

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

FCA grants injunction against Japanese whaling company



Facts

The respondent was a large Japanese company that operated under permits from the Japanese Government. The applicant was a public interest organisation incorporated in NSW, an “interested person” under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the Act).

The respondent had been conducting whaling activities off Antarctica in vessels that it owned. The applicant alleged the respondent was in breach of ss 229 and 230 of the Act as a result of its whaling activities in the Australian Whale Sanctuary. An application for an injunction against the respondent’s whaling activities was made by the applicant in the Federal Court of Australia (FCA) under s 475 of the Act, which authorises the grant of a ‘public interest injunction’.

The applicant alleged that the respondent had intentionally engaged in whaling activities in the Australian Whale Sanctuary that were in contravention of the Act. The applicant also argued that the respondent, unless restrained, would continue in the future to engage in similar whaling activities in contravention of the Act. Moreover, the applicant claimed that an injunction would not be futile, as there was a wide spectrum of suitable remedies with which to enforce an order for contempt.

The respondent did not make a court appearance to contest the claims.

Decision

The Court found that the respondent had contravened ss 229, 229A, 229B and 229C of the Act in killing, injuring, taking and interfering with certain whales in the Australian Whale Sanctuary. The respondent was also found to have contravened ss 229D and 230 in treating and possessing such whales without permission or authorisation under ss 231, 232 or 238 of the Act.

The Court granted an injunction against the respondent from killing, injuring, taking or interfering with whales in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Sanctuary, unless permitted or authorised to do so under ss 231, 232 or 238 of the Act.

The Court established, from reports submitted by the respondent to the International Whaling Commission, that the respondent had contravened the relevant sections of the Act and would be likely to continue to carry out such whaling activities in future seasons.

With regards to the consideration of the likely futility of the

injunction, based on the views of the earlier 2006 Kyodo majority Full Court judgment, Allsop J determined that he did not believe, in this case, that “practical difficulty (if not impossibility) of enforcement is a reason to withhold relief”.

The reasoning for this conclusion was threefold. Firstly, as set out by the earlier 2006 Kyodo majority Full Court judgment, the Act’s statutory intention evinces an intended educative element to the public interest injunction, thus warranting its use even if the deterrence element is less evident. Secondly, Allsop J found that futility brought about by disobedience of the injunction is not a ground for refusing the injunction. Thirdly, as a aside note Allsop J argues at [52] that the “public interest nature of the claim” should also be taken into account in considering whether to grant the injunction.

Finally, as in *Mabo*, the Court found that the issue of the sovereign claim by Australia to the Antarctic territory was not a matter capable of being determined by the Court in the proceedings.

Comments

This was the first time that the Japanese whalers were brought before an Australian court. More importantly, it was the first time that whaling activities were found to be illegal under Australian law. However, according to the HSI, the injunction has thus far been ignored and the respondent continues to conduct its whaling activities within the Australian Whale Sanctuary, in contempt of the court.

The precedential implications of this case were not tremendous. Allsop J’s decision was, in many respects, a confirmation of the reasoning contained in the earlier decision in the Full Court.

The case also raised some interesting issues regarding the interplay of international and domestic law. While this case did confirm the illegality of whaling activities within the Australian Whale Sanctuary, the apparent ineffectiveness of the injunction highlights the importance of neutral, international judicial bodies such as the International Whaling Commission in addressing whaling and illegal fishing. Due to the sensitive nature of Antarctic sovereignty claims, and the unilateral nature of this case, a body such as the International Whaling Commission may provide a more mutually respected and thus effective solution to such a dispute.

