FEDERAL COURT OF AUSTRALIA

State of Queensland through the Department of Agriculture and Fisheries v Humane Society International (Australia) Inc [2019] FCAFC 163

Appeal from:	*Humane Society International (Australia) Inc and Department of Agriculture & Fisheries (Qld)* [2019] AATA 617
File number:	QUD 230 of 2019
Judges:	**ALLSOP CJ, GREENWOOD AND ROBERTSON JJ**
Date of judgment:	18 September 2019
Catchwords:	**ADMINISTRATIVE LAW** – appeal on a question of law from a decision of the Administrative Appeals Tribunal – whether the Tribunal exceeded its decision-making power in imposing conditions inconsistent with the essence of the application to the Great Barrier Reef Marine Park Authority, the primary decision-maker – whether the Tribunal misunderstood or erred in its application of the precautionary principle – whether the Tribunal proceeded on the basis of a false (and erroneous) dichotomy between scientific and non-scientific evidence – whether, in varying the permit to include certain conditions, the Tribunal denied the applicant procedural fairness or erred in failing to specify that its decision was not to come into operation until a later date under s 43(5B) of the *Administrative Appeals Tribunal Act 1975* (Cth) **ENVIRONMENT LAW** – appeal on a question of law from a decision of the Administrative Appeals Tribunal – the decision under review by the Tribunal was the decision of the Great Barrier Reef Marine Park Authority to grant two permissions under the *Great Barrier Reef Marine Park Regulations 1983* (Cth) to the applicant to use and enter the Marine Park: to conduct a program to take animals or plants that pose a threat to human life or safety, being the Queensland Shark Control Program; and to conduct a research program comprising certain specified studies – whether the Tribunal misunderstood or erred in applying the precautionary principle
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) ss 43, 44 *Great Barrier Reef Marine Park Act 1975* (Cth) ss 2A, 3AA, 3AB, 3(1), 7(3)

	Great Barrier Reef Marine Park Regulations 1983 (Cth) regs 3, 74, 77 *Great Barrier Reef Marine Park Zoning Plan 2003* (Cth)
Cases cited:	*Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; 215 FCR 301 *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage (No 2)* [2006] AATA 94; 93 ALD 625 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17; 130 LGERA 508
Date of hearing:	15 August 2019
Date of last submissions:	21 August 2019
Registry:	Queensland
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	137
Counsel for the Applicant:	Mr J Horton QC with Dr G Sammon
Solicitor for the Applicant:	Crown Law
Counsel for the First Respondent:	Mr E C Muston SC with Dr C McGrath and Mr D Hume
Solicitor for the First Respondent:	Environmental Defenders Office (NSW) Ltd
Counsel for the Second Respondent:	Ms E Longbottom

Solicitor for the Second Respondent:	Australian Government Solicitor

ORDERS

QUD 230 of 2019

BETWEEN:	**STATE OF QUEENSLAND THROUGH THE DEPARTMENT OF AGRICULTURE AND FISHERIES (QLD)** Applicant
AND:	**HUMANE SOCIETY INTERNATIONAL (AUSTRALIA) INC** First Respondent
	GREAT BARRIER REEF MARINE PARK AUTHORITY Second Respondent
JUDGES:	**ALLSOP CJ, GREENWOOD AND ROBERTSON JJ**
DATE OF ORDER:	**18 SEPTEMBER 2019**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The applicant pay the costs of the first respondent.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 This appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) on, and limited to, questions of law is brought from the decision of the Administrative Appeals Tribunal given on 2 April 2019.

2 Before the Tribunal, Humane Society International (Australia) Inc (**Humane Society**) sought review of a decision of the Great Barrier Reef Marine Park Authority dated 2 June 2017 (as varied on 10 July 2018) affirming its decision dated 23 March 2017 to grant two permissions under the *Great Barrier Reef Marine Park Regulations 1983* (Cth) (the **Regulations**) (as in force at June 2009) to the Queensland Department of Agriculture and Fisheries, the present applicant, to use and enter the Great Barrier Reef **Marine Park** for the following purposes:

- to conduct a program to take animals or plants that pose a threat to human life or safety being the Queensland Shark Control Program ...; and
- to conduct a research program comprising certain specified studies ... .

3 The Tribunal said the Queensland Shark Control Program involved "setting baited drum lines 500 metres offshore from the most popular beaches in the Marine Park and (sic) to catch and kill 19 species of shark that are on a target list; Schedule 3 of the Current Permit as Varied - Target Shark Species ("**target shark list**")." The protected areas range from south of Gladstone to just north of Cairns. The beaches at which the drum lines are installed represent 0.3% of the Marine Park coastline.

4 The sharks on the target shark list were:

Common name	Scientific name
Australian Blacktip	*Carcharhinus tilstoni*
Big Nose Whaler	*Carcharhinus altimus*
Blue Shark	*Prionace glauca*
Bull Whaler	*Carcharhinus leucas*
Common Blacktip Whaler	*Carcharhinus limbatus*
Dusky Whaler	*Carcharhinus obscurus*
Great Hammerhead	*Sphyrna mokarran*
Grey Reef Whaler	*Carcharhinus amblyrhynchos*

Long Nose Whaler (Spinner Shark)	*Carcharhinus brevipinna*
Longfin Mako	*Isurus paucus*
Shortfin Mako	*Isurus oxyrinchus*
Oceanic Whitetip Whaler	*Carcharhinus longimanus*
Pigeye Whaler	*Carcharhinus amboinensis*
Sandbar Whaler	*Carcharhinus plumbeus*
Sharptooth Shark/ Lemon shark	*Negaprion acutidens*
Silky Whaler	*Carcharhinus falciformis*
Silvertip Whaler	*Carcharhinus albimarginatus*
Tiger Shark	*Galeocerdo cuvier*
White Shark	*Carcharodon carcharias*

5 A drum line consists of a string of floats connected to the substratum via a single anchor and chain, with a 14/0 baited hook attached to the outer float via a two metre chain trace. They are deployed in 173 locations and are normally inspected every second day, but on the Capricorn Coast they are inspected 208 times per year. The average annual catch of tiger sharks between 2001 and 2016 was 144.

6 The Tribunal said, at [34], that there are three species in Australia that give any real cause for concern in regards to safety. They are the (great) white shark, the tiger shark and the bull shark. In a 40 year period there have only been five species of shark that have interacted with people. They are the tiger shark, the bull shark, the white tip reef shark, the grey reef shark, and the wobbegong shark. Of those five species, the last three have only been associated with one shark incident. The main safety concern in the reef area relates to the tiger shark and the bull shark. The evidence primarily focused on the tiger shark. Other sharks on the target shark list were there because they were known to have caused fatalities elsewhere in the world; they were not known to have caused fatalities in the Marine Park.

7 At [10], the Tribunal said that the *Great Barrier Reef Marine Park Zoning Plan 2003* (Cth) (**Zoning Plan**) is the primary planning instrument for the conservation and management of the Marine Park. The Zoning Plan divides the Marine Park into eight zones, of which the following three were relevant: General Use Zone; Habitat Protection Zone; and Conservation Park Zone. Each zone had a defined purpose for which it could be used or entered without permission and a defined purpose for which it could be used and entered with permission. The Zoning Plan required the written permission of the Authority to use or enter each of the three relevant zones

for the purposes of "a program to take animals that pose a threat to human life or safety". The Queensland Shark Control Program is a relevant permission, the Tribunal said.

The statutory provisions

8 Regulation 3 contained the following definitions:

> ***relevant permission*** means a permission required under a provision of the Zoning Plan with respect to the purposes for which a zone may be used or entered.
>
> ...
>
> ***Zoning Plan*** means the *Great Barrier Reef Marine Park Zoning Plan 2003*.

9 Sections 2.2.2, 2.3.2 and 2.4.2 of the Zoning Plan were in the following terms:

> **2.2.2 Objects for General Use Zone**
>
> The objective of this Zoning Plan for the General Use Zone is to provide for the conservation of areas in the Marine Park, while providing opportunities for reasonable use.
>
> ...
>
> **2.3.2 Objectives for Habitat Protection Zone**
>
> The objectives of this Zoning Plan for the Habitat Protection Zone are:
>
> (a) to provide for the conservation of areas of the Marine Park through the protection and management of sensitive habitats, generally free from potentially damaging activities; and
>
> (b) subject to the objective mentioned in paragraph (a), to provide opportunities for reasonable use.
>
> ...
>
> **2.4.2 Objectives for Conservation Park Zone**
>
> The objectives of this Zoning Plan for the Conservation Park Zone are:
>
> (a) to provide for the conservation of areas of the Marine Park; and
>
> (b) subject to the objective mentioned in paragraph (a), to provide opportunities for reasonable use and enjoyment, including limited extractive use.

10 Section 2A of the *Great Barrier Reef Marine Park Act 1975* (Cth) (***GBRMP Act***) sets out the objects of that Act, as follows:

> **2A Objects of this Act**
>
> (1) The main object of this Act is to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region.
>
> (2) The other objects of this Act are to do the following, so far as is consistent with

the main object:

(a) allow ecologically sustainable use of the Great Barrier Reef Region for purposes including the following:

(i) public enjoyment and appreciation;

(ii) public education about and understanding of the Region;

(iii) recreational, economic and cultural activities;

(iv) research in relation to the natural, social, economic and cultural systems and value of the Great Barrier Reef Region;

(b) encourage engagement in the protection and management of the Great Barrier Reef Region by interested persons and groups, including Queensland and local governments, communities, Indigenous persons, business and industry;

(c) assist in meeting Australia's international responsibilities in relation to the environment and protection of world heritage (especially Australia's responsibilities under the World Heritage Convention).

(3) In order to achieve its objects, this Act:

(a) provides for the establishment, control, care and development of the Great Barrier Reef Marine Park; and

(b) establishes the Great Barrier Reef Marine Park Authority; and

(c) provides for zoning plans and plans of management; and

(d) regulates, including by a system of permissions, use of the Great Barrier Reef Marine Park in ways consistent with ecosystem-based management and the principles of ecologically sustainable use; and

(e) facilitates partnership with traditional owners in management of marine resources; and

(f) facilitates a collaborative approach to management of the Great Barrier Reef World Heritage area with the Queensland government.

