

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2008] FCA 3 (15 January 2008)

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FEDERAL COURT OF AUSTRALIA

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

ALLSOP J
15 JANUARY 2008
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: 15 JANUARY 2008

WHERE MADE: SYDNEY

1. THE COURT DECLARES that the respondent has killed, injured, taken and interfered with Antarctic minke whales (*Balaenoptera bonaerensis*) and fin whales (*Balaenoptera physalus*) and injured, taken and interfered with humpback whales (*Megaptera novaeangliae*) in the Australian Whale Sanctuary in contravention of [sections 229, 229A, 229B and 229C](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth), (the "Act"), and has treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of [sections 229D and 230](#) of the Act, without permission or authorisation under [sections 231, 232 or 238](#) of the Act.

2. THE COURT ORDERS that the respondent be restrained from killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*), fin whale (*Balaenoptera physalus*) or humpback whale (*Megaptera novaeangliae*) in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Australian Whale Sanctuary, unless permitted or authorised under

[sections 231, 232 or 238](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth).

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

REASONS FOR JUDGMENT

Background

1 These reasons should be read against the background of the earlier judgments on service: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2004\] FCA 1510](#); (2004) 212 ALR 551, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2005\] FCA 664](#) (the two judgments containing my original reasons for refusing leave to serve outside Australia), *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2006\] FCAFC 116](#); (2006) 154 FCR 425 (the Full Court judgment), and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2007\] FCA 124](#) (my reasons on substituted service). I do not propose to repeat matters there discussed. Phrases and terms used in these reasons (if otherwise undefined or unexplained) are to be understood by reference to those earlier reasons.

2 This is an application under [section 475](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) (the "EPBC Act") for injunctive relief and accompanying declarations in relation to whaling activities undertaken by the respondent in the Australian Whale Sanctuary, in contravention of ss 229-230 of the EPBC Act. References to section numbers are to provisions of the EPBC Act unless otherwise stated.

3 The respondent is a company incorporated in Japan, which the evidence reveals is the owner of a number of ships from which it has engaged, and is likely in the future to engage, in the killing of various species of whales in the Australian Whale Sanctuary. The respondent has engaged in such activity pursuant to the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA), issued under Article VIII of the *International Convention for the Regulation of Whaling* (opened for signature 2 December 1946) 1948 ATS 18 (entered into force 10 November 1948) (the "Whaling Convention") and monitored by the International Whaling Commission ("IWC"). From 2005, a second, more extensive, whaling programme has been undertaken by the respondent under a special permit, known as JARPA II.

4 The applicant is a public interest organisation incorporated in New South Wales, whose stated objectives include promotion of the "enhancement and conservation of all wild plants and animals". The applicant qualifies as an "interested person" pursuant to s 475(7) of the EPBC Act, and is therefore entitled to bring an action claiming the relief sought: see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2004\] FCA 1510](#); (2004) 212 ALR 551 at [\[15\]](#).

The EPBC Act

5 The EPBC Act was enacted by the Commonwealth Parliament in 1999. The objects stated in s 3 of the EPBC Act include, amongst other things, the protection of the environment, particularly for matters of national environmental significance, conservation of biodiversity and heritage and promotion of ecologically sustainable development.

6 The EPBC Act is drafted in wide terms. It applies throughout Australia, including its external territories (s 5(1)), and to adjacent waters claimed as Australia's Exclusive Economic Zone. It applies to all persons and all vessels within territorial Australia and the exclusive economic zone, including persons who are not Australian citizens and vessels that are not registered Australian vessels: s 5(4).

7 One of the stated means by which the Parliament has expressed its intention to achieve the objects of the Act is by the establishment of the Australian Whale Sanctuary "to ensure the conservation of whales and other cetaceans": s 3(2)(e)(ii). The Australian Whale Sanctuary is established by s 225 of the EPBC Act, which is in the following terms:

(1) The Australian Whale Sanctuary is established in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters.

