FEDERAL COURT OF AUSTRALIA

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2015] FCA 1275

Citation:	Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2015] FCA 1275
Parties:	**HUMANE SOCIETY INTERNATIONAL INC v KYODO SENPAKU KAISHA LTD**
File number:	NSD 1519 of 2004
Judge:	**JAGOT J**
Date of judgment:	18 November 2015
Catchwords:	**CONTEMPT OF COURT** – whether respondent is guilty of contempt of court by reason of failure to comply with previous orders of the court – respondent guilty of whaling within the Australian Whale Sanctuary contrary to an injunction of the court – respondent found guilty of wilful contempt of court
Legislation:	*Crimes Act 1914* (Cth) s 4B(3) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 225, 229-231 *Evidence Act 1995* (Cth) s 87(1)(c) *Federal Court of Australia Act 1976* (Cth) s 31 *Federal Court Rules 1979* r 37.12 *Federal Court Rules 2011* rr 1.34, 41.06, 42.13
Cases cited:	*Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 *Burwood Council v Ruan* [2008] NSWLEC 167 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; [2006] FCAFC 116 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510; [2008] FCA 3 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 *Humane Society International Inc v Kyodo Senpaku Kaisha*

Ltd [2008] FCA 36
Madeira v Roggette Pty Ltd (No 2) [1992] 1 Qd R 394
National Australia Bank Ltd v Juric [2001] VSC 375
Sun Newspapers Pty Ltd v Brisbane TV Ltd (1989) 92 ALR 535
Tchia v Rogerson (1992) 111 FLR 1

Date of hearing:	18 November 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	46
Counsel for the Applicant:	Mr J Kirk SC and Mr J Hutton
Solicitor for the Applicant:	EDO NSW
Counsel for the Respondent:	The respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1519 of 2004**

BETWEEN:	**HUMANE SOCIETY INTERNATIONAL INC** **Applicant**
AND:	**KYODO SENPAKU KAISHA LTD** **Respondent**

JUDGE: **JAGOT J**
DATE OF ORDER: **18 NOVEMBER 2015**
WHERE MADE: **SYDNEY**

THE COURT:

Declaration and orders with respect to 2008/2009 season

1. DECLARES that the Respondent, Kyodo Senpaku Kaisha Ltd, breached Order 2 of the orders made by this Honourable Court in these proceedings on 15 January 2008 (**2008 Injunction**) by reason that, between 10 December 2008 and 22 March 2009, it:

   (a) interfered with, took, injured and killed Antarctic minke whales (*Balaenoptera bonaerensis*) in the Australian Whale Sanctuary in contravention of sections 229 and 229B of the Environment Protection and Biodiversity Conservation Act 1999 (Cth), (**Act**), and

   (b) treated and possessed such whales taken, injured or killed 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. ORDERS that the Respondent be found guilty of wilful contempt of Court by reason of the conduct described in Order 1 above.

3. ORDERS that the Respondent be fined for the contempt of Court in Order 2 above in an amount of $250,000 (in addition to the amounts in Orders 6, 9 and 12 of these orders).

Declaration and orders with respect to 2009/2010 season

4. DECLARES that the Respondent breached the 2008 Injunction by reason that, between 14 December 2009 and 20 March 2010, it:

   (a) interfered with, took, injured and killed Antarctic minke whales (*Balaenoptera bonaerensis*) in the Australian Whale Sanctuary in contravention of sections 229 and 229B of the Act, and

   (b) treated and possessed such whales taken, injured or killed 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.

5. ORDERS that the Respondent be found guilty of wilful contempt of Court by reason of the conduct described in Order 4 above.

6. ORDERS that the Respondent be fined for the contempt of Court the subject of Order 5 above in an amount of $250,000 (in addition to the amounts in Orders 3, 9 and 12 of these orders).

