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They Said They'd Never Win: Humane Society International Inc v Kyodo Senpaku Kaisha Ltd

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Abstract

On 15 January 2008, the Federal Court of Australia declared the routine whale hunting being conducted by Japanese company Kyodo Senpaku Kaisha Ltd to be unlawful in the Australian Whale Sanctuary, and imposed an injunction restraining the unlawful action. This was a landmark decision and one that has been consistently pursued by the concerned applicant, the Australian office of Humane Society International (HSI). The case involves a complex web of domestic and international law, with further complications injected by politics and foreign affairs. The article outlines the major legal issues involved in the case, as well as summarises the major steps in the litigation from HSI's application in 2004 until the most recent decision of January 2008.

Key words

Whaling, Southern Ocean, Humane Society International

† Position commencing January 2009.

Introduction

On 15 January 2008, the Federal Court of Australia declared the routine whale hunting being conducted by Japanese company Kyodo Senpaku Kaisha Ltd to be unlawful in the Australian Whale Sanctuary, and imposed an injunction restraining the unlawful action. This was a landmark decision and one that has been consistently pursued by the concerned applicant, the Australian office of Humane Society International (HSI). The injunctive relief arrives nearly three years and two months after HSI initiated legal proceedings. However, the victory seems hollow. Without the assistance of the Federal Government, it is impossible to enforce. In ordering the injunction, Allsop J noted that "one cannot ignore the public interest nature of the claim and ... the lack of wide international recognition of Australia's claim to the relevant part of Antarctica".[1] In light of this, the consequences of the decision are likely to be political.

The Japanese Whaling Case (as it is commonly referred to) involves a complex web of domestic and international law, with further complications injected by politics and foreign affairs. This article will outline the major legal issues involved in the case, as well as summarise the major steps in the litigation from HSI's application in 2004 until the most recent decision of January 2008.[2]

Background to the case

In November 2004, HSI commenced Federal Court action against Kyodo Senpaku Kaisha Ltd ("Kyodo"). Kyodo is issued permits by the Japanese Government, allowing it to kill whales as part of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA).[3] The scale of operations has more than doubled under the revised program for 2005/2006 (JARPA II[4]). HSI alleged that Kyodo was in breach of the *Environment Protection and Biodiversity* (EPBC) *Act 1999*

1 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 at [52].

2 The relevant citations 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. For all pleadings, affidavits and maps associated with the litigation, see HSI's website <www.hsi.org.au>.

3 JARPA initially permitted 300 (±10%) Antarctic minke whales to be killed annually between 1986 and 2005. In 1995 the survey area expanded and scale of the hunt increased to 400 (±10%) Antarctic minke whales per year.

4 JARPA II permits lethal sampling of 850 (±10%) Antarctic minke whales, 50 humpback whales and 50 fin whales. However no humpback whales have been hunted.

(Cth)[5] by killing whales in a part of Antarctica over which Australia claims sovereignty. HSI claimed that Kyodo's contraventions were not excused by its permit.

HSI initiated legal action as a way to stop the Japanese whaling and bring publicity to the issue. In a 2004 media release, HSI spokesperson Nicola Beynon stated:[6]

> Killing whales in Australian waters is an offence. We hope HSI's case in the Federal Court will embarrass the whaling company and the Japanese Government, and push the Australian Government into prosecuting the whaling themselves.[7]

HSI was also pursuing its long-term goal of protecting whales in the Australian Whale Sanctuary through reliance upon the protections within the *Environment Protection and Biodiversity Conservation Act*. In February 2007, HSI Director Michael Kennedy said:[8]

> The government has refused to take any legal action over the 7 years that this law [*Environment Protection and Biodiversity Conservation Act*] has been in place, leaving it up to a third party, HSI, to prosecute the lawbreakers.

Since 2004, HSI has sought declaratory and injunctive relief. Allsop J refused leave for HSI to serve an originating process on Kyodo before receiving submissions from the Attorney-General. The Howard Government expressed a strong preference not to pursue the matter through Australian courts, but to resolve it via diplomatic channels.[9] Although the Government never questioned the availability of legal action, it did outline a preference for diplomatic avenues to be pursued on the ground of "national interest". After receiving these submissions, Allsop J refused leave. This decision was overturned on appeal to the Full Federal Court and the matter remitted to Allsop J. Eighteen months later, HSI obtained its injunction. However, in terms of practical outcomes, the win might be best described as a moral victory.