(2) The Australian Whale Sanctuary comprises:

(a) any waters of the sea inside the seaward boundary of the exclusive economic zone, except:

(i) waters, rights in respect of which have been vested in a State by [section 4](#) of the [Coastal Waters \(State Title\) Act 1980](#) or in the Northern Territory by [section 4](#) of the [Coastal Waters \(Northern Territory Title\) Act 1980](#); and

(ii) waters within the limits of a State or the Northern Territory; and

(b) any waters over the continental shelf, except:

(i) waters, rights in respect of which have been vested in a State by [section 4](#) of the [Coastal Waters \(State Title\) Act 1980](#) or in the Northern Territory by [section 4](#) of the [Coastal Waters \(Northern Territory Title\) Act 1980](#); and

(ii) waters within the limits of a State or the Northern Territory; and

(iii) waters covered by paragraph (a); and

(c) so much of the coastal waters of a State or the Northern Territory as are prescribed waters.

8 Sections 229 to 230 make it an offence to kill, injure, intentionally take or otherwise deal with a cetacean in the Australian Whale Sanctuary. The relevant provisions are as follows:

229 *Killing or injuring a cetacean*

(1) A person is guilty of an offence if:

(a) the person takes an action; and

(b) the action results in the death or injury of a cetacean; and

(c) the cetacean is in:

(i) the Australian Whale Sanctuary (but not the coastal waters, or a part of the coastal waters, of a State or the Northern Territory for which a declaration under section 228 is in force); or

(ii) waters beyond the outer limits of the Australian Whale Sanctuary.

(1A) Strict liability applies to paragraph (1)(c).

(2) The offence is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.

229A *Strict liability for killing or injuring a cetacean*

(1) A person is guilty of an offence if:

(a) the person takes an action; and

(b) the action results in the death or injury of a cetacean; and

(c) the cetacean is in:

(i) the Australian Whale Sanctuary (but not the coastal waters, or a part of the coastal waters, of a State or the Northern Territory for which a declaration under section 228 is in force); or

(ii) waters beyond the outer limits of the Australian Whale Sanctuary.

(2) Strict liability applies to paragraphs (1)(a), (b) and (c).

(3) The offence is punishable on conviction by a fine not exceeding 500 penalty units.

229B *Intentionally taking etc. a cetacean*

(1) A person is guilty of an offence if:

(a) the person takes, trades, keeps, moves or interferes with a cetacean; and

(b) the cetacean is in:

(i) the Australian Whale Sanctuary (but not the coastal waters, or a part of the coastal waters, of a State or the Northern Territory for which a declaration under section 228 is in force); or

(ii) waters beyond the outer limits of the Australian Whale Sanctuary.

(2) Strict liability applies to paragraph (1)(b).

(3) The offence is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.

(4) In this Act:

interfere with a cetacean includes harass, chase, herd, tag, mark or brand the cetacean.

trade a cetacean:

(a) includes:

(i) buy the cetacean, agree to receive it under an agreement to buy, agree to accept it under such an agreement or acquire it by barter; or

(ii) sell the cetacean, offer it for sale, agree to sell it, have it in possession for the purpose of sale, deliver it for the purpose of sale, receive it for the purpose of sale or dispose of it by barter for the purpose of gain or advancement; or

(iii) cause or allow any of the acts referred to in subparagraph (i) or (ii) to be done; but

(b) does not include export the cetacean from Australia or an external Territory or import it into Australia or an external Territory.

229C *Strict liability for taking etc. a cetacean*

(1) A person is guilty of an offence if:

(a) the person takes, trades, keeps, moves or interferes with a cetacean; and

(b) the cetacean is in:

(i) the Australian Whale Sanctuary (but not the coastal waters, or a part of the coastal waters, of a State or the Northern Territory for which a declaration under section 228 is in force); or

(ii) waters beyond the outer limits of the Australian Whale Sanctuary.

(2) Strict liability applies to paragraphs (1)(a) and (b).

(3) The offence is punishable on conviction by a fine not exceeding 500 penalty units.

