dealing

with activities in the Antarctic EEZ, such as those apparently conducted by the respondent, which may be seen to be in contravention of the EPBC Act; and

(e) the futility of any order permitting service in Japan.

3 The submissions of the applicant dealt with these matters as well as the two matters in respect of which I sought further assistance in my reasons of November:

(a) whether the permits issued by Japan to the respondent, apparently under Article VIII of the Whaling Convention, cannot also be seen to be permits under Article 3 rules 1 and 2 of Annex II to the Madrid Protocol; and

(b) the form of the pleading and whether it was pregnant with the proposition that the activities of the respondent exceeded what was allowed for by the relevant permit issued to it by the Government of Japan.

4 At the centre of the submissions on behalf of the Attorney-General are the international law issues attending Australia's claim to the Antarctic EEZ. There is no dispute that as a matter of Australian municipal law the Australian Antarctic Territory (that is Australian Antarctica "proper") is an external territory of Australia and the relevant adjacent waters of the Australian Antarctic Territory are part of Australia's Antarctic EEZ. Accordingly, there is no dispute that, as a matter of Australian municipal law, the provisions of the EPBC Act apply to foreigners and foreign flagged vessels (such as the respondent and its vessels) in the waters concerned.

5 The submissions on behalf of the Attorney-General reveal that Australia's claims to sovereignty over the Australian Antarctic Territory (along with the similar territorial claims of Argentina, Chile, New Zealand, Norway and the United Kingdom to different parts of the continent) are recognised by only a small number of countries. Formal recognition of Australia's claim is limited to four countries, including some of the other claimants to Antarctic territory: Norway, New Zealand, France and the United Kingdom. Japan does not recognise Australia's claim of territorial sovereignty over the Australian Antarctic Territory.

6 The legal framework (in terms of public international law) for activities in Antarctica that has been put in place to avoid arguments over fundamental claims to territorial sovereignty is found in the *Antarctic Treaty 1959*. The *Antarctic Treaty*, to which there are 28 Consultative Parties (both Australia and Japan being parties), provides (in Article IV) for the preservation of the positions of Parties in relation to their claims, or their opposition to claims of others, of

territorial sovereignty.

7 Article VI of the *Antarctic Treaty* provides:

*The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present 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 that area.*

8 The Australian domestic legislation concerning the Antarctic EEZ must (subject to any contrary intention in the domestic statute) be read conformably with the international convention providing the foundation for the legislation: *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 209 ALR 448; [2004] 2 Lloyd's Rep 537 at [142] and the cases there referred to. The extension of territorial claims for control or some form of sovereignty to adjacent maritime waters is now regulated under international law in the *United Nations Conventions on the Law of the Sea*, done at Montego Bay on 10 December 1982 ("UNCLOS"). UNCLOS provides for the notion of EEZs up to 200 nautical miles beyond baselines of the coastal States from which the breadth of territorial seas are measured: see Article 57 of UNCLOS. Article 55 of UNCLOS recognises the fact that the claims for sovereignty in an EEZ are to be seen as balanced against the rights of other States and are to be found within the compromises embodied within the terms of UNCLOS. Article 55 reads:

*Specific legal regime of the exclusive economic zone.*

*The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.*

9 I referred in my earlier reasons to Article 65 of UNCLOS (see [54]). The balance between coastal States and other States can be seen in the terms of Articles 56 and 58 of UNCLOS which are in the following terms:

*Article 56*

*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*

1. *In the exclusive economic zone, the coastal State has:*

(a) *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-*

- bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;*
- (b) *jurisdiction as provided for in the relevant provisions of this Convention with regard to:*
- (i) *the establishment and use of artificial islands, installations and structures;*
  - (ii) *marine scientific research;*
  - (iii) *the protection and preservation of the marine environment;*
- (c) *other rights and duties provided for in this Convention.*
2. *In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.*
3. *The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.*

...

#### *Article 58*

##### *Rights and duties of other States in the exclusive economic zone*

1. *In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.*
2. *Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.*
3. *In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.*

10 Article 87 referred to in Article 58 paragraph 1 is the fundamental right of the freedom of the high seas. Article 89 provides that no State may validly purport to subject any part of the high seas to its sovereignty.