Declaration and orders with respect to 2011/2012 season

7. DECLARES that the Respondent breached the 2008 Injunction by reason that, between 1 January 2012 and 6 March 2012, it:

   (a) interfered with, took, injured and killed Antarctic minke whales (*Balaenoptera bonaerensis*) in the Australian Whale Sanctuary in contravention of sections 229 and 229B of the Act, and

   (b) treated and possessed such whales taken, injured or killed 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.

8. ORDERS that the Respondent be found guilty of wilful contempt of Court by reason of the conduct described in Order 7 above.

9. ORDERS that the Respondent be fined for the contempt of Court the subject of Order 8 above in an amount of $250,000 (in addition to the amounts in Orders 3, 6, and 12 of these orders).

Declaration and orders with respect to 2012/2013 season

10. DECLARES that the Respondent breached the 2008 Injunction by reason that, between 26 January 2013 and 14 March 2013, it:

(a) interfered with, took, injured and killed Antarctic minke whales (*Balaenoptera bonaerensis*) in the Australian Whale Sanctuary in contravention of sections 229 and 229B of the Act, and

(b) treated and possessed such whales taken, injured or killed 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.

11. ORDERS that the Respondent be found guilty of wilful contempt of Court by reason of the conduct described in Order 10 above.

12. ORDERS that the Respondent be fined for the contempt of Court the subject of Order 11 above in an amount of $250,000 (in addition to the amounts in Orders 3, 6, and 9 of these orders).

Costs

13. ORDERS that the Respondent pay the Applicant's costs of the interlocutory application filed in Court on 3 September 2015 in an amount to be assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1519 of 2004**

BETWEEN:	**HUMANE SOCIETY INTERNATIONAL INC** **Applicant**
AND:	**KYODO SENPAKU KAISHA LTD** **Respondent**

JUDGE: **JAGOT J**
DATE: **18 NOVEMBER 2015**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE APPLICATION

1 This is an application for orders that the respondent, Kyodo Senpaku Kaisha Limited (**Kyodo**), be found guilty of contempt of court on the basis that it has killed, taken and treated Antarctic minke whales off the coast of Antarctica in the Australian Whale Sanctuary in each of the summers of 2008 to 2009, 2009 to 2010, 2011 to 2012 and 2012 to 2013 in breach of an injunction which this Court issued on 18 January 2008 to restrain breaches of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**). The penalty which is sought by the applicant, the Humane Society International Incorporated (**HSI**), is a fine in respect of each contempt.

2 The Court's power in relation to the punishment of contempts of court is set out in s 31 of the *Federal Court of Australia Act 1976* (Cth), which provides as follows:

> (1) Subject to any other Act, the Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
> (2) The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court may be exercised by the Court as constituted at the time of the contempt.

BACKGROUND

3 In order to understand the background to this matter, it is necessary to return to the circumstances as they existed in 2008. In short, following the commencement of proceedings

by the applicant in 2004 seeking injunctions, the matter came before the Court on various occasions including before Allsop J, as he then was, in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, in which his Honour declined the applicant's application for leave to serve the originating process in Japan, Kyodo having its registered office in Japan, on discretionary grounds. His Honour found that in circumstances where Japan did not recognise Australia's claims to sovereignty over Australia's Antarctic territory it would be inappropriate to grant leave to serve the originating process outside the jurisdiction in Japan.

4 This decision was the subject of an appeal to the Full Court, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; [2006] FCAFC 116, in which the majority determined that the political considerations to which Allsop J had referred were not matters which could lead to the exercise of discretion against the applicant in relation to the issue of service. As a result, orders were subsequently made in 2007 permitting service of the originating process outside the jurisdiction (see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124).

5 Ultimately, the substantive application came back before Allsop J. In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510; [2008] FCA 3, his Honour found that Kyodo, via its whaling fleet, had engaged in conduct in contravention of certain provisions of the EPBC Act and intended to do so in the future, thereby making it appropriate that the injunctions as sought be granted. His Honour made orders as follows, referred to below as the **2008 injunctions**:

> 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).