229D *Treating cetaceans*

Treating unlawfully killed or taken cetaceans

(1) A person is guilty of an offence if:

(a) the person treats a cetacean; and

(b) the cetacean has been:

*(i) killed in contravention of section 229 or 229A;
or*

(ii) taken in contravention of section 229B or 229C.

(2) An offence against subsection (1) is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.

Treating unlawfully imported cetaceans

(2A) A person commits an offence if:

(a) the person treats a cetacean; and

(b) the cetacean has been unlawfully imported.

(2B) An offence against subsection (2A) is punishable on conviction by imprisonment for not more than 5 years or a fine not exceeding 1,000 penalty units, or both.

(3) In this Act:

treat a cetacean means divide or cut up, or extract any product from, the cetacean.

230 Possession of cetaceans

Possession of unlawfully killed cetaceans

(1) A person is guilty of an offence if:

(a) the person has in his or her possession:

(i) a cetacean; or

(ii) a part of a cetacean; or

(iii) a product derived from a cetacean; and

(b) the cetacean has been:

*(i) killed in contravention of section 229 or 229A;
or*

(ii) taken in contravention of section 229B or 229C.

(2) An offence against subsection (1) is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.

Possession of unlawfully imported cetaceans

(3) A person commits an offence if:

(a) the person has in his or her possession:

(i) a cetacean; or

(ii) a part of a cetacean; or

(iii) a product derived from a cetacean; and

(b) the cetacean, part or product, as the case may be, has been unlawfully imported.

(4) An offence against subsection (3) is punishable on conviction by imprisonment for not more than 5 years or a fine not exceeding 1,000 penalty units, or both.

9 A "cetacean" is defined in schedule 1 to the Act as "a member of the sub-order Mysticeti or Odontoceti of the Order Cetacea". Relevantly, Antarctic minke whales, fin whales and humpback whales are cetaceans as defined by the EPBC Act.

10 The Commonwealth Director of Prosecutions is responsible for prosecuting any offences under the EPBC Act, a decision which is made independently of the Executive Government. To date, the DPP has not sought to prosecute the respondent or others for undertaking the activity complained of by the applicant. In the absence of, or in addition to, criminal prosecution, section 475 of the Act gives the Minister, or an "interested person", standing to seek in a civil action an injunction to restrain conduct that would amount to an offence. This is what has been sought in this case. The section plainly gives *locus standi* to the applicant to seek the orders in this proceeding, without seeking the fiat of the Attorney-General and without any attendant complexities that might otherwise arise in the civil enforcement or prevention of conduct that is provided for by the criminal law (here by the same Commonwealth statute).

UNCLOS

11 Territorial claims for some form of sovereignty over waters adjacent to a state are regulated in international law by the *United Nations Convention on the Law of the Sea* done at Montego Bay, 10 December 1982 ("UNCLOS"). Article 57 of UNCLOS defines the exclusive economic zone of a coastal state as not exceeding 200 nautical miles from the baseline from which the territorial sea is measured.

12 Australia's claimed exclusive economic zone extends to the waters adjacent to the baseline of Australia's external territories, including, importantly for this matter, the Australian Antarctic Territory. By virtue of the statutory definition in s 225 of the EPBC Act, the waters within 200 nautical miles from the Australian Antarctic Territory land mass are within the Australian Whale Sanctuary.

13 Australia's claim to sovereignty over the Australian Antarctic Territory is recognised only by four nations (New Zealand, France, Norway and the United Kingdom), themselves with asserted (and otherwise disputed) claims over various parts of the Antarctic land mass. Japan rejects Australia's purported exercise of jurisdiction over waters that are considered by Japan to be the high seas. This is not a ground for invalidity of the EPBC Act: the sovereign claim by Australia to the Australian Antarctic Territory is not a matter capable of being questioned in this Court in this proceeding: cf *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1. These matters of sovereignty and international recognition (and lack of extensiveness thereof) can be taken to have been before, and well recognised by, Parliament when it enacted the EPBC Act.