5 *Environment Protection and Biodiversity* (EPBC) Act 1999 (Cth), ss 229–230.

6 Humane Society International (Australian Office) *Humane Society International goes to Federal Court over Japanese Whaling* News Release 19 October 2004 <www.hsi.org.au/news_library_events/press_releases/N270.htm> (3 March 2008).

7 Note that s 475 *Environment Protection and Biodiversity Conservation Act* allows an "interested person" to bring applications for injunctions under the Act.

8 Humane Society International (Australian Office) *Fickle justice for whales in the Southern Ocean* News Release 16 February 2007 <www.hsi.org.au/news_library_events/press_releases/N428_Whales.htm> (3 March 2008).

9 As evidenced in its submissions of 25 January 2005 to Allsop J. These are discussed further below.

Before the major judgments are outlined, the key background issues relevant to *The Japanese Whaling Case* will be discussed. This will be done under the following headings:

- The Australian Antarctic Territory and the Antarctic Treaty System
- The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- The Whaling Convention

The Australian Antarctic Territory and the Antarctic Treaty System

The Australian Antarctic Territory (AAT) constitutes 42 percent of the Antarctic mainland and lies south and south-west of Australia. The Territory was transferred to Australia from the United Kingdom in 1933.[10] Under Article 57 of the *United Nations Convention on the Law of the Sea* (UNCLOS)[11] a coastal State's Exclusive Economic Zone (EEZ) extends to 200 nautical miles from the territorial baseline. Australia has claimed an EEZ adjacent to its external territories including the AAT.

Only four other States formally recognise Australian sovereignty in Antarctica. These are Norway, France, New Zealand and the United Kingdom.[12] Japan rejects Australia's claim to territorial sovereignty over the AAT, and hence, rejects Australia's purported exercise of jurisdiction over the adjacent seas.

Both Japan and Australia are Consultative Parties to the *Antarctic Treaty 1959*. Under Article IV, sovereignty over the Antarctic has been 'frozen' at its 1959 position. Put simply, the ambiguous wording in Article IV preserves the status quo meaning that Australia's claim to the AAT cannot be expanded or diminished.

Whether Article IV prohibits Australia applying domestic law to foreign nationals in the AAT is debatable. Australian policy has been not to enforce Australian laws against foreign nationals unless those persons have voluntarily submitted themselves to the jurisdiction.[13] The junior counsel in *The Japanese Whaling Case*, Chris

10 The territory was formally transferred by a British Order in Council asserting British rights over the area and subsequently placing it under the administration of the Australian Commonwealth. The *Australian Antarctic Acceptance Act* 1933 (Cth) followed.

11 Signed 10 December 1982 at Montego Bay.

12 See Australian 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* (AGPS, Canberra: 1992) [2.8].

13 Don. R Rothwell and Shirley V Scott, "Flexing Australian Sovereignty in Antarctica: Pushing Antarctic National Treaty Limits in the National Interest" in Lorne Kriwoken, Julia Jabour and Alan Hemmings (eds) *Looking South* (Federation Press, Sydney: 2007) 12.

McGrath, cited studies by Professor Gillian Triggs supporting the application of domestic law in the AAT.[14] The Australian House of Representatives Standing Committee on Legal and Constitutional Affairs has also supported this position.[15]

Three agreements supplement *the Antarctic Treaty.* These are the *Convention for the Conservation of Antarctic Seals 1972*, the *Convention for the Conservation of Antarctic Marine Living Resources 1980*, and the *Protocol on Environmental Protection to the Antarctic Treaty 1991* (The Madrid Protocol). The four agreements comprise "The Antarctic Treaty System". Australia gives effect to the Madrid Protocol through the *Antarctic Treaty (Environment Protection) Act 1980* (Cth). Section 7(1) of the *Antarctic Treaty (Environment Protection) Act* stipulates:

> Notwithstanding any other law, but subject to the regulations, no action or proceeding lies against any person for or in relation to anything done by that person to the extent that it is authorized by a permit or by a recognised foreign authority.