6 After this, on 18 January 2008 in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36, Rares J made orders pursuant to which the applicant was granted leave to serve sealed copies of these orders together with certain other material by way of substituted service.

7 On 2 September 2015, the applicant filed an interlocutory application in these proceedings seeking various orders, including the signing of a statement of charge, leave to serve relevant documents referred to in the interlocutory application by means of substituted service, as well as orders that Kyodo be found guilty of contempt of court by reason of breaches of the 2008 injunctions at the dates and places and in the manners specified in the attached statement of charge, which as noted above relates to four whaling summer seasons, as well as a specific incident which occurred during the 2012 to 2013 whaling season on 15 February 2013 as set out in paragraph 5 of the statement of charge.

CONTEMPT OF COURT

Principles

8 In circumstances where, consistently with all of the other hearings in this matter, the interlocutory application has proceeded before me today on an *ex parte* basis, Kyodo not having entered an appearance or appeared at the hearing, it is unnecessary for me to do more than provide a brief outline of the reasons why I am satisfied that the applicant has made out its case to the requisite standard of proof, being beyond reasonable doubt, that Kyodo has committed contempts of court as identified in the statement of charge.

9 I accept, in effect, all of the written and oral submissions of the applicant which have been put before me today. As set out in the written submissions provided by the applicant, there are five matters which must be proved beyond reasonable doubt in order to sustain a finding of contempt of court (see *National Australia Bank Ltd v Juric* [2001] VSC 375 at [37] – [38] and *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 at [31] and [32]), namely that:

(1) an order was made by the court;

(2) the terms of the order are clear, unambiguous and capable of compliance;

(3) the order was served on the alleged contemnor or excused in the circumstances, or service dispensed with pursuant to rules of court;

(4) the alleged contemnor has knowledge of the terms of the order; and

(5) the alleged contemnor has breached the terms of the order.

10 In the present case, the evidence which has been placed before me on behalf of the applicant establishes each of these five requirements beyond reasonable doubt.

11 In *Burwood Council v Ruan* [2008] NSWLEC 167, Biscoe J conveniently summarised the law with respect to the three classes of contempt (technical, wilful and contumacious). His Honour said at [7] that:

> There are three classes of contempt: technical, wilful and contumacious. Technical contempt is where disobedience of a court order (or undertaking to the court) is casual, accidental or unintentional. Wilful contempt is where the disobedience is more than that, but is not contumacious. Contumacious contempt is where there is a specific intention to disobey a court order or undertaking to the court, which evidences a conscious defiance of the court's authority. Although a contempt may be established, in the circumstances of the case the court may decide note to make any order. The element of intention is relevant to whether any order should be made and, if so, to punishment. These principles emerge, in my view, from the following authorities.

12 As explained below, I am satisfied beyond reasonable doubt that the actions of Kyodo fall within the category of at least wilful contempt. That is, there is no possible basis upon which an inference could be drawn that the breaches of the 2008 injunctions were casual, accidental or unintentional. They were wilful and voluntary actions of Kyodo done, I am satisfied, in circumstances where Kyodo had knowledge of the orders and what they required. In other words, there is no basis upon which it could possibly be concluded that the conduct of Kyodo, proved to have occurred by reason of the applicant's affidavit evidence, amounted to nothing more than a technical contempt.

Service

13 I should also say something more about service. Given the history of the proceedings, there are a number of steps where service was relevant. Rule 42.13 of the *Federal Court Rules 2011* (the **2011 Rules**) provides that the relevant documents constituting an application alleging a contempt of court must be served personally on the alleged contemnor. However, I made orders on 3 September 2015 in relation to service. I am satisfied beyond reasonable doubt that service of the documents comprising the application for an order that Kyodo be found to be in contempt of court, as set out in the statement of charge, had been served as required by those orders. I do not have any concern that the orders and other relevant documents were left at the general reception or concierge desk on the ground floor of the building and not on the 5th floor itself where Kyodo's offices are actually located. I note that

there is no reference in Kyodo's registered place of business to the location of the company on any particular floor of that building. As set out in the applicant's written submissions, the order required that the documents be left at Kyodo's registered place of business and that registered place of business is the address at which the documents were left. In any event, as has been noted, the person seeking to effect service attended the 5th floor and was required to leave that level under threat of the police being called. In these circumstances, there cannot be any question about effective service of the documents by having left them on the ground floor of the building in which Kyodo is located, as required by the orders.