11 For a discussion of the nature of the limitations on the notion of sovereignty as used in

Article 56 and in respect of the EEZ, see Koh “The Exclusive Economic Zone” 30 *Malaya Law Review* 1, reproduced in Caminos (Ed), *The Law of the Sea* (Ashgate 2001) p 155.

12 Thus, as it was submitted on behalf of the Attorney-General, the claim of Australia to the Antarctic EEZ is not one of sovereignty in the full sense over the waters adjacent to the Antarctic Territory (except for the territorial sea), but of claims (reflected in domestic legislation) to exercise the rights of exploitation, conservation, management and control, and enforcement thereof, given to coastal States by UNCLOS. (As to enforcement, see Article 73 of UNCLOS.) The recognition of the limitations (short of full claims to sovereignty) of Australia’s claims to the Antarctic EEZ becomes important in assessing whether for the purposes of Order 8 Rules 1(a), (b) and (j) the acts of the respondent and the contraventions of the EPBC Act took place “in the Commonwealth”. I will return to this issue. For the moment, it only needs to be recognised that Japan, by its non-recognition of the claim by Australia to sovereignty over the Antarctic Territory, does not recognise Australia’s claims to the Antarctic EEZ and thus to Australia’s claim to entitlement, in international law, to pass domestic legislation such as the EPBC Act. As far as Japan is concerned, the Australian Antarctic EEZ is the high seas which is not subject to any legitimate control by Australia under UNCLOS and domestic legislation provided for thereby (such as the EPBC Act).

13 A recognition of the above has influenced the views, and affected the conduct, of the Australian Executive Government in the following manner described in the submissions on behalf of the Attorney-General. First, the Government considers that the Government of Japan would regard any attempt by Australia to enforce Australian law against Japanese vessels and its nationals in the Antarctic EEZ to be a breach of international law on Australia’s part and would give rise to an international disagreement with Japan. Secondly, enforcement of Australian domestic law against foreigners in the Antarctic EEZ, based as it is on Australia’s claim to territorial sovereignty to the relevant part of Antarctica, can be “reasonably expected to prompt a significant adverse reaction from other Antarctic Treaty Parties”. Thirdly, up to this point, the Australian Government has not enforced the laws of the Commonwealth in Antarctica against nationals of other States which are Parties to the Antarctic Treaty, except where there has been submission to Australian law, for example by applying for permits under applicable Australian law.

14 The submissions on behalf of the Attorney-General also stated that Australia’s claim to the

Antarctic Territory, though not widely recognised, has not yet been disputed in an international court or tribunal (the avoidance of such disputes having been one aim of Article IV of the *Antarctic Treaty*). It was also stated that an assertion of jurisdiction by an Australian court over claims concerning rights and obligations found in the EPBC Act, in the view of the Government, would or may provoke an international disagreement with Japan, undermine the status quo attending the *Antarctic Treaty*, and “be contrary to Australia’s long term national interests.”

15 For the above reasons, it appears that the Commonwealth has not sought to intercept, board or arrest Japanese vessels engaged in whaling activities adjacent to the Antarctic Territory and in the Antarctic EEZ.

16 It was submitted by the Attorney-General that, whilst the EPBC Act applied as a matter of domestic legislation, the Executive Government of the Commonwealth considers what it sees (for the above reasons) as the more appropriate pursuit of diplomatic solutions in relation to activities (at least of this kind) by foreign vessels in the Antarctic EEZ to be a key consideration to be taken into account in the question of leave in these proceedings.

17 Two matters are important to note in respect of the above. First, (as could not be the case) the submissions put on behalf of (and so by) the Attorney-General did not purport to direct this Court in any way in the exercise of the judicial power of the Commonwealth arising under Chapter III of the Constitution in the Court’s role as the third, and independent, arm of government (using that last word in the wider sense than it has been hitherto used in these reasons as referring to the Executive Government provided for under Chapter II of the Constitution). Secondly, the matters to which I have referred were put in submissions filed pursuant to the invitation which I gave in November 2004. No affidavit was filed seeking to prove the views of the Government, the approach and conduct of the Executive and the Government’s concerns as to the effects on Australia’s long term national interests and relations with other nation States, including Japan. No certificate was given by or on behalf of the Commonwealth with respect to a matter of foreign affairs.