"A recognised foreign authority" is defined in section 3(1) of the Act as:

> ... a permit, authority or arrangement that:
>
> (a) authorises the carrying on of an activity in the Antarctic; and
>
> (b)(i) has been issued, given or made by a Party (other than Australia) to the Madrid Protocol that has accepted under that Protocol the same obligations as Australia in relation to the carrying on of that activity in the Antarctic.

The above provision was considered in the HSI case by the Federal Court. The Court accepted HSI's claim that JARPA is not "a recognised foreign authority", as the Madrid Protocol does not regulate whaling.[16] Hence, section 7 of the *Antarctic Treaty (Environment Protection) Act* did not apply.

14 Chris McGrath "The Japanese Whaling Case" (2005) 22 *Environmental and Planning Law Journal* 250, 252. See Gillian Triggs "Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation" (2000) 5 *Asia Pacific Journal of Environmental Law* 33.

15 See note 12 at [2.31]. The Committee formed the view that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.

16 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [40]. Regulation of whaling is by the Whaling Convention, which will be discussed later in this article.

The Environment Protection and Biodiversity Conservation Act 1999 (Cth)

On 16 July 2000, the Australian Whale Sanctuary (AWS) was established under section 225 of the *Environment Protection and Biodiversity Conservation Act*. Parliament stated that the AWS would exist as a measure "to ensure the conservation of whales and other cetaceans".[17] The AWS includes the waters within Australia's EEZ.[18] Killing, injuring and taking whales in the Sanctuary are strict-liability offences under sections 229–230 of the *Environment Protection and Biodiversity Conservation Act*. These provisions apply to all persons and vessels, including unregistered vessels and persons who are not Australian citizens.

Japan openly rejects Australia's claim to the AAT and adjacent waters and considers the AWS to be part of the high seas. There is international support for the position that these seas truly are high seas and given international practice (including the non-recognition of Australia's claims and the position taken by the Australian Government not to enforce its laws against foreign nationals), the better conclusion is that the legal status of the seas surrounding the Antarctic continent is that of high seas.[19] Japan asserts that it has exclusive jurisdiction, as the flag State, over Japanese vessels in these waters. It considers Australia's attempt to enforce the *Environment Protection and Biodiversity Conservation Act* against Japanese vessels to be a breach of international law. Chris McGrath notes that by refusing to recognise Australian sovereignty, Japan "keeps alive" its ability to whale in the AAT.[20]

The Whaling Convention

In 1986, the International Whaling Commission (IWC) set the worldwide catch limit of commercial whaling at zero.[21] Japan is one of the 77 member States bound by this moratorium. However, the IWC grants two important exceptions: scientific whaling and aboriginal whaling. Article VIII of the Whaling Convention deals with hunting whales for scientific research. Clause 1 allows any Contracting Government to grant to its nationals a special permit authorising them to kill, take and treat whales for the purpose of scientific research. From 1986, the Japanese Government

17 Section 3(2)(e)(ii) *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
18 Section 225(2) *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
19 Rachel Baird *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, Dordrecht: 2006) 138–139.
20 Chris McGrath, note 14 at 251.
21 *International Whaling Commission Schedule*, para. 10(e).

issued such permits as part of JARPA. This initially involved killing 300 (±10%) Antarctic minke whales annually between 1986 and 2005, with the scale of the hunt increasing to 400 (±10%) in 1995.[22] In 2005, JARPA was revised, and the 2005/2006 seasons saw 853 minke whales and 10 fin whales killed under JARPA II.[23] The 2007/2008 hunt has been expanded to 935 minke whales and 50 fin whales.

The 2004 Hearing (Allsop J)

In its initial action, HSI sought leave from the Federal Court to serve an originating process on Kyodo in Japan.[24] Whilst HSI succeeded in satisfying the relevant requirements under O 8, r 2 of the Federal Court Rules, Allsop J exercised the overriding discretion of the Court and refused to allow service. His Honour decided that in light of "national interest, including inter-governmental relations between Australia and Japan" it was appropriate to invite submissions from the Attorney-General on the matter.[25] His Honour made an interim order that HSI serve the Commonwealth with copies of documents in the proceeding.