14 In respect of the 2008 injunction, which was the subject of the orders made by Rares J, the applicant has disclosed that a part of that order was not fully complied with in that not all of the documents were forwarded by registered post, as required. However, as has also been demonstrated by the evidence, the service by registered post of the documents was of no practical consequence because the envelope was returned unopened. As such, I accept that it could not have made any practical difference whether the documents that were not included had been included. More relevantly, the evidence establishes not only that all of the documents required to be served were personally served on Kyodo by being left at its registered place of business as required, but also that the documents were served by facsimile. I do not consider it necessary that there be any order made dispensing with compliance with any of the orders made by Rares J.

15 The other matter that should be noted is the 2008 injunction, as served, contained the endorsement under what was then rr 37.21(1) and (3) of the *Federal Court Rules 1979* (the **1979 Rules**). The endorsement was in the following terms:

> Take notice that where an order of the Court requires you to abstain from doing an act you are liable to sequestration of property if you disobey the order.

16 This endorsement has been replaced by a new version in the 2011 Rules, as set out in r 41.06. Consequently, the 2008 injunction, as served, did not carry the endorsement in that form. However, given that r 41.06 of the 2011 Rules did not exist at the relevant time it cannot be said that the applicant has failed to comply with that rule. Rule 41.06 is not a pre-condition to enforcement of an order by punishment for contempt. As the applicant submitted, if necessary, I could exercise the power in r 1.34 to dispense with any such requirement. Again, I do not consider it is necessary to do so.

Knowledge

17 As I have said, another of the five requirements which must be established beyond reasonable doubt is that Kyodo has knowledge of the terms of the order. In this regard, I accept the submissions for the applicant as follows.

18 The point of requiring service of a court order is to bring matters to the attention of the party in question. It is not the case that a party can avoid having to comply with a court order and thereby can avoid the potential of being found in contempt of court merely by engaging in wilful blindness to the terms of the court order. This is demonstrated by various decisions including *Sun Newspapers Pty Ltd v Brisbane TV Ltd* (1989) 92 ALR 535, *Madeira v Roggette Pty Ltd (No 2)* [1992] 1 Qd R 394 and *Tchia v Rogerson* (1992) 111 FLR 1.

19 There is also evidence in the present matter which discloses that Kyodo was well aware of the proceedings and the orders that were made in the form of the 2008 injunctions. As set out in the written submissions for the applicant, Ms Beynon gives evidence of the events on 23 January 2008 surrounding personal service of the orders. In summary, the interpreter who accompanied Ms Beynon to Kyodo's registered office in Japan told her that the person from Kyodo who came in response to the phone call they made using the telephone directory in the company's reception "informed her that he was aware of the court's orders". When three other apparently more senior gentlemen appeared, Ms Beynon instructed the interpreter to explain that they were there to serve court orders from the Australian Federal Court instructing them to stop whaling in the Australian Whale Sanctuary. Ms Beynon believes the message was communicated by way of the interpreter. She also instructed the interpreter to say in response to a question about her identity that she was from HSI. The gentleman involved then refused to accept the documents and when the documents were left at their feet, they tried to give them back. As has been noted in the applicant's written submissions, not only has the applicant publicised the fact that it had served the orders on Kyodo but Kyodo had, of course, previously been served, again personally and by registered post, with the originating process (and the envelope in that latter case was returned unopened).