14 A claim to an exclusive economic zone does not amount to sovereignty for all purposes. See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [11] – [13] for a discussion of the rights flowing from a claim to the exclusive economic zone.

History of the litigation

15 The applicant commenced proceedings in this Court on 19 October 2004. On the same day, the applicant also filed a notice of motion, together with supporting affidavits, seeking leave to serve the respondent out of the jurisdiction in Japan, in accordance with Order 8 rule 2 of the [Federal Court Rules](#). On 23 November 2004, I ordered the applicant to serve copies of documents in the proceeding on the Attorney-General for the Commonwealth, on the basis that it was appropriate that he be informed of the nature of the matter.

16 In due course, the Attorney-General filed submissions as *amicus curiae*. The substance of those submissions was that the subject matter of the proceedings was a matter best dealt with by the Executive Government, and it was not appropriate for the Court to exercise its discretion to grant relief, either to serve the respondent out of the jurisdiction, or final relief of the nature of the declarations and injunctions sought. After considering submissions both from the Attorney-General and the applicant, I gave judgment on 27 May 2005, dismissing the motion: see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664. I do not propose to set out my reasons enunciated therein; it is sufficient to say that, in light of the international position, including the view of Japan that the assertion of jurisdiction in this matter would be a breach of international law, including, but not limited to, the Whaling Convention, of the place of an international body, the IWC, to deal with the issue of the killing of whales for scientific or other purposes, of the expression of the Executive Government of its (non-justiciable) view of Australia's long-term national interest, of the placing of the Court at the centre of an international dispute (indeed, helping to promote such a dispute) between Australia and a friendly foreign power, and of the likelihood that any attempt to enforce an injunction against the respondent would be futile (a matter that was never seriously contested by the applicant on the application for leave to serve out of Australia), I was not persuaded that the Court's exercise of discretion to grant leave to serve the respondent outside the jurisdiction was appropriate.

17 On that day, senior counsel for the applicant made an application for leave to appeal under the [Federal Court Rules](#), as he was entitled to do. I granted that leave.

...

Service and non-appearance of the respondent

20 Following the Full Court judgment, the applicant attempted, unsuccessfully, to serve the respondent in Japan via diplomatic channels. The Japanese Ministry of Foreign Affairs, in a note verbale dated 26 October 2006, refused to allow the documents to be accepted for service on the grounds that "this issue relates to waters and a matter over which Japan does not recognise Australia's jurisdiction". The applicant then filed a notice of motion on 31 January 2007, seeking substituted service upon the respondent in accordance with Order 7 rule 9 of the [Federal Court Rules](#).

21 On 2 February 2007, I made the following orders for service upon the respondent:

1. The applicant be permitted to serve the originating process on the respondent in Japan by:

(a) Serving the following documents on or before 1 April 2007:

(i) Copies in English of the amended application and the amended statement of claim;

(ii) Copies in Japanese of the amended application and the amended statement of claim; and

(iii) A copy of this order in English and Japanese.

(b) Serving the documents referred to in 1(a) on the respondent by:

(i) Sending by registered post addressed to the managing director of the respondent at the following address, being the respondent's registered place of business: 4-5 Toyomi-cho, Chuo-ku, Tokyo, Japan; and

(ii) Serving the said documents at the respondent's registered place of business: 4-5 Toyomi-cho, Chuo-ku, Tokyo, Japan.

...

Pleadings

28 The applicant originally sought leave to serve upon the respondent a pleading to the effect that the whaling conducted pursuant to the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA) by the respondent was not scientific whaling. Leave was not given to serve a pleading containing that allegation, as the allegation was not particularised. There was no appeal from that part of the original decision to refuse leave to serve out of Australia. In the circumstances, this proceeding has been conducted on the premise that JARPA (and later JARPA II) are not challenged as lawful permits under the Whaling Convention and thus it was not asserted that the impugned activity of the respondent was and is not scientific research.

