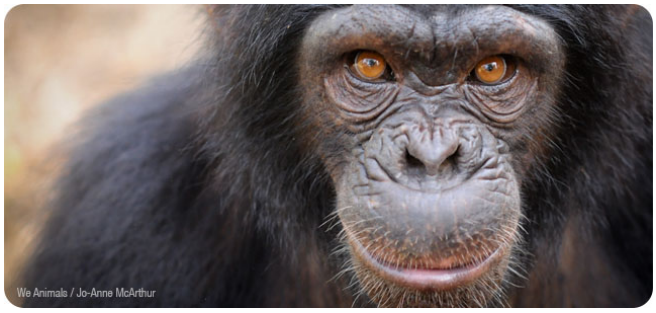
Lawyers for Animals Newsletter: April

Events

Animal Law Moot 2014 – October

The Voiceless Australian-New Zealand Intervarsity Moot on Animal Law (ANIMAL) will be taking place at Bond University in October this year. It is a knockout style moot competition that will explore and consider the legal issues within the emerging area of animal law. The moot is open to all law students in Australia and New Zealand. For more details, go to the Voiceless website.



Animal Activists Forum – Call for speakers

The Animal Activists Forum is an annual two-day conference that endeavours to provide a space within which activists can network, collaborate and learn. This year the conference will be held in Sydney on 18-19 October. The organisers are seeking expressions of interest from individuals or groups who wish to present at the conference. For more information, visit www.activistsforum.com.

2014 Voiceless Animal Law Lecture Series – 15 and 16 May

The 2014 Animal Law Lecture Series will explore the rise of 'ag-gag' laws which criminalise many of the methods used by animal advocates to uncover incidents of cruelty. Two lectures are taking place in Victoria:

First lecture

- When: Thursday 15 May 2014, 6:00 pm
- Where**:** University of Melbourne

Second lecture

- When: Friday 16 May 2014, 1:00 pm
- Where: King & Wood Mallesons (CBD)

Registration for the events is through the Voiceless website.

Legal developments

Victoria's new breeding Code for cats and dogs comes into effect

The new *Code of Practice for the Operation of Breeding and Rearing Businesses* came into effect on 11 April 2014. See LFA's 2013 Year In Review for a summary and analysis of the Code.

"Should a Chimp Be Able to Sue Its Owner?"

In our 2013 Year In Review, we reported on the filing by the Non-Human Rights Project of a common law writ of habeas corpus claiming that Tommy, a chimpanzee confined to a small cage in New York, was being held captive unlawfully. On 23 April 2014, the New York Times published an article on Steven Wise, one of the driving forces behind the lawsuit. The article makes for fascinating reading, setting out some of the background to the case and how it was formulated, and providing a window into the life of Steven Wise and his 25 year mission to have non-human animals recognised as legal persons.

You can read the article here: http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?_r=0.

EU law to ban alien species

In a bid to stem biodiversity loss, the EU Parliament has approved legislation that will ban the possession, transport, selling or growing of alien species, such as the "killer shrimp", that are considered to be of "Union concern". The Regulation will contain three types of intervention: prevention, early warning and rapid response, and management. EU Member States will work together to create a list of about 50 species to which these measures will be applied. The law is expected to come into force in January 2016.

LFA Article

Whaling in the Antarctic: A summary of the International Court of Justice decision regarding Japan's Antarctic whaling program

By Claire Southwell, LFA Volunteer

Photo: AFP/Sea Shepherd Australia/Glenn Lockitch

On 31 March 2014, the International Court of Justice ("ICJ") upheld Australia's application to end Japan's Antarctic whaling program. The Court unanimously held that that it had jurisdiction to hear the case and by 12 votes to four found that special permits granted by Japan to conduct whaling were not for the purpose of scientific research, as required by the International Whaling Commission ("IWC") rules. The ICJ is the highest United Nations judicial body thus the decision is binding and cannot be appealed. It is hoped that the strength of this decision will put an end to commercial whaling that occurs under the pretence of scientific research, and that it will influence global responses to the conservation of whales.