20 The applicant has also correctly pointed out that the controversy about Japanese whaling in the Antarctic originating from Australia in particular and leading up to proceedings in the International Court of Justice (the **ICJ**) has been notorious for years, so that it cannot reasonably be doubted that Kyodo was well aware of this fact. Consequently, I accept the submission of the applicant that:

> The careful and deliberate attempts to refuse service, both in person and by post, bespeaks knowledge of the proceedings and their significance to Kyodo's whaling operations.

21 In all of the circumstances, I am satisfied beyond reasonable doubt that Kyodo had sufficient knowledge of the 2008 injunctions in order to be liable for contempt of court in the event of a breach of those orders. The evidence has also satisfied me that there has indeed been such breach.

Breach

22 In respect of the issue of breach of the orders, the first point that can be made is that I accept the evidence that no permit otherwise authorising the actions which had been taken has been granted. Otherwise, there is comprehensive evidence available in the form of the cruise reports for each of the relevant years and the associated analysis and mapping exercise carried out by Dr Grech, a spatial information scientist, based on those cruise reports of the killing and treatment of Antarctic minke whales in the Australian Whale Sanctuary in breach of the 2008 injunctions.

23 As set out in the applicant's written submissions, the various cruise reports which are in evidence were prepared for the purposes of Japan reporting the results of its whaling activities to the Scientific Committee of the International Whaling Commission and were obtained from the website of the Institute of Cetacean Research. These cruise reports have to be read in the context of special permits issued by Japan for the relevant years, shipping reports on the vessels used to carry out the whaling, and the company searches for Kyodo, which demonstrate the relationship between Japan, the Institute for Cetacean Research and Kyodo, and Kyodo's role in carrying out the whaling. The special permits are in evidence and relate to the taking of Antarctic minke whales, 850 in total, for what are said to be scientific purposes in the Antarctic Ocean.

24 The vessels to be used in this exercise are also specified, the owner being described as Kyodo Senpaku Limited, which is one of the translations of Kyodo's Japanese company name. Each special permit is issued to the Institute of Cetacean Research, which is a body having the same address as Kyodo but is legally separate from it. However, from documents filed in the proceedings in the ICJ referred to as Japan's counter-memorial, the relationship is explained. Specifically, it is stated that:

> Kyodo is a private company established in accordance with the Commercial Code of Japan in 1987. It owns ships and employs ship crews for cetacean research and

> operates the research cruises under charter contract with the Institute of Cetacean Research.

25 It is said further that since Kyodo is the only organisation that has a fleet and ship crew capable of whale research in the Antarctic Ocean, the Institute of Cetacean Research has maintained a charter contract with Kyodo regarding whale research. I accept that I am able to rely on this evidence in this proceeding as an admission against Kyodo pursuant to s 87(1)(c) of the *Evidence Act 1995* (Cth), it being reasonably open to find that Japan, Kyodo, and the Institute of Cetacean Research had a common purpose in carrying out whaling in the Antarctic, and that the documents filed by Japan in the ICJ proceedings were made in furtherance of that common purpose.

26 When this information is put together with the various shipping reports in evidence which identify Kyodo as ship manager and registered owner of a number of ships, it is apparent that the only ships referred to in the special permits and cruise reports that are not established by the shipping reports to be owned and managed by Kyodo are two in number, both of which are listed as a sighting vessel or dedicated sighting vessel for certain years, and were thus not directly engaged in the actual whaling activities.

27 The Kyodo company search supports all of this evidence, because it states that between 29 January 2008 and 17 December 2014, the purposes of the company included "contracting of research into whales and other marine resources" and "processing and sale of whale products". I am satisfied beyond reasonable doubt that Kyodo operated the vessels which undertook the whaling operations described in each of the relevant cruise reports.

28 Amongst other things, the cruise reports annex a series of maps depicting where particular species of whales were sighted or, as it were, sampled, which is a term used to describe the taking and killing of whales. For example, it is noted that "sampled" whales were the subject of a study of internal organs. There is no doubt that where whales have been sampled in the cruise reports, they have been taken and killed. Dr Grech's exercise was essentially one of mapping and the provision of an opinion as to the location of the sampling shown in the maps annexed to the cruise reports having taken place within the Australian Whale Sanctuary in breach of the 2008 injunctions.