29 The amended statement of claim asserts the following:

- That the respondent has intentionally engaged in a series of activities that have resulted in Antarctic minke whales and fin whales being killed, taken and interfered with, and humpback whales being taken and interfered with, within the Australian Whale Sanctuary, and subsequently intentionally treated and possessed in contravention of ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act;

- That the conduct was done in accordance with the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA) issued by the government of Japan under Article VIII of the Whaling Convention;
- That JARPA is not a recognised foreign authority for the purposes of subsection 7(1) of the [Antarctic Treaty \(Environment Protection\) Act 1980](#) (Cth).
- That the respondent is not permitted or authorised to kill, take, interfere with, treat or possess whales in accordance with ss 231, 232 or 238 of the EPBC Act;
- That, unless restrained, the respondent will in the future intentionally kill, take and interfere with within the Australian Whale Sanctuary, and subsequently intentionally treat and possess Antarctic minke whales, fin whales and humpback whales in contravention of the EPBC Act.

The hearing

30 The evidence reveals that the whaling activity in the waters off Antarctica was undertaken by a fleet of five vessels: the MV *Kyoshin Maru No 2*, a sighting and survey vessel that steamed ahead of the fleet to locate whale pods; the MV *Yushin Maru*, the MV *Kyo Maru No 1* and the MV *Toshi Maru No 25*, being sampling or "catcher" vessels used for hunting and killing whales; and the MV *Nisshin Maru*, being the base ship where the slaughtered whales were processed and research carried out. The MV *Toshi Maru No 25* was retired prior to the 2002/2003 season and was replaced with the MV *Yushin Maru No 2*. The MV *Kaikoh Maru*, a second sighting and survey vessel, also participated in the 2005/2006 and 2006/2007 whaling seasons.

31 The evidence of the registration of each of the vessels *Kyoshin Maru No 2*, *Yushin Maru*, *Yushin Maru No 2*, *Kyo Maru No 1*, *Kaikoh Maru*, *Toshi Maru No 25* and *Nisshin Maru* discloses that the respondent is the owner of the vessels. That is sufficient *prima facie* evidence of ownership: *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* [2005] FCAFC 68; (2005) 143 FCR 43 at 85 [171]. There was no suggestion in the evidence that the registration was, or was likely to be, in any way inaccurate. Although the respondent's purposes, as stated in its company registration certificate, include "conducting shipping and lease of vessels", there is no evidence to suggest that that the vessels were either demise or time chartered when they were engaged in the whaling activity.

32 Under JARPA, the whaling activity was conducted in two groups of areas, alternating on a biennial basis. In the 2001/2002 and 2003/2004 seasons, whaling was conducted south of latitude 60deg. S to the ice edge of the Antarctic land mass between longitude 35deg. E and longitude 130deg. E (referred to as Area IV and Area IIIE). In the 2000/2001, 2002/2003 and 2004/2005 seasons, whaling was conducted south of latitude 60deg. S to the ice edge of the Antarctic land mass between longitude 130deg. E and longitude 145deg. W (referred to as Area V and Area VIW). After the introduction of JARPA II, the internal boundaries were shifted such that in the 2005/2006 season, whaling occurred between 35deg. E and 175deg. E and in 2006/2007, between 175deg. E and 145deg. W.

33 The applicant relied upon reports submitted by the respondent to the IWC pursuant to JARPA (and from the 2005/2006 season onwards, JARPA II) to establish the respondent's whaling activity in the Antarctic. The reports identify that whale pods were located and pursued by the sighting and survey vessels in a manner that falls within the statutory definition of "interfering" with a cetacean within the scope of 229B(1) and (4).

