

CHAPTER 3

APPLICATION TO ESTABLISH AN OCEANARIUM IN VICTORIA

Legal Requirements

3.1 The capture and keeping of captive cetacea in Australia are regulated both through Commonwealth and State legislation.

3.2 The Whale Protection Act 1980, framed in accordance with the findings and recommendations of the Frost Report is designed to afford protection to all cetacea. The legislation has the effect of giving the Commonwealth indirect control over captive cetacean facilities, which are regulated by State legislation, by requiring a permit for the taking of cetacea in any Australian sea waters other than the coastal waters of a State or Territory. The Act prohibits killing, injuring, taking or interfering with whales unless specific conditions apply. The term 'whales' is defined as any member of the sub-order Mysticeti or Odontoceti of the order Cetacea and thus the Act includes dolphins. A person with a permit may, under section 11(1)(a) of the Act, 'take whales for live display or kill or take whales for scientific or educational purposes'. Application for a permit to take cetacea from Commonwealth waters must be made pursuant to section 18 of the Act which requires that the particulars of the application be published and that interested persons be invited to make written comments on the application to the Minister responsible. Ownership of a cetacean taken in Commonwealth waters is vested in the Commonwealth under section 36 of the Act and not in the person or organisation which captures or keeps it. No permit has yet been issued under this Act.

3.3 The granting of a permit is contingent upon meeting set standards in guidelines for the capture and care of cetacea. Draft 'Guidelines for the Maintenance, Handling and Care of Live Cetaceans', for applicants under the Whale Protection Act were drawn up by Australian National Parks and Wildlife Service (ANPWS) in October 1984. These established minimum conditions for the maintenance of cetacea in captivity. They are:

'... based on the best available information on the biological requirements of captive cetaceans. It is recognised that there are significant intra- and inter-specific differences in the biological and behavioural characteristics of cetaceans in their natural habitats and in their requirements in captivity which have to be taken into account ... In all cases, the goal is the welfare of the individual captive cetacean.'¹

3.4 The guidelines cover such areas as space requirements (including pool size and water volume), construction materials, temperature, lighting, noise, water quality, food and feeding, special facilities, veterinary care, training, handling, inspections and maintenance of records.

3.5 The draft 'Guidelines for Techniques of Live Capture and Transport of Cetaceans', drawn up at the same time by ANPWS, deal with methods of capture which '... must be designed to minimise physical harm, discomfort and shock'.² Sections deal with transportation, containers, carriage, care and food requirements in transit, duration of trip and terminal handling facilities.

3.6 The States have jurisdiction over cetacea caught within the three mile territorial sea limit. Some complement the cetacean capture provisions of the Whale Protection Act by legislating in respect of the display and education facilities

for captive cetacea. In Victoria, the Wildlife Act 1975 as amended by the Wildlife (Protection of Whales) Act 1981 provides, under section 78(1)(a), that a permit may be issued authorising the possession of cetacea for specific purposes connected with live display or scientific or educational purposes. Publication of the particulars of the application, together with an invitation for interested people to lodge written comments, is provided for under section 82 of the Act. In New South Wales, cetacea are protected by the National Parks and Wildlife Act 1974 which requires that a licence be issued under section 121. South Australia and Queensland protect cetacea under the general provisions of their respective Fisheries Acts. Tasmania is currently considering new legislation to be called The Whale Protection Act. In Western Australia, application must be made under the provisions of its Wildlife Conservation Act.

3.7 Some States require applicants to satisfy criteria before an oceanarium may be established and cetacea captured. Atlantis Marine Park, which was established in 1981, was granted a permit by the Director of Fisheries and Wildlife under the Western Australian Wildlife Conservation Act, and is subject to the conditions set out in its 'License Conditions and Guidelines relating to the Care and Maintenance of Marine Mammals'. Atlantis was not subject to the provisions of the Whale Protection Act because it applied for a permit to capture its cetacea in Western Australian waters.

3.8 In 1983, an application for a permit to establish and operate an oceanarium in Victoria resulted in the publication of 'Guidelines for the Capture, Transport and Care of Cetaceans 1984', compiled by the Fisheries and Wildlife Service of the Department of Conservation, Forests and Lands. At the same time ANPWS drafted its guidelines for applications under the Commonwealth Whale Protection Act. A draft code of conduct for

marine mammals, for applications made under N.S.W. legislation, governing 'The Physical Conditions for the Acquisition, Transportation, Maintenance in Captivity and Disposal of Smaller Whales, Dolphins, Seals, Sea Lions and Fur Seals' was also drawn up.