11 Section 3AA of the *GBRMP Act* defines "ecologically sustainable use" as follows:

3AA Ecologically sustainable use

For the purposes of this Act, ***ecologically sustainable use*** of the Great Barrier Reef Region or its natural resources is use of the Region or resources:

(a) that is consistent with:

(i) protecting and conserving the environment, biodiversity and heritage values of the Great Barrier Reef Region; and

(ii) ecosystem-based management; and

(b) that is within the capacity of the Region and its natural resources to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of

future generations.

12 Section 3AB provided:

> **3AB Principles of ecologically sustainable use**
>
> For the purposes of this Act, the following principles are ***principles of ecologically sustainable use***:
>
> (a) decision-making processes should effectively integrate both long-term and short-term environmental, economic, social and equitable considerations;
>
> (b) the precautionary principle;
>
> (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
>
> (d) the conservation of biodiversity and ecological integrity should be a fundamental consideration in decision-making;
>
> (e) improved valuation, pricing and incentive mechanisms should be promoted.

13 Section 3(1) of the *GBRMP Act* contains the following definitions (subject to a contrary intention):

> ***precautionary principle*** means the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.
>
> ...
>
> ***take***, in relation to an animal or plant, includes remove, gather, catch, capture, kill, destroy, dredge for, raise, carry away, bring ashore, interfere with and obtain.

14 Section 7(3) of the *GBRMP Act* provides:

> (3) In managing the Marine Park and performing its other functions, the Authority must have regard to, and seek to act in a way that is consistent with:
>
> (a) the objects of this Act in section 2A; and
>
> (b) the principles of ecologically sustainable use; and
>
> (c) the protection of the world heritage values of the Great Barrier Reef World Heritage Area.

15 Regulations 74 and 77 were relevantly as follows:

> **74 Application for relevant permission**
>
> (1) An application to the Authority for a relevant permission must be in writing unless the Authority agrees otherwise.
>
> (2) An application to the Authority for a relevant permission must contain the

following information:

(a) the name and address of the person making the application;

(b) the name of the zone, and (if a designated area is proposed to be used or entered) the name of the designated area, that is to be used or entered;

(c) the purposes for which the zone or designated area is to be used or entered;

(d) any prudent and feasible alternatives to the proposed use or entry;

(e) the proposed movements within the zone or designated area of any person proposing to use or enter the zone or designated area;

(f) the location of the use of, or entry into, the zone or designated area, including the name of any shoal, reef or island on or near which the use or entry is proposed to take place;

(g) the period in respect of which the relevant permission is sought;

(h) the means of transport to be used for entry into, travel within, and departure from, the zone or designated area;

(i) the maximum number of persons (if any) to whom the applicant intends to give an authority;

(j) any other information that the Authority may reasonably require and has asked the applicant to provide.

(3) However, an application is not invalid only because it does not include all of the information required by subregulation (2).

(4) An application for a relevant permission for the purposes of research, however described, must contain, in addition to the information required under subregulation (2), the following information:

(a) the purpose of the research;

(b) a brief description of how the research is to be undertaken, including:

(i) a description of the sequence and location of fieldwork to be carried out; and

(ii) an explanation of the experimental design and methods of analysis to be used in the research; and

(iii) the number, quantity and description of any specimens of animals, plants or marine products to be taken for the purpose of the research; and

(iv) the methods to be used in taking any such specimens;

(c) the frequency and duration of visits to the zone or designated area for the purposes of the research.

(5) In considering an application for a relevant permission, the Authority must have regard to:

(a) the objective of the zone; and

(b) the need to protect the cultural and heritage values held in relation to the Marine Park by traditional owners and other people; and

(c) the likely effect of granting permission on future options for the Marine Park; and

(d) the conservation of the natural resources of the Marine Park; and

(e) the nature and scale of the proposed use in relation to the existing use and amenity, and the future or desirable use and amenity, of the relevant area and of nearby areas; and

(f) the likely effects of the proposed use on adjoining and adjacent areas and any possible effects of the proposed use on the environment and the adequacy of safeguards for the environment; and

(g) the means of transport for entry into, use within, or departure from, the zone or designated area and the adequacy of provisions for aircraft or vessel mooring, landing, taking off, parking, loading and unloading; and

(h) in relation to any structure, landing area, farming facility, vessel or work to which the proposed use relates:

(i) the health and safety aspects involved, including the adequacy of construction; and

(ii) the arrangements for removal, upon the expiration of the permission, of the structure, landing area, farming facility or vessel or any other thing that is to be built, assembled, constructed or fixed in position as a result of that use; and

(i) the arrangements for making good any damage caused to the Marine Park by the proposed activity; and

(j) any other requirements for ensuring the orderly and proper management of the Marine Park; and

(k) any charge, collected amount or penalty amount that is overdue for payment by the applicant as the holder of a chargeable permission (whether or not the permission is in force); and

(l) any late payment penalty that is payable by the applicant as the holder of a chargeable permission (whether or not the permission is in force); and

(m) if the application relates to an undeveloped project, the cost of which will be large — the capacity of the applicant to satisfactorily develop the project.

...

77 Grant or refusal of relevant permission

(1) If a person has applied for a relevant permission and has complied with any requirement or request by the Authority about the application, the Authority must, by notice in writing to the person, grant or refuse the permission.

(2) The Authority may grant the permission subject to a condition or conditions specified in the permission, being:

(a) ...; and

(b) ...; and

(c) a condition appropriate to the attainment of the object of the Act (including a requirement that the person give the Authority a written undertaking in a form approved by the Authority).

(3) The Authority may impose a condition on the permission, or vary an existing condition, at any time:

(a) in circumstances other than those to which subregulation 109 (2) or (3) or 110 (1) applies; and

(b) if the permission holder consents in writing;

to ensure that the conditions of the permission remain appropriate to the attainment of the object of the Act.

(3A) For a relevant permission to conduct a tourist program, or a relevant permission for the installation or operation of a facility that is operated in association with such a tourist program, the Authority may impose a condition on the permission, or vary an existing condition, in circumstances other than those to which subregulation 109 (2) or (3) or 110 (1) applies, without the consent of the permission holder, if:

(a) the Authority gives written notice to the permission holder of the proposed change and has regard to any written response of the permission holder made within 28 days of issue of the notice (or any longer period allowed by the Authority before the end of the 28 days); and

(b) the condition, or amended condition, is appropriate to the attainment of the objects of the Act.

(3B) A notice by the Authority informing the permission holder of the commencement of the condition, or amended condition, must allow a period of at least 28 days from the date of the notice before commencement of the change.

(3C) The condition that the Authority notifies is to commence, in subregulation (3B), may be a modification of the initial proposal if the modification is to take into account submissions made by the permission holder under paragraph (3A) (a).

(4) A relevant permission remains in force for the period specified in the permission unless it is sooner surrendered or revoked.

16 Sections 43(5A) and (5B) of the *Administrative Appeals Tribunal Act* provided:

(5A) Subject to subsection (5B), a decision of the Tribunal comes into operation forthwith upon the giving of the decision.

(5B) The Tribunal may specify in a decision that the decision is not to come into operation until a later date specified in the decision and, where a later date is so specified, the decision comes into operation on that date.

reasons of the Tribunal

The reasons of the Tribunal were, essentially, as follows.

5 On 23 March 2017, the Authority and the Department of National Parks, Sport and Racing concurrently granted the present applicant two permissions to use and enter particular zones within the Marine Park to:

(a) temporarily install up to 173 baited drum lines; and

(b) conduct a research program, allowing the temporary installation of up to 54 baited research devices.

19 The permits were subject to conditions. One of the conditions was that when a shark on the target shark list was caught on a baited drum line it was to be euthanised.

20 The parties agreed that the Tribunal was required to determine the following two issues:

1. Whether the current permit should have been issued by the Authority, which authorises DAF to:

   (a) carry out a program to take animals that pose a threat to human life or safety – being the SCP; and

   (b) conduct a research program – being various research projects contributing to one or more of the following objectives:

      (i) marine animal tagging and tracking;

      (ii) retention of animals or samples of animals taken in the SCP apparatus; or

      (iii) trial of new technologies, equipment configurations, baits and hook types to improve the effectiveness of the SCP and minimise bycatch,

   in particular General Use zones, Habitat Protection zones and Conservation Park zones as those zones are located in the AGBRMP Section.

2. Whether the current permit should have been issued by the Authority in its current form, including but not limited to:

   (a) issuing the current permit for a period of ten (10) continuous years (including in the Marine Stinger season);

   (b) allowing the installation of 173 traditional baited drum lines in the AGBRMP section for a period of ten (10) years;

   (c) allowing the installation of a further two (2) baited research devices (including drum lines) at each authorised drum line location in the AGBRMP Section for a period of ten (10) years;

   (d) authorising the killing of 19 shark species on the target shark list set out in Schedule 3 of the current permit;

(e) allowing the inclusion of shark species on the target shark list that do not pose a threat to human life or safety;

(f) allowing any marine animal to remain on a drum line for up to two (2) days during favourable weather conditions, and for an indeterminate period in inclement weather; and

(g) allowing the use of acoustic transmitters.

21 The Humane Society's primary case before the Tribunal was that the decision under review should be set aside and substituted with a new decision to refuse the continuation application. In the alternative, the Humane Society asked that the Tribunal vary the current permit. The Tribunal said it had the power to vary the permit including to prohibit the killing of any shark species, noting that it was open to the Authority to impose that condition pursuant to reg 77(2)(c) of the Regulations.

22 The Humane Society's case had essentially two limbs. The first was that there was no scientific basis for the proposition that a lethal Shark Control Program reduced the risk of human/shark interaction at anything other than a theoretical level. It argued that there was no point in conducting a lethal program if the effect of the lethal program was not to reduce the risk of unprovoked shark bites. The second limb was that a lethal Shark Control Program risked causing significant harm to the ecology of the reef because of the impact of the declining tiger shark population and flow on effects of removing an apex predator from the ecosystem.