34 The numbers of whales killed in the waters off Antarctica each season, as outlined by the reports, are as follows:

Whaling season	Number of Antarctic minke whales killed under JARPA and JARPA II	Number of fin whales killed under JARPA and JARPA II
2000/2001	440	0
2001/2002	440	0
2002/2003	440	0
2003/2004	440	0
2004/2005	440	0
2005/2006	853	10
2006/2007	505	3
Total	3,558	13

35 The reports indicate that no humpback whales were killed under the JARPA II regime during the "feasibility study" period, which comprised the 2005/2006 and 2006/2007 seasons. However, the 2006/2007 report stated that the "full-scale JARPA II will start from the 2007/08 season", during which time the respondent expected to take 50 humpback whales, 50 fin whales and 850 Antarctic minke whales each season. I therefore conclude that it is likely that the respondent will kill humpback whales in future seasons.

36 The 2005/2006 and 2006/2007 reports stated that "biopsy samples" were taken from humpback whales, as well as other whale species, by use of a compound crossbow. I am satisfied that this non-lethal method of sampling amounted to injuring, interfering with and treating a cetacean within the definition of the EPBC Act.

37 The applicant tendered photographs annexed to an affidavit of Kieran Paul Mulvaney, a Greenpeace whaling protester, which identify that after slaughter, the whales were taken aboard the MV *Nisshin Maru* and dissected. This is consistent with the respondent's cruise reports and is on its face a breach of s 230 of the EPBC Act.

38 The cruise reports filed with the IWC acknowledge the assistance of employees of the respondent in the preparation of the report. It is reasonably open to infer (and I do) that the authors of the report include employees of the company, and that the representations made in the reports go to a matter within the scope of the employees' employment and authority: the [Evidence Act 1995](#) (Cth), [ss 87](#) and [88](#).

39 The area in which the fleet conducted its whaling activities extends beyond the boundaries of the Australian Whale Sanctuary. Nevertheless, by overlaying a map of the Australian Whale Sanctuary over the maps in the cruise reports identifying the locations at which whales were taken, I conclude that a significant number of the whales were taken inside the Australian Whale Sanctuary.

40 The Australian Government has not issued a permit under s 238 of the EPBC Act authorising these acts. On the basis of the above, the applicant has established on the balance of probabilities that the fleet has engaged in conduct that contravenes ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act, and intends to continue doing so in the future under the JARPA II regime.

41 Attribution of acts of individuals to a body corporate for the purposes of the EPBC Act is prescribed by s 498B(1), which is in the following terms:

Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is to be taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

42 The respondent is the entity authorised by the Japanese Government to conduct the whaling. No direct evidence has been adduced to establish that the crews of the vessel were employees of the respondent. I infer, however, that the crews of the various vessels in the fleet were acting in accordance with the respondent's authority, under JARPA and JARPA II.

43 Based on the facts outlined above, I am satisfied that the respondent is responsible for the actions of the whaling fleet for the purposes of the EPBC Act.

44 For the reasons already given in earlier reasons, I am satisfied that the EPBC Act applies to the Australian Whale Sanctuary and that there is no recognised foreign authority for the purposes of s 7(1) of the [Antarctic Treaty \(Environment Protection\) Act 1980](#) (Cth). In reaching this latter conclusion, I have acted on the submissions and material put on by the applicant and the concession of the Attorney-General, both referred to at [40] of my reasons published on 27 May 2005 ([2005] FCA 664). Thus, I am satisfied that the respondent has contravened the EPBC Act, as alleged.

Discretion

45 The Full Court made its views clear (unanimously) as to the taking into account of what Black CJ and Finkelstein J called in their reasons "political" questions, at the point of leave to serve out of the jurisdiction. Once leave has been granted, and the matter is before the Court to be resolved in the exercise of federal jurisdiction, it follows *a fortiori* from the Full Court's views as to the irrelevance of those matters at the point of decision whether to grant leave to serve process outside Australia that they are irrelevant at the point of final relief. Though it does not matter for the resolution of this proceeding, it may well be that the breadth or range of discretionary matters is wider at the point of deciding upon leave to serve out of Australia than at the point of decision about final relief. In any event, in accordance with the reasons of the Full Court, I can give no weight or relevance to the considerations that, when combined with futility, influenced my earlier decision. I therefore turn to futility, as a separate issue.