The 2004 hearing was important as it confirmed that even though Kyodo was acting according to the terms of its permit, it could be in breach of Australian municipal law.[26] Allsop J confirmed that if the matter did proceed, the Court would not breach international comity[27] as it would not be required to adjudicate upon the validity of acts and transactions of the Japanese Government.[28] His Honour also confirmed that if the matter proceeded, the Federal Court had jurisdiction to hear it.[29]

The Attorney-General's Submissions

On 25 January 2005, the then-Attorney-General, Philip Ruddock, filed submissions in response to Allsop J's request. The submissions were made on behalf of the Commonwealth and filed as *amicus curiae*. The Attorney-General stated that the

22 Government of Japan *The 2002/2003 Research Plan for the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA)* Report No SC/54/O1 (2002) 1.

23 Affidavit of Nicola Jane Beynon (27 October 2006) *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* No. NSD 1519 / 2004.

24 Kyodo does not have an office in Australia and leave was therefore required to serve the originating process in a foreign jurisdiction.

25 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, at [3], [5], [6], [72].

26 Ibid at [71].

27 The principle whereby courts should not adjudicate upon the validity of acts and transactions of a foreign sovereign State within the foreign sovereign's territory: *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40–41.

28 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd,* note 25 at [73].

29 Ibid, at [17].

matter was best dealt with by the Executive Government. It was not appropriate for the Court to grant leave for HSI to serve an originating process, nor would it be appropriate for the Court to order final injunctive and declaratory relief. Ruddock pre-empted diplomatic tension with Japan:[30]

> Japan has indicated that enforcement of Australian law against Japanese vessels would be likely to give rise to an international disagreement with Japan. Similar disputes could also arise with other countries that do not accept Australia's claim to the AAT...The object of Article IV of the Antarctic Treaty was to avoid such disputes, by preserving the status quo with respect to Antarctic claims. Provoking a disagreement in this instance may undermine the status quo, which would be contrary to Australia's long term national interests.

The Attorney-General cited Japan's rejection of Australian sovereignty as "a key consideration to be taken into account" in deciding whether or not to enforce the *Environment Protection Biodiversity and Conservation Act*.[31] Prosecuting Kyodo under Australian domestic legislation without the permission of Japan "would not be consistent with international law".[32]

The 2005 decision (Allsop J)

After considering the Attorney-General's submissions, Allsop J refused to grant leave for HSI to serve an originating process on Kyodo. His Honour echoed the Attorney-General's statements that Japan would see the proceedings as an interference with international law. His Honour emphasised the separation of powers principle, but stated that he was not prepared to place the Court "at the centre of an international dispute (indeed helping to promote such a dispute) between Australia and a friendly foreign power".[33]

His Honour also cited futility as a reason for his decision. Any injunctive orders by the Court would seem virtually impossible to enforce and the making of a declaration alone "might be seen as tantamount to an empty assertion of domestic law."[34]

A notable feature of Allsop J's second decision is that His Honour drew attention to differences in cultural attitudes toward whaling. He noted that many Australians

30 Commonwealth Attorney-General, *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae* (25 January 2005) at 17 <www.hsi.org.au>.

31 Ibid, at [19], [20].

32 Ibid, at [42].

33 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, note 16 at [35].

34 Ibid, at [34].

saw whales as "not merely a natural resource ... but as living creatures of intelligence and of great importance" and slaughtering whales as "deeply wrong".[35] However, His Honour noted that it could be assumed that these views "are not shared by many in Japan, and in Norway and in other places".[36]

Appeal to the Full Federal Court (2006)

Following Allsop J's refusal to allow service, HSI appealed to the Full Court of the Federal Court. In July 2006, HSI succeeded in its appeal. The Full Court held that the "political" considerations referred to by Allsop J should not have affected his exercise of judicial discretion.[37] The majority (Black CJ and Finkelstein J) noted that the judicial system is "at the service of litigants".[38] As such, courts must be prepared to hear and determine matters regardless of their political sensitivity. Black CJ and Finkelstein J indicated that there may be "special circumstances" where the court takes into account political considerations. However, this was not relevant here, as Parliament had stated that the action was justiciable in an Australian court.[39]