Background to the Case

On 31 May 2010, Australia filed an Application in the Registry of the ICJ instituting proceedings against Japan. The proceedings were in respect of Japan's pursuit of large-scale whaling in the Antarctic, specifically the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II"). Australia argued that this program was in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (ICRW) and other international obligations for the preservation of marine mammals and the marine environment.[1] Japan argued that its activities were lawful because the special permits were issued for the purposes of scientific research, as provided for by Article VIII of the ICRW.[2]

The ICRW entered into force for Australia on 10 November 1948, and for Japan on 21 April 1951. The Schedule to the ICRW contains substantive provisions that regulate the conservation of whales and the management of the whaling industry. The Schedule and amendments to it are binding on State parties unless they present an objection.

Article VIII states that any State party contracting to the ICRW may grant to any of its nationals a special permit authorising it to kill, take and treat whales for purposes of scientific research, subject to restrictions as the State party sees fit. The killing, taking, and treating of whales that is in accordance with the provisions of this Article is permissible and exempt from the operation of ICRW.

The ICJ Decision

Alleged Violations of International Obligations under the Convention

Australia alleged that JARPA II is not a program for the purposes of scientific research within the meaning of Article VIII of the Convention, thus Japan had breached, and continued to breach, obligations under the Schedule to the ICRW. Australia's key claims concerned the alleged failure to comply with the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes, and the obligation not to undertake commercial whaling in the South Ocean Sanctuary.[3] Japan contested all of the breaches alleged by Australia, arguing that the obligations invoked by Australia did not apply to JARPA II given its fundamental scientific research purpose.

Interpretation of the "scientific research" exemption

Interpretation of Article VIII was critical to the Court's decision-making. Of particular concern was the meaning of the phrase 'for purposes of scientific research'. The Court determined that even if a whaling program involves scientific research, treatment of whales pursuant to a program would not fall within the meaning of Article VIII unless the activities were 'for the purpose of' scientific research', suggesting that research must be the dominant or substantial rationale.[4] The Court considered the explanations of experts called by both Parties. The experts of both Parties agreed that lethal methods could have a place in scientific research, however they did not come to an agreed conclusion as to the conditions for their use.

The Court was of the view that the fact that a program involves the sale of whale meat and the use of proceeds to fund research was not in itself sufficient to cause a special permit to fall outside Article VIII.[5] Other considerations would have to be weighed against this factor. The Court viewed the scale of a program's use of lethal sampling as a significant consideration, as lethal sampling on a larger scale than that which is required to achieve a program's stated research objectives may be indicative of conduct falling outside the scope of Article VIII.[6] The Court indicated that while pursuit of a policy could seek to accomplish more than one goal, a program's research objectives alone must be sufficient to justify

[1] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Judgment)* (International Court of Justice, General List No 148, 31 March 2014) [30]. ('*Whaling in the Antarctic*').
[2] *Whaling in the Antarctic* [30].
[3] *Whaling in the Antarctic* [48].
[4] *Whaling in the Antarctic* [71].
[5] *Whaling in the Antarctic* [94].
[6] *Whaling in the Antarctic* [97].

the design and implementation of a whaling program.[7]

JARPA II in light of Article VIII of the Convention

The stated objectives of JARPA II included monitoring the Antarctic ecosystem, modelling competition among whale species, investigating the temporal and spatial changes in whale stock structure, and improving the management of Antarctic minke whale stocks. The program focused on Antarctic minke, humpback and fin whales. The proposed annual lethal sampling was 850 Antarctic minke whales, 50 humpback whales and 50 fin whales. The program also used non-lethal research components such as sighting surveys and the collection of oceanographic data.

The Court viewed the following factors as difficult to reconcile with scientific research purposes.

