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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2023 06152

RAYMOND HOSER Plaintiff

v

THE SECRETARY OF THE DEPARTMENT OF ENERGY, ENVIRONMENT AND CLIMATE ACTION Defendant

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JUDGE:	Forbes J
WHERE HELD:	Melbourne
DATES OF HEARING:	9-10 April 2024
DATE OF JUDGMENT:	29 May 2024
CASE MAY BE CITED AS:	Hoser v Secretary of the Department of Energy, Environment and Climate Action
MEDIUM NEUTRAL CITATION:	[2024] VSC 277

ADMINISTRATIVE LAW – Judicial review and appeals –Judicial review of administrative decision to issue a direction to remedy various alleged breaches of the *Wildlife Regulations 2013* (Vic) – Breaches include failure to comply with applicable codes of practice – Res judicata and issue estoppel – Relevant considerations – Unreasonable or illogical decision – Bad faith and improper purpose – Procedural fairness –Partial success in misapplication of minimum standards in the code of practice - Whether utility in setting aside direction that has expired – *Wildlife Act 1975* (Vic) – *Wildlife Regulations 2013* (Vic) reg 43.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Self-represented	-
For the Defendant	R Chaile	VGSO

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HER HONOUR:

A Background

1 The plaintiff Mr Raymond Hoser (**Hoser**) keeps wildlife, mostly snakes and other reptiles. He describes his occupation as wildlife displayer, snake catcher and scientist. His business includes a breeding program, presenting reptile shows and educating the public about reptiles, as well as catching and relocating snakes found where they are unwelcome. He conducts his business using a number of registered names including Snakeman. He is also a published author on reptiles including scientific papers.

2 As a keeper of wildlife, Hoser is licenced by the state government presently through the Secretary of the Department of Energy, Environment and Climate Action (the **Department**) (the **Secretary**). He has held a licence to keep live reptiles since the age of 12 when licencing was first introduced in NSW.[1] In Victoria he has held a Commercial Wildlife (Wildlife Demonstrator) Licence and other licences to keep and to catch reptiles for 20 years or more. He is presently aged 62.

3 It would be fair to say that no love is lost between Hoser and the Department. This is reflected in litigation between the two going back at least to 2012, some of which I will shortly summarise. The present dispute arose when the Department attended Hoser's premises to inspect his wildlife on 12 September 2023. Hoser says he was told that the purpose of the visit was to count the animals,[2] while the Department says the purpose of the visit was to audit compliance with the applicable legislation and regulations and the terms of his licences.[3] As a result of the visit, conducted by ten department officers, Hoser was issued a Direction Notice on 7 December 2023 (the **Notice**) on behalf of the Secretary under reg 43(2) of the *Wildlife Regulations 2013* (Vic) (**Wildlife Regulations**). The Notice identified potential offences under reg 43 of

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1 Plaintiff, 'Affidavit of Raymond Terrence Hoser' sworn 20 December 2023 in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152 (**First Hoser Affidavit**).

2 First Hoser Affidavit, [44].

3 Defendant 'Affidavit of Lucille Watterson' affirmed 16 February 2024 in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, [8] (**First Watterson Affidavit**).

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the Wildlife Regulations that the delegate of the Secretary reasonably believed that Hoser was committing. The Notice required compliance by no later than 8 April 2024.

4 Hoser took up the invitation in the covering letter accompanying the Notice to engage with the Department about the written directions. He wrote to the Department on 9 December 2023 setting out reasons why the Notice should be withdrawn.[4] On 11 December that request was refused. Hoser issued this proceeding on 20 December 2023 seeking judicial review of the decision to issue the Notice.

5 The matter initially came on before me in the Practice Court urgently on 20 February 2024 with Hoser seeking an interim stay of the Notice. The defendant foreshadowed a summary dismissal application, but as the Court could offer an early listing date for final hearing, the Secretary was content to argue the matter on its merit and agreed to extend the time for compliance to a date seven days after the trial. He issued an amended Notice to Hoser on 28 February 2024 with a revised date for compliance of 16 April 2024. At trial the Secretary undertook not to commence any prosecution of the plaintiff for breach of reg 43(1) of the Wildlife Regulations until delivery of judgment in the proceeding.

6 The amended Originating Motion dated 5 March 2024 identified twelve grounds under which Hoser claimed the decision to issue the Notice was invalid, most of which contained multiple subparagraphs and discursive matters. In broad compass the amended grounds, as supplemented by Hoser's written and oral submissions, fell into six groups:

(a) the decision was precluded by res judicata or issue estoppel (ground 1 in the amended Originating Motion) (**Ground One**);

4 The letter is exhibited in the exhibit bundle to the First Hoser Affidavit and commences 'I have reviewed your 'Directions Notice' to comply served on me dated 7 December 2023 which I view as a full-scale attack on myself and my successful wildlife education business in the same vein as those your cohort have launched against me in previous years'.

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(b) the decision took into account irrelevant considerations and/or failed to take into account relevant considerations (grounds 2, 3 and 4 in the amended Originating Motion) (**Ground Two**);

(c) the decision was illogical and/or unreasonable (this ground permeates the amended Originating Motion, see for example grounds 2, 4, 11 and 12) (**Ground Three**);

(d) the decision was made for an improper purpose or in bad faith (grounds 4, 5, 7, 8, 9 and 11 in the amended Originating Motion) (**Ground Four**);

(e) the decision was made with a denial of procedural fairness (ground 4H in the amended Originating Motion and substantially developed in oral submissions) (**Ground Five**);

(f) miscellaneous other grounds (grounds 5, 6, 10, 12) (**Remaining Grounds**).

7 An additional ground was identified in oral submissions at hearing and in the absence of objection, leave was given to include this ground. This was that the *Code of Practice for the Welfare of Animals – Private Keeping of Reptiles* (**COP Reptiles**), which formed the basis for many of the breaches, did not apply to persons such as himself – that is, persons holding a Commercial Wildlife (Wildlife Demonstrators) Licence.

A.1 Summary of conclusions

8 For the reasons that follow I have decided that most of the grounds relied on by Hoser are not made out. With regard to Ground Two, in my view the decision maker has misapplied the COP Reptiles and as a consequence failed to take account of relevant considerations or taken account of irrelevant considerations. However, as a matter of discretion I do not propose to revoke or quash the Notice. There is no basis to order the other wide-ranging relief sought in the amended Originating Motion, many of which are not within the power of a court on judicial review. I will discuss the remedies sought further in the reasons.

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B The evidence

9 Hoser relied on three affidavits sworn by him, one sworn on 20 December 2023 and two sworn on 7 March 2024. One of the affidavits sworn on 7 March 2024 exhibited an expert opinion of Hoser based upon his expertise in keeping, breeding and managing captive reptiles. In addition he sought to rely on two further expert reports appended to affidavits; one of Mr Clifford Wellington (**Wellington**) sworn 7 March 2024 and one of Mr Paul Woolf (**Woolf**) sworn on 6 March 2024. The defendant opposed the admission of the expert reports of Wellington and Woolf.

10 The defendant relied on two affidavits affirmed by Ms Lucille Watterson (**Watterson**) on 16 February 2024 and 21 March 2024. Watterson is an authorised officer of the Office of the Conservation Regulator. Watterson was one of the officers who attended Hoser's premises on 12 September 2023. A third affidavit of Watterson affirmed on 16 April 2024 was filed after the hearing addressing my request for clarity as to the meaning of the abbreviated column headings in the spreadsheet recording the Officer's Report as exhibited to Watterson's first affidavit.

11 In addition, both parties relied on written submissions prepared for this hearing and the earlier stay application.

C Statutory framework

12 The *Wildlife Act 1975* (Vic) (**Wildlife Act**) has two objectives. One is promotional, the other regulatory. Section 1A provides

> The purposes of this Act are –
>
> (a) to establish procedures in order to promote –
>
> (i) the protection and conservation of wildlife; and
>
> (ii) the prevention of taxa of wildlife from becoming extinct; and
>
> (iii) the sustainable use of and access to wildlife; and
>
> (b) to prohibit and regulate the conduct of persons engaged in activities concerning or related to wildlife.

13 As part of its regulatory purpose, the Secretary has the power to issue wildlife licences under s 22 of the Wildlife Act. A person holding a licence is subject to any

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conditions, limitations or restrictions prescribed, including that the licence holder submit to inspection by authorised officers to monitor compliance with the Wildlife Act, Wildlife Regulations and licence conditions.[5]

14 The Wildlife Regulations are made under s 87 of the Wildlife Act. They provide for twelve categories of wildlife licences under s 22 of the Wildlife Act. The cover letter attaching the Notice references Hoser's Commercial Wildlife Licence. A person holding this licence is authorised to undertake the activities set out in reg 13 of the Wildlife Regulations which include the ability to possess, keep, breed, buy, sell and display specified wildlife.

15 Part 3 of the Wildlife Regulations deals with the protection of wildlife. Within part 3, reg 43 provides:

> **43 Housing wildlife other than specified birds**
>
> (1) A person other than a person referred to in subregulation (3) who possesses living wildlife, other than specified birds, must keep the wildlife in cages or enclosures that –
>
> (a) are designed, constructed and maintained to provide for the adequate shelter for the wildlife; and
>
> (b) prevent the escape or injury of the wildlife; and
>
> (c) protect the wildlife from predators; and
>
> (d) resist access by persons not authorised by the person who possesses the wildlife; and
>
> (e) provide for the good health and welfare of the animal in accordance with any applicable code of practice made under the **Prevention of Cruelty to Animals Act 1986** or the **Domestic Animals Act 1994**.
>
> Penalty: 50 penalty units.
>
> (2) If a cage or enclosure is not designed, constructed and maintained to comply with subregulation (1), the Secretary may direct in writing that the person possessing the wildlife make specific changes or alterations to the enclosure within the period specified in the direction.

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5 *Wildlife Act 1975* (Vic) s 22(3)(c).

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(3) A person does not commit an offence under subregulation (1) if the person has obtained prior written approval of the Secretary under subregulation (4) and is acting in accordance with that approval.

(4) The Secretary may –

(a) give written approval for a person to keep wildlife in an enclosure which does not comply with any or all of the requirements of subregulation (1); and

(b) impose conditions on an approval given under paragraph (a).

16 There are two applicable codes of practice in this proceeding: the COP Reptiles and the *Code of Practice for the Welfare of Amphibians in Captivity* (the **COP Amphibians**) (together, the **Codes** or **Codes of Practice**).

D The Notice

17 The Secretary issued the Notice pursuant to reg 43(2). Beneath a list of the 178 animals that were observed at the 12 September 2023 inspection, the Notice states that the delegate of the Secretary believes on reasonable grounds that Hoser is 'currently holding wildlife, in contravention of sub regulations 43(1)(d) and (e)'.

18 This is followed by a heading 'Nature of offences believed to be committed' under which regs 43(1)(d) and (e) are reproduced. The Notice then states:

> Failure to comply with the instructions of this Notice by the specified date, may result in the person in possession of the wildlife being found guilty of offences under sub regulation 43(1)(d) and (e). Furthermore, such an offence may be considered as a factor in determining any future applications to renew your Commercial Wildlife Licence.

Accompanying the Notice is a list setting out the number and descriptions of the 178 animals inspected on 12 September 2023.

19 At the conclusion of this list there is a narrative as follows:

> **Reason you are receiving this notice**
>
> The issuer reasonably believes that you are committing offences under the *Wildlife Regulations 2013* by not housing wildlife in a manner that prevents unauthorised access and additionally, by not adhering to the applicable Codes of Practise to ensure the good health and welfare of the animals.
>
> Authorised Officers are permitted under the *Wildlife Act 1975* to undertake compliance inspections of any licenced premises. If the future inspections

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identify any further breaches of your licence, such breaches will be investigated.

If you fail to comply with this notice you may be guilty of an offence under s 43(1)(d) and(e) and liable to pay a penalty of:

$9,615.50 (50 penalty units) per offence.

Wildlife being held in contravention of the Act or Regulations may be seized to prevent the continuation of an offence. An offence under the Act or Regulations may be considered a factor in determining any future applications to renew your authorisation.

The written directions provided below are in reference to:

1. *The Code of Practice for the Welfare of Animals – Private Keeping of Reptiles* (COP Reptiles)

2. *The Code of Practice for the Welfare of Amphibians in Captivity* (COP Amphibians)

20 The Notice then sets out the written directions. There are five written directions: one each applicable to lizards, crocodiles, turtles, pythons and elapids. Each contains one or more species and identified breach of one or more of reg 43(1)(d) or (e). Where reg 43(1)(e) is relied on, the clauses of the relevant code of practice are also identified. In total the written directions allege breaches in respect of the housing and/or conditions of 145 creatures: 39 lizards, 2 crocodiles, 8 turtles, 31 pythons, 61 elapids and 4 frogs. The list of animals inspected on 12 September 2023 totalled 178. The discrepancy is explained by the fact that one deceased python, 2 green tree pythons and 30 tiger snakes were not included in the written directions. From the Department's Officer Report spreadsheet exhibited to Watterson's first affidavit, it is clear that the Secretary intended to include all enclosures in the Notice so it appears that their omission from the written directions was an oversight. Counsel's instructions from the Secretary confirmed that all enclosures were non-compliant in one form or another but that the extent of non-compliance was variable.[6]

21 The written directions were based upon information contained in the spreadsheet known as the Officer Report. That spreadsheet contained 55 columns recording

6 Transcript of Proceedings, *Hoser v Secretary of the Department of Energy, Environment and Climate Action* (Supreme Court of Victoria, S ECI 2023 06152, Justice Forbes, 9–10 April 2024) 107.13-16 ('**T**').

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wildlife inspected and the officers' observations. Three columns are referenced in the written directions. The first column identifies the breaches (by reference to reg 43 of the Wildlife Regulations and by reference to the relevant clauses in the Codes), the second includes relevant Field Officer observations from 12 September 2023 and the third states the action required to rectify non-compliance. By way of illustration, for the Eastern Brown Snake at Item 5.4, the written direction reads:

Breach	**Observations**	**Action required**
WR 2013 R43 Regarding COP section 3.3.4 (paragraphs 1, 2 and 4)	(a) No natural light cycles were observed with animals residing in racked tubs with little access to sunlight through opaque enclosure walls.	(a) Ensure that natural light cycles are provided to ensure the good health and welfare of the reptiles in accordance with the COP.
WR 2013 R 43 Regarding COP section 5 (paragraphs 1, 2, 3 and 4)	(b) Adequate furniture to reflect environmental needs of snakes was not provided. Additionally, no rough object or rock was provided under a heat source/to assist sloughing.	(b) Ensure that furniture is provide that reflects the animal's natural environment: providing a basking site, a rough object or rock, and is overall designed to ensure the security and welfare of the animals in accordance with the COP.
WR 2013 R43 Regarding COP section 8 (paragraph 3)	(c) Water containers provided were not large enough for the snake to fully submerge to facilitate sloughing if required.	(c) Ensure you provide a large enough water contained in accordance with the COP.

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WR 2013 R43 Regarding COP section 3.1.2 (paragraph 1)	(d) Many of the enclosures provided did not meet height, width, and depth (length) requirements.	(d) Ensure you provide enclosures that adhere to the size requirements in accordance with the COP. *For terrestrial species:* *- the length of the enclosure must be 0.45 X the length of the specimen,* *- the width must be 0.375 X the length of the specimen,* *- and the height must be 0.25 X the length of the specimen.*
WR 2013 R43 Regarding COP section 7 (paragraph 2)	(e) No locks prohibiting unauthorised access were observed on the enclosure lids.	(e) Ensure that all human access points, including on the enclosure and entry points to the buildings, are locked to prevent the escape of the animal, or injury to people in accordance with the COP.

22 As to the COP Reptiles, the written directions identify breaches of the following clauses:

3. Enclosures

3.1. Sizes

3.1.1. Lizards

1. Minimum floor area for 2 adult specimens = 2.5L × 2.0L (L = length of longest specimen); for each additional specimen add 20% to the area.

3.1.2. Terrestrial snakes

1. 1. For two adult specimens up to 4m in total length (L = length of longest specimen), length = 0.45L, width = 0.375L, height = 0.25L

3.1.3. Arboreal snakes

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1. For two adult specimens up to 4 m in total length (L = length of longest specimen), length = 0.45L, width = 0.3L, height = 0.5L

3.1.5. Crocodiles

2. For all specimens, the pond must be at least twice the length of the largest specimen and have a width at least as great as the length of the largest specimen

4. An additional area of dry land must be provided, which is at least as long and wide as the length of the largest specimen, and which has a basking site with a temperature of 30 to 33C.

3.3. Indoors

3.3.4. Lighting

1. Reptiles must be provided with a light cycle that allows for the normal physiological functioning and behaviour of the species.

2. Where reptiles, particularly diurnal lizards, tortoises and crocodilians, are not exposed to unfiltered natural sunlight, lighting must include an ultraviolet spectrum due to the known importance of ultraviolet light in the absorption and synthesis of certain vitamins and minerals. Nocturnal or fossorial reptiles are exempt from this requirement.

4. Most reptiles respond to local photoperiod and therefore lighting should be restricted during the day to allow the natural arrival of dawn and dusk. Where there is insufficient natural light to allow this, it is preferable that a regular day/night light cycle similar to local conditions be provided. Alternatively, not less than 8 hours lighting shall be provided daily.

5. Cage furniture

1. The interior design of enclosures must be consistent with the environmental needs of the inhabitants.

2. A basking site, such as a rock slab or log, should be provided under the heat source in all reptile enclosures.

3. Snakes must be provided with a rough object, such as a rock or log, to provide a sloughing aid.

4. The enclosure should be landscaped to allow for the reptile(s) to feel secure. This may involve a hollow log, shelter box, plant pot or angled piece of bark or rock. These should not be located in an area at the low end of the temperature range. They may be positioned in such a way as to allow the reptile(s) to still be seen by the keeper.

6. Climbing branches must be provided for arboreal species.

6. Hygiene

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1. Faecal and urine wastes and uneaten food must be removed daily, and the substrate regularly replaced or be able to be easily cleaned.

7. Housing of dangerous reptiles

2. In addition to other requirements, the following security precautions shall be met for the housing of dangerous reptiles. Rooms containing dangerous reptiles must be constructed such that, in the event of an escape, the reptile will be contained within the room. Consequently, gaps or holes in the floor, walls, or around closed doors must be eliminated. Windows must be locked or be properly fitted with suitable non-detachable wire gauze screens. Human access points to the room must be lockable. It is highly recommended that night security systems, such as sensors, be fitted to rooms containing dangerous reptiles. A formalised security and inspection system must be implemented to ensure that access doors and enclosure lids are kept locked at all times. The keeper of the animals should be aware of a 'duty of care' to keep visitors informed of the dangers. Windows/screens must allow the keeper to visually locate dangerous reptiles before opening the door to enclosures. Enclosures and rooms containing dangerous reptiles should have signs alerting visitors of the danger.

8. Water

3. Snakes, particularly pythons, must be provided with a water container large enough to allow the snake to coil up and submerge to facilitate sloughing as required.

23 As to the COP Amphibians, breaches are identified of the following clauses:

7. Housing and environment

Minimum standard

7.9 All amphibians must be provided with adequate space to move around and an environment to explore.

Recommended practice

7.11 As a general guide, an aquarium with dimensions 60cm by 40cm by 40cm (length by width by height) one-third filled with water will be required to support 20 to 30 small tadpoles, or 6 to 8 large tadpoles providing that adequate food is available and that water quality is maintained.

7.12 The same sized aquarium will be the minimum size required to house 2 adult or 4 half-grown Green Tree Frogs.

7.13 For small to moderate sized species, an enclosure measuring 40cm by 40cm floor area with at least 10cm of suitable substrate will house 2 or 3 adults. Larger species will require larger tanks or aquaria — at least 60cm by 60cm floor area for 1 or 2 adults with at least 10cm of suitable substrate.

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Guidelines

7.18 A full spectrum UVB-emitting ultraviolet fluorescent tube designed for reptiles, attached to a timer to mimic natural (seasonal) day/night cycles, will provide appropriately balanced light. In addition, tropical species may require an artificial heat source (refer to section 10). UVB output from such tubes diminishes to nil over 12 to 18 months requiring regular replacement.

8.2 Tree frogs

8.2.1 A tree frog's enclosure should have more height relative to area to allow for climbing. Tree frogs need to have their size and weight taken into account when furnishing their enclosure with plants. A large tree frog will require suitably sized climbing structures.

9 Lighting requirements

Recommended practice

9.2 It is recommended that light be artificially provided by means of a full spectrum fluorescent tube light fitting on a timer (Household light bulbs do not produce the correct wavelengths of light)

9.3 Frogs are particularly sensitive to light and the role ultraviolet radiation provides for normal behaviour patterns. For example, an NEC Blacklight is recommended for tropical frogs. Temperate (Victorian) species of frogs kept in captivity do not require this specific type of UV lighting. It is recommended that a dual batten fitting light be used as this will fit both the UV tube as well as a fluorescent tube suitable for plant growth lighting.

Guidelines

9.4 An essential vitamin, Vitamin D, is produced in the frog skin when exposed to the ultraviolet component of sunlight. Due to the dangers of allowing direct sunlight onto an enclosure and the filtering effect of glass it is necessary to use special 'reptile' ultraviolet fluorescent light tubes as part of the day cycle. Exercise caution and seek professional advice when purchasing UV-lights as some are dangerously strong and do not produce the correct wavelengths.

10 Temperature requirements

Recommended practice

10.3 Tropical and semi-tropical frog species will require artificial heating during the cooler months. Tropical species should be kept at a temperature of at least 200°C and semi-tropical species should be kept at a temperature of at least 150°C.[7]

[7] Temperatures as written in the COP Amphibians in evidence obviously containing typographical errors in the original.

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24 Both Codes of Practice are published by Agriculture Victoria which is an entity of the Department. The COP Reptiles has an introduction that states it is 'intended to complement the requirements of individuals under legislation so that people keeping reptiles do so in a manner that meets minimum standards of animal welfare appropriate for the species concerned'. It provides that 'detailed requirements for particular species can be obtained by referring to the publications cited in the bibliography'.

25 After a section defining terms, the COP Reptiles then sets out seven general requirements at cl 2. Relevantly they include:

> 2. All reptiles held by private keepers must be provided with temperatures, humidity and light cycles that are appropriate to the species and allow normal physiological functioning and behaviour.

26 Similarly the COP Amphibians has an introduction that describes one of its purposes as 'to provide minimum standards of care for keeping amphibians in captivity'.

27 Both Codes of Practice were made under s 7 of the *Prevention of Cruelty to Animals Act 1986* (Vic) (**Prevention of Cruelty to Animals Act**).[8]

28 Issuing a notice under reg 43(2) is a discretionary step that may be taken by the Secretary or their delegate. It is not a pre-condition for bringing charges for an offence under the Wildlife Act or Wildlife Regulations. Those charges may be brought as a summary offence before the Magistrates' Court or by the service of an infringement notice with rights of review and appeal available.[9] Nor does the statutory scheme create a separate offence of failing to comply with a Notice given under reg 43(2).

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8 COP Reptiles: Victoria, *Victorian General Gazette* No G 44, 30 October 2003, 2780; COP Amphibians: Victoria, *Victorian General Gazette* No G 36, 7 September 2006, 1906. The versions of the Codes in evidence note they were last updated 6 July 2020. The Bibliography references publications dated 2000 or earlier.

9 *Conservation, Forests and Lands Act 1987* (Vic) ss 91 and 96; *Sentencing Act 1991* (Vic) s 112(2); *Magistrates' Court Act 1999* ss 25 and 99; *Infringements Act 2006* (Vic) s 22.

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E Admissibility of expert evidence

29 The Secretary objected to Hoser's tender of the affidavits of Woolf and Wellington on a number of bases. The first objection is that neither report was before the decision maker. The legality of a decision is generally challenged only on the material before the decision maker, save for limited exceptions.[10] The Secretary submits that the affidavits do not fall into any of the recognised exceptions. Second, the reports express irrelevant opinions and opinions beyond the expertise of the deponents, going to the merit of the decision.[11] The Secretary further submits that the statements are identical or substantially similar to the plaintiff's own statements to the Court and so do not appear to be an expression of the deponent's own opinions. Annexure A to the defendant's written submissions provided a table of statements in all three expert reports across thirteen topics. Although the Secretary notes that Woolf has not set out details necessary to establish expertise, he confines his objection to the substantive deficiencies.

30 As the opinions were not before the decision maker, the plaintiff would need to demonstrate that a relevant exception arises to tender the affidavits. The admissibility of such material was considered in *Mackenzie v Head, Transport for Victoria*.[12] Relevantly one such exception would be if the affidavits constitute evidence capable of showing that a decision maker failed to make an obvious inquiry about a critical fact, the existence of which is easily ascertained and so is relevant to the question of whether the decision is legally unreasonable.[13] Another exception would be expert evidence capable of showing that there was or was not an intelligible foundation for the decision.[14]

31 Assuming that both Woolf and Wellington hold appropriate expertise in the keeping and husbandry of reptiles and amphibians, I accept that their opinions, at least as to

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10 T 108.30–1.

11 T 108.25-29.

12 [2021] VSCA 100.

13 Ibid, [161]–[162] citing *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155, 169-70.

14 Ibid, [171]–[174] citing *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446; *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* (2018) 238 LGERA 344 (Cavanough J); *City of Melbourne v Neppessen* [2019] VSC 84 (Niall JA).

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the requirements for the welfare of reptiles and amphibians in captivity, would be capable of having a bearing on the question of whether the decision made by the Secretary's authorised delegate was legally unreasonable or without evident foundation.

32 However, to the extent they are admissible, I accord them little weight. It is apparent that much of the two statements and Hoser's own expert opinion, in layout and expression, do seem to have been created by one person. It may be that a draft statement was submitted by Hoser for their consideration rather than being prepared by them – a practice to be discouraged as undermining the independence of the opinion – or there is some other explanation for the striking similarities between the style as well as the content of the statements. However, each deponent has read and sworn that the contents of the affidavit are true and correct and that he holds the opinions expressed. I accept that each deponent holds the relevant opinion that the caging used by Hoser is 'industry standard and best practice'.[15] Beyond the statements of Woolf at paragraphs [16] through [34] of his affidavit and Wellington at paragraph [27] of his affidavit, the statements have little probative value or are inadmissible as expressing opinions beyond their expertise.

33 The utility of the opinions is also undermined as they largely amount to a number of statements or conclusionary opinions that lack an explanation as to how that opinion is arrived at by application of their specialised knowledge. In this way they do not meet the requirements of *Makita (Aust) Pty Ltd v Sprowles*[16] and *Dasreef Pty Ltd v Hawchar*.[17]

34 Importantly, experts are required to set out reasons for reaching their conclusions. The opinions of Wellington and Woolf as to Hoser's compliance with the relevant Codes of Practice do not include reasons for reaching these conclusions and as such

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15 As set out in Plaintiff, 'Affidavit of Paul Woolf' sworn on 6 March 2024 in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152 [16]-[34] (**Woolf Affidavit**); Plaintiff, 'Affidavit of Clifford Wellington' sworn 7 March 2024 in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, [27(a)-(l)] (**Wellington Affidavit**).

16 (2001) 52 NSWLR 705.

17 (2011) 243 CLR 588.

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are deficient. Wellington points out Hoser's compliance with the COP Reptiles up to cl 3.1 without elaboration and thereafter discusses the need for reform of the Code.[18] An opinion about the need for reform of the COP Reptiles is not a relevant opinion for the purpose of this proceeding. Woolf, in almost identical language takes the same approach.[19]

35 Finally, while the Secretary takes no objection to Hoser's expertise, as a matter of weight he submits that the same deficiencies in reasoning and expansion beyond areas of expertise plague the statement of opinion. The Secretary submits that the weight to be accorded Hoser's expertise should also reflect the fact that he is wearing the dual hat of litigant and expert, and so is providing opinion to the court not truly independent from his role as advocate in his own cause.

36 I accept that, to a limited extent, the three opinions as to the practice of caging and care of captive wildlife are admissible as relevant to the ground of unreasonableness. I will deal further with the weight to be accorded to them under the consideration of that ground.

F Previous litigation

37 It is necessary to summarise some of the previous litigation between the parties to understand the ground that a res judicata or issue estoppel arises. There is reference to a large number of previous disputes but Hoser relies on three litigated matters in particular: a Magistrates' Court proceeding in 2014, a Court of Appeal decision in 2014 and a VCAT decision in 2015.

38 Turning first to the Magistrates' Court proceeding, Hoser described the proceeding as a series of animal cruelty charges brought in 2012 with respect to cages which he 'won' in 2014.[20] Two pages of a charge sheet were exhibited to his 7 March 2024

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18 Wellington Affidavit, [39], [40] and subsequent paragraphs.

19 Woolf Affidavit, [49], [50] and subsequent paragraphs.

20 First Hoser Affidavit, [26]; Plaintiff, 'Affidavit of Raymond Hoser' sworn 7 March 2024 in in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, [14]-[15] (**Second Hoser Affidavit**).

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affidavit.[21] They demonstrate charge one was that on 7 July 2011, while holding a Commercial Wildlife (Wildlife Demonstrator) Licence, Hoser conducted a demonstration in a manner contrary to the Wildlife Act. Charges 8, 9 and 10 all related to 17 August 2011 and the confinement of a diamond python in conditions that were likely to have caused unreasonable pain or suffering to the animal contrary to s 9(1)(b) of the Prevention of Cruelty to Animals Act. Hoser says that 23 charges in total were laid.[22] Apart from the four charges identified, there is nothing further before me about the number or nature of the charges. The final orders made in the proceeding are not in evidence so it is unclear even whether the charges were withdrawn without adjudication on the merit, or were heard and found not proven. Either way, as an evidentiary matter there is insufficient material upon which to conclude the Magistrates' Court proceeding gives rise to a res judicata or issue estoppel.

39 In 2012 the Department suspended and then cancelled Hoser's licences and authorisations under the Wildlife Act. A decision to suspend or cancel a licence may be made where the licence holder has been found guilty of an offence against the Wildlife Act or has breached a condition of their licence. It was not in issue that Hoser had pleaded guilty in 2011 to nine breaches of conditions of his Commercial Wildlife Licence. Hoser brought proceedings challenging the suspension and cancellation of his licences at the Victorian Civil and Administrative Tribunal (**VCAT**, or the **Tribunal**). After a lengthy contested hearing, VCAT affirmed the Secretary's decisions. Hoser appealed under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). His appeal was confined to questions of law.[23] His application for leave to appeal came before the Court of Appeal who gave leave to appeal and granted the appeal. This was broadly on the basis that the Tribunal had failed to take into account various relevant considerations which infected the Tribunal's conclusion that Hoser was not a fit and proper person to continue to hold

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21 Charge sheet extracts dated 3 May 2012, which forms part of the exhibit bundle to the Second Hoser Affidavit.

22 T 30.10-11.

23 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).

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the relevant licences. The Court of Appeal made orders setting aside the VCAT decision on 5 September 2014. The matter was not remitted to the Tribunal because, by the time the orders were made, the licences in question had expired.[24] On 5 September 2014 orders were pronounced. In *Hoser v The Department of Sustainability and Environment (No 2) ('Hoser (No 2)')*,[25] by summons in the Court of Appeal proceeding, Hoser sought further orders. A further hearing was held, where for the reasons given in *Hoser (No 2)* no further orders were made.

40 Hoser applied for new licences on expiry of the ones under challenge, and in a further VCAT hearing in 2015, challenged two decisions to refuse his applications for a Private Wildlife Licence and Commercial Wildlife (Wildlife Demonstrator) Licence on the basis that he was not a fit and proper person to hold those licences under the Wildlife Act.[26] The Department relied on a number of events to show that Hoser was not a fit and proper person. Mostly the dispute revolved around differing views about the risk posed by Hoser's use of devenomised snakes. The Department contended Hoser used venomous snakes in his demonstrations giving rise to a danger to the public of envenomation. The Tribunal noted Hoser had removed the venom glands from the snakes used in his demonstrations before the practice was made illegal in Victoria unless performed for a therapeutic reason by a registered veterinarian.[27] Hoser's snake handling skills were also in question and the Tribunal was satisfied that Hoser's snake husbandry skills were good, the snakes were largely healthy and had bred. Hoser was successful in this action.

G <u>Grounds</u>

41 Before turning to the specific grounds, I observed during the hearing a tension between Hoser's acceptance and understanding that a judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) looked to whether there was an error in the way the decision was made and did not look at the merit of

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24 *Hoser v Department of Sustainability and Environment* [2014] VSCA 206, [77] ('*Hoser v DSE*').
25 [2014] VSCA 346 ('*Hoser (No 2)*').
26 *Hoser v Department of Environment Land Water and Planning (Review and Regulation)* [2015] VCAT 1147.
27 *Hoser v Department of Sustainability & Environment (Occupational and Business Regulation)* [2008] VCAT 2035, [21].

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the decision itself. Despite expressing this understanding, much of the evidence relied on by Hoser and the written and oral submissions made by him did stray into matters addressing the lack of merit for the content of the Notice. He described it as an illegal Notice submitting that compliance with it would adversely affect the wildlife, demonstrating one point at which this tension manifests. The Secretary's submissions at a number of points also identified matters where Hoser invited a merits review.

G.1 Ground One: Res judicata or issue estoppel

G.1.1 Submissions

42 In light of the preceding summary of prior litigation it is convenient to deal first with the ground that an issue estoppel or res judicata precludes a decision by the Secretary to issue the Notice that Hoser was in breach of the Wildlife Regulations or conditions of his licences. Hoser states that 'the exact same things have been litigated before',[28] in the Magistrates Court in 2014 and the Court of Appeal in 2014 and in VCAT in 2015 all in his favour. Hoser submits therefore that it is not appropriate to relitigate these matters via a direction notice.

43 Hoser's submissions refer to the principle that res judicata applies where there has been a final judgment in a matter and that this and issue estoppel are legal doctrines to prevent the relitigating of claims between the same parties that have already been determined.[29]

44 Hoser points to no final order that determines the condition in which his reptiles are housed is adequate or compliant with law. There is no final order in evidence from the Magistrates' Court proceeding in 2014. The orders following the Court of Appeal

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28 Plaintiff, 'Submissions in Response to Submissions [sic] by DEECA dated 5 April 2024', Submissions in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, 9 April 2024, [30].

29 Plaintiff, 'Submissions in Summary in Support of the Application for Revocation of a DEECA Directions Notice dated 7 December 2023', Submissions in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, 26 March 2024, [49].

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decision in 2014 simply set aside the orders of the VCAT proceeding subject to the appeal. The Court of Appeal said specifically:

> We did not make any affirmative order that the applicant's licences should not be cancelled.[30]

45 In VCAT's 2015 decision, VCAT similarly set aside the then Department's decision as it was not affirmatively satisfied that Hoser was not a fit and proper person. I infer that subsequently the Department did make a decision granting Hoser a licence.

46 The Secretary submits that the present proceeding deals with an individual exercise of statutory discretion and does not attract the doctrine of issue estoppel or res judicata because it is not dealing with a subsequent proceeding. The extension of these doctrines to a discretionary administrative decision would fetter the statutory power.[31]

G.1.2 Consideration

47 Issue estoppel arises when a judicial determination directly involves an issue of fact or law.[32] It operates to

> [preclude] a party in a subsequent proceeding from raising the ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in an earlier judgment.[33]

48 There are three requirements for issue estoppel to be made out:

> (a) the same question has been decided in an earlier proceeding;
>
> (b) the judicial decision which is said to create the estoppel was final; and
>
> (c) the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel was raised or their privies.[34]

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30 *Hoser (No 2)* (n 25) [11].

31 T 128.22-27.

32 *Blair v Curran* (1939) 62 CLR 464, 531–2 (Dixon J).

33 *Gemcan Constructions Pty Ltd v Westbourne Grammar School (Enforcement of Arbitral Award)* [2022] VSC 6, [45](c) citing *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507, 517 [22] (French CJ, Bell, Gageler and Keane JJ).

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49 Hoser characterises the outcome of the proceedings in 2012, 2014 and 2015 as being court orders that relevant licences be issued to him.[35] It may be that an inference that Hoser keeps his reptiles in conditions that provide for the good health and welfare of the animals can be drawn from the dismissal of charges or the setting aside of a decision of the Department or VCAT. But that potential inference is not the same as orders being made to positively determine this question in a proceeding, much less determining it in any continuing way that accounts for future conduct. Nine years or more have passed since the orders and proceedings relied on.

50 The Notice concerns the question of Hoser's compliance with the Wildlife Regulations and the conditions of his Wildlife Demonstrator Licence (14465868) as at 12 September 2023. That is not the same question as was determined by any of the three proceedings identified by Hoser.

51 The Magistrates' Court charges, insofar as the partial charge sheet reveals, dealt with particular conduct alleged to be an offence under s 22(6) of the Wildlife Act in conducting a demonstration and three charges under s 9(1)(b) of the Prevention of Cruelty to Animals Act. The question of conducting demonstrations raised by the first charge is not a question raised by the Notice so it cannot be said the same question has been decided by the Magistrates' Court proceeding. As to the three charges under s 9(1)(b) relating to the diamond python, they are pursuant to the Prevention of Cruelty to Animals Act. None of the charges relate to the Wildlife Regulations. Again it cannot be said that the Magistrates' Court proceeding determined the same question.

52 Similarly the Court of Appeal decision in 2014 was itself dealing with whether a particular decision of VCAT was lawfully made. The Court of Appeal identified legal error in that specific decision. Hoser sought orders that his cancelled licences be

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34 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 935 (Lord Guest), quoted with approval in *Kuligowski v Metrobus* (2004) 220 CLR 363, 373 [21] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

35 'Letter from Hoser to DEECA dated 9 December 2023', which forms part of the exhibit bundle to the First Hoser Affidavit.

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reinstated by the Court of Appeal, asking the Court to make orders reflecting the merit of a decision to grant or refuse a licence, something it made clear it had no power to do. The judicial review did not and could not deal with the factual matters going to the merit of holding a licence. The summary in the Court's reasons demonstrates this:

> 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.[36]

53 It is clear that the Court of Appeal left open the question of whether in fact Hoser was a fit and proper person to hold the licences.

54 The VCAT decision in 2015 dealt again with the question of whether Hoser was a fit and proper person to hold a Commercial Wildlife Licence. Hoser challenged the Department's refusal to grant the relevant licences, and so VCAT's jurisdiction was to make the correct or preferable decision as to Hoser's fitness to hold the relevant licences. That question was informed by evidence of a number of matters, including opinion evidence as to Hoser's snake husbandry and handling skills as well as

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36 *Hoser v DSE* (n 24), [31].

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evidence of the way Hoser conducted his demonstrations. That does not mean that each of those evidentiary matters give rise to an issue estoppel, much less a res judicata. They were simply matters of evidence which the Tribunal took into account in reaching its conclusion. The Tribunal decided that it was not satisfied that Hoser was not a fit and proper person to hold the licences. It set aside the Department's decision.

55 Having read the reasons of the Court of Appeal in 2014 and of Senior Member Butcher in the 2015 VCAT proceeding, the question of cage conditions or compliance with reg 43 of the Wildlife Regulations are not specifically mentioned in either decision. It cannot be said that the question or issue of legal compliance in the manner in which Hoser houses his wildlife has been determined in a way that gives rise to an issue estoppel.

56 Even if, contrary to my conclusion, the same question of law or fact has been decided in an earlier proceeding, the doctrine applies to a subsequent court proceeding. This decision is an administrative notice stating belief as to non-compliance. It is not a subsequent court proceeding. This proceeding is not concerned with the fact of compliance or non-compliance with reg 43(1).

57 Whilst it is apparent that the Notice is a step in a long battle between the Department and Hoser over his licences, the issuing of the Notice is not precluded by either res judicata or issue estoppel. The fact that earlier proceedings have considered particular aspects of his compliance (or not) with the conditions of his licences is not sufficient to preclude consideration of continuing compliance generally or compliance with reg 43 specifically. Ground One is misconceived.

G.2 Ground Two: Relevant considerations

G.2.1 Submissions

58 The question of whether the decision maker gave consideration to irrelevant matters, or failed to give consideration to relevant matters, permeated many of the grounds relied on. In Hoser's amended originating motion, grounds 2, 3 and 4 in particular

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dealt with three aspects of the decision to issue the Notice. First, Hoser contends that the decision was made by 'cherry picking' some parts of the Codes and failing to have regard to other, contradictory parts. Second, Hoser contends that parts of the Codes are outdated and contradict the current best practice for animal welfare. Third, Hoser contends that there was a failure by the decision maker to consider relevant parts of the applicable code and the linked and cited material provided in the Codes. Hoser relied largely on his written submissions on this point, stating that his oral and written submissions on bad faith were also of relevance to these grounds.[37] Hoser primarily relies on a failure by the decision maker to take into account the demonstrated long term good health and welfare of the reptiles and frogs in cage conditions. He submits that the other relevant demands of the Codes of Practice in respect of the cages or enclosures have not been considered such as those that require cages to allow for ease of maintenance, needs of hygiene and proper inspection, as well as the safety of handlers. Hoser says that his methods do comply with the Codes of Practice by providing for enclosures that are appropriate for species, are hygienic and allow for suitable handling.[38]

59 He also submits that the decision maker failed to take into account relevant considerations following the issuing of the Notice, as Hoser provided the Department with detailed reasons and extensive evidence as to why he considered that he complied with the Codes of Practice.[39]

60 The Secretary submits that none of these considerations were mandatory relevant considerations as understood and described in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* ('*Peko-Wallsend*').[40] The Secretary contends that the decision maker is bound to take account of matters 'germane to whether there is compliance with regulation 43(1)'. The matters it is therefore bound to consider are those of compliance with the applicable codes of practice. It is not a broad evaluation of good

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37 T 87.20–88.16.
38 Plaintiff's Submissions dated 26 March 2024, [150].
39 T 88.3–9.
40 (1986) 162 CLR 24.

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health and welfare of reptiles or amphibians in general but an evaluation of whether they are kept in accordance with any applicable code as specified in reg 43(1)(e).

G.2.2 *Consideration*

61 In *Peko-Wallsend*, Mason J said the following propositions had been established:

> (a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he [or she] is *bound* to take into account in making the decision…
>
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion.
>
> …
>
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law.
>
> …
>
> (d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind…it is generally for the decision-maker and not the court to determine the appropriate weight to be given to matters which are required to be taken into account when exercising the statutory power.[41]

62 There is a distinction to be drawn between factual matters and relevant considerations. That distinction was drawn by the Court of Appeal in *Chang v Neill*,[42] in the context of considering whether a statutory decision maker had made an error of fact constituting a jurisdictional error. The Court said that while there may be overlap between the concept of a failure to take account of relevant considerations and the concept of errors about non-jurisdictional facts, they are quite different, saying:

> A 'relevant consideration' in the *Peko-Wallsend* sense is usually expressed at a significantly higher level of generality than a factual matter.[43]

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41 Ibid 39–41 (emphasis in original).
42 (2020) 62 VR 174.
43 Ibid 195 citing *Minister for Immigration and Multicultural Affairs v Yusef* (2001) 206 CLR 323.

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63 A relevant consideration for a decision maker exercising the power under reg 43(2) is whether or not the relevant codes of practice are being complied with. Where the Codes prescribe mandatory standards, those standards are factual matters that bear upon that relevant consideration. But the Codes do more than prescribe mandatory minimum standards, and minimum standards are not prescribed in all aspects of the Codes. Where no minimum standard is prescribed, compliance with the Codes does require consideration of other provisions that address the health and welfare of the animal.

64 For example, looking at the clauses relied on as extracted above at paragraphs [22] and [23], certain conditions are set out stating things that 'must' be provided. Other provisions do not. Under cl 3.3.4.4 of COP Reptiles the language used is 'lighting should be restricted to' and 'it is preferable that a regular day/night cycle'. Other parts of the COP Reptiles talk in more general terms of 'adequate ventilation', 'suitable humidity', temperatures that 'should be within the range'. The COP Amphibians is even more strongly structured in a hierarchy of mandatory minimum standards, matters that should be addressed as recommended practice and guidelines to consider for each area identified.

65 Regulation 43(1) is concerned with the conditions of cages or enclosures. It regulates these in respect of five aspects set out in sub-regs (a) to (e). There is overlap in the five subsections of the regulation, as the Codes of Practice address matters of construction and maintenance of enclosures contemplated in reg 43(1)(a) as well as protection of and from the housed wildlife in reg 43(1)(b) to (d). A breach of reg 43 may arise by a failure to comply with a minimum standard set out in the applicable Codes of Practice. But where the Codes do not set minimum standards, relevant considerations must encompass a broader evaluative consideration of recommended approaches within the framework of the health and welfare of the relevant species.

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The Secretary accepted that in those circumstances the decision maker's task was to evaluate whether those discretionary matters were met by the conditions observed.[44]

66 Therefore I do not accept the Secretary's submission that whether the conditions produce adverse welfare outcomes is not a relevant consideration. In my opinion this view of the relevant considerations is unduly narrow. A purpose of the Codes of Practice and their statutory force by virtue of reg 43(1)(e) is to ensure the health and welfare of relevant wildlife. At the high level of identifying relevant considerations, animal health and welfare is a relevant consideration. It is not merely a consideration under regulation 43(1)(e) but relevant to the housing of wildlife in cages or enclosures that comply with (a) to (d).

67 I accept the defendant's submission that the Codes' ordinary construction is that the specific takes precedence over the general, and the general supplements gaps left by the specific,[45] so that there are no conflicting or contradictory provisions as contended by Hoser. Where no minimum standard is set out, the general provisions guide the evaluative decision about compliance with the relevant code. In order for a recipient of a written direction to understand what is required, particularly where there is no mandatory minimum for compliance a written direction under reg 43(2) includes the 'specific changes or alterations to the enclosure'.

68 I also do not accept Hoser's submission that in the absence of evidence of actual poor health and welfare or suffering, there is no basis to allege breach of the Codes of Practice. The statutory framework of the Wildlife Act is one designed to prevent circumstances that lead to poor welfare outcomes. It is supplemented by the statutory framework of the Prevention of Cruelty to Animals Act. The consideration of health and welfare of animals is relevant but must be considered within the context of the relevant codes of practice.

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44 T 146.20–22.

45 T 146.15.

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69 Where the Codes provide no mandatory standard, in my view this does not mean that the state of the enclosure is unregulated. First, the state of enclosures is independently regulated by reg 43(1)(a)-(d) in general terms, even though it is also subject to the Codes of Practice referred to in subparagraph (e). Second, the relevant codes make a number of general statements regarding the welfare of reptiles and amphibians. These would still apply to the relevant consideration of whether the cages or enclosures are compliant with reg 43(1). Apart from specific minimum standards set out, the Codes provide general mandatory matters to be considered. In relation to cage sizes, cl 3.1 of the COP Reptiles provides that cages must be of sufficient size to provide space to take exercise, to protect animals from undue dominance or conflict and to have a temperature gradient. The range for an appropriate temperature gradient for reptiles is not specified by the COP Reptiles other than to observe that a temperature gradient of 25°C to 30°C will accommodate the thermal requirements of most species and that natural daily and seasonal variations should be provided.

70 Hoser contends that his snake enclosures do not breach the COP Reptiles because the applicable minimum sizes are for enclosures holding two or more snakes, and his enclosures each hold only one snake. The spreadsheet that forms part of the Officer's Report demonstrates that the breaches identified as to size regarding snake enclosures for both terrestrial and arboreal snakes have applied the formula provided in the COP Reptiles. This can be seen from the illustration set out at paragraph [21] for the Eastern Brown Snake. The relevant size provisions of the Code, cls 3.1.2 and 3.1.3, are also set out above. As can be seen the formula applied is on the basis that two specimens, not exceeding four metres in total are housed, but size is calculated on the basis of the longer specimen only. The formula is adjusted as described if more than two snakes are held in the enclosure.

71 The written directions attached to the Notice have applied the formula in the COP Reptiles despite the enclosures holding only one snake. The Secertary submits that he has done so because the proper construction of the COP Reptiles is that the

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formula for snakes is to be applied to enclosures of 'up to' two specimens.[46] While conceding the document may be ambiguous in this respect, the Secretary submits that construed in light of the purpose of the document, two snakes does not exclude the presence of only one reptile.

72 I do not accept this submission. It reads into the document words that are not there and seems an unlikely interpretation given the formula is applied by reference only to the larger specimen rather than the total length as would a formula that contemplated size for one or two specimens. It is also inconsistent with the specific adjustment to the formula for additional snakes. In contrast the COP Reptiles does use language of minimum enclosure sizes for 'up to' two specimens in relation to crocodiles. I also observe in a number of places the COP Reptiles discusses snake behaviour in particular 'dominance related stress' and 'intragroup aggression'. Hoser says in his statement of expert evidence that in the wild reptiles do not like one another and as a rule for most species they are solitary animals on a day to day basis.[47] It appears that behavioural issues are a consideration for minimum enclosure sizes housing multiple snakes. These issues do not arise for snakes kept on their own.

73 On the basis that the COP Reptiles does not provide a specific minimum enclosure size for singly housed terrestrial or arboreal snakes or lizards, then in respect of the Notice going to those breaches, the decision maker is in error. That error can be described as having considered an irrelevant matter being the applicable minimum standard for enclosures containing two snakes, or failing to consider relevant matters being those found in the COP Reptiles more generally regarding the adequacy of the size of the cage in accordance with cl 3.1, or as having misapplied the COP Reptiles. The detail of the spreadsheet of observations makes clear that it was the specific measurements and application of the formula relied on, and not other observations about the design, construction or maintenance of the enclosures,

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46 T 172.12-31.

47 Exhibit RH-1A, Second Hoser Affidavit.

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that formed the view about non-compliance with reg 43(1)(e). Hoser's relevant considerations ground is made out in this respect.

74 I should observe that the COP Reptiles takes a different approach dealing with security precautions and the risk of escape in housing of dangerous reptiles. Dangerous wildlife is defined in the Wildlife Regulations as including elapid snakes, whether or not capable of a venomous bite. The COP Reptiles does not set clear minimum standards as to security precautions because there is an interaction between cl 3.3.3 regulating indoor enclosures and cl 7.2 which is set out above. Clause 3.3.3 states:

> Indoor enclosures shall be escape-proof and have all ventilation holes securely screened, have all doors and lids fitted with latches, hooks or clasps to securely fasten the door lid, be designed to facilitate ease of maintenance and keeper safety, have smooth walls to reduce the likelihood of injury.

Unlike the issue of minimum cage sizes, the question of whether Hoser's enclosures comply with the Wildlife Regulations does not give rise to any clear misapplication of the COP Reptiles because such a decision about compliance includes evaluative considerations. The Notice simply observes the absence of 'locks' on enclosure lids and directs that 'access points… are locked'[48] without providing the specific changes or alterations that are required.

75 Whether or not the relevant enclosures are secured in a manner that complies with both reg 43(1)(d) and (e) might require consideration of the meaning of 'locked' in cl 7.2 of the COP Reptiles with its focus on the health and welfare of the animal, and also in light of the wording of reg 43(1)(d) with its different focus on the question of access by persons not authorised by the licencee.

76 This in turn would involve a consideration of the factual matrix of the housing of such reptiles overall remembering that the Codes are applicable to all licence holders addressing both private and commercial purposes. It may be, as a matter of fact, that enclosures are locked preventing unauthorised access even if every individual

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48 See paragraph [21] of this judgment.

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enclosure is not separately padlocked, if collectively enclosure lids prevent unauthorised access in accordance with cl 7.2. That factual matrix includes cl 7.1 which provides:

> 7.1 It is the responsibility of the licencee to ensure against the possibility of dangerous reptiles escaping. Enclosures containing dangerous reptiles must be designed so that enclosures may be cleaned without endangering the keeper.

77 I am not satisfied that in respect of the application of the COP Reptiles regarding housing dangerous reptiles there has been any legal error by the decision maker. Rather, as can be seen from the previous paragraphs, the challenge to this aspect is in fact addressing the merit of the decision as to these alleged breaches. Hoser's submissions in respect of enclosures for dangerous reptiles that the Codes are outdated and contradicting best practice for a commercial reptile keeper stray impermissibly into a merit review.

78 For completeness, and consistent with the discussion later of the procedural fairness grounds, I am also not satisfied that the information provided to the decision maker after the Notice was issued was a relevant consideration at the time the decision was made to issue the Notice.

79 While Hoser has established a particular error in the decision maker's application of the COP Reptiles to circumstances where minimum standards are not prescribed, he has not established that this was deliberate, as was alleged as part of the unreasonableness ground and dealt with next.

G.3 Ground Three: Unreasonable or illogical decision

G.3.1 Submissions

80 This ground permeates all Hoser's submissions. Hoser submits that the decision to issue the Notice was unreasonable or irrational for a variety of reasons. First, he submits the decision maker deliberately misapplied the COP Reptiles relying on one section but ignoring other relevant sections.[49] Hoser submits that had the decision

[49] Plaintiff's Submissions dated 26 March 2024, [140]–[143].

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maker applied the Codes properly, no breach could reasonably be found. In oral submissions, Hoser also argued that the power to issue a written direction is intended to be used to correct the actions of persons that are risking the safety of their animals through non-compliance with the regulations, not to be used to issue notices to experts such as himself with animals in good physical condition.

81 Second he submits that the decision is unreasonable because the Department did not inspect for or allege that the cages in use did not provide for the health and welfare of his reptiles. Third, and relatedly, he submits that there was no evidence that the conditions in which they are kept is leading to pain or suffering of any animals. Hoser submits that the two Watterson affidavits reveal that the Department had no actual evidence of breaches of the Wildlife Act, Wildlife Regulations or the Codes.[50] He also submits that the general good health of his animals means that it was not available for the Department to make an inference that the Code had been breached.[51]

82 Fourth he submits that the Notice is unreasonable because it is contrary to the objects of the Wildlife Act and Wildlife Regulations. Hoser submits that the directions contained in the Notice are contrary to the welfare of reptiles. He describes the Notice as a 'Kill Notice', opining that compliance with it would lead to suffering and death of his animals. Hoser also submits that the decision is unreasonable because complying with the Notice would cost him over $1 million,[52] yet he says it will provide no extra welfare benefit to the animals.

83 He submits, as also raised in his natural justice grounds, that the decision is also unreasonable because the Department failed to make proper enquiries of him before issuing the Notice.

84 The Secretary submits that the Notice has identified the objective basis on which the decision maker has formed the view that the plaintiff has failed to comply with the

50 Plaintiff's Submissions dated 26 March 2024, [159]–[162]; [170].
51 Plaintiff's Submissions dated 26 March 2024, [171]–[173].
52 T 36.22.

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Codes and has justified this view with specific qualitative and quantitative evidence, including photographs and measurements of the plaintiff's enclosures.[53]

G.3.2 *Consideration*

85 A legally unreasonable or illogical decision is one so lacking a rational or logical foundation that no rational or logical decision maker could reach it.[54] It is an error described as extremely confined and context specific.[55] As was said by Nettle and Gordon JJ, this error is addressing circumstances where the decision is beyond power because it is unreasonable:

> The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision maker or, put in different terms, the decision is beyond power. That question is critical to an understanding of the task for a court on review.[56]

86 There has been no evidence that any misapplication of the applicable Codes or selective reliance on parts of them to the exclusion of others was deliberate. The information relied on as informing the belief of the decision maker is set out in the Officer's Report. Those observations do establish a justification for the decision to issue the Notice. Whether or not those observations actually amount to a breach of reg 43(1) is not determinative of whether the decision to issue the Notice is itself legally unreasonable. The applicable codes are the explanation for the decision to issue the Notice. Both in outcome and in transparency of the process the Codes provide an intelligible justification for the decision.

87 Disagreement as to whether the Codes provide for best practice, or are harmful, as clearly occurs in these factual circumstances does not establish that the decision taken is one beyond power. As Gleeson CJ said:

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53 T 107.20–31.

54 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 375; *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, 28.

55 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 564 (Gageler J).

56 