18 The applicant submitted that because of the absence of an affidavit or a certificate, I could have no regard to these submissions. Judicial notice cannot be taken of these matters, it was submitted.

19 I reject that submission. The submissions of the Attorney-General stated the views and concerns of the Executive Government. These are matters that are, at least in the context in which they arise here, non-justiciable. At least in the framework in which the issues arise here, it is not for this Court to decide as a fact whether or not Japan will view a step taken by Australia as a breach of international law, or whether or not Australia's long term national interests are best served by one course or another, or whether or not the use of the EPBC Act will endanger the diplomatic balance underlying the *Antarctic Treaty* or Australia's claims to sovereignty in Antarctica. These are questions, at least in the context in which they present themselves here as relevant considerations to be weighed in the exercise of a judicial discretion under Order 8, outside the purview of the Court: *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 47, 367-73. On any view as to how one analyses the jurisprudential basis of non-justiciability (see *Re Ditfort* and Lindell "Judicial Review of International Affairs" in Opeskin and Rothwell (Eds) *International Law and Australian Federalism* pp 160-209) assessment of the conduct of foreign affairs (including the formation of relevant views about such matters and Australia's interests in such matters) will generally be outside the judicial function. I say "generally" because of the type of qualification adverted to by Brennan J in *Baker v Carr* 369 US 186, 211 (1962) and because of the need, always, to understand the operation of Chapter III of the Constitution and the context of the arising of the issue in question in the manner discussed by Gummow J in *Re Ditfort*.

20 The Chapter III context here is the decision whether or not to grant leave to serve process outside the jurisdiction. It is relevant to the exercise of the judicial power of the Commonwealth in that respect to understand the views of the Executive Government in weighing the possible consequences thereof. A consideration of those views does not involve a judicial enquiry as to the wisdom or correctness of those views. This is so because of the character of the subject matter of those views – international and foreign relations insofar as they may affect Australia and her interests. See generally: *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd* (1987) 15 FCR 274, 278-79 (per Bowen CJ), 281 (per Sheppard J), 307, 308 (per Wilcox J); *Buttes Gas and Oil v Hammer (No 3)* [1982] AC 888, 937-38; *Gerhardy v Brown* (1985) 57 ALR 472, 523-24; *Petrotimor v Commonwealth* (2003) 126 FCR 354, 361 *et seq.* See also, in somewhat different contexts, *R v Bow Street Magistrates; Ex parte Pinochet (No 1)* [2000] 1 AC 61; *Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2002] 2 AC 883; *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 381; and *Secretary of State v Rehman* [2003] 1 AC 153.

- 21 To the extent that the submissions set out the understandings, views and concerns of the Executive Government of the Commonwealth of Australia, the submissions are adequate to inform me of those things. There was no suggestion that the submissions did not come with the authority of the Attorney-General and the Executive Government. They were signed by counsel, including Mr Burmester QC, on behalf of the Attorney-General, and filed by the Australian Government Solicitor. The submissions were a way of informing the Court of matters, which, on their face, were matters for the Executive Government, and not matters for investigation by the Court: *In re Westinghouse Uranium Contract* [1978] AC 547, 650-51; *Shaw Saville Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 364; and *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 51.
- 22 Apart from views of the Executive Government, the submissions covered factual issues – such as the state of non-recognition of Australia’s claims. They also dealt with the procedures that have been followed in the control of the Antarctic EEZ. None of these matters were the subject of factual dispute. Section 190(3) of the *Evidence Act 1995* (Cth) permits me to make an order that Parts 2.2, 3.2 and 3.3 of the *Evidence Act* not apply to the submissions as evidence of their contents and so to have recourse to the submissions on these factual matters. The submissions will be marked on the file exhibit 1. Though I have not heard the applicant on this course under the *Evidence Act*, it is ultimately unnecessary to do so because my view as to the exercise of discretion would be the same even if I did not take into account these factual issues. The submissions are without more an adequate and proper vehicle for disclosing to the Court the views and concerns of the Executive Government, without the need for the use of s 190(3) of the *Evidence Act*.
- 23 There is no fundamental constitutional issue here of any fact in question being a relevant and disputed constitutional fact: *Attorney General (Commonwealth) v Tse Chu-Fai* (1998) 193 CLR 128, 149. Nor is there any question of abrogation, or usurpation, of the judicial power or function.
- 24 The views of the Executive Government are relevant. The views concern subject matters which are within the province of the democratically elected Government of this country. The views of the Government may not be shared by the applicant. Nevertheless, they are about considerations that are peculiarly within the field of the Executive Government, as involving political judgments (using that phrase in the broad sense) and lacking legal criteria permitting

judicial assessment.