(a) Absence of proper justification for the use of lethal methods

The Court concluded that the papers provided by Japan regarding the use of lethal methods in JARPA II revealed little analysis of the feasibility of using non-lethal methods in achieving JARPA II's research objectives. There was also expanded use of lethal methods in JARPA II compared to the earlier program, JARPA. Moreover, Japan pointed to a 2007 paper that appeared to support a preference for lethal sampling on the basis of it being a source of funding to offset research costs. The Court viewed these factors as difficult to reconcile with Japan's obligation to use lethal methods only to the extent necessary to meet its scientific objectives.[8]

(b) Inadequate justification for species-specific sample sizes

The scale and use of lethal methods in JARPA II is determined by sample sizes that are species-specific. It was notable that the overall research objectives of JARPA and JARPA II were very similar. The Court viewed the similarity in the stated research objectives of the two programs to cast doubt on the need for the latter program to significantly increase the minke whale sample size and to add the lethal sampling of two more species.[9] The Court stated that the weaknesses in Japan's explanation for the increased sampling sizes in the latter program afforded weight to the argument that the sample sizes were not driven by scientific purposes.[10]

Australia argued that Japan failed to provide a coherent scientific rationale for the JARPA II sample sizes, which Japan refuted.[11] The Court considered the way that Japan set the target sample sizes for fin and humpback whales. It held that there was only limited information regarding the basis for the sample size decision.[12] In considering the minke whale sample size, the Court concluded that this evidence also offered little analysis or justification for the fundamental rationales that determined the overall sample size.[13]

(c) Discrepancy between sample size and actual take

The Court considered the significant gap between the JARPA II target sample sizes and the actual number of whales that have been killed since implementation of the program. A total of 18 fin whales were killed over the first seven seasons of JARPA II. In subsequent years, zero to three fin whales were taken annually. No humpback whales have been killed under JARPA II. The actual take of minke whales has fluctuated from year to year. 853 were taken in the first season, despite the sample size of 850. Approximately 450 were taken in the several years following, and since 2010, the actual take annually has been around 100-170.

The Court could not ascertain a single explanation for the discrepancy based on Japan's arguments. The Court held that two conclusions could be drawn from the evidence regarding the gap between the target and actual sample sizes. Firstly, Japan suggested that the actual take of minke whales did not compromise the program because smaller numbers of minke whales could nonetheless generate some measure of valuable research. The Court considered that Japan's assertion that the program can achieve scientifically useful results by either extending the research period or by accepting results with a lower level of accuracy raised doubt about whether the target sample size was reasonable in achieving the stated scientific objectives of JARPA II.[14]

Secondly, the court noted that Japan's emphasis on multi-species competition and ecosystem research has been unwavering. The Court viewed the gap between the target samples for fin and humpback whales and the actual take as undermining Japan's argument that the increased target sample size for minke whales is justifiable on the basis of ecosystem research objectives.[15] The Court concluded that these two factors cast great doubt on the characterisation of JARPA II as a program that is for the purposes of scientific research.[16]

Additional aspects of the design and implementation of JARPA II

The Court also briefly considered other factors to which the Parties had called attention.

(a) Open-ended time frame

Australia contended that the program's open-ended timeframe evidenced that the design of JARPA II was intended to support the ongoing perpetuation of whaling by any means. The Court noted that a time

[7] Ibid.

[8] *Whaling in the Antarctic* [144].

[9] *Whaling in the Antarctic* [153].

[10] *Whaling in the Antarctic* [156].

[11] *Whaling in the Antarctic* [158]-[159].

[12] *Whaling in the Antarctic* [181].

[13] *Whaling in the Antarctic* [198].

[14] *Whaling in the Antarctic* [209].

[15] *Whaling in the Antarctic* [210].