23 The Humane Society proposed the following conditions in the form of marked up amendments to the conditions on which the permission was granted by the Authority, so far as presently relevant, by an annexure to its closing submissions before the Tribunal:

24 This permit allows for the temporary installation (for the duration of this permit) of a maximum of 173 baited drumlines at any one time.

24A The Permittee must carry out the Program in a manner that avoids, to the greatest extent possible, the lethal take of species.

25 The Permittee must ensure that all equipment used in conjunction with this Program:

(i) is clearly marked in a way that identifies it as Queensland Shark Control Program equipment and displays the 24 hour Shark Hotline number;

(ii) is deployed on bare reef rock and/or sand only, unless specified otherwise;

(iii) is secured according to environmental conditions and design specifications;

(iv) is monitored and maintained on a regular basis;

(v) does not pose a risk to navigation and other users of the Marine Parks; and

(vi) is removed from the Marine Parks following use and prior to the expiry of the permit.

26 This permit allows for ~~target~~ the following species~~, as listed in Schedule 3 that are~~ caught on Program equipment to be ~~euthanized~~ tagged, using best available technology:

- Tiger shark – *Galeocerdo cuvier*
- Bull whaler *Carcharhinus leucas*
- White shark – *Carcharodon carcharias*

27 The Permittee must ensure that all Program equipment is checked at least daily and that ~~any non-target~~ all animals found alive on the Program equipment are carefully removed and released ~~at the site of capture~~ as soon as possible.

27A The Permittee must remove all Program equipment from the Marine Park each year during the marine stinger season for each location.

28 The Permittee must not euthanize any ~~protected~~ species, ~~EXCEPT target species listed in Schedule 3,~~ unless they are ~~sick/injured and~~ non-retrievable. If an individual of a protected species is discovered deceased or if any species has to be euthanized, the Permittee must notify the Great Barrier Reef Marine Park Authority, by submitting the approved form within 72 hours.

29 The Permittee must ensure that all deceased carcasses, except those retained for the purpose of research or used for bait, are disposed offshore in deep channels.

30 The Permittee must keep a record of the GPS locations of all carcass disposal sites and provide this information to the Managing Agency within 21 days of written request to do so.

31 When captured marine turtles are tagged, the tagging must be in accordance with current Department of Environment and Heritage Protection tagging and reporting procedures prior to release at the site of capture.

32 The Permittee must conduct background checks on **all** contract staff prior to engagement to ensure no real or perceived conflict of interest exists.

33 The Permittee must provide an annual education program on shark identification and ensure that contractors complete the program.

34 The Permittee must ensure that all contractor staff working within the Cairns/Cooktown Management Areas complete a speartooth shark (*Glyphis glyphis*) identification education program.

35 The Permittee must, prior to 30 September of each year, forward to the Great Barrier Reef Marine Park Authority a searchable electronic spreadsheet of all catch, ~~including target and non-target specimens~~ caught on Program equipment within the Marine Parks during the previous financial year, including, for each animal, details of:

(i) common and scientific name;

(ii) date of capture;

(iii) specific beach or bay of capture;

(iv) fate - whether the animal was released alive, euthanized or discovered dead;

(v) latitude and longitude of equipment;

(vi) the tag numbers of turtles or other animals if captured and released alive; and

(vii) Whether the individual was provided to researchers (deceased) or sampled or tagged for the purpose of research, including the name and institution of the relevant researcher.

36 The Permittee must record in a searchable electronic format the information specified in condition 35(i)-(vii). The data required under conditions 35(i)-(iv) must be made available to the public in electronic format on the Permittee's website no later than two (2) months post-collection.

24 The Humane Society's further amended statement of facts, issues, and contentions had sought similar conditions. To the extent those conditions differed from those in the preceding paragraph they were as follows:

24 This permit allows for the temporary installation (for ~~the duration~~ twelve (12) months from the commencement date of this permit) of a maximum of 173 baited drumlines at any one time. All baited drumlines in use within the first twelve (12) months of the Program to be replaced by SMART drumlines within three (3) months from the commencement of this permit.

24A The Permittee must, in accordance with the findings of the Research Program set out in Schedule 2 of this permit, replace all drumlines, including SMART drumlines, with non-lethal alternatives, within twelve (12) months of the commencement date of this permit.

...

26 This permit allows for target species, as listed in Schedule 3 that are caught on Program equipment to be ~~euthanized~~ tagged, using external acoustic tagging technology. The Permittee must not use internal acoustic tagging on any species caught on Program equipment.

27 The Permittee must ensure that all Program equipment is checked at least daily and in the case of SMART drumlines, as soon as the SMART drumline is triggered, subject to safety considerations. The Permittee must ensure that ~~any non-target~~ all animals found alive on the Program equipment are carefully removed and released at the site of capture as soon as possible. The target species, as listed in Schedule 3, may be transferred to an appropriate location offshore.

...

28 The Permittee must not euthanize any ~~protected~~ species, ~~EXCEPT target species listed in Schedule 3~~ unless they are sick/injured and non-retrievable. ...

...

35 The Permittee must, prior to 30 September of each year, forward to the Great

> Barrier Reef Marine Park Authority a searchable electronic spreadsheet of all catch, including target and non-target specimens, caught on Program equipment within the Marine Parks during the previous financial year, including, for each animal, details of:

(SMART is an acronym for Shark Management Alert in Real Time.)

25 The present applicant's case also had two principal limbs, the Tribunal said. The first was that in the almost 60 years in which the Shark Control Program had been operating there had only been one fatal attack at beaches which hosted drum lines. It asserted that this proved the drum lines were effective in protecting the public. The second was that it had established a highly qualified Scientific Working Group to advise it on the latest research and development in technology in relation to shark control.

26 Having referred to the evidence of three experts, the Tribunal said at [45] that it was plain from the evidence given in the proceedings that Queensland's lethal Shark Control Program was out of step with national and international developments. At [47], the Tribunal said that Queensland was the only place that continued to deliberately operate a permit where sharks were automatically euthanised if caught on the drum lines. Elsewhere, they were tagged and released alive. Neither the South African program nor the New South Wales program had reported an increase in shark incidents as a result of changing to a non-lethal program.

27 At [55], the Tribunal said that in evaluating the scientific evidence one must not lose sight of the superficially attractive albeit non-scientific approach of the present applicant which pointed to the fact that there had not been a fatality at a protected beach in the Marine Park since 1962, whereas there had been fatalities at non-protected beaches. The problem with that argument, the Tribunal said, was that there had been no negative shark interactions recorded at many beaches where there was no Shark Control Program; and fatal shark incidents had occurred at beaches outside the Marine Park where a Shark Control Program was in place. The statistics showed, the Tribunal said, that one in five of the fatal shark attacks in Queensland occurred at Shark Control Program controlled beaches even though those beaches were only a very small part of the coastline. That did not prove anything but it rather weakened the logic of the argument that the Shark Control Program had proven a success because there had been no attacks on Shark Control Program controlled beaches in the Marine Park, the Tribunal said.

28 At [56], the Tribunal said that it was satisfied from the scientific evidence that, other than from the truly theoretical viewpoint, drum lines did not reduce the risk of shark attack on the individual.

29 The Tribunal then considered various options available that did not involve the killing of sharks.

30 At [76], the Tribunal said it was prepared to accept that without being precise, there was a significant decline in tiger shark population in the Marine Park area which was multifactorial and that the Shark Control Program made a significant contribution to that decline.

31 At [83], the Tribunal considered the precautionary principle. That principle, the Tribunal said, meant that the lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there were threats of serious or irreversible environmental damage. The Tribunal said that there was a "lack of full scientific certainty" that the killing of the tiger sharks was actually having an adverse effect on the reef within the Marine Park. However, it was common ground that the Great Barrier Reef was at present under stress for a number of reasons, particularly climate change, water quality, coastal development, and fishing impacts. The Tribunal saw the precautionary principle as requiring decision-makers to proceed with caution "where there is a threat of serious or irreversible environmental damage".

32 Having reviewed the expert evidence, at [87] the Tribunal said that it thought it appropriate to apply the precautionary principle by not contributing to the culling of tiger sharks given the importance of:

- the Great Barrier Reef Marine Park;
- the unchallenged evidence that it was at present the subject of substantial stress;
- the fact that, whether or not it was as great as some think, the population of tiger sharks in areas of the reef had decreased significantly; and
- the fact that trophic cascade may occur with the reduction in a population of an apex predator.

33 At [94], the Tribunal found that the lethal component of the Shark Control Program did not reduce the risk of unprovoked shark interactions. The scientific evidence before the Tribunal was overwhelming in this regard, the Tribunal said. Most compelling was the evidence of Associate Professor McPhee who gave evidence that he would never recommend a lethal program, and could never imagine advocating for a lethal shark program anywhere. He agreed that it was "highly plausible" that if the Shark Control Program became non-lethal tomorrow, we would see "no discernible change in unprovoked shark bites, in particular fatalities."

34 At [95], the Tribunal found that having regard to the nature and extent of the environmental harm caused by the Shark Control Program, in particular its impact on the tiger shark and the ecosystem of the reef, it had concluded that there had been a significant reduction in tiger shark population within sections of the Marine Park, and that the reduction was a cause for concern. Applying the precautionary principle, the Tribunal said it was an "even greater cause for concern being (sic) the Marine Park is in a World Heritage listed area."

35 At [96], the Tribunal said it was satisfied that the euthanasia of any species of sharks, significantly the tiger sharks, that have been caught on drum lines should be a last resort and not occur as a matter of practice.

36 The Tribunal found, at [97], that the terms of the current permit were inconsistent with the objects of the *GBRMP Act* and the criteria set out in reg 74(5) of the Regulations.