25 Those views have been laid before me. I propose to take them into account.

26 In taking them into account, I recognise that Parliament has spoken in the EPBC Act and provided an entity such as the applicant with standing to bring these proceedings. If the respondent were present in Australia the EPBC Act would plainly apply to it and no issue would arise as to jurisdiction. But it is not present. Leave, involving the exercise of a discretion, is required to permit service in a foreign country.

27 Very relevant to the exercise of that discretion are the kinds of consideration dealt with by the Attorney-General's submissions. I can conclude that Japan will view service or any attempt at service in Japan of process of this Court seeking orders under the EPBC Act as the attempted enforcement of rights that it does not recognise and as an interference with rights, under international law, of its nationals to ply the high seas and conduct themselves conformably with Japan's rights under international law, in particular by acting conformably with the Whaling Convention. I can conclude that the Australian Government has the view that the attempt to enforce the EPBC Act may upset the diplomatic status quo under the *Antarctic Treaty* and be contrary to Australia's long term national interests, including its interests connected with its claim to territorial sovereignty to the Antarctic. I can also conclude that Japan would take the view that an attempt to invoke the exercise of federal jurisdiction under the EPBC Act was itself contrary to international law and that the claim by this Court to the exercise of jurisdiction was based on an impermissible claim by Australia under international law to the Antarctic Territory. Of course, that would be no answer in this Court if the respondent were present within Australia when served or if there were to be voluntary submission by the respondent to the jurisdiction of the Court.

28 Any difficulties raised by the above would be compounded by the difficulty, if not impossibility, of enforcement of any court order. Enforcement (if the opportunity for such arose) may then place the Executive Government (as the branch of government which may assist in giving effect to and enforcing, in an administrative way, the orders of the Court by assisting in bringing people to court or levying execution on property) in the position of assisting the enforcement of an order of this Court (whether in contempt proceedings or otherwise) contrary to its view that such a course was in the best interests of this country by

reference to considerations that are non-justiciable.

- 29 The nature of the underlying issues also illuminates the international political framework and content of the dispute. It does not involve private rights of property or liberty. It involves the protection of whales (which, subject to UNCLOS, are owned by no one) from interference and killing. To express the matter thus is not intended, in the slightest, to diminish either the statutory right sought to be enforced or the views of those who guide the applicant. The whales being killed by the respondent are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them in the manner that has occurred is deeply wrong. These views are not shared by all. It may be assumed that they are shared by many Australians. It may be assumed that they are not shared by many in Japan, and in Norway and in other places. They are views which, at an international level, are mediated through the Whaling Commission and its procedures, by reference to the Whaling Convention and the views of nation States. They are views which contain a number of normative and judgmental premisses, the nature and content of which do not arise in any simple application of domestic law, but which do, or may, arise in a wider international context.
- 30 Weighed against this is the standing of the applicant and the material disclosing a clear prima facie case of contravention of Australian municipal law.
- 31 The issue for me is not only whether there appears to be a contravention of the EPBC Act, but also whether I should exercise a discretion to permit service of proceedings under the EPBC Act which seek a declaration and an injunction under domestic legislation dealing with these issues of international political controversy of the above character with the possible consequences referred to above and which are otherwise dealt with under international law and procedures.
- 32 The taking into account of the matters to which I have referred is central to the proper exercise of the discretion concerning leave to serve process claiming such orders against a Japanese company in Japan, in circumstances where Japan will view (what is in any event often called the “exorbitant” jurisdiction) the assumption of jurisdiction as baseless by international law.

33 It was accepted in submissions that a legitimate consideration to take into account in the exercise of the discretion was the lack of means of making any injunction effectual. See *Marshall v Marshall* (1888) 38 Ch D 330; *Kinahan v Kinahan* (1890) 45 Ch D 78, 84; and *cf Watson v Daily Record* [1907] 1 KB 853; and also *ACCC v Chen* (2003) 132 FCR 309 at [45] and *ACCC v Kaye* [2004] FCA 1363 at [199]–[202]. Relevant to such a consideration here are the facts that there is no apparent reason for any of the ships of the respondent (apart from requiring refuge) to call into Australian ports and that there is no place of business of the respondent in Australia. Also, as the issue is one for public law, it cannot be expected that Japanese courts would give effect to an injunction.