[16] *Whaling in the Antarctic* [212].

frame with intermediary targets, rather than an on-going timeframe, would have been more appropriate for a program for the purposes of scientific research.[17]

(b) Scientific output of JARPA II to date

The Court noted that the Research Plan uses a six-year period to obtain statistically significant information for minke whales and a 12 year period for the other two species hence the main scientific output would be expected after these timeframes. It noted, however, that the first research phase of JARPA (commencing 2005-2006) has already passed, and Japan only pointed to two peer-reviewed papers that have resulted from JARPA II. Given that JARPA II has been in effect since 2005 and has involved the killing of approximately 3,600 minke whales, the Court concluded that this scientific output is limited.[18]

(c) Co-operation with other research institutions

The Court noted that evidence of co-operation between JARPA II and other research institutions could have been expected in light of the program's emphasis on the Antarctic ecosystems and environmental changes in the region. However evidence of this was not provided.[19]

Conclusions regarding the application of Article VIII to JARPA II

The Court ultimately considered that the evidence did not establish that the program's design and implementation are reasonable in relation to achieving its stated objectives. The Court concluded that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not 'for the purposes of scientific research'.

Remedies

The Court observed that JARPA II is an ongoing program and that measures beyond declaratory relief were warranted. It ordered Japan to revoke any extant authorisation, permit or licence to kill, take or treat whales in relation to JARPA II, and to refrain from granting any further permits in pursuance of JARPA II.

Implications of the Decision

The ICJ decision effectively places a ban on Japan's whaling programs in the Southern Ocean. While the decision directly implicates Japan's JARPA II program, it is hoped that the landmark decision will have wider implications on whaling globally. Shadow Attorney-General Mark Dreyfus asserted that in addition to its direct implications in ceasing Japan's program, it is likely to put pressure on smaller countries that continue to engage in commercial whaling operations.[20]

There are, however, limitations to how much the decision will impact whaling conduct internationally. Firstly, countries such as Iceland and Norway continue to engage in commercial whaling thus they are not impacted by the Court's decision regarding whaling for scientific research purposes. Additionally, the ICJ decision relates only to the specific program in question rather than whaling programs deemed to be for the purposes of scientific research more generally. Consequently, Japan plans to continue its whaling program in the North Pacific. Japan's Fisheries Minister Yoshimasa Hayashi has also indicated that, while the government intends to uphold the ICJ ruling, it will prepare a new program under which it can continue its hunting operations in the Southern Ocean by 2015-16.[21]

A significant aspect of the decision was the Court's explanation of a number of factors that will need to be considered when determining whether whaling operations are reasonable for the purposes of scientific research. This may have broader implications on whaling programs globally and the granting of future permits, as it will hopefully preclude the approval of future whaling programs that are fundamentally motivated by commercial, rather than research, purposes. Environment Minister Greg Hunt has noted that, given the strength of the Court order, the prospect of future approvals of whaling programs that do not clearly meet the ICW's requirements is low.[22]

Ultimately, the ICJ decision signifies a clear call for the end of whaling programs in the Southern Ocean. The ruling represents an international denunciation of commercial whaling programs and is a significant vindication of global whale conservation efforts.

Lawyers for Animals

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[17] *Whaling in the Antarctic* [216].

[18] *Whaling in the Antarctic* [219].

[19] *Whaling in the Antarctic* [219].

[20] Andrew Darby, 'International Court of Justice Upholds Australia's Bid to Ban Japanese Whaling in Australia', *The Age* (online), 31 March 2014 <http://www.theage.com.au/federal-politics/political-news/international-court-of-justice-upholds-australias-bid-to-ban-japanese-whaling-in-antarctica-20140331-35ude.html>.

[21] Andrew Darby, 'Japan Strikes Back', *The Age* (online), 19 April 2014 <http://www.theage.com.au/environment/whale-watch/japan-strikes-back-on-whaling-20140419-36x7o.html>.

[22] Andrew Darby, 'Abbott Urged to Ensure Japans Abides by Whaling Decision', *The Age* (online), 18 April 2014 < http://www.theage.com.au/environment/whale-watch/abbott-urged-to-ensure-japan-abides-by-international-courts-whaling-decision-20140419-36xel.html>.