3.9 The draft guidelines were based on the specifications for the 'Humane Handling, Care, Treatment and Transportation of Marine Mammals' under the United States Marine Mammal Protection Act. These were regarded as the most progressive and up-to-date guidelines available. However Fuller contended that:

'In recent years it has become increasingly obvious that regulations governing the dimensions of dolphin tanks, in force at the time establishments such as Atlantis Marine Park were proposed, were woefully inadequate. Controlling bodies in some countries are now insisting on very large tanks for the housing of dolphins.'³

ANPWS thought that:

'... it would be fair to say that now there is some contention over even the standards that have been recommended within the U.S. at the moment.'⁴

Oceanarium proprietors have also commented on deficiencies in existing guidelines and suggested improvements. It has been noted that guidelines would continually become outdated as new information about cetacea was discovered and that they would therefore always need periodic revision.

3.10 The other Australian oceanaria were established before the Whale Protection Act was passed and have not had to conform to its guidelines for minimum standards for the welfare of cetacea. However, if any of these wishes to capture more cetacea for its facility, it may have to apply under either State or Commonwealth legislation and a permit could be refused if the

facility or standard of care was not considered to be adequate. Recently, in New Zealand, Napier Marineland, with a high record of cetacean mortalities, was granted a permit to capture more cetacea only after it had undertaken significant improvements in the facility.

3.11 Restrictions and controls under State legislation vary considerably. While Victoria, New South Wales and Western Australia have established comprehensive guidelines, South Australia and Queensland have none.

3.12 Problems exist with the enforcement of the legislation. Although there is provision for the inspection of facilities it is questionable whether they can be adequately monitored because of time and staffing constraints. It is also possible that capture jurisdiction cannot be properly policed. Those wishing to circumvent Commonwealth legislation could capture cetacea in Commonwealth waters but maintain that they had caught them within State limits.⁵

3.13 The RSPCA has expressed concern that a captive cetacean facility, which satisfied all criteria specified in guidelines, may be viable initially but may, in the longer term, lose profitability. As a result, cetacean welfare may suffer.⁶ Abel has proposed that oceanarium proprietors or managers be licensed rather than, or, as well as, the facility itself. It would then be necessary for any prospective owner or manager to undergo a stringent assessment before obtaining a licence to run an oceanarium.

3.14 As well as regulating the capture and keeping of cetacea through Commonwealth and State legislation, Australia, as a signatory to certain international instruments, has an obligation to comply with their conditions regarding captive cetacea.

3.15 Australia is one of the original signatories to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which was negotiated by more than 70 countries in 1973. A regulation of the European Council, which came into force at the beginning of 1984, added dolphins and killer whales to Appendix I of the Convention, which requires ratifying nations not to trade these cetacea for primarily commercial purposes. Trade in cetacea, which are listed in Appendix II of the Convention, is regulated through a permit system.

3.16 Initially, Australia gave effect to the provisions of CITES through a variety of legislative actions. In 1982 these were consolidated under the Wildlife Protection (Regulation of Exports and Imports) Act 1982. Schedules 1-3 list wildlife to which strict export and import controls apply. Schedule 3 contains all species of the order Cetacea.

3.17 In 1982, Australia signed, but has not yet ratified, the Law of the Sea Convention and the final Act of the Law of the Sea Conference. Australia is also a signatory to the International Convention for the Regulation of Whaling 1946, which established the International Whaling Commission (IWC).

The Application by Marine World Victoria

3.18 On 19 December 1983, the City of Springvale Council granted a permit which approved, in terms of landuse, the establishment of an oceanarium.

3.19 The applicant was Marine World Victoria, incorporated on 11 October 1983 which would be trading as Sequana Marine Garden, Keysborough, Victoria. The cost of the project was determined to be \$18 million. It was planned that the oceanarium would occupy 10 hectares of land with 18.9 hectares for parking, landscaping and other ancillary services.