34 The making of a declaration alone (a course suggested by the applicant) might be seen as tantamount to an empty assertion of domestic law (by the Court), devoid of utility beyond use (by others) as a political statement.

35 Futility will be compounded by placing the Court at the centre of an international dispute (indeed helping to promote such a dispute) between Australia and a friendly foreign power which course or eventuality the Australian Government believes not to be in Australia's long term national interests.

36 In my view, in all the circumstances, I should not exercise a discretion to place the Court in such a position.

37 For these reasons, I do not propose to grant leave to serve originating process in Japan.

38 This course may perhaps be seen as having echoes of the monist (as opposed to dualist) theory of the relationship between municipal and international law (*cf* Brownlie *Principles of Public International Law* (6<sup>th</sup> edn) ch 2) or of a notion of *forum non conveniens* leading to the preference of international dispute resolution mechanisms over domestic mechanisms. Neither is a correct explanation for my reasons for refusing to exercise the discretion as asked. The case is an unusual one, in which futility is deeply intertwined with powerful non-justiciable considerations, tending to make it inappropriate to exercise the discretion.

39 Nothing that I have said would necessarily determine the question of the grant of leave if there were revealed material upon which I could conclude that the grant of leave was likely to

bring the respondent to the Court in circumstances tending to show that any orders made would be able to be enforced and thereby be effectual to enforce the EPBC Act.

40 This leaves a number of matters to comment upon. I sought further submissions upon whether the permit issued by the Japanese Government to the respondent was a permit under Article 3 of Annex II to the Madrid Protocol as well as being a permit issued under Article VIII of the Whaling Convention. The applicant has put on material which would indicate that Japan does not treat the permit as one issued under Article 3 of Annex II to the Madrid Protocol. Also, the Attorney-General conceded that the permit for scientific whaling issued to the respondent by the Government of Japan, was not a recognised foreign authority for the purpose of s 7(1) of the *AT(EP) Act*. This concession, together with the submissions of the applicant, permit me to conclude that the relevant permit is not under the Article 3 of Annex II of the Madrid Protocol for the purposes of this application. However, one could see an argument being put forward, at a level of disputed application, to the effect that the permit was both a permit under Article VIII of the Whaling Convention and Article 3 of Annex II to the Madrid Protocol.

41 I indicated in my reasons in November 2004 that I needed to be persuaded why the statement of claim should not be amended to exercise the words “purported to be done” in paragraph 7 of the Statement of Claim. The submissions of the applicant in effect concede that the statement of claim should be amended in this respect, if leave were to be given. If I had been of the view that leave should be given, I would have required that amendment. There is no evidence that the respondent has engaged in conduct outside the terms of its permit. Also, for the reasons I gave in November 2004, it seems to me that that consideration is irrelevant.

42 It is unnecessary to decide whether the Antarctic EEZ is, or can be seen as, “in the Commonwealth” for the purposes of three of the four bases sought to be raised under Order 8 rule 1. It is sufficient for me to say that the submissions of the Attorney-General appear to have great force and my conclusion to the contrary in my November reasons was made, as I expressly said, subject to hearing from the Attorney-General. If I had otherwise been minded to grant leave any view that the Antarctic EEZ was not “in the Commonwealth” would not have prevented leave being granted because of the availability of Order 8 rule 1(l).

43 For the above reasons, the application for leave to serve the originating process in Japan

should be dismissed.

44 It remains only for me to express my gratitude to counsel and solicitors for the applicant and for the Attorney-General for the most careful and helpful submissions put before me to assist me in the disposition of the matter.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 27 May 2005

Counsel for the Applicant: Mr S Gageler SC with Mr C McGrath

Solicitor for the Applicant: Environmental Defender's Office

Submissions on behalf of the Attorney-General for the Commonwealth as *amicus curiae* Mr H Burmester QC and Mr B Dubé

Date of Hearing: 16 November 2004

Date of last submission: 10 February 2005

Date of Judgment: 27 May 2005