29 It is not necessary to explain the process by which Dr Grech did so other than to observe that, on a very conservative basis, Dr Grech was satisfied that in each of the four years in question at least one whale had been taken and killed inside the boundaries of the Australian Whale

Sanctuary. As the applicant submits, however, the maps attached to Dr Grech's report establish beyond reasonable doubt that in each of the four years in question, there were indeed numerous instances, generally more than five in each year and in some years substantially more than that, in which whales were taken and killed in the Australian Whale Sanctuary.

30 There is also specific evidence relating to activities on 15 February 2013, being eye witness evidence from Captain Hammarstedt and Mr Lockitch. They directly observed a whale being killed and processed by persons onboard two vessels, Yūshin Maru No. 2 for the killing and the processing of the whale subsequently on the Nisshin Maru. Captain Hammarstedt gives detailed evidence of the practice of the vessel on which he was on, the Bob Barker, for recording coordinates and the manner in which those coordinates were recorded during the evening of 15 February 2013 over the period of approximately two hours when the killing of the whale by persons aboard the Yūshin Maru No. 2 and its subsequent transfer to the Nisshin Maru were observed. These coordinates were provided to Dr Grech, who placed their location on a map showing the boundaries of the Australian Whale Sanctuary, and it is apparent that all of the relevant incidents – that is, the harpooning of the whale and the subsequent interaction between the two vessels during which a person aboard Bob Barker sought to prevent the transfer of the whale from the Yūshin Maru No. 2 to the Nisshin Maru – occurred well within the boundaries of the Australian Whale Sanctuary. Captain Hammarstedt also identified the whale as an Antarctic minke whale, applying his experience in whale conservation over the past 10 years.

31 There is no reason to doubt any of this evidence. As the applicant has accepted, however, this specific incident which is referred to in paragraph 5 of the statement of charge is subsumed into the more general charge relating to the 2012 to 2013 whaling season, which is set out in paragraph 4 of that statement of charge.

32 I accept accordingly that the applicant has established beyond reasonable doubt each of the five elements necessary to establish contempts of court in respect of each of the four whaling seasons identified in the statement of charge, in addition, of course, to the specific incident which occurred on 15 February 2013.

PENALTY

33 I also accept the submission of the applicant that the fact that Kyodo has not appeared and it is unknown whether Kyodo has any assets within the jurisdiction, thereby raising a question

as to whether any penalty can ultimately be enforced, are not matters which would make it appropriate to decline to impose any fine. In that regard, I accept and adopt the written submissions for the applicant:

> 115. HSI submits that it would not be appropriate to decline to impose any fine on the basis that if a fine is imposed: (i) Kyodo is likely to disobey the order to pay the fine; and (ii) if Kyodo does disobey the order to pay the fine, it may not be able to be compelled to pay it because it may not have assets in the jurisdiction:
>
> (a) As the Full Court observed in the 2007 Full Court Judgment at [15], it is for Kyodo to prove that it has no assets in the jurisdiction. It has not done so. The Court should not impose the burden of proving absence of assets on HSI.
> (b) As Allsop J observed in the 2008 Judgment at [51], futility can be seen from the perspective of disobedience. It would not be appropriate to refuse to impose a fine on the basis that it is unlikely ever to be enforced because the person on whom it is imposed will refuse the order to pay it and has no identifiable assets against which orders can be made to satisfy the fine. Many fines against, for instance, undischarged bankrupts, might not be imposed on that basis. While there are authorities in which imprisonment has been imposed as a penalty instead of a fine because of the unlikelihood of a fine being paid due to the contemnor's impecuniosity… HSI's lawyers are not aware of a case where *no penalty* has been imposed because there is an apprehension that the contemnor will disobey the order to pay a fine and has no other identifiable assets against which to enforce it. The Court should not be seen to effectively reward disobedience.
> (c) As both the Full Curt observed in the 2008 Full Court Judgment at [18]-[27], and Allsop J observed in the 2008 Judgment at [52], the public interest nature of the claim is an important consideration. It makes it more important that the Court is not seen to let Kyodo breach the 2008 Injunction without any finding that it is in contempt.
> (d) There is some prospect that the fine might be able to be effectively enforced (that is, Kyodo might be compelled to pay it). The Court can take notice that if the whaling ships owned by Kyodo encountered serious difficulties at sea (for instance mechanical failure or a medical emergency) they might be required to sail into, or they might be taken into, Australian territorial waters. In that event, HSI could immediately commence an action *in rem* by writ and have the ship or ships seized.
> (e) While it might be unlikely that Kyodo's ships will ever come within Australian territorial waters, if they were to do so, and this Court had declined to impose any penalty on the basis of futility, then damage would be done to the authority of the Court, since it would create the impression that its orders had not been vindicated in circumstances where they could have been.