37 The decision of the Tribunal was in the following terms:

> Pursuant to section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), the decision under review is varied as follows:
>
> 1. The current permit is to be varied to include a condition requiring the permittee (Great Barrier Reef Marine Park Authority) to carry out the Shark Control Program in a manner that avoids, to the greatest extent possible, the lethal take of shark species;
>
> 2. The target shark list is to be removed from the current permit;
>
> 3. The current permit is to be varied to ensure that the euthanasia of sharks caught on the drum lines is only to be undertaken on animal welfare grounds, specifically when a shark is unlikely to survive release due to its condition or an injury, or which cannot be safely removed alive due to weather conditions or hooking location;
>
> 4. The current permit is to be varied to ensure sharks are attended to as soon as possible when captured on drum lines, preferably within 24 hours;
>
> 5. The current permit is to be varied to ensure all tiger, bull and white sharks caught on drum lines are tagged, using best available technology, before being released so that their movements may be monitored and researched;
>
> 6. The current permit is to be varied to ensure tagged sharks be relocated off shore, where possible, and not at site of capture;
>
> 7. The current permit is to be varied to ensure SMART drum lines are trialled and implemented on a progressive basis as soon a reasonably possible;
>
> 8. The current permit is to be varied to include a condition that requires research to be conducted into alternative non-lethal shark control measures; and
>
> 9. The current permit is to be varied to include a condition requiring research be conducted into the tiger shark population.

The notice of appeal

38 The applicant sought to rely on a further amended notice of appeal. Leave so to rely was not opposed and the Court granted that leave. That notice of appeal stated that the applicant appealed from the making of conditions 1–8 inclusive.

39 The questions of law were identified in the further amended notice of appeal as follows:

> 1. Whether Conditions 1-7 (inclusive) of the Tribunal's decision were lawful and reasonable under the general law, and under the legislative regime established under the Barrier Reef Act.
>
> 3. Whether the Tribunal made an error of law in failing to consider and apply s 43(5B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), in failing to order that Conditions 1-7 be staged as to the timing of their implementation, by the State of Queensland under the permit, given that those Conditions came into effect forthwith upon the giving of the Tribunal's decision because of s 43(5A) of the AAT Act.
>
> 4. Whether the Tribunal made an error of law in not giving the State of Queensland the opportunity to be heard as to the need for Conditions 1-7 to be staged in their implementation under s 43(5B) of the AAT Act, by the State of Queensland under s 43(5B) of the AAT Act, given the effect of those conditions on the State of Queensland, in breach of the requirements of procedural fairness.
>
> 5. The proper scope and extent of the Tribunal's decision-making power under Part 2, Division 2.3 of the *Great Barrier Reef Marine Park Regulations 1983* (Cth).
>
> 6. The lawful adequacy of the manner in which the Tribunal characterised, assessed and weighed the evidence before it.
>
> 7. The adequacy of findings made to found the Tribunal's engagement of the precautionary principle.
>
> 8. The propriety of the finding at [94] of the Tribunal's Reasons.

40 The grounds relied on were:

> 1. Conditions 1-7 of the Tribunal's decision are not lawful and reasonable under the general law, and under the legislative regime established under the Barrier Reef Act.
>
> 3. The Tribunal made an error of law in failing to consider and apply s 43(5B) of the *Administrative Appeals Tribunal Act 1975* (Cth) in failing to order that Conditions 1-7 be staged as to the timing of their implementation by the State of Queensland under the permit, in the circumstances that those Conditions came into effect forthwith upon the giving of the Tribunal's decision because of s 43(5A) of the AAT Act and that the permit is implemented by contractors appointed by the State of Queensland under terms of contracts, and that Conditions 1-7 require:

(a) additional training of the contractors;

(b) acquisition of further equipment by the State of Queensland and its contractors;

(c) incurring of considerable expense by the State of Queensland in achieving (a) and (b).

4. The Tribunal made an error of law in not giving the State of Queensland the opportunity to be heard as to the need for Conditions 1-7 to be staged in their implementation under s 43(5B) of the AAT Act, by the State of Queensland, given the effect of those conditions on the State of Queensland, in breach of the requirements of procedural fairness.

7A. The Tribunal committed an error of law by granting the permission sought by the State in such a way as to re-formulate that application in a manner that was never made and by the imposition of conditions beyond the scope which Reg 77(1) and (2)(c) of the Regulations lawfully allow.

9. The Tribunal wrongly characterised and rejected particular evidence as 'non-scientific' and preferred over it the opinions of experts as 'scientific'; and failed to consider and weigh all the evidence in the proceeding.

10. The Tribunal erred in applying the precautionary principle despite not having reached a state of satisfaction necessary to its engagement, namely finding there to be a threat of serious or irreversible environmental damage.

11. The finding at Reasons [94] in the terms stated by the Tribunal was one:

a. for which there was no evidence to justify the making of it;

b. which was beyond the lawful scope of the Tribunal's power.

41 The applicant sought that the matter be remitted to the Tribunal for determination in accordance with law and that the first respondent pay the applicant's costs of this appeal.

42 On 12 April 2019, a judge of this Court granted an interim stay of the Tribunal's decision: *State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc* [2019] FCA 534. That left in place until the determination of this appeal the permission, with the conditions, granted by the Authority.

Submissions

43 The applicant submitted there were four main errors in the Tribunal's decision.

Whether the Tribunal exceeded its decision-making power

44 The applicant submitted the first main error was that the Tribunal exceeded its decision-making power.

45 The applicant submitted that the Tribunal stood in the shoes of the Authority, and for the express purpose of deciding whether to "grant or refuse" the application. The applicant

submitted that the Tribunal was led into error by accepting the Humane Society's invitation to do something which was beyond the authority of the statute, namely: "... to assess whether there is a good reason to kill sharks". The applicant submitted that the decision-making power was reg 77(1) of the Regulations which confined the power to either granting or refusing the relevant permission that had been applied for, not to decide to grant a permission unconnected to the application. Common law principles, the applicant submitted, precluded the imposition of conditions that would render any permission granted significantly different from that applied for. Indeed, the applicant submitted, much of what the Tribunal did was to vary the permission granted by the Authority below, and without regard to whether the variations were to be regarded as conditions or as something else.

46 The applicant submitted that the "relevant permission" here was to take sharks and that the provisions of reg 77(3) were not engaged.

47 The applicant submitted that there were several statutory indications that the decision-making function did not extend to reformulating what was sought in the way in which the Tribunal did, whether by the imposition of conditions or otherwise. The applicant submitted that there was statutory authority, as part of assessing the "mandatory considerations" (in reg 74(5) or otherwise), to determine whether the *type* of program proposed was necessary to manage the risk to human life or safety. The decision-maker must be satisfied that the program was truly one of the kind that could be applied for, that is, to take sharks that pose a threat to human life or safety by lethal means. But once that threshold requirement was satisfied, the applicant submitted, it was no part of the decision-making function to assess whether the type of program proposed was necessary to manage the risk to human life or safety.

48 So too, the applicant submitted, the conditions the Tribunal imposed, and the other variations it made, were outside the statutory power. The applicant submitted that the only available head of power was reg 77(2)(c) and that the Tribunal identified no object of the *GBRMP Act* to which the conditions (if they were conditions) were an appropriate attainment. The Tribunal did not seem to turn its mind at all to that requirement in the sense the statutory terms demanded, the applicant submitted. It was put orally that the Tribunal nowhere seemed to direct its mind to the grant or refusal on condition, according to the attainment of objects, the touchstone being to grant or refuse the application. It was submitted that the essence of the application was to enter to kill, that is, to conduct a lethal program. If the Tribunal was not prepared to grant the very essence of what was sought then that was a refusal, not a grant.

49 The applicant referred to the *GBRMP Act*'s objects in ss 2A(1) and (2).

50 The applicant submitted that the conditions (and indeed the variations the Tribunal sought to make) ran contrary to the common law principles that attend decision-making powers of the kind which were cast upon the Authority. The applicant referred to *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; 215 FCR 301, which it submitted recorded many of the principles that govern the extent to which it is lawful to impose conditions (recognising that this will vary according to the statutory scheme under consideration). Of particular relevance, the applicant submitted, was the discussion in *Buzzacott* at [163] and following of *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734. The Court in *Mison* held, the applicant submitted, that:

> a. if a condition imposed on a purported consent has the effect of significantly altering the development in respect of which the consent is made, then the purported consent is not a consent to the application;
>
> b. if the effect of a condition is to leave open the possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application was made, then the purported consent is not, in fact, consent to the application.

51 The applicant also referred to *Winn v Director-General of National Parks and Wildlife* [2001] NSWCA 17; 130 LGERA 508, which was also referred to in *Buzzacott* (at [168] and following). The applicant submitted that in *Winn*, Spigelman CJ noted that a purported exercise of power (in that case, under an environmental planning statute) would not be valid unless it constituted a "consent to the application". The power to impose conditions, it followed, could not be exercised such that the exercise of the power failed to answer the description of a "consent" or a "consent to that application". Stein JA stated, the applicant submitted, that where a condition has the effect of significantly altering the development, or to leave open the possibility that the development carried out in accordance with the condition will be significantly different from that applied for, it does not amount to a consent to the application.

52 The applicant submitted that the Tribunal's variation of the permission granted by the Authority by the imposition of conditions and so as to "include" and "ensure" numerous other matters was so far from what was applied for as to amount to something entirely different from it. The Tribunal made no discernible attempt, the applicant submitted, to justify the imposition of those conditions and variations with sources of statutory power. It seemed simply to have been the result of its at-large inquiry into how and in what circumstances the control of sharks might take place.

53 The Authority limited its submissions to addressing this question of statutory construction as to the scope of the power to decide an application for, and if granted impose conditions on, a permission. The Authority adopted the construction of the present applicant on the present issue, being whether under reg 77 the power of the decision-maker was confined to either granting or refusing the relevant permissions and imposing certain limited conditions on any grant but did not extend to a grant subject to conditions that altered the nature of the relevant permission from that applied for.