46 The respondent has, on the evidence, no presence or assets within the jurisdiction. Unless the respondent's vessels enter Australia, thus exposing themselves to possible arrest or seizure, the applicant acknowledges that there is no practical mechanism by which orders of this Court can be enforced (supplementary submissions, paragraph 36).

47 In addition to paragraphs [14] – [16] of the majority judgment of the Full Court of this Court on appeal (excerpted above), Black CJ and Finkelstein J said the following on futility at [18] – [20]:

There is another way of considering the question of futility. The injunctive relief that the appellant seeks is relief by way of statutory injunction under s 475 of the EPBC Act. That section authorises the grant of what has been called a public interest injunction: see ICI Australia Operations Pty Ltd v TPC [1992] FCA 474; (1992) 38 FCR 248 at 256. Section 475 and the related provisions in Div 14 of Pt 17 of the EPBC Act have their counterpart in s 80 of the Trade Practices Act 1974 (Cth) ('the TP Act') upon which they appear to have been largely modelled.

Parliament has determined that it is in the public interest that the enforcement provisions of the EPBC Act should be unusually comprehensive in scope. Section 475 of the EPBC Act and its related provisions form part of a much larger enforcement scheme contained in the 21 divisions of Pt 17. The provisions include the conferral of powers of seizure and forfeiture, powers to board and detain vessels and authority to continue a pursuit on the high seas.

It is an important and distinctive feature of Div 14 of Pt 17 of the EPBC Act that, like s 80(4) of the TP Act, the Federal Court is expressly empowered to grant an injunction restraining a person from engaging in conduct whether or not it appears to the Court that the person intends to engage again in conduct of that kind and, even, whether or not there is a significant risk of injury or damage to the environment if the person engages or continues to engage in conduct of that kind: see s 479(1)(a) and (c).

Further, at [21], the majority said:

Although 'deterrence' is more commonly used in the vocabulary of the law than 'education', the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. Thus, there being a 'matter' (see [28] below), the grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the EPBC Act. Indeed, some of those objects are expressed directly in the language of 'promotion', including the object provided for by s 3(1)(c), namely to promote the conservation of biodiversity, which is an object that the legislation links to the establishment of an Australian Whale Sanctuary 'to ensure the conservation of whales and other cetaceans': s 3(2)(e)(ii).

48 The majority compared the terms of section 475 of the EPBC Act with similar provisions in s 80 of the *Trade Practices Act* (at [23] – [25]).

49 Moore J did not agree with the majority on the question of futility of enforcement. His Honour was of the opinion that both long-standing common law authorities and recent High Court dicta support the proposition that relief should not be granted unless it would be effectual (or unless there are reasonable grounds to believe an injunction will be efficacious in the future). In support of this proposition, Moore J cited the following authorities:

Abebe v Commonwealth [1999] HCA 14; (1999) 197 CLR 510 at [31] per Gleeson CJ and McHugh J:

The term "matter" has meaning only in the context of a legal proceeding, as the passages from South Australia v Victoria, Re Judiciary and Navigation Acts, Stack v Coast Securities (No 9) Pty Ltd and Attorney-General (NSW) v Commonwealth Savings Bank demonstrate. A "matter" cannot exist in the abstract. If there is no legal remedy for a "wrong", there can be no "matter". A legally enforceable remedy is as essential to the existence of a "matter" as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no "matter". If a person breaches a legal duty which is unenforceable in a court of justice, there can be no "matter". Such duties are not unknown to the law. For example, in Australian Broadcasting Corp v Redmore Pty Ltd, this court had to consider the effect on a contract of a statutory provision which prohibited the making of the contract without the approval of a minister. The prohibition arose in a context where s 8(1) of the relevant Act imposed a duty on the board of the appellant to ensure that it did not contravene any provision of the Act but s 8(3) provided that "[n]othing in this section shall be taken to impose on the Board a duty that is enforceable by proceedings in a court". Although the point did not arise for decision, it is plain that breach of the prohibition was incapable of giving rise to a "matter".