34 Otherwise in respect of penalty, while my attention has been drawn to a number of decisions where fines have been imposed for wilful breaches of court orders, it would be fair to say that none are comparable to the present case. Apart from the facts to which I have already referred above, the best guide to what might be an appropriate penalty, in my view, is to be found in the provisions of the EPBC Act. The objects of the Act set out in s 3 include

provide for the protection of the environment, the promotion of ecologically sustainable development and the conservation of biodiversity. The relevant provisions in the present case relating to the Australian Whale Sanctuary are contained in, first, s 225 of the EPBC Act, which is as follows:

> (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) the waters of the exclusive economic zone (other than the coastal waters of a State or the Northern Territory); and
> (b) so much of the coastal waters of a State or the Northern Territory as are prescribed waters; and
> (c) any marine or tidal waters that are inside the baseline of the territorial sea adjacent to an external Territory, whether or not within the limits of an external Territory.

35 Other relevant provisions include ss 229 to 230:

> **229 Recklessly 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 out limits of the Australian Whale Sanctuary.
>
> (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 paragraphs (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.

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 an illegally killed or take cetacean

(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) 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.

(3) In this Act:

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

230 Possession of cetaceans

(1) Subject to section 231, 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; 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 this section is punishable on conviction by imprisonment for not more than 2 years or a fine not exceeding 1,000 penalty units, or both.

36 It is apparent that ss 229 and 229A are related offences in the sense that s 229 does not involve a strict liability offence for the acts there specified, whereas s 229A is a strict liability offence for the same actions. Those offences constitute the taking of action which results in the death or injury of a cetacean in the Australian Whale Sanctuary. The same formula is used in the division between ss 229B and 229C of the EPBC Act. The former relates to an offence of taking, trading, keeping, moving or interfering with a cetacean in the Australian Whale Sanctuary which involves intention, whereas the latter relates to the same action although on the basis of strict liability. Section 229D is a separate offence altogether which has as one of its elements the killing or taking of a cetacean in contravention of ss 229 or 229A in the case of killing, or ss 229B or 229C in the case of taking. It provides that a person is guilty of an offence if, in those circumstances, the person treats a cetacean, "treat" being defined to mean "divide or cut up or extract any product from the cetacean". Section 230 is also an entirely separate offence and relates to the possession of a cetacean or part of a cetacean or a product derived from a cetacean if it has been killed or taken, again, in contravention of, as relevant, ss 229 or 229A, or ss 229B or 229C. I should also mention s 231, which provides that those sections do not apply to certain actions, none of which on the evidence before me can be of any potential application to the present case.

37 It will be apparent, therefore, that the action of taking, killing, and then dividing or cutting up any whale in the Australian Whale Sanctuary and otherwise the possession of such a whale or any part of it or any product derived from it involves a multiplicity of offences against these provisions which, by reason of s 4B(3) of the *Crimes Act 1914* (Cth), involve very significant potential pecuniary penalties.