3.20 In August 1984, application was made under the Victorian Wildlife Act 1975, as amended by the Wildlife (Protection of Whales) Act 1981, to the Director of the Fisheries and Wildlife Service for a permit to enable the transportation and keeping, for live display and educational purposes, of the cetacea.

3.21 Application was also made in August 1984 under the Commonwealth Whale Protection Act 1980, to the Minister for Home Affairs and the Environment, for a permit to enable the collection, for live display and educational purposes, of 11 (seven female and four male) sub-adult bottlenose dolphins (Tursiops truncatus) and two (one female and one male) sub-adult false killer whales (Pseudorca crassidens).

3.22 The cetacea were to be collected at periods between September 1985 and September 1986 by the Breakaway Hoop Net method in Commonwealth waters in Bass Strait.

3.23 The Commonwealth application was made in accordance with the 'Guidelines for the Preparation of Applications for Permits for Live Display, Scientific or Educational Purposes', drawn up by ANPWS in October 1982. The applicant was required to furnish detailed information on, amongst other things, transport, display facilities, water supply, diet, sanitation practices, qualifications and experience of staff, veterinary certification, display practices, number of displays daily, previous experience and cetacean mortalities. The guidelines stated that the Minister would consider, in relation to the permit application, the information provided by the applicant, whether the proposal was consistent with the objects and provisions of the Act, whether substantial public benefit would be gained and the effect of the proposal on cetacea and the marine ecosystem, the applicants qualifications, comments from other persons, and other factors relevant to the preservation, conservation and protection of cetacea.

3.24 In accordance with Commonwealth and Victorian legislation, public notices were issued inviting public comment on the application. The ANPWS received 298 submissions and the Victorian Government received 317. About three-quarters of the submissions, 223 to the Commonwealth and 236 to Victoria, expressed opposition to the establishment of the oceanarium.

3.25 The most comprehensive representation of this opposition has been made by three organisations: Project Jonah, Greenpeace and the Australian Conservation Foundation. Project Jonah communicated its opposition to the Springvale Municipal Council on 8 March 1984. The Council in reply found that:

- '(i) to keep, train and display dolphins in a well-run oceanarium is an acceptable way of keeping such animals;
- (ii) oceanaria make a substantial contribution to community understanding of sea life and respect for the animals concerned as well as providing entertainment and employment for people; and
- (iii) the operators of oceanaria commonly provide substantial support for conservation of marine wild-life, especially cetaceans, because of the knowledge and facilities which they establish in an area.'⁷

Accordingly it issued the necessary town planning permits.

3.26 However, the application for a permit to collect the cetacea from Commonwealth waters was refused by the Minister for Home Affairs and the Environment on 24 October 1984 'due to the extent and nature of public opposition to the proposal'. The Minister indicated that the application might be reconsidered at a later date in the light of any recommendations on captive

display of cetacea from the Senate Select Committee on Animal Welfare.⁸ The Victorian Government, which was also considering the application, decided to make no decision on the proposed oceanarium until the Senate Committee reported.

3.27 In refusing the application the Minister for Home Affairs and the Environment gave no consideration to the information required by the Guidelines for Preparation of Applications regarding adequacy of the facilities or to the provision for the welfare of the cetacea. Marine World, Victoria, was informed that the decision to refuse the application was based solely on the extent and nature of public opposition. It should be noted that Marine World, Victoria, did comply with all Victorian legislation and guidelines regarding capture, transport, handling, maintenance and display of live cetacea and that the Minister was informed by ANPWS that 'the proposed methods of transport and capture of the cetaceans, appear to be in accordance with accepted practice for these activities'.⁹

3.28 The Committee considers that it is very difficult to gauge the extent of public opposition to an issue such as the keeping of cetacea in captivity. While Friends of Marine World and Project Jonah in Victoria and Sea World in Queensland have all collected thousands of signatures for petitions either for or against captive cetacea, the Committee is of the opinion that they cannot be used as a reliable indicator of public opinion.

3.29 Project Jonah told the Committee that about three-quarters of the submissions received by the Victorian Government and ANPWS were opposed to the proposed oceanarium at Keysborough in Victoria. This, too, cannot be regarded as an indicator of general public opinion. Many of these submissions were written either by members of Project Jonah or other animal welfare organisations campaigning against the oceanarium or by

people connected with these organisations. In addition, advertisements calling for comments on proposals more often attract opponents rather than supporters of those proposals.