The Appeal decision is particularly significant in its examination of "public interest" remedies under the *Environment Protection and Biodiversity Conservation Act*. Black CJ and Finkelstein J interpreted the *Environment Protection and Biodiversity Conservation Act* analogously to the *Trade Practices Act 1974* (Cth). They emphasised that injunctions may serve a "deterrent" or "educative" function, even if they are difficult or impossible to enforce. According to the joint judgment:[40]

> [... it has been said in relation to s 80(4) of the TP Act that whilst the Court should not grant an injunction unless it is likely to serve some purpose, it may be that in a particular case an injunction will be of benefit to the public by marking out the Court's view of the seriousness of a respondent's conduct...]

Moore J dissented on the principle of public interest injunctions under the *Environment Protection and Biodiversity Conservation Act*. His Honour adopted a narrower view than the majority. He held that whilst the trial judge erred in applying political considerations, it was almost certain that the injunctive relief sought would be futile and so the Court should not grant leave to HSI.[41] McGrath notes that, like

35 Ibid, at [29].
36 Ibid.
37 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [12]–[13], [38].
38 Ibid, at [10] citing *Oceanic Sun Line Special Shipping Co Inc v Fay* (1998) 165 CLR 197 at 239; 79 ALR 9 at 39 (Brennan J).
39 Ibid, at [13].
40 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd,* note 37 at [22]–[26].
41 Ibid, at [39], [43]–[45].

Allsop J, Moore J was "largely unswayed by the winds of change" of *The Trade Practices Act* favouring public interest remedies.[42]

Substituted Service

Bound by the Full Federal Court's decision, Allsop J granted leave for HSI to affect service when the matter was remitted to His Honour for hearing. HSI was unsuccessful in affecting service through diplomatic channels.[43] On 2 February 2007, Allsop J made an order allowing substituted service, and this was affected successfully.

Merits decision of Allsop J (2008)

On 15 January 2008, Allsop J issued judgment in HSI's favour, declaring that Kyodo had contravened ss 229, 229A, 229B and 229C of the *Environment Protection and Biodiversity Conservation Act*, and ordering that an injunction be imposed on Kyodo's contravening activities. Kyodo did not appear at trial, nor did it file a notice to appear.

Allsop J inferred that Kyodo was acting within its authority under JARPA and JARPA II. However, he concluded that on the evidence, a significant number of whales were taken inside the AWS.[44] Acting on the submissions of the applicant and the concession of the Attorney-General, His Honour was satisfied "that the *Environment Protection and Biodiversity Conservation Act* applies to the AWS and that there is no recognised foreign authority for the purposes of s7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth)."[45]

Being bound by the Full Federal Court's decision, Allsop J could not give weight or relevance to the political considerations which, combined with futility, influenced his earlier decision. He thus examined futility as a separate issue. He cited Black CJ and Finkelstein J's view of "public interest" injunctions, but also examined futility in light of "disobedience". At 51–53, His Honour stated:

> The question of futility can ... 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

42 Chris McGrath, "Japanese Whaling Case Appeal Succeeds" (2006) 23 *Environmental and Planning Law Journal* 333, 335.

43 On 26 October 2006, the Japanese Ministry of Foreign Affairs issued a note stating refusal to accept service on the grounds that "this issue relates to waters and a matter over which Japan does not recognise Australia's jurisdiction".

44 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 at [39].

45 Ibid, at [44].

mandate in the *Environment Protection and Biodiversity Conservation 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.*

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. 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.