38 As set out in the written submissions for the applicant, the monetary penalties that could be imposed for each breach of the relevant provisions which must be taken to reflect

Parliament's view of the objective seriousness of the conduct restrained by the 2008 injunctions are substantial, being:

> i. 1000 penalty units for each contravention of s 229;
>
> ii. alternatively, 500 penalty units for each contravention of s 229A;
>
> iii. 1000 penalty units for each contravention of s 229B;
>
> iv. alternatively, 500 penalty units for each contravention of s 229C;
>
> v. 1000 penalty units for each contravention of s 229D;
>
> vi. 1000 penalty units for each contravention of s 230;
>
> vii. For a body corporate such as Kyodo, the Court was empowered to impose an amount 5 times the maximum set out above, pursuant to s 4B(3) of the *Crimes Act 1914* (Cth)
>
> viii. a penalty unit was $110 pursuant to s 4AA of the *Crimes Act 1914,* as it stood at all relevant times up to 28 December 2012, after which it was $170, pursuant to the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*, Schedule 3, Items 7 and 9.

39 In other words, and for example, a contravention of s 229 in respect of a single cetacean could attract a maximum penalty of $550,000 before the relevant amendments increasing the amount of each penalty unit. If that cetacean was then treated, an additional penalty again in the amount of $550,000 could be imposed pursuant to s 229D. I accept the applicant's submissions that these provisions indicate the serious nature of the conduct which has been carried out in the years contrary to the terms of the 2008 injunctions.

40 In addition, I accept the applicant's submissions as follows:

(1) There can be no doubt that the conduct involved has been deliberate, systematic and sustained in circumstances where I am satisfied beyond reasonable doubt that Kyodo had knowledge of what the 2008 injunctions required. Further, the conduct involved required substantial effort and resources to carry out.

(2) Even on a conservative view, there have been at least five Antarctic minke whales killed in the Australian Whale Sanctuary in breach of the 2008 injunctions for each of the four years involved.

(3) The 2008 injunctions have a substantial public interest component and perform an educational role, so that any penalties imposed should be sufficient to be seen as a

denouncement of the conduct of Kyodo and to be consistent with the clear intention of Parliament that this conduct be recognised to be objectively serious.

41 On the evidence, it is apparent that part of the overall arrangement in which Kyodo is involved includes an intention to sell whale products in Japan. While I cannot be satisfied beyond reasonable doubt that the actual Antarctic minke whales that were killed in the Australian Whale Sanctuary were used for the purpose of generating commercial revenue by sale in Japan, I can be satisfied beyond reasonable doubt that Kyodo has at least sought to generate revenue from its activities, including its activities in breach of the 2008 injunctions.

42 Further, it goes without saying that Kyodo has not offered any expression of contrition for its breaches of the 2008 injunctions.

43 Specific deterrence is also not irrelevant in this case, notwithstanding the *ex parte* nature of the proceedings, as is general deterrence. The evidence shows that Kyodo is the only company involved in these operations, and the penalty should be large enough overall to deter Kyodo and others from carrying out activities in breach of the 2008 injunctions.

44 In addition, given the *ex parte* nature of the proceedings, there is no basis on which to consider that any fine lower than that which might otherwise be imposed should result in this case by reason of any financial constraints to which Kyodo is subject.

45 Taking into account these considerations, I am satisfied that a penalty of not less than $250,000 for each of the four whaling seasons should be imposed on Kyodo. In this regard, although I accept the submissions put orally today that what is involved is four separate courses of conduct and therefore no consideration need be given to the cumulative penalty, even if weight is to be given to the cumulative nature of the penalty, I do not see that as in any way excessive, having regard to the serious nature of the breaches which the applicant has established.

46 Accordingly, Kyodo is found to be in contempt of court and consequently, is to pay fines which together total $1,000,000.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 2 December 2015