54 The Authority submitted that those provisions did not empower the decision-maker to, in effect, grant a relevant permission that was substantially different from that which was the subject of the application. The Authority submitted that by reg 77(1), the decision-maker "must grant or refuse **the** permission" (Authority's emphasis). The use of the definite article "the" connoted that it was the relevant permission that had been applied for – for example, a program to take, by lethal means, animals that posed a threat to human life or safety – that the decision-maker must either grant or refuse. The Authority submitted that the function of the decision-maker was to determine, having regard to the statutory criteria, whether that application ought to be granted or refused.

55 Similarly, the Authority submitted, reg 77(2) did not empower the decision-maker to impose conditions the effect of which was to grant a relevant permission unconnected or different in nature to that applied for. The ancillary power to impose conditions could not be exercised in such a manner as to have the consequence that the exercise of the power failed to answer the description of a grant of "the" relevant permission that was the subject of the application under Div 2.3 of the Regulations. The Authority referred, by way of analogy, to *Winn* at [14] per Spigelman CJ, and also to *Buzzacott* at [161] and [168]–[179].

56 The Authority accepted that, in discharging its function of determining whether an application ought to be granted or refused, the decision-maker "must be satisfied that the animals pose a threat to human life or safety in so far as that is required to in turn be satisfied that (sic) the application is for a program of the relevant type". Moreover, the Authority submitted, if it was evident that the program would have an unacceptable impact on the conservation of the natural resources of the Marine Park, that is, if the particular use was inconsistent with the objects of the Act, then it was incumbent on the decision-maker to refuse the relevant permission. But the Authority submitted that, those matters being decided favourably to the applicant, it was

not the role of the decision-maker to determine whether the type or program proposed was necessary to manage the risk to human life or safety.

57 The Authority submitted that if the attainment of the objects of the *GBRMP Act* would necessitate the imposition of conditions that would fundamentally alter the relevant permission from that applied for, then the appropriate course would be to refuse the application. Regulation 77(2)(c) would, however, allow for the imposition of conditions such as one requiring the permittee to explore during the term of the relevant permission alternative programs that would lessen the environmental impact on the Marine Park. That was because such a condition was appropriate to the attainment of the object of the *GBRMP Act* but did not have the consequence that the exercise of the power failed to answer the description of the grant of "the" relevant permission identified in reg 77(1).

58 In oral submissions, the Authority developed the submission that the provisions of the Regulation, particularly in relation to what is required to be contained in an application, made clear that there is a delineation of responsibility about the constituent elements of a proposed use and that the issue of reasonable and feasible alternatives is something that is squarely within the realm of responsibility of the applicant for a relevant permission and beyond the scope of the power of the decision-maker, as regulator, in and of itself to put forward. The decision-maker is acting as a regulator, the Authority submitted, and its role does not extend to creating a program that is to be the subject of the relevant permission. The Authority submitted that its particular skillset is in determining whether or not a program that has been applied for is consistent with the objects of the *GBRMP Act*, but not in determining what ought to be the constituent elements of that program

59 On this ground, the Humane Society submitted that the present applicant's claim that the Tribunal could not assess whether a lethal program actually worked to improve human safety was contrary to the way in which its case was conducted below. Its evidence and submissions were predominantly directed to persuading the Tribunal of the efficacy of the lethal program. The Humane Society submitted that it was also contrary to the way in which the Authority decided the application at first instance where it listed, as a factor that was "particularly important", that "the Program is effective in relation to its intended purpose of reducing the risk to bathers of shark attacks". This conclusion was based on information provided to it by the present applicant.

60 The Humane Society submitted that the Tribunal was required to consider the benefit and detriment of the Shark Control Program in considering whether it was a "reasonable use" within the objectives of the three relevant zones in which the Shark Control Program was proposed to be undertaken, referring to ss 2.2.2, 2.3.2 and 2.4.2 of the Zoning Plan, which itself was a mandatory consideration under reg 74(5)(a): *Great Barrier Reef Marine Park Authority v Indian Pacific Pearls Pty Ltd* [2004] FCAFC 277; 140 FCR 214, at [55] and [57]. As a corollary, it was submitted, consideration of the claimed benefits of the Shark Control Program was plainly not prohibited. Nor could any such intention be implied. The absurdity of such a prohibition was shown in this case, the Humane Society submitted, in that it would require that a decision-maker who was commanded to take a protective approach to the biodiversity of a marine park must – according to the present applicant – ignore the fact (as the Tribunal found) that there was no benefit to killing sharks.

61 The Humane Society submitted that the very thing that permission was being sought for was "a program to take animals or plants *that pose a threat to (i) human life or safety*" (Humane Society's emphasis). The purpose of the Shark Control Program was to reduce the risk of negative shark interactions with humans and this was the very thing the present applicant used to justify allowing the ecological damage caused by the Shark Control Program. To suggest that the Authority and the Tribunal were entitled to examine the program only to the extent that it facially answered that description was a recipe for the avoidance of a statutory responsibility. Understandably, neither the Authority nor the Tribunal was invited to take the approach that the applicant only now advocated.

62 The Humane Society submitted that the likely efficacy or utility of the lethal component of the Shark Control Program – involving findings as to its potential environmental consequences, findings as to whether or not there were alternatives to it which would not give rise to, at least, the risk of those environmental consequences, and thereafter balancing those matters – was far from being an irrelevant (prohibited) consideration but was, in fact, mandated by the *GBRMP Act*.

63 The Humane Society submitted that the present applicant now contended that the Tribunal misunderstood and exceeded its proper function. The root contention, the Humane Society submitted, was that the permission granted by the Tribunal was significantly different to that which was applied for and, on that basis, the Tribunal lacked jurisdiction to grant such a permission: because the present applicant applied for a permission to allow it to kill target shark

species, it was not open to the Tribunal to only permit the killing of sharks for animal welfare reasons. The present applicant made no such submission below, although the Authority did.

64 The Humane Society submitted that the boundaries of the broad conditioning power in reg 77(2)(c) should be assessed against orthodox principles of legal rationality and reasonableness and by reference to the text, scope, subject matter and purpose of the legislation in question.

65 The Humane Society submitted that reg 77(1) authorised the grant of a "relevant permission" and did not in terms authorise only the grant of the permission applied for. Regulation 77(2) then provided a broad power to attach conditions limited only by the requirement that the condition is "appropriate to the attainment of the object of the Act".

66 The Humane Society submitted that, on 28 February 2005, the Authority issued a permit authorising the present applicant to carry out a program to "take" animals that pose a threat to human life or safety, being the Shark Control Program in the Marine Park.

67 The original permit was due to expire in 2010 and this triggered applications to renew it. On 15 May 2013, the Humane Society submitted, the present applicant applied to replace or continue an existing permission. That existing permission was Permit G04/8856.1, which authorised entry and use for the purposes of the "conduct of a Program to take animals or plants that pose a threat to human life or safety, being the Queensland Shark Control Program". In the existing permit, "take" bore its meaning in the *GBRMP Act* and "Queensland Shark Control Program" was undefined. Properly understood, the existing program was a permission to take animals or plants that posed a threat to human life or safety. So far as the words "Queensland Shark Control Program" imposed any limit, that limit could only be to narrow the permission otherwise granted.

68 With an application of that kind before it, the Tribunal did precisely what it was authorised to do, the Humane Society submitted. It granted the permission (order 1) and therefore granted what was sought. It then imposed a number of conditions which it considered were appropriate to the attainment of the objects of the *GBRMP Act* (orders 1 through 9). Each of the conditions was apt to provide for the longer-term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region, the Humane Society submitted.

69 Here, the Humane Society submitted, the present applicant applied for a "relevant permission" and it got one. The Zoning Plan specified that permission was required to use the various zones to *take* animals that pose a threat to human life or safety and that "take" is not limited to lethal means. That permission allowed it to "take" sharks by catching them. It also permitted the present applicant to "take" sharks by killing them in the interests of animal welfare. It was within the Tribunal's power to condition the permission in that way. And even if there was an implicit limitation that prevented the imposition of conditions that significantly changed that which was applied for, no such significant change occurred here.

70 The Humane Society submitted that the statutory context here was different to *Buzzacott*, *Mison* and *Winn* and that none of those authorities assisted the applicant. Here, there was an Act which authorised the grant of a relevant permission (as defined) and which authorised the imposition of conditions of *any* kind on that permission subject to the criteria in reg 77(2)(c). The present applicant's approach sought to add words to reg 77(2)(c) which did not appear there.

71 In addition, the Humane Society submitted, *Mison* and *Winn* involved different contexts. Those were cases concerning applications for development approval under New South Wales planning law. Under New South Wales planning law (both now, and as it stood at the times of *Mison* and *Winn*), where a particular application for development consent was made, a consent authority had power to grant "consent to *that* application" (emphasis added), not "consent to the application" as incorrectly quoted by the applicant. The Court of Appeal emphasised that language in *Winn* at [13], the Humane Society submitted.

72 The Humane Society submitted that it was fatal to this ground that, given the relative informality of the application that was made, there was no obvious baseline against which the permission that was sought could be compared with the permission that was granted, conditioned in the way it was by the Tribunal. Even if it was assumed that the application made by the applicant was, in effect, an application to continue doing what was being done under the expiring approval, to characterise that as "in essence, permission to enter and kill sharks" was a gross oversimplification of the nature of the application that was made. What was being sought was permission to enter into a zone and take sharks, having regard to the definition of "take" in the *GBRMP Act*. Under the Tribunal's decision, the applicant was allowed to enter into the zone and place drum lines at exactly the same locations as it had asked to place drum lines, the consequence of which was that to the extent that the hooks on the drum lines were

baited, sharks would be taken. It is accepted by the Humane Society that, having regard to the conditions imposed by the Tribunal, the ability to euthanise sharks had been reduced and was different to what had been sought.

73 The Humane Society submitted that what was being sought was a right to enter the zones, catch sharks and, if they happened to be sharks which were on a list appended to the approval, euthanise the sharks. But if they were not sharks on that list, the applicant was to release them. The Humane Society submitted that what the Tribunal did by the conditions was to allow taking but in a subtly different form, so that what the Tribunal granted was not so significantly different to what was asked for that the Tribunal, in effect, did not approve the application at all.

Whether the Tribunal erred in applying the precautionary principle

74 The applicant submitted that the central difficulty in the Tribunal's deployment of the precautionary principle was that the principle, on its terms, was never engaged. The precautionary principle holds that full scientific certainty ought not be a reason to postpone a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

75 Having set out the findings of the Tribunal at [71], [76], [77] and [86] and referring to the evidence that modelling indicated that the stock of bull sharks was currently sustainable, the applicant submitted that it followed that there was no finding of a threat of irreversible environmental damage from the activities under the permit, and no evidence to support such a finding. At the worst, the damage may take "years" to reverse, but it was still reversible, the applicant submitted.

76 There was also no finding as to the threat of "serious" environmental damage, the applicant submitted. Nor did the evidence support the making of such a finding. The evidence, at the highest, was that bull and tiger sharks (in a general international sense) were "near threatened" on the International Union for Conservation of Nature red list. It followed, the applicant submitted, that the Tribunal deployed the precautionary principle, but without proper foundation. It was impermissible to use it to overcome deficiencies in proof except upon the satisfaction of its threshold for engagement. This was the only object of the *GBRMP Act* which the Tribunal identified as founding the imposition of conditions, the applicant submitted.

77 The applicant submitted that: the Tribunal misunderstood what the principle was; the Tribunal did not make factual findings for the threshold engagement of the principle; and there was a misunderstanding in some of the findings of the Tribunal about the evidence that was given.

78 On this ground, the Humane Society submitted that, on a fair reading of the reasons as a whole, the Tribunal clearly found on multiple occasions that there were threats of serious or irreversible harm in allowing a lethal Shark Control Program to continue in the Marine Park, thereby triggering the precautionary principle, summarised by the Humane Society as follows:

> (a) In relation to concerns expressed by one of the experts of a possible "trophic cascade" and "a whole series of additional effects caused by removal of an apex predator such as the tiger shark", the Tribunal concluded that: "Unfortunately, a lack of targeted research does not establish whether a trophic cascade has occurred in relation to the tiger shark on the reef." This was clearly a finding of a *risk of serious harm*, which the evidence did not establish had in fact yet occurred. As Preston CJ said [in *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 at [129]]: "it is not necessary that serious or irreversible environmental damage has actually occurred — it is the threat of such damage that is required."
>
> (b) The Tribunal referred to a risk assessment conducted by DAF [the present applicant] for the purposes of issuing a permit, which said, "it is not clear whether the current take of tiger sharks from the Marine Park is sustainable." Again, this was clearly a finding of a *threat of serious harm*, which the evidence did not establish had in fact yet occurred.
>
> (c) The Tribunal stated at [70] and [76]:
>
> > "The tiger shark is one of the largest predatory shark species and therefore one of the most important shark species in the Great Barrier Reef ecosystem. They are also the most commonly caught species in the Marine Park under the SCP ...
> >
> > We are prepared to accept that without being precise, there is a significant decline in tiger shark population in the Marine Park Area which is multifactorial and that the SCP makes a significant contribution to that decline."

79 The Humane Society submitted that the Tribunal repeated these findings and concerns about the impact of the Shark Control Program on the tiger shark population at [83], [87] and [95]. These findings were clear findings of serious harm in the past and a threat of serious harm in the future if the lethal Shark Control Program was allowed to continue.

80 The Tribunal was aware of and applied the correct test at [83] of its reasons, the Humane Society submitted. The Tribunal did not expressly say "we find there are threats of serious or irreversible environmental damage", but it did not need to. Its findings satisfied that test on multiple occasions. An administrative decision-maker was not required robotically to repeat

language of a statutory test without adapting it to the facts. The Tribunal's reasons at [78]–[87], in particular at [87], were a perfectly orthodox application of the precautionary principle, the Humane Society submitted.

81 The Humane Society submitted that the precautionary principle and its application were not preconditions to the making of the Tribunal's decision. The factual findings underpinning the invocation of the principle were not jurisdictional facts. The precautionary principle or the invocation of the precautionary principle was merely a factor which, pursuant to the *GBRMP Act*, was required to be taken into account in order to exercise the Authority's decision-making power.

Whether the Tribunal erred in its consideration of scientific and non-scientific evidence

82 The applicant submitted that there was a false (and erroneous) dichotomy as between the so-called scientific and non-scientific evidence. In its submissions on this point, the applicant related this claimed error to the two claimed errors dealt with above. The applicant submitted that it was an error for the Tribunal to treat the matter as one by which it could decide whether the program ought be in place at all, when it best achieved its intended purposes, and what was the state of learning on the detail of the program. More particularly related to this ground, the applicant submitted that the Tribunal engaged closely with the opinions of experts called by the parties, and contrasted and preferred that "scientific" evidence to the "non-scientific approach" of the State, which involved objective evidence of an absence of fatalities due to sharks in the many decades in which the program had been running and which itself was underpinned by a panel of scientists who advise upon it (the Scientific Working Group). The Tribunal found this body to comprise "very eminent people" (at [89]) and to be the "body best placed to consider and make recommendations about the ecosystem of the Marine Park" (at [92]). The applicant submitted that the Tribunal erred:

(a) in characterising the evidence that contradicted the experts who expressed opinions in the AAT proceeding as, in effect, non-scientific (Reasons [54]–[56]). The State's program was one based upon scientific opinion and advice. It was wrong to, in effect, dismiss that evidence on the basis of that characterisation (which the Tribunal seems to have done);

(b) to act upon a belief that the so-called "scientific" evidence trumped all other evidence simply because it could be so characterized, and so as to displace other

> kinds of evidence. It was an error to treat evidence characterised as scientific as being, for that reason alone, superior to other evidence.

This exercise, the applicant submitted, was one upon which the Tribunal ought not to have embarked. Its function was to be undertaken within closer boundaries than it recognised, the applicant submitted. The decision-making power did not authorise the making of policy about the nature of a program to reduce the possibility of shark attacks, the applicant submitted, nor the assessment of whether there was good reason to control sharks in the manner applied for.

83 The applicant submitted that the Tribunal seemed to have limited its decision to things which were scientific (the opinions given by scientists to the Tribunal), and not things which were not scientific, as if things which were not scientific were not evidence and things which were scientific were evidence.

84 The applicant submitted that was an unduly narrow approach to what constitutes evidence. The applicant submitted that in evaluating the scientific evidence, one must not lose sight of the non-scientific approach or the objective fact as to the absence of fatalities.

85 On this ground, the Humane Society submitted that it raised issues going to the merits of the Tribunal's decision, rather than any question of law. It was outside the permitted scope for an appeal under s 44 of the *Administrative Appeals Tribunal Act* and should be dismissed, it was submitted. If the proposition was that the applicant's program involved a Scientific Working Group which comprised eminent people and was therefore underpinned by science, and that the Tribunal should not have characterised the State's approach as non-scientific, and if that was erroneous, the Humane Society submitted it was a mere error in fact finding.

86 The Humane Society submitted that there was scientific and non-scientific evidence in respect of the utility of the program in preventing shark attacks. The Tribunal, at [39] and following, evaluated the evidence of the three scientists called by the respective parties to give evidence as to the utility of the lethal component of the program in reducing shark attacks. The overwhelming conclusion drawn by the scientists who gave evidence was that it was largely inutile for that purpose, the Humane Society submitted. What the Tribunal's reasons recorded at [55] was the State's core proposition which was based largely on statistics, or a skewed view of statistics, but which the Tribunal found not to be scientific. There was in that paragraph no false dichotomy, but a true dichotomy between scientific and non-scientific evidence. In relation to the issue of evidence as to the potential environmental impact, considered by the Tribunal at [68]–[87], the Tribunal drew no dichotomy and at [88] had express regard to the

fact that there was a Scientific Working Group which was comprised of eminent individuals, but preferred the evidence given by the three scientists who gave evidence before it and whose evidence was tested in the Tribunal proceedings.

Whether the Tribunal, in imposing the conditions, failed to turn its mind to s 43(5B) of the Administrative Appeals Tribunal Act, or denied the applicant procedural fairness

87 The applicant also submitted that it was an error of law for the Tribunal to impose sweeping changes on what was sought, with the requirement of immediate compliance. At no time, the applicant submitted, did the Tribunal appear to turn its mind to s 43(5B) of the *Administrative Appeals Tribunal Act*, which provides that "[t]he Tribunal may specify in a decision that the decision is not to come into operation until a later date specified in the decision". So too, the applicant submitted, there had been a denial of procedural fairness in that the changes which the Tribunal imposed were not ones canvassed at the hearing in a way which allowed the State properly to address whether they were appropriate to an attainment of an object of the *GBRMP Act*, and, quite separately, the merits or otherwise of them.

88 On this ground, the Humane Society separately addressed three issues. First, in relation to procedural fairness, the Humane Society submitted that an administrative decision-maker was not obliged to give a party an opportunity to present information or argument on a matter that is already obviously at issue or open on the known material, referring to: *York v General Medical Assessment Tribunal* [2002] QCA 519; [2003] 2 Qd R 104 at [30] per Jerrard JA, with whom McMurdo P and Davies JA agreed; *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338; 155 LGERA 322 at [46] per McMurdo P, with whom Holmes JA and Mackenzie J agreed. (These cases applied the earlier decision of a Full Court of this Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; 49 FCR 576.) The Humane Society submitted that the requirements in conditions 1–7 were clearly in issue before the Tribunal, including in the form of an amended permit filed and served by it as an annexure to its amended statement of facts, issues and contentions. In fact, the present applicant requested its expert, Associate Professor McPhee, to consider and comment on the amended permit. Consequently, there was no breach of procedural fairness as alleged.

89 The Humane Society also referred to an amended permit, said to be in the same form, annexed to its further amended statement of facts, issues and contentions before the Tribunal, as to which

see [24] above. Issues about the implementation of, and the practicality of implementing, those sorts of conditions was also an issue which was alive at the hearing before the Tribunal.

90 Second, in relation to the claimed failure to order that the conditions be staged, the Humane Society submitted that the need for further equipment and associated extra expense as a result of these conditions was live before the Tribunal. The applicant could not now complain there was an error in the Tribunal proceeding to make decisions that were clearly contemplated in the case before it when the present applicant made no submission as to staging. Further, the permit did not compel the present applicant to do anything, but was permissive. There was no immediate need for the applicant to do anything. If it might take time to put in place what was necessary to comply with the conditions, until then the applicant did not need to put drum lines in the Marine Park and could choose not to bait hooks.

91 In any event, the Humane Society submitted, properly construed in the context of the permit as a whole, referring to *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175; 192 FCR 1; at [56] (including by reference to Condition 1 which provided: "All activities conducted under this permission, must be undertaken in accordance with the provisions of the laws in force from time to time in the State of Queensland and the Commonwealth of Australia"), nothing in the Tribunal's conditions required the present applicant or contractors engaged in the Shark Control Program to do anything that was unsafe or for which they had not been properly trained. So, for instance, the requirement that sharks be tagged must be read as subject to tagging being done safely after appropriate training.

92 The Humane Society submitted that, on one view, s 43(5B) of the *Administrative Appeals Tribunal Act* was a wholly unsuitable mechanism to achieve the result that the applicant says it was entitled to be given an opportunity to achieve: the applicant does not ask for delaying a decision made by the Tribunal but, in effect, that certain parts of the decision should be changed so as to enable them to occur over a longer period of time.

93 Third, in relation to the challenge to the Tribunal's reasons at [94], the Humane Society submitted that it was a bold claim to argue that there was "no evidence" for something the Tribunal found there was "overwhelming" evidence of. The evidence of Associate Professor McPhee (the present applicant's witness), quoted by the Tribunal at [94], overwhelmingly showed that the "lethal component of the [Shark Control Program] does not reduce the risk of unprovoked shark interactions." In oral submissions, the Humane Society submitted that the balance of the Tribunal's reasons at [94] was a complete answer to the proposition that there

was no evidence. In addition, the Humane Society referred to the Tribunal's findings at [47]–[54], and submitted that [94] was merely repeating the conclusion arrived at in [56] after surveying a body of evidence. As to the applicant's submission that the evidence of Associate Professor McPhee was misunderstood by the Tribunal, the Humane Society submitted that the Tribunal did not mischaracterise the evidence, the qualification in the evidence now relied on by the applicant being sufficiently immaterial for it not to have been referred to by the Tribunal, and if there was any error it amounted to no more than an error in fact finding not giving rise to any question of law.

94 In its written submissions in reply, the applicant submitted that the procedural fairness point went to the failure of the Tribunal to hear it on whether all or some of the additional conditions imposed on the permit should be time-staged in their implementation under s 43(5B) of the *Administrative Appeals Tribunal Act*. Otherwise, all the new conditions imposed by the Tribunal took effect immediately: *Administrative Appeals Tribunal Act* s 43(5A). It was, the applicant submitted, one legal function of the Tribunal to determine which if any conditions should be imposed, but it was a separate legal function of the Tribunal to determine the extent to which the conditions should be time-staged in their implementation under s 43(5B). Procedural fairness applied to the second of these legal functions, quite apart from procedural fairness obligations as to the merits of the new conditions themselves.

95 The applicant submitted that until the Tribunal announced its decision with the imposed conditions, no party would know what they were, and what effect they would have. The Tribunal ought to have proposed the conditions it intended to make, then given the present applicant, as the party adversely affected by those new conditions, and the other parties, the opportunity to make submissions about whether some or all of the new conditions be time-staged in their implementation. It could have been expected that the Tribunal would have done what is ordinarily done, that is, to give its reasons and then give the parties an opportunity to make submissions as to the conditions or the timing of them. The Tribunal did not invite submissions on this before handing down its decision, and the decision makes no reference to whether the effect of ss 43(5A) and (5B) was even considered.

96 The applicant accepted that it did not in terms ask the Tribunal to give it an opportunity to proceed in that two-stage way, but submitted that it did not know what approach the Tribunal might take and that it acted reasonably in relying upon a decision-making body such as the

Tribunal to know from the submissions made about impracticability that it ought to proceed in a staged way.

97 Some of the new conditions imposed by the Tribunal, the applicant submitted, had an immediate adverse effect on the State, and were impossible for the State to comply with through its contractors, given the need for additional training of the contractors and the additional cost to the State to comply.

98 The applicant submitted the Tribunal had before it evidence of the system, and detail of the contracts, by which the Shark Control Program was implemented, and was therefore aware of how any changes to the permit would need to be implemented by the State through the contracts.

99 There were therefore two errors of law made by the Tribunal about application of s 43(5B) of the *Administrative Appeals Tribunal Act*, the applicant submitted:

> a. failure to afford procedural fairness in hearing from the parties on time-staging of the variation conditions; and
>
> b. failure to apply s 43(5B) in circumstances when on the evidence before it, it should have.

100 The applicant submitted the Humane Society's fall back attempt to read the conditions as not requiring immediacy or as including some unstated or implicit qualification about safety should be rejected as calling for orders to be read without the requisite authoritativeness and certainty.

101 Short supplementary written submissions were filed by the applicant and by the Humane Society, by leave, after the hearing of the appeal.

102 The applicant contended that before the Tribunal it was confronted with a broad range of proposed new conditions, and two sets of them, without knowing which ones (and which combination of an innumerable number of possibilities) might be accepted. These matters were sufficient to trigger s 43(5B) of the *Administrative Appeals Tribunal Act*, especially on the system of contracts by which the Shark Control Program is administered, because the evidence and submissions before the Tribunal disclosed that significant additional funding would be required by the State, and changes would be required to the contracts and training of the contractors. The applicant referred to the approach taken by the Tribunal in *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage (No 2)* [2006] AATA 94; 93 ALD 625 as showing that the Tribunal had power to give reasons and then allow the parties an opportunity to make submissions on the time for commencement of

the conditions (if not the wording of those conditions). The applicant submitted the failure to adopt that two-stage approach gave rise to a denial of natural justice, and a decision which was not the correct and preferable one. The applicant submitted that, in giving its decision to the parties which was complete in its terms, the jurisdiction of the Tribunal was spent, referring to *Comcare v Moon* [2003] FCA 569; 75 ALD 160 at [64]–[65].

103 In its short supplementary submissions, the Humane Society contended that if, as it now suggested, the applicant was faced with "innumerable possibilities", it could (and should) have raised that with the Tribunal and requested that the Tribunal either adopt a two-stage process or (so far as it could assist) apply s 43(5B). It did not do so. This was not a case of an under-resourced, inexperienced or unrepresented litigant: this was the State of Queensland, which was well-represented at all stages. And it was simply wrong to assert, the Humane Society submitted, that "the State had no opportunity to make submissions about whether the new conditions should be time-staged". It had ample opportunity to do so in advance of the Tribunal's decision.

104 The applicant's contention, the Humane Society submitted, was not that the orders made by the Tribunal were not reasonably open on the known material. Rather, the applicant's contention appeared to be that there were a number of potential options reasonably open on the known material and the Tribunal should have disclosed which of those options it was proposing to adopt. That contention did not engage with any recognised principle of administrative law and was contrary to the general principle that, outside the categories in *Alphaone*, "a decision-maker is not … required to expose his or her thought processes or provisional views for comment before making the decision": *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [9] (French CJ and Kiefel J).

105 In any event, the Humane Society submitted, caution was needed before acceding to the suggestion that the applicant was in some way hindered by being confronted with various possibilities. In truth, there were only a handful of possible shark control mechanisms before the Tribunal (each of which was addressed in the evidence and submissions, and in the Tribunal's reasons). Each of those mechanisms was well understood in the expert community and should have been well understood by the present applicant, as a regulator in this field, the Humane Society submitted. The applicant has adduced no evidence that it was impracticable for it to compile evidence or make submissions which adequately addressed the various possibilities. The applicant was not in a materially different position to a litigant addressing a

damages case that has various permutations. And it made no complaint to the Tribunal, the Humane Society submitted.

106 The Humane Society agreed with the applicant that upon the determination of its review, the Tribunal was functus officio, subject to the operation of s 43AA of the *Administrative Appeals Tribunal Act*. However, it submitted, if there had in fact been a constructive failure on the part of the Tribunal to "determine" the application to the Tribunal by reason of a material breach of the duty to afford procedural fairness, the Tribunal could revisit the orders it had purportedly made: *Phillips and Inspector-General in Bankruptcy* [2012] AATA 788; 131 ALD 564 at [449]–[465].

Consideration

Whether the Tribunal exceeded its decision-making power

107 We do not accept the applicant's proposition that there are, relevantly, "common law principles" that attend decision-making powers vested in the Authority. In our opinion, *Buzzacott* records principles of statutory construction: see *Winn* at [12] per Spigelman CJ, with whom Powell JA agreed, who said the issue was one of construction of the particular statute under consideration and the application of the statute to the circumstances of the particular case. To that extent therefore, judicial consideration of other statutory schemes, such as the provisions of the *Environmental Planning and Assessment Act 1979* (NSW), must be approached with caution. We do not see any close analogy between a consent to permit development of residential land and the present power. We would of course accept that, as required by reg 77(2)(c), any conditions imposed on a permission must be appropriate to the attainment of the object of the *GBRMP Act*: that is what the provision says. We also accept that there is a presumption of law that the legislature is taken to intend statutory discretionary powers to be exercised reasonably, but we do not see that principle as one which lies at the centre of the applicant's complaint.

108 We agree with the applicant that reg 77(3) has no relevant application. That provision deals with the imposition of a new condition on an existing permission or the variation of an existing condition to ensure, in each case, that the (existing) conditions of the permission remain appropriate to the attainment of the object of the *GBRMP Act*.

109 The real point, in our opinion, is the relationship between the conditions imposed and the permission (a **relevant permission**, meaning a permission required under a provision of the

Zoning Plan with respect to the purposes for which a zone may be used or entered) for which the present applicant had applied. There must, in our opinion, be a sufficient relationship between the permission which has been granted subject to the conditions imposed by the decision-maker and the permission that has been applied for.

110 While we would not base this conclusion on the use of the definite article in the expression "grant or refuse the permission", we agree that the permission in question, including as affected by the condition or conditions specified in it, must sufficiently relate to the relevant permission for which the person has applied. We do not doubt that it is not open to the Authority or the Tribunal to receive an application for a permission and then, without more, to take it upon itself to decide a range of matters and impose a sequence of conditions about those matters such that there is an absence of the relevantly sufficient relationship. To do so would be to purport to grant a permission but constructively to reject it.

111 The starting point therefore must be the Zoning Plan and the present applicant's application to the Authority.

112 In our opinion, contrary to the applicant's submissions, the application for permission to use and enter the Marine Park was, as described by the Tribunal, relevantly to conduct a program to take, including to kill, sharks that were considered to pose a threat to human life or safety, being the Shark Control Program. This is in the context where any condition was required by reg 77(2)(c) to be appropriate to the attainment of the object of the *GBRMP Act*, the "main object" being to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region.

113 In our opinion, the Tribunal was not looking in the abstract at whether it had the power to vary the permit including to prohibit the killing of any shark species, but in the context of whether the correct or preferable decision was to grant the applicant permission to use and enter the Marine Park to conduct the Shark Control Program. In our opinion, the desirability of that program must necessarily include its utility. The applicant applied for permission to take, including to kill, sharks and the Tribunal found that there was no benefit to killing sharks. Under the Zoning Plan, the written permission of the Authority was required to use or enter the Zone for, relevantly, the purpose of a program to take animals that pose a threat to human life or safety. The conditions on which the Tribunal decided to grant the permit were directed to that end. It is to be recalled that the statutory definition of "take" includes remove, gather, catch, capture, kill, destroy, dredge for, raise, carry away, bring ashore, interfere with and

obtain. In this case, there was no constructive rejection of the application for a permission because there is a sufficiency of relationship between that which was applied for, including a permission to carry out the Shark Control Program, and the permission granted, taking into account the conditions imposed.

114 No doubt the present applicant disagrees with the conclusion of the Tribunal that its Shark Control Program was ineffective and disproportionate to the extent it included the lethal take of shark species, but that does not bespeak error of law on the part of the Tribunal.

115 We do not accept the applicant's submission that the Tribunal's reasons at [26] show or establish that what the Tribunal did was beyond its power. The applicant's approach involves reading the Tribunal's language out of context. That paragraph itself includes a correct reference to the Tribunal's power in reg 77(2)(c) to grant the permission subject to a condition appropriate to the attainment of the object of the Act.

116 We do not accept the applicant's submission that the killing of shark species was fundamental to the permission applied for so that the Tribunal may not, as a matter of law, impose a condition so as to remove the killing of shark species except on animal welfare grounds; neither do we accept that in those circumstances the Tribunal's conclusion had to be a refusal. It does not appear to have been put to the Tribunal, and it is not self-evident, that the applicant contended that if it was not permitted to kill the sharks it did not want the relevant permission.

117 As to the applicant's attack on [94] of the Tribunal's reasons, we reject the submission that the finding was one for which there was no evidence and the submission that the finding was beyond the lawful scope of the Tribunal's power. In our opinion the applicant's complaint is, at best, one of erroneous fact-finding.

118 We reject this ground.

Whether the Tribunal erred in applying the precautionary principle

119 In our opinion, the Tribunal did not misunderstand the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage. The Tribunal found there were threats of serious environmental damage. Consequently there was no legal error in this respect. The applicant's submissions do not afford a fair reading to the Tribunal's reasons.

120 Although we agree, with respect, with the observations of Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 at [129] that it is not necessary that serious or irreversible environmental damage has actually occurred – it is the threat of such damage that is required – in the context of the present legislation we do not regard it as apposite in relation to the *GBRMP Act* to say, as his Honour said at [128] in relation to the different language in s 6(2)(a) of the *Protection of the Environment Administration Act 1991* (NSW), that the precautionary principle "is triggered by the satisfaction of two conditions precedent or thresholds". Certainly, in our opinion, the decision-maker under the *GBRMP Act*, before applying the principle, must form the view that there are threats of serious environmental damage or that there are threats of irreversible environmental damage and that in those circumstances lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment. However, we regard the issue of whether there are threats of serious environmental damage as largely a matter of evaluative fact for the decision-maker, and not as a jurisdictional fact the correctness of which we may independently evaluate.

121 In our opinion, no error on the part of the Tribunal in this respect has been established. The relevant principle was considered by the Tribunal at [78]–[87] of its reasons and it proceeded on the basis that there was a threat of serious environmental damage but lack of full scientific certainty. It found that trophic cascade may occur with the reduction in a population of an apex predator and in those circumstances applied the precautionary principle "by not contributing to the culling of tiger sharks." We accept the submission on behalf of the Humane Society that the Tribunal found there were threats of serious or irreversible harm in allowing a lethal Shark Control Program to continue in the Marine Park.

122 We reject this ground.

Whether the Tribunal erred in its consideration of scientific and non-scientific evidence

123 We see no substance in this ground. In our opinion it impugns only the merits of the Tribunal's assessment of the evidence before it: it is within the fact-finding role of the Tribunal to describe evidence or approaches as scientific or non-scientific as part of its evaluation of the material before it.

124 So far as concerns the Scientific Working Group, the Tribunal found, at [92], that while that Group was the body best placed to consider and make recommendations about the ecosystem of the Marine Park, its existing research did not appear presently to be directed to the impact

of the Shark Control Program on tiger sharks and that the Group may take years to conduct such research which would inevitably depend on funding. Further, the Tribunal found, at [93], that it could not have confidence that the recommendations of the Scientific Working Group would necessarily be followed if they were out of step with public sentiment.

125 It was for the Tribunal to give such weight as it saw fit to evidence or approaches which it regarded as non-scientific. In our opinion, at [55], in saying that in evaluating the scientific evidence one must not lose sight of the superficially attractive albeit non-scientific approach of the applicant, the Tribunal was carrying out its task. It was entitled to prefer, by giving more weight to, the evidence of the witnesses before it than to the arguments the applicant sought to advance by reference to historical data.

126 We do not accept the applicant's submission that the Tribunal took an unduly narrow approach to what constitutes evidence. The Tribunal is an administrative body and, strictly, it is inappropriate to consider what material it prefers as a question of evidence. In any event, the Tribunal did what it was entitled or required to do which was to evaluate for itself the material which was before it.

127 We do not accept the applicant's submission that in evaluating the scientific evidence, the Tribunal lost sight of the non-scientific approach or the objective fact as to the absence of fatalities. This is at best a complaint about the merits of the Tribunal's decision-making.

128 We reject this ground.

Whether the Tribunal, in imposing the conditions, failed to turn its mind to s 43(5B) of the Administrative Appeals Tribunal Act, or denied the applicant procedural fairness

129 It seems clear that the applicant did not ask the Tribunal to consider s 43(5B) of the *Administrative Appeals Tribunal Act*. This was in circumstances where the Humane Society, at least, had put forward the many conditions for which it contended and which we have set out above.

130 We are not persuaded that the Tribunal failed to afford procedural fairness in not hearing from the parties on time-staging of the variation conditions. The present applicant had the opportunity to make submissions as to the proposed conditions, including as to whether or not the introduction of such condition should be time-staged.

131 We do not accept the applicant's submission that "the State had no opportunity to make submissions about whether the new conditions should be time-staged". In our opinion, it had

that opportunity during the course of the Tribunal's hearing. We are not persuaded that the number of potential options open on the known material was such that the Tribunal should have disclosed which of those options it was proposing to adopt. As submitted by the Humane Society, generally "a decision-maker is not ... required to expose his or her thought processes or provisional views for comment before making the decision": *SZGUR* at [9].

132 While we accept that the Tribunal could have, if it had wished, adopted the two-step approach taken by the Tribunal in *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage (No 2)*, there was nothing in the present case which required the Tribunal to do so or which made it procedurally unfair for the Tribunal not to do so. The applicant had the opportunity to ask, but did not ask, the Tribunal to take that approach.

133 Similarly, we see no error in the Tribunal failing to apply s 43(5B) of the *Administrative Appeals Tribunal Act*. It was not asked to exercise that discretionary statutory power. It is also difficult to see how that power would be apposite. Under that power the Tribunal may specify in a decision that the decision is not to come into operation until a later date and, in those circumstances, the decision comes into operation on that date. But here the applicant's complaint is not as to the decision itself but as to some of the conditions by the inclusion of which the decision to continue permission was to be varied. Under s 43(5B), as we would construe it, the entire decision would not come into operation until a later specified date. That is not the remedy, as we understand it, for the difficulties of which the applicant complains.

134 We reject the applicant's submission that it was one legal function of the Tribunal to determine which if any conditions should be imposed, but that it was a separate legal function to determine the extent to which the conditions should be time-staged in their implementation under s 43(5B). In our opinion, we consider there to be no utility in treating the powers as "separate".

135 We also see some force in the submission on behalf of the Humane Society that, applying *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597, if the Tribunal had denied procedural fairness to the applicant and had made a jurisdictional error then, notwithstanding what would otherwise have been the position respecting the finality of its decision, the Tribunal could have made the decision again, the first (purported) decision being regarded, in law, as no decision at all. However in that case, speaking generally, the whole of a decision would be able to be revisited. Further, what appears to be implicit in this submission is that before this Court there is no *material* error of law flowing from any denial

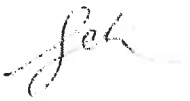
of procedural fairness on the part of the Tribunal. Materiality was not fully argued before us. We do not take any application of *Bhardwaj* into account.

136 We reject this ground.

Conclusion and orders

137 We would dismiss the appeal. The applicant is to pay the costs of the first respondent. We would make no order as to the costs of the second respondent.

I certify that the preceding one hundred and thirty-seven (137) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, Justices Greenwood and Robertson.

Associate: 

Dated: 18 September 2019