Conclusions

Despite being hard-fought, HSI's recent victory may seem like a lot of effort for little gain. Japan is certain to ignore the Federal Court's orders. HSI has already experienced difficulty in serving the orders, with the Court granting leave for substituted service on 18 January 2008.[46]

One option is that HSI may issue contempt proceedings in the likely event that Kyodo ignores the Federal Court's injunction.[47] A resulting fine could be enforced via arrest and sequestration of Kyodo's vessels if they entered Australian waters. Port State jurisdiction would enable Australia to enforce domestic law against vessels voluntarily in port. Similarly, directors of Kyodo voluntarily within Australian jurisdiction (for example on business or holiday) could be subject to enforcement proceedings.[48] Arrest and sequestration within the AWS could only be achieved with the support of the Federal Government. Most simply, although unlikely, notwithstanding the change in Australia's official position under the Rudd Labor Government, authorities would need to order the arrest by an Australian customs or fisheries vessel.[49]

46 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36.

47 See for an elaboration on the use of the Federal Court Rules, Chris McGrath, "Injunction Granted in Japanese Whaling Case" (2008) *HSI Technical Bulletin* 3 <www.hsi.org.au/news_library_events/Japanese_Whale_Case/HSI_Technical_Bulletin_Japanese_whaling_case.pdf> (23 March 2008).

48 The fact that enforcement against a vessel or director would create an international incident, in light of the political sensitivities surrounding the status of the Australian Whale Sanctuary, it is no bar to the valid exercise of Australian law within Australian jurisdiction.

49 McGrath, note 47.

A key election promise of the new Government was to "enforce Australian law prohibiting whaling within the Australian Whale Sanctuary ... penalising any whalers found to have breached Australian law".[50] Following Labor's election win, the new Attorney-General explicitly requested that the Federal Court not rely on the previous Attorney-General's submissions.[51] On 19 December 2007, the Government announced a series of diplomatic measures to combat Japanese whaling. These included developing proposals to improve the procedures at the IWC and to "modernise the International Whaling Commission".[52] Monitoring of the Japanese vessels (by the Australian Customs vessel, the *Oceanic Viking*, and the Australian Antarctic Division's aircraft) has also been undertaken.[53]

In addition, the new Government has announced willingness to pursue Kyodo in the International Court of Justice.[54] Whilst the evidentiary case against Japan is strong, outcomes are never certain. However, the very bringing of legal action would focus international attention on the "scientific research" loophole relied upon by Japan. Due to insufficient particulars, HSI was unable to challenge Kyodo's permits in the Federal Court. The proceedings were conducted on the basis that JARPA and JARPA II were lawful permits under the Whaling Convention, and the question of whether Kyodo's activities constituted scientific research was not raised.

There are a number of indirect benefits arising from the litigation. Public awareness of the issues surrounding the Japanese whaling program has risen dramatically. This assists in the campaign to increase diplomatic pressure being brought to bear upon the Japanese Government. On this ground alone, the decision is a positive development in the anti-commercial whaling campaign.[55] Most recently, high level meetings have taken place in London aimed at calling upon the IWC to scrutinise the 'special permits' granted by Japan and to pursue a draft agreement for limited commercial whaling by Japan in its own waters as a trade off for forgoing the 'scientific research' exception in the Whaling Convention.[56] If the decision is viewed as an integral step in the campaign to halt the 'scientific whaling' conducted by Japan in the Southern Ocean, then it is a crucial step in the right direction.

50 Kevin Rudd and Peter Garrett *Federal Labor's Plan to Counter International Whaling* ALP Media Release 19 May 2007 <www.alp.org.au/media/0507/msenhloo190.php> (13 March 2008).

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

52 Peter Garrett *Australia Charts New Course on International Whale Conservation* ALP Media Release 1 March 2008 <www.environment.gov.au/minister/garrett/2008/pubs/mr20080301.pdf> (14 March 2008).

53 Stephen Smith and Peter Garrett *Australia Acts to Stop Whaling* ALP Media Release 19 December 2007 <www.environment.gov.au/minister/garrett/2007/pubs/mr20071219.pdf> (14 March 2008).

54 Kevin Rudd and Peter Garrett, note 50.

55 As distinct from some of the less helpful actions taken by the Sea Shepherd Society in January/February 2008.

56 Australian Associated Press Pty Ltd "Australia Drums Up Anti-Whaling Support" 9 March 2008; Charles Miranda "Scientific Whaling to End" *The Courier Mail* 11 March 2008 at 12.