(footnotes omitted)

Truth About Motorways v Macquarie Infrastructure Investment Management Ltd [2000] HCA 11; (2000) 200 CLR 591 at [49] per Gaudron J:

Absent the availability of relief related to the wrong which the plaintiff alleges, no immediate right, duty or liability is established by the court's determination. Similarly, if there is no available remedy, there is no administration of the relevant law. Thus, as Gleeson CJ and McHugh J pointed out in Abebe v Commonwealth, "[i]f there is no legal remedy for a 'wrong', there can be no 'matter'".

Bass v Permanent Trustee [1999] HCA 9; (1999) 198 CLR 334 at [47]:

Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions. The jurisdiction with respect to declaratory relief has developed with an awareness of that traditional attitude. In Re F (Mental Patient: Sterilisation), Lord Goff of Chieveley said that:

a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument, for example, in default of defence or on admissions or by consent.

By "not a real question", his Lordship was identifying what he called the "hypothetical or academic". The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense. Barwick CJ pointed this out in Commonwealth v Sterling Nicholas Duty Free Pty Ltd. However, that is not the present case.

(footnotes omitted)

50 The applicant submitted that a broad range of remedies are appropriate in attempting to enforce an order for contempt. In this regard, the applicant cited the case of *Simonton v Australian Prudential Regulation Authority* [2006] FCAFC 118; (2006) 152 FCR 129, in particular [70] – [74].

51 The question of futility can, however, also be seen from a perspective of disobedience. To do so requires the setting to one side of the refusal by Japan to recognise Australia's claim to Antarctica. It is not for this Court to question Australia's claim or Parliament's mandate in the EPBC Act, which is based on Australia's claim. Thus, this perspective can be seen to be relevant for this Court to take into account (even if from another perspective, for instance that of Japan, the perspective is flawed). So viewed, it (futility arising from disobedience and an inability to bring about obedience) may bring to mind what was said by Hardie, Hutley and Bowen JJA in *Vincent v Peacock* [1973] 1 NSWLR 466 at 468:

In our opinion, it is not a ground for refusing an injunction that it would not have a practical effect, where its failure to have a practical effect is because the defendant disobeys it.

52 Further, one cannot ignore the public interest nature of the claim and the complete recognition by the Parliament of that type of claim and of the lack of wide international recognition of Australia's claim to the relevant part of Antarctica: see the majority of the Full Court reasons at [\[2006\] FCAFC 116](#); 154 FCR 425 and [21] – [24]; and see also *Citron v Zündel (No 4)* (2002) 41 CHRR D/274 at [298] – [301].

53 In the light of the reasons of the majority of the Full Court, I cannot conclude that the practical difficulty (if not impossibility) of enforcement is a reason to withhold relief.

54 On the material placed before the Court, I am satisfied that the respondent has contravened ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act in relation to Antarctic minke whales and fin whales by killing, injuring, taking and interfering with them and the treating and possessing of them and by injuring, interfering with and treating and possessing humpback whales and that, unless restrained, it will continue to kill, injure, take and interfere with them, and treat and possess them.

55 In all the circumstances, the orders of the Court will be:

1. The Court declares that the respondent has killed, injured, taken and interfered with Antarctic minke whales (*Balaenoptera bonaerensis*) and fin whales (*Balaenoptera physalus*) and injured, taken and interfered with humpback whales (*Megaptera novaeangliae*) in the Australian Whale Sanctuary in contravention of [sections 229, 229A, 229B and 229C](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth), (the "Act"), and has treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of [sections 229D and 230](#) of the Act, without permission or authorisation under [sections 231, 232 or 238](#) of the Act.

2. The Court orders that the respondent be restrained from killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*), fin whale (*Balaenoptera physalus*) or humpback whale (*Megaptera novaeangliae*) in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Australian Whale Sanctuary, unless permitted or authorised under [sections 231, 232 or 238](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth).