SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0081

RAYMOND HOSER

Applicant

v

DEPARTMENT OF SUSTAINABILITY AND ENVIRONMENT

Respondent

JUDGES:	REDLICH, TATE and SANTAMARIA JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	17 March 2014
DATE OF JUDGMENT:	5 September 2014
MEDIUM NEUTRAL CITATION:	[2014] VSCA 206
JUDGMENT APPEALED FROM:	*Hoser v The Department of Sustainability and Environment (Occupational and Business Regulation)* [2012] VCAT 264

ADMINISTRATIVE LAW – Appeal against suspension and cancellation of Wildlife Demonstrator Licence held by the applicant under *Wildlife Act 1975* – Whether Tribunal erred in exercising its discretion to affirm the respondent's suspension and cancellation decisions - Failure to take into account the gravity of the applicant's breaches of licence conditions – Public snake demonstrations - Whether barriers use complied with licence conditions- Expertise of applicant- Safety of applicant's devonomised snakes- Effect of licence cancellation on applicant's livelihood – Appeal allowed.

APPEARANCES:	Counsel	Solicitors
For the Applicant	The applicant appeared in person	
For the Respondent	Mr C J Horan	Victorian Government Solicitor

REDLICH JA
TATE JA
SANTAMARIA JA:

1 The applicant, who appeared in person before this Court, was the holder of a Wildlife Demonstrator Licence, a Wildlife Controller Licence, an Authorisation and an Approval under the *Wildlife Act 1975* ('Wildlife Act').[1] He seeks leave to appeal against orders made by the Victorian Civil and Administrative Tribunal ('the Tribunal') on 9 March and 26 April 2012, affirming the respondent's decisions to suspend his Wildlife Demonstrator Licence, Wildlife Controller Licence, Authorisation and Approval and then to cancel his Wildlife Demonstrator Licence, Authorisation and Approval ('the suspension and cancellation decisions') and awarding costs against the applicant.

2 On 8 June 2012, Buchanan and Nettle JJA ordered that the application for leave to appeal be adjourned to this Court.

3 For the reasons that follow, we would grant the applicant leave to appeal, allow the appeal and set aside the Tribunal's orders and the respondent's suspension and cancellation decisions. As the licenses, Authorisation and Approval that are the subject of this hearing expired on 30 June 2012, it will be necessary for the applicant to apply for new licenses and authorisations if he wishes to continue to conduct snake-handling courses and demonstrations.

Questions of law raised on appeal

4 The applicant appeals pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1986* ('VCAT Act'). Section 148(1) permits appeals to this Court on questions of law.

5 In the course of this appeal, the applicant's formal case has evolved, and his filed documents have undergone a number of iterations. Due to the unsatisfactory

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[1] These terms are defined below at [9].

state of his material, a hearing of his application before this Court on 21 May 2013 did not proceed and the applicant was required to reformulate his grounds and submissions. The applicant filed an amended notice of appeal on 23 July 2013, supplemented by amended written submissions dated 13 September 2013. The new submissions remained inadequately linked to the grounds of appeal contained within the amended notice of appeal. Both the written submissions and the amended notice of appeal sought to reopen questions of fact that had been determined by the Tribunal. Thus shortly prior to the oral hearing, the applicant was requested to further refine his material and the questions of law for determination. At the hearing before this Court on 17 March 2014, the applicant sought leave to file a further amended notice of appeal.

6 The applicant's amended notice of appeal dated 23 July 2013 was in the following unsatisfactory form:

> **THE GROUNDS OF APPEAL ON WHICH THE APPELLANT RELIES IN RESPECT OF THE JUDGEMENT 9 MARCH 2012 ARE:**
>
> **The Tribunal erred in law as follows:**
>
> **1. The Tribunal misapplied sections 25B and 25D of the Wildlife Act 1975 ('the Act') and thereby applied the wrong test in that the Tribunal:**
>
> a) founded its decision to cancel the Appellant's Wildlife licences on the basis that:
>
> i. he had been convicted of offences under the Act;
>
> ii. had breached conditions of his licences; and,
>
> iii. he 'was not a fit and proper person' to hold such licences.
>
> b) Whether the Appellant is or was a fit and proper person to be licensed is <u>not</u> a consideration with respect to a decision to cancel his licences pursuant to sections 25B and/or 25D of the Act.
>
> **2. The Tribunal made findings of fact contrary to the evidence or that were not open on the evidence or that were perverse in that:**
>
> a) The Tribunal found there was a risk of regeneration of venom glands, following venom gland and duct removal surgery contrary to the evidence.

b) The Tribunal found that there was no or insufficient evidence that the Appellant depended on the snake demonstrations for his livelihood.

c) The Tribunal found that the evidence showing snake demonstrations, by competitors contravening licence conditions, comprising photographs exhibited to the affidavit of the Appellant, was 'wholly unsatisfactory, largely irrelevant and otherwise unsubstantiated'.

d) The Tribunal:

i. Found that the barrier used by the Appellant did not comprise a pit, when the conditions of his licence require either a barrier or a pit with different intended purposes, and;

ii. Conflated the concepts of 'pit' and 'barrier' to find that the barriers used by the Appellant did not comprise a pit.

e) The Tribunal found as a basis for licence cancellation 'continuing breaches', involving four incidents, all of which predated the hearing in the County court of the charges to which the Appellant pleaded guilty.

f) The Tribunal made many other findings of fact not available on the evidence within the hearing, including: a finding that the applicant had no relevant expertise; there had been no scientific trials of devenomizing surgery appellant; that the Appellant had put reptiles at risk of theft and the basis for microchipping of the applicant's snakes; was wrong to allege Dr Funk supported the idea a venomoid[2] surgery may fail due to the regeneration of a cellular remnant; the statement 'the alleged breaches were in essence the same kind of conduct for which the Appellant sought and was refused approval by the 2008 Tribunal Decision' was not supported by any evidence and contradicted by evidence.

g) The Tribunal made other findings unavailable on the evidence or adverse findings out of context throughout the judgement.

3. The Tribunal failed to exercise its discretion properly or at all in that it:

a) decided the question on the basis of a finding that the Appellant was not a fit and proper person to hold wildlife demonstration licences, along with finding that he had been convicted under the Act and had further breached the

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[2] The Tribunal defined 'venomoid' snakes as 'elapid snakes whose venom glands have been surgically removed': *Hoser v The Department of Sustainability and Environment (Occupational and Business Regulation)* [2012] VCAT 264, [31(b)] (*'Reasons'*). For the definition of an 'elapid' snake, see note 4 below.

conditions of his licences.

b) The Tribunal failed to consider the impact of the decision upon the livelihood of the Appellant.

c) The Tribunal failed to properly consider the alternative option of imposing further conditions on the appellant's licences.

d) The Tribunal failed to consider the fact that the DSE did not provide any or any adequate instructions or diagrammatic or written advice with regard to what would comprise a compliant 'pit' or 'barriers'.

e) The Tribunal failed to consider the negative public safety implications of cancelling the appellant's licence.

4. The Decision of the Tribunal was so unreasonable no reasonable Tribunal could have exercised its discretion that way in that it:

a) failed to evaluate the evidence against the Appellant on the *Briginshaw* standard of proof;

b) relied upon a finding that he was not a fit and proper person to hold a wildlife demonstrator's licence;

c) did not give consideration or adequate consideration to the Appellant's submissions as required by sections 25C and 25DC [sic] of the Act.

d) failed to accept the evidence of the Appellant's livelihood depending upon his capacity to provide wildlife demonstrations.

THE GROUNDS OF APPEAL ON WHICH THE APPELLANT RELIES IN RESPECT OF THE JUDGEMENT OF 26 APRIL 2012 ARE:

The Tribunal erred in law as follows:

1. The Tribunal found that the Appellant's case unnecessarily disadvantaged the Respondent, contrary to the evidence to the effect that the length and conduct of the hearing was predominantly controlled by the Respondent;

2. The Tribunal found that there was no tenable factual basis for the Appellant's case, when had the Tribunal considered the matter according to the relevant sections of the Act, objectively on the evidence, in particular expert evidence regarding the devenomisation of the Appellant's elapid[3] snakes, the Appellant's case was clearly arguable, and not hopeless.

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[3] The respondent adopted the definition of an 'elapid' snake given by an expert witness for the respondent that '[a]n elapid snake is a snake that belongs to the family elapidae, which is one of the families of snakes and that includes the majority of venomous snakes we have here in Australia': *Reasons*, [31(a)].

3. The Tribunal found that the Appellant conducted the case in a way that unnecessarily prolonged the case, when the evidence was that the predominant prolongation of the case was controlled by the Respondent.[4]

7 As can be seen, each of these grounds of appeal contained lengthy particulars in the form of submissions. The amended written submissions dated 13 September 2013 further amplified some of these particulars. The written submissions also raise broad further grounds concerning matters about which the applicant has consistently complained. They are that in the conduct of the hearing and in its findings the Tribunal demonstrated actual or apprehended bias against the applicant and breached ss 97 and 98 of the VCAT Act. Section 97 provides that the Tribunal must act 'fairly and according to the substantial merits of the case'. Section 98(1)(a) provides that the Tribunal is bound by the rules of natural justice. Although neither of these allegations were pursued as discrete grounds in oral argument, the allegations of bias and procedural unfairness permeate all of the grounds. For the reasons that follow, we do not find it necessary to address these further allegations.

8 Insofar as Ground 1 in respect of the judgment of 9 March 2012 raises the issue that the question whether the applicant was a fit and proper person was relevant to an exercise of discretion under ss 25B and 25D of the *Wildlife Act,* it was not addressed in the applicant's written or oral submissions. It does not appear to have any substance. As such, it cannot be made out. We are satisfied that the remaining grounds in the applicant's amended notice of appeal dated 23 July 2013, complemented by his written and oral submissions, sufficiently expose the questions of law that are central to the applicant's argument. However the proposed further amended notice of appeal is also in an unsatisfactory form. Making due allowance for the fact that the applicant is unrepresented before this Court, we are not persuaded that the further amended notice of appeal or the applicant's amended submissions raise questions of law which would justify a grant of leave to file the further amended notice of appeal.

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4 Emphasis in original; citations omitted.

Background

The applicant's licences and authorisations

9 The applicant held the following pursuant to the Wildlife Act:

- Commercial Wildlife (Wildlife Demonstrator) Licence (No 12720671) ('Wildlife Demonstrator Licence');
- Wildlife Controller Licence Type 2 (No 12387349) ('Wildlife Controller Licence');
- Authorisation issued under s 28A of the Wildlife Act to conduct venomous snake handling courses ('Authorisation'); and
- Approval dated 27 June 2011 to use wildlife held under the Wildlife Demonstrator Licence in a television production ('Approval').[5]

10 The relevant conditions attaching to the applicant's Wildlife Demonstrator Licence were as follows:

> Condition 11: Possession and demonstration of wildlife under this licence must be conducted in a manner and proximity which minimises the risk of wildlife escaping or being stolen, stressed or injured in any way.
>
> Condition 12: Venomous snakes (elapids; whether or not the individual specimen is capable of a venomous bite) must not under any circumstances be handled or touched by any person other than the holder of this licence or their licenced Assistant without prior written approval of the Secretary.
>
> Condition 13: Possession and demonstration of wildlife under this licence must be conducted in a manner and proximity which minimises the risk of any injury to any person. Where venomous snakes (elapids) are involved, the demonstration must not be conducted closer than 3m to the audience, except where the licence holder is working in a pit which ensures that members of the public cannot approach, touch or handle the snakes.
>
> Condition 14: Where venomous snakes (elapids) are involved, only one venomous snake may be demonstrated at a time and all other venomous snakes (elapids) not being demonstrated must be confined to secure enclosures constructed to prevent escape, injury to the public and access by unauthorised persons, except where the licence holder is working in a pit which ensures that members of the public cannot approach, touch or handle the snakes.

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5 *Reasons*, [4].

Legislative regime

11 At the relevant time, the Wildlife Act provided that:

> **25B Power of Secretary to suspend licence**
>
> (1) The Secretary may suspend a licence under this Part, by notice in writing given to the holder of the licence, if the Secretary is satisfied, on reasonable grounds, that—
>
> (a) the holder of the licence has been found guilty of an offence against this Act; or
>
> (b) the holder of the licence has breached a condition of the licence. …
>
> **25D Power of the Secretary to cancel a licence**
>
> (1) The Secretary may cancel a licence under this Part if the Secretary is satisfied, on reasonable grounds, that—
>
> (a) the holder of the licence has been found guilty of an offence against this Act; or
>
> (b) the holder of the licence has breached a condition of the licence. …
>
> **28D Suspension of authorisation**
>
> (1) If the Secretary is satisfied that there are reasonable grounds to do so, the Secretary may suspend an authorisation, by notice in writing given to the holder of an authorisation. …
>
> **28F Cancellation of authorisation**
>
> (1) If the Secretary is satisfied that there are reasonable grounds to do so, the Secretary may cancel an authorisation. …

12 This regime appears to have been treated as applicable to the Approval held by the applicant. This was not contested by either party before the Tribunal or this Court.

Earlier proceedings and breaches of licence conditions

13 On 31 January 2008, the applicant applied to the respondent for authorisation under s 28A of the Wildlife Act to vary conditions 12, 13 and 14 of his Wildlife Demonstrator Licence, to the effect that the applicant would be entitled to hold more

than one snake at any time, to approach the public closer than three metres when demonstrating snakes, and to hand non-venomous reptiles (including those that have been permanently devenomised) to the public to be handled. The applicant's request for authorisation was refused. That refusal was later affirmed by the Tribunal on 30 September 2011.[6]

14 In May 2010, the applicant was charged with 13 breaches of conditions 11, 13 and 14 of his Wildlife Demonstrator Licence in demonstrations at Traralgon, Wonthaggi, Endeavour Hills and Warrnambool in 2008 and 2009.[7] The charges all related to the same alleged conduct: that the applicant was demonstrating more than one elapid snake at a time and doing so within three metres of the audience, without adequate barriers or pits.[8]

15 The applicant was found guilty of all 13 charges at the Ringwood Magistrates' Court on 16 February 2011. He appealed to the County Court, heard before Judge Campton on 4 August 2011, and ultimately pleaded guilty to nine breaches. The respondent withdrew the remaining four charges.[9] The applicant gave evidence before the Tribunal[10] in the present proceeding and repeated in oral argument in this Court that he pleaded guilty in the County Court appeal due to a lack of funds.

16 In addition to referring to these convictions, the Tribunal in its reasons referred to the following further breaches of the applicant's licence conditions that had not been the subject of any proceedings.

17 On 7 July 2011, the applicant had conducted a demonstration at Melton Shopping Centre ('the Melton demonstration'). In that demonstration, which was extensively considered in the Tribunal's reasons,[11] the applicant caused two elapid

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6 Ibid [41]–[46].

7 Ibid [48].

8 Ibid [52].

9 Ibid [54], [56].

10 Ibid [57].

11 Ibid [62]–[71].

snakes to bite his twelve year old daughter, for the purpose of demonstrating in the then pending County Court appeal that his snakes were safe. The snakes were among those upon which the applicant had performed venom gland removal surgery. He claimed that they were permanently non-venomous as a result. The Tribunal referred to a video of the demonstration, which was tendered into evidence. The Tribunal extracted the applicant's commentary during the demonstration, as well as his comments in subsequent media interviews. There was, at the time of the Tribunal hearing, an investigation taking place into the Melton demonstration.

18 The Tribunal also noted evidence put forward by the respondent that the applicant had committed further possible breaches of licence conditions and Tribunal orders at subsequent demonstrations attended by personnel of the respondent.[12]

Decisions to suspend and cancel applicant's licences and authorisations

19 Section 25D of the Wildlife Act gives the secretary of the respondent power to cancel a licence if satisfied on reasonable grounds that the holder of the licence has been found guilty of an offence against the Wildlife Act or has breached a licence condition. Section 28F gives the secretary power to cancel an authorisation if there are reasonable grounds to do so. In each case, once the preconditions on the exercise of power have been met, the secretary has the discretion to suspend or cancel the licence.

20 On 16 August 2011, a delegate of the secretary of the respondent notified the applicant of his decision to suspend the Wildlife Demonstrator Licence, the Wildlife Controller Licence, the Authorisation and the Approval pursuant to ss 25B and 28D of the Wildlife Act. The applicant was provided with an opportunity to make submissions as to why the licences, the Authorisation and the Approval should not be cancelled.

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12 Ibid [73]–[78].

21 On 23 August 2011, Judge Morrish, in her capacity as Vice President of the Tribunal, ordered that the respondent's decision to suspend the licences, Authorisation and Approval be stayed pending final determination of the review process, subject to certain conditions restraining the applicant from dealing with elapid snakes at public demonstrations.

22 After receiving submissions from the applicant, on 23 September 2011 the delegate notified the applicant of his decision to cancel the Wildlife Demonstrator Licence, the Authorisation and the Approval pursuant to ss 25D and 28F of the Wildlife Act. The respondent did not cancel the Wildlife Controller Licence.

23 On 8 June 2012, Buchanan and Nettle JJA stayed the respondent's suspension and cancellation decisions on the terms mutatis mutandis of the order of Judge Morrish pending the determination of this appeal.

The Tribunal's decision

24 The applicant sought a review of the respondent's suspension and cancellation decisions before the Tribunal, pursuant to s 86C of the Wildlife Act. Section 51 of the VCAT Act required the Tribunal to re-exercise the powers of the respondent and to affirm, vary or set aside the original decision. The Tribunal dismissed the application and affirmed the decisions made by the respondent.

25 In its reasons, the Tribunal accepted the respondent's arguments in all relevant respects. In particular, it made findings to the effect that the applicant had committed offences under the Wildlife Act and had committed further breaches of his licence conditions (most prominently, in relation to the Melton demonstration).[13] The Tribunal found that the applicant's demonstrations did not comply with the licence conditions, and that the applicant's demonstrations created an unreasonable risk to the public.[14] Having found that the threshold requirements for cancellation

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13 Ibid [214].

14 Ibid [193].

under ss 25D and 28F had been satisfied, it fell to the Tribunal to determine whether to exercise its discretion to cancel the Wildlife Controller Licence, Authorisation and Approval.

26 The Tribunal made a number of adverse findings as to the applicant's credibility. It found that the applicant was 'an unreliable witness who displayed little regard for the truth';[15] that he 'demonstrated a tenuous understanding of his responsibilities under the [Wildlife Demonstrator Licence]';[16] that he, 'through his demeanour and evidence, displayed a contempt and reckless disregard for the Licence conditions';[17] and that he 'demonstrated no real insight into the nature of his prior offending', in particular by claiming that he pleaded guilty in the County Court only for cost considerations[18] and by maintaining that he had not breached his licence conditions.[19]

27 In exercising its discretion to affirm the respondent's suspension and cancellation decisions, the Tribunal made the following further findings:

> In addition to the criteria satisfied pursuant to s 25D of the Wildlife Act, I am satisfied that the Applicant is not a fit and proper person to hold or retain the subject Licence, Authorisation and Approval and there are additional reasonable grounds justifying the cancelling of the Applicant's current Licence, Authorisation and Approval by reason of the Applicant's:
>
> (a) Apparent continuing failure or refusal to comply with Licence conditions;
>
> (b) Failure or refusal to follow the reasonable directions or instructions of responsible staff of the Respondent in relation to compliance with Licence conditions;
>
> (c) Apparent contemptuous attitude towards his obligations under his Licence; and a reckless disregard for the consequences;
>
> (d) Persistent failure to handle de-venomised elapid snakes as if they were still venomous;

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15 Ibid [190].

16 Ibid.

17 Ibid [191].

18 Ibid.

19 Ibid [192(b)].

(e) False and/or misleading public statements via the media and internet;

(f) Conducting demonstrations in a manner which:

(i) Places the general public, particularly children, at unreasonable risk of harm and potentially life threatening consequences;

(ii) Places the reptiles at unreasonable risk of harm, or loss [by escape or theft];[20]

(iii) Mishandles elapid snakes in particular;

(iv) Fails to properly and safely secure elapid snakes;

[(v)] Conveys misinformation about the proper handling of elapid snakes in particular; and

[(vi)] The primary objective is to deliver entertainment, often in a sensational manner, with minimal educational content or value.[21]

28 On 26 April 2012, the Tribunal made an order for costs in favour of the respondent, fixed at $20,000, pursuant to s 109 of the VCAT Act.

Improper exercise of discretion — Grounds 2, 3 and 4

29 An appeal from the Tribunal being limited to questions of law, the applicant must show error of law in the Tribunal's conclusion that its discretion was enlivened or in the exercise of its discretion. The applicant submits that the Tribunal erred in its fact-finding. Thus he must show there was either no evidence to support the impugned finding or that the finding was not reasonably open.[22] In attacking the exercise of the discretion, it is necessary for the applicant to demonstrate error of law in accordance with the well-known principles of *House v The King*.[23]

30 The terms of the discretion granted by the Wildlife Act are unconfined, and as such the Tribunal had a broad scope as to the factors that it could take into account

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20 Square brackets in original.

21 *Reasons*, [215].

22 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89 (Phillips JA).

23 (1936) 55 CLR 499, 504–5.

in the exercise of that discretion.[24] However, for the reasons that follow, we are of the opinion that the Tribunal erred in some of its findings and in its exercise of the discretion to affirm the respondent's decisions. Though it was open to the Tribunal to conclude that its discretion to affirm the respondent's suspension and cancellation decisions was enlivened, the Tribunal's exercise of that discretion miscarried.

31 Our conclusions may be summarised as follows. In assessing the gravity of the applicant's breaches of conditions 13 and 14 of his Wildlife Demonstrator License and the moral culpability attaching to those breaches, the Tribunal failed to take into account the consideration that the enforceability of the conditions breached was doubtful given the uncertainty of the exception provided for in conditions 13 and 14 due to the lack of any definition of a pit or barrier; the respondent's conduct over time in failing to provide the applicant with a description of the barrier required; and the inconsistent manner in which the respondent had purported to enforce those conditions. The Tribunal also failed to take into account a body of evidence relevant to the question whether the applicant had established that he was an expert such that his opinion was relevant to an assessment of the gravity of the breaches. The Tribunal erred in its conclusion that the applicant had a 'reckless disregard' for the conditions of his licence. Furthermore, the conclusion that the applicant's demonstrations placed the public at risk of harm was based upon general evidence that it is possible that devenomised snakes might regenerate their venom glands, rather than on a specific determination as to the safety of the applicant's snakes. The Tribunal's errors in relation to the gravity of the breaches of the applicant's licence conditions, the applicant's expertise, his reckless disregard for his licence conditions and the risk to the public infected its conclusion that the applicant was not a fit and proper person to continue to hold the Wildlife Demonstrator Licence, Authorisation and Approval. Finally, the Tribunal erred in concluding that there was no credible evidence that the suspension or cancellation of his licence would significantly affect the applicant's livelihood.

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24 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

32 We turn to our reasons for each of these conclusions.

The requirement for a 'pit'

33 Conditions 13 and 14 of the applicant's Wildlife Demonstrator Licence proscribe certain conduct 'except where the licence holder is working in a pit which ensures that members of the public cannot approach, touch or handle the snakes'. The offences for which the applicant was charged and convicted by the County Court in 2011 concerned breaches of these conditions.

34 The applicant had for some years used a barrier when demonstrating elapid snakes and contended before the Tribunal and before us that this form of structure had over time been approved by the respondent. The respondent acknowledged in its submission that the licence conditions do not specify or define the concept of a 'pit' and that a structure or barrier may suffice to meet the exception. It said:

> Rather, it is a functional or purposive concept directed to whether the relevant structure or barrier is effective to ensure that members of the public do not come into contact with a venomous snake. As such, the concept of a 'pit' for the purposes of the exception to conditions 13 and 14 is not capable of precise or exhaustive definition or specification. The concept must be applied to the facts and circumstances of any particular case.

35 The applicant submitted that he had been 'prosecuted for complying' with the respondent's directions. Further, the applicant consistently maintained, with some force, that the respondent had never sufficiently defined the requirements of a 'pit' and had selectively enforced the condition. He further submitted that he had acted in accordance with the County Court's decision regarding a pit.

36 The applicant drew attention to the following observations of Judge Campton when sentencing him for the breaches in the County Court:

> I accept as a matter going to mitigation on the plea that there were no written guidelines provided to [the applicant] by the [respondent] with respect to what constitutes a secure pit. I consider that in order to prevent any future problems it would be useful if the [respondent] could provide [the applicant] with written guidelines with respect as to what constitutes a suitable pit for

the purposes of his [Wildlife Demonstrator Licence].[25]

37 In its reasons, the Tribunal emphasised the applicant's failure to comply with the requirement for a pit. For instance, when considering the conduct for which he was convicted, the Tribunal found:

> In relation to the alternative requirement for an effective pit, the Applicant simply contended that he complied with industry standards; and that no pit can keep a snake in or a determined member of the public out. In my view, the Applicant wilfully failed or refused to demonstrate any genuine understanding of his obligations in this respect.[26]

38 In relation to the applicant's use of a barrier, the Tribunal found that the barriers used by the applicant 'self-evidently [did] not comply' with his licence conditions,[27] and 'could not possible be represented as creating a pit'.[28]

39 The applicant adduced evidence including correspondence between the applicant and the respondent concerning the requirements of a pit or the alternative of a barrier. For instance, in an email on 28 April 2011, before his County Court appeal against his convictions, the applicant requested that the respondent provide further detail regarding the pit requirement:

> Please specify what exactly constitutes a 'pit' as (not) defined in conditions 13 and 14 of our demonstrator's permit. … Please identify the exact dimensions required, including size, shape, height, method of joining surfaces, exact material type to be used and any other requirement you may later rely upon for seeking to prosecute us for.

40 Although the Tribunal accepted the respondent's evidence that there was 'a general understanding in the herpetilogal [sic] community as to what complies' with the pit condition,[29] the respondent's evidence, acknowledged by the Tribunal, was that despite requests by the applicant to do so, the respondent never informed the applicant that any particular structure, including that which the applicant habitually

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25 *Department of Sustainability & Environment v Hoser* (Unreported, County Court of Victoria, Judge Campton, 4 August 2011) {20].

26 *Reasons*, [59].

27 Ibid.

28 Ibid [193].

29 Ibid [172], [213].

used at his demonstrations, would satisfy the condition.[30]

41 In correspondence with the applicant and in submissions before us, the respondent submitted that it was not possible for the respondent to define a 'pit' or other structure or barrier as requested by the applicant. For instance, in a letter dated 22 September 2011, the respondent wrote to the applicant:

> In order to be considered a 'pit' under the conditions of your Licence, any structure must ensure that 'members of the public cannot approach, touch or handle the snakes'. This is a performance-based condition which allows demonstrators to construct a pit using a range of materials and methods that suit their needs and capacity to construct, store and transport the structures. This approach provides flexibility to demonstrators but still demands that, whatever the construction method and materials used, the pit must prevent the public from approaching, touching or handling the snakes in order to be compliant.

42 This was and remains an unsatisfactorily vague definition of what the applicant was required to do in order to comply with the pit requirement. 'Scissor' barriers, as apparently used by the applicant, could conceivably operate to ensure that no member of the public could approach a demonstrator's snakes (although the Tribunal found that the applicant's barriers did not do so). But such barriers could self-evidently never come within the commonly understood meaning of a 'pit'.

43 The *Macquarie Dictionary* defines a 'pit' as, relevantly, 'a hole or cavity in the ground', or alternately 'a hole in the ground used for any of various purposes, as disposal of waste, burning charcoal, making silage, etc'.[31] It is clear from the evidence that the respondent did not require holders of a licence subject to the pit requirement to comply with this definition. The word 'pit' may have some special meaning in this particular field. However, it is not acceptable for the respondent to have failed to provide a comprehensible definition.

44 It is axiomatic in the law of contract that a term that is overly vague or

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30 Ibid [213].

31 *Macquarie Dictionary* (Macquarie, 5th ed, 2009) 1269.

uncertain may be unenforceable.[32] Similarly, here, it appears to us that the enforceability of conditions 13 and 14, at least in relation to a pit requirement and the type of barrier which will suffice, is doubtful. Moreover, if there was, as the Tribunal accepted, a commonly understood definition of 'pit' within the relevant industry, in circumstances where the respondent was not enforcing the requirement for a pit in accordance with the precise terms of the licence, it was obliged to give proper directions to the applicant where a dispute arose as to whether certain conduct would satisfy the respondent's interpretation of the condition.

45 As the applicant rightly submits, the respondent's failure to give a detailed description of what was required in terms of a 'pit' was compounded by a level of inconsistency in the way that any pit or barrier requirement was actually enforced. The applicant pointed to an email from 2006 in which a representative of the respondent had attended a demonstration by the applicant in which he had used his barrier and had apparently been satisfied that the applicant was complying with his licence conditions.

46 Given that the applicant has previously been convicted of breaching his licence conditions, it was open to the Tribunal to find that there had been such a breach and that its discretion to cancel the applicant's licence had thereby been enlivened. However, in the exercise of that discretion, the Tribunal had to consider the gravity of the breach and the moral culpability attaching to the breach. The Tribunal attached great weight to the breaches, ascribing to the applicant a careless disregard for conditions attaching to his licence. Insofar as the breach concerned the requirement of a pit or the need for a barrier or other structure, the lack of clear instruction from the respondent as to how the applicant was to comply with such requirements together with its acceptance of the applicant's use of a barrier should have mitigated the gravity of this particular breach of condition. With respect to this particular breach, it cannot be said that the applicant 'wilfully failed or refused to

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[32] See, eg, *Thorby v Goldberg* (1964) 112 CLR 597, 607 (Menzies J).

demonstrate any genuine understanding of his obligations in this respect'.[33] In this context, the Tribunal ought to have taken into account the uncertainty of the exception, the unwillingness of the respondent to provide any definition of a pit or barrier and the manner in which the respondent had sought to enforce the conditions. These matters bore upon the gravity of this particular breach and the level of moral culpability attaching to the applicant's conduct.

The applicant's expertise

47 We turn then to the finding that the applicant had displayed a 'contemptuous attitude towards his obligations under his Licence; and a reckless disregard for the consequences' of breach of those obligations.[34] In making this finding, the Tribunal failed to take account of the relevant expertise of the applicant, and failed to take into account the evidence relied upon by the applicant to establish that his devenomised snakes were in fact safe.

48 The Tribunal made the following findings as to the applicant's expertise:

> Respondent's Counsel submitted, and I accept, that the Applicant:
>
> (a) does not possess the qualifications or training to give expert evidence about the surgery he has performed on elapid snakes; and
>
> (b) is not suitably qualified to give expert evidence about whether the surgery that has been performed has, in fact, rendered the snakes incapable of delivering a venomous bite.[35]

49 In making these findings, the Tribunal erred in its analysis of the question of the applicant's expertise.

50 It is uncontested that the applicant has extensive experience in working with snakes that have been subject to venom gland removal surgery. The applicant claimed before the Tribunal that he had the relevant expertise to perform the devenomisation surgery and express his opinion as to its consequences. As his

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33 *Reasons*, [59].

34 Ibid [215].

35 Ibid [110].

expertise was challenged by the respondent, the Tribunal was required to examine the applicant's credentials and experience, including those in published form. In the event, the Tribunal stated that the applicant was unable to substantiate his claimed expertise. In particular, in summarising the applicant's evidence the Tribunal found that:

> He has been working with reptiles all his life and has published extensively, *although he did not provide any details of such publications*. He says that he is widely cited, including articles concerning the performance of his surgery. *Again, there were no details provided in support of these claims*.[36]

51 In concluding that the applicant was not an expert, the Tribunal found:

> [T]he Applicant claims to be the author of nine books and hundreds of definitive reptile papers. However, no detail was given about the content of such books or papers; and no material, by way of peer review of any such publications, was presented to the Tribunal.[37]

52 The Tribunal erred in finding that the applicant did not substantiate his claims regarding his publications. In the applicant's statement of expert evidence, produced for the purpose of the Tribunal hearing, the applicant summarised his publications and provided a link to a website containing a number of the documents. In cross-examination, the applicant was asked about his publications, and offered to produce them to the Tribunal:

> Have you got copies of the articles or documents yourself? — I have copies of all of them. Every one of them. I can produce them to the court if need be. They're in my car.
>
> In your car? — Well, I wasn't expected to be called. I mean, I've got boxes of files in the car expressly in case things were called, but I'm happy to produce every one of them.
>
> Okay. Well, I might have a look at those later, your Honour, and I will just continue with the cross-examination.

53 It appears that the respondent's counsel did take up the applicant's invitation. In oral argument before this Court, the applicant stated, without objection from the respondent, that he had subsequently produced the materials to the Court the same

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36 Ibid [80] (emphasis added).

37 Ibid [108].

afternoon. It was not in dispute that the voluminous material was made available to the respondent's counsel who chose not to pursue the issue. The applicant drew attention during the appeal to the extensive nature of that material including his many publications to which he had deposed before the Tribunal. It is unnecessary that we reach any conclusion as to whether that material which plainly bears upon the applicant's expertise compelled any particular conclusion as to whether the applicant was expert in the task of surgical removal of the venom glands or whether he had the expertise to express opinions as to the surgical consequences of devenomisation. It is sufficient for the applicant's purposes that he demonstrated that the Tribunal was in error in stating that the applicant did not provide material that may have substantiated his expertise.

54 The Tribunal founded its conclusion that the applicant did not have any relevant expertise upon the applicant's failure to substantiate that expertise. That finding cannot stand. The Tribunal failed to have regard to evidence that may have established that the applicant's expertise went to his surgical expertise to properly devenomise his snakes or to whether he had the expertise to opine that the appropriate surgery would devenomise the snakes, or both. If an expert, his expert opinion was relevant to whether the public were at risk.

The applicant's reckless disregard for his licence conditions and the consequences of his breaches

55 The Tribunal found that the applicant had a reckless disregard for the consequences of the breaches of his licence obligations. In making this finding, the Tribunal relied upon general and theoretical evidence as to the possibility of the regeneration of venom glands in devenomised snakes. The Tribunal failed to take into account the evidence relied upon by the applicant that his snakes were safe.

56 It was uncontested that in his demonstrations the applicant only used venomous snakes whose venom glands he had removed many years earlier. A central issue before the Tribunal, which is the primary question addressed in the

Tribunal's reasons, was whether it was possible that such snakes could subsequently regenerate their venom glands. The applicant maintained that that was not possible, while the respondent disagreed. Each party had support from expert witnesses. The Tribunal ultimately accepted the respondent's evidence that:

> (a) There has been no scientific trial to examine the efficacy of de-venomising surgery; and even a remote possibility that such surgery could be ineffective poses an unreasonable risk to the public; and
>
> (b) Prudence dictates that all venomoid snakes should be handled as if they were venomous[.][38]

57 Assuming for present purposes that the applicant was not an expert on such matters or, if he was, that the Tribunal would not have been persuaded by his opinion, it would have been open to the Tribunal to make these general findings on the evidence before it. The applicant submits with some force that even if such general findings were open — a matter he disputes — those findings do not address the question whether the applicant's snakes were unsafe or whether the applicant showed a reckless disregard for the safety of the public in using those snakes in his demonstrations.

58 It is convenient to briefly extract the Tribunal's summary of the applicant's evidence concerning the snakes used in his demonstrations, and the circumstances surrounding the applicant's practice concerning devenomising surgery for those snakes, none of which was contested:

> The Applicant said he had performed venomoid surgery since 2003 on about 40 live snakes after first practising on dead snakes. He ceased performing such surgeries in 2006 after being instructed to do so by a wildlife officer. …
>
> Following surgery, he tests the snakes by a number of techniques, none of which have produced any venom to date:
>
> (a) He causes the snake to bite a beaker, which in venomous snakes will cause venom to be released;
>
> (b) He causes the snake to bite live prey, such as a rodent;
>
> (c) Ultrasound;

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38 Ibid [205].

(d) Autopsy upon dead de-venomised snakes, which has not revealed any regenerated gland; and

(e) Microscopic examination: venom is quite different to saliva[.]

The Applicant and his staff have been bitten by venomoid snakes without ever being hospitalised.[39]

59 Dr McCracken, an expert witness for the respondent, gave evidence that an elapid snake might still deliver a venomous bite following surgery to remove its venom glands.[40] Dr McCracken was a Senior Veterinarian at the Melbourne Zoo.[41] The Tribunal accepted Dr McCracken's evidence that this could occur in two circumstances: first, if the venom glands were not completely removed; and second, if the venom gland tissue regenerated.[42]

60 The second proposition — that a snake's venom glands may regenerate even if fully removed in surgery — was the subject of very extensive consideration in the Tribunal's reasons, and appears to have been the dominant focus of the hearing before the Tribunal. However, the debate rarely rose above the hypothetical. Dr McCracken, who had not examined the applicant's snakes, did not suggest that regeneration of venom glands had been proven to have occurred. On very limited information Dr McCracken opined that it was possible by analogy with the (scientifically proven) phenomenon of other reptile tissues regenerating.[43] As a consequence, Dr McCracken stated, it is not possible to be certain that a snake whose venom glands have been removed has been rendered permanently non-venomous.[44]

61 Dr Funk, the applicant's expert witness, had examined some of the applicant's

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39 Ibid [85], [88]–[89].

40 Ibid [142].

41 The applicant alleged that the Melbourne Zoo was one of a number of his competitors who performed public demonstrations of wildlife and who had received favourable treatment from the respondent. The Tribunal rejected that claim and it was not pursued in oral argument on the appeal.

42 *Reasons*, [142], [204(c)].

43 Ibid [142], [145(b)].

44 Ibid [142].

snakes before giving evidence.[45] He stated that he had 'no doubt that those snakes have been made permanently non-venomous'.[46] However, in cross-examination, he accepted that in theory it may be 'remotely' possible for venom gland tissue to regenerate following surgery if the surgery had failed to extract any cellular remnant of the gland at the site.[47] He did not any make concession with respect to the second proposition advanced by Dr McCracken that a snake whose venom glands have been completely removed might regenerate those glands.

62 The respondent submitted, and we accept, that whilst there remains any uncertainty, no matter how remote, regarding the efficacy of surgery to devenomise elapid snakes, the imposition of licence conditions is justified that are predicated on the notion that snakes that have been devenomised should nonetheless be treated as if they may still be venomous. Indeed, the Tribunal's findings on this issue appear to be directed to the possibility, however remote, that the applicant's snakes continue to be, or may be in the future, venomous. We agree that the risk justifies the continued imposition of the conditions.

63 But the applicant gave uncontested evidence that he and other members of his staff had repeatedly, over the course of many years, been bitten by his snakes since he performed the surgery. It was thus sufficiently clear that the first possibility opined by Dr McCracken was not a finding open in relation to the applicant's snakes and that as to the second possibility, there had thus far been no regeneration of any venom glands.

64 On the evidence, the applicant had ceased conducting devenomising surgery in 2006. He had tested the snakes after the surgery, and in the intervening years he and his staff had been bitten by the snakes many times without incident. He was satisfied that the snakes were safe, and he had reasonable grounds for such a belief.

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45 Ibid [125(n)].

46 Ibid [125(j)].

47 Ibid [137(i)].

As he said, he had a system in place which ensured that he used only snakes in his demonstration that were no longer venomous. The finding that the applicant had a reckless disregard for his licence conditions cannot be sustained. That finding required that the applicant had recognised that the risk existed but proceeded nonetheless to expose the public to that risk. The applicant did not consider there to be a risk to the public at all. He had reasons for holding that belief. Furthermore, the fact that there was evidence that the applicant's snakes had been effectively devenomised, and that the applicant did not use elapid snakes other than those devonomised long ago, when the procedure to do so was permitted, should have diminished to a significant degree the gravity of any of the applicant's breaches. This was particularly so where the purported risk was unproven, although we accept it cannot be discounted. We make no finding as to the severity of the risk to the public.

65 The Tribunal's adverse conclusions as to the applicant's expertise and the finding that he acted in reckless disregard of his licence conditions are affected by error.

The applicant's livelihood

66 The Tribunal found that the applicant had not sufficiently particularised the financial effect that the decisions would have upon his livelihood:

> I am also satisfied that there was no credible evidence:
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> …
>
> (c) As to the extent to which the Applicant derives his livelihood from demonstrations. Indeed, more questions were raised than were answered by the Applicant's evidence. In particular, the Applicant:
>
> (i) is uncertain about the number of staff that he employs;
>
> (ii) is unsure of the salary the two full time staff receive; does not know what his part time staff receive, and is also unclear about how many part time staff work for him;
>
> (iii) said his wife handled the accounts, but she was not called to give evidence;

(iv) produced a document headed Kotabi Pty Ltd Trading Profit and Loss Statement for the Year ended 30 June 2010. However, no evidence was given as to who prepared this document; or who are the Directors and shareholders; and

(v) said that the wages and salaries figure of $59,100 for the financial year 2010 'probably' related to 2 full time staff and 8 part time staff.[48]

67 Thus the Tribunal, in affirming the respondent's suspension and cancellation decisions, did not take into account the effect upon the applicant's livelihood. In failing to do so the Tribunal fell into error.

68 The applicant consistently maintained that the effect of such a decision would be to destroy his livelihood. He made that claim in his submission to the respondent following its decision to suspend the licences. It was repeated in his affidavit in support of his application for review of the decision by the respondent to suspend and cancel his licences, in his subsequent affidavit for the Tribunal hearing, and in his evidence before the Tribunal.

69 The evidence of financial impact that was led by the applicant before the Tribunal was in response to the reasons that the respondent had provided in its notice to the applicant that it had decided to cancel the Wildlife Demonstrator Licence, Authorisation and Approval. In that notice the respondent advised that it had decided not to cancel the applicant's Wildlife Controller Licence in response to the 'business viability and public interest concerns' that the applicant had raised. Consequently, the applicant sought to show before the Tribunal that retention of the Wildlife Controller Licence would not in fact address his business viability concerns. He stated in his affidavit that '[w]hile the [Wildlife Controller Licence] is important to me, it is far less so than the [Wildlife Demonstrator Licence] from the point of view of earning income'. The applicant submitted, and the respondent did not contest, that he earned approximately $7,000 per annum from activities under the aegis of his Wildlife Controller Licence. He submitted that a 'living could not possibly be earned' from those activities. This was the focus of his evidence in chief

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48 Ibid [199].

in relation to the livelihood issue before the Tribunal.

70 During oral argument on the appeal the Court requested transcript references to any passages where the respondent had sought to challenge the applicant's repeated claim that he derived the bulk of his income from demonstrations. The references provided show that no such challenge was made. The only question which went directly to this issue was as follows:

> And you say that from 2003 your dominant income, you make your livelihood … from the demonstrations? — Yes, definitely.

71 Counsel for the respondent at no time suggested to the applicant that the bulk of his income was not derived from demonstrations or that he did not rely upon that income for his livelihood.

72 Counsel for the respondent did briefly question the applicant as to financial matters concerning his business, 'Snakebusters'. The applicant said he was unable to provide details of income and expenditure, explaining that his wife attended to the financial accounts. The applicant said that his income came 'pretty much all' from that business. It was put to the applicant that he had not separated his income from demonstrations from any other source of income in the material he had tendered. As we have said, he had in his affidavit explained how he had calculated the small amount of income that he derived from calls to control wildlife.

73 In re-examination, the applicant produced for the Tribunal an annual report for the 2010 financial year for Kotabi Proprietary Limited, the applicant's operating company. The Tribunal asked a number of questions arising from those records in relation to the wages the applicant paid to himself and to his staff. No evidence emerged that cast doubt upon the applicant's evidence that the demonstrations provided most of his income.

74 The Tribunal proceeded on the basis that the evidence did not establish that the applicant derived the bulk of his livelihood from the demonstrations conducted under the Wildlife Demonstrator Licence. Although the applicant did not place

documentary material before the Tribunal which contained a breakdown of his income from his financial records, he had set out the content of the returns from the Wildlife Controller Licence in his affidavit, which showed the precise and small amount of income derived from snake catching over a three year period. The applicant stated numerous times in affidavits and in his viva voce evidence that the effect of the decision to cancel his Wildlife Demonstrator Licence would be to destroy his livelihood. He confirmed in cross-examination that he made his livelihood from the demonstrations. That proposition was never challenged by the respondent in the course of the applicant's evidence. Neither did the Tribunal state that it would require a documentary breakdown of his income. It was not open to the Tribunal to disregard the applicant's evidence and financial records. It constituted credible evidence that the applicant's livelihood would be substantially affected if his Wildlife Demonstrator Licence was cancelled.

Conclusion

75 For the reasons given, the applicant's breach of licence conditions requiring a 'pit' could not support the discretionary decision to cancel the applicant's Wildlife Demonstrator Licence, Authorisation and Approval. The findings that the applicant had failed to establish his expertise and that he had reckless disregard for the consequences of the breaches of his licence conditions cannot be sustained. As any expertise of the applicant may have been relevant to the question whether the applicant by his conduct put the public at risk, the error in the analysis as to that expertise was an error that infected the exercise of discretion. The Tribunal's analysis as to the risk to the public posed by the breaches was not directed to the actual risk posed by the applicant's snakes. The discretion also miscarried as a consequence of the failure to take account of the effect of cancellation of his licence upon the applicant's livelihood. The Tribunal's discretionary decision to affirm the respondent's suspension and cancellation decisions must be set aside.

76 This Court must exercise restraint in the disposition of an appeal arising

pursuant to s 148.[49] This Court may only make a substitutive order where only one conclusion is open on the correct application of the law to the facts found by the Tribunal. Where the outstanding issue involves the formation of an opinion, the matter would ordinarily be remitted to the Tribunal[50] for reconsideration of its factual findings and opinion having regard to the errors of law we have identified. For the reason that follows we see no utility in the present circumstances in so remitting the matter.

77 As mentioned above, the licences, Authorisation and Approval that are the subjects of this hearing expired on 30 June 2012. Whatever the effect of the stay pending the outcome of this appeal, the licences, Authorisation and Approval will no longer be in force following the making of orders giving effect to our decision. However, notwithstanding the applicant's submission in his amended notice of appeal that the matter should be remitted to the Tribunal for further hearing if he is successful, it would be futile for us to make any such order. If the applicant applies for renewal or grant of new licences or authorisations, those aspects of the Tribunal's reasons that have been successful impugned must be disregarded. Of course, there may be other relevant considerations that may be taken into account in determining whether a new licence or authorisation should be granted. Nothing we have said should be treated as indicating any concluded view as to whether the applicant's past conduct should be taken into account in considering whether to impose further conditions upon any licence or authorisation in the event that it is granted. However, the applicant must be given the benefit of this judgment.

78 We would grant the applicant leave to appeal. We will order that the Tribunal's decisions of 9 March 2012 to affirm the respondent's suspension of the Wildlife Controller Licence, the Wildlife Demonstrator Licence, the Authorisation and the Approval held by the applicant and to affirm the respondent's cancellation

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49 *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320, 332–3 (French CJ, Gummow and Bell JJ).

50 Ibid.

of the applicant's Wildlife Demonstrator Licence, the Authorisation and the Approval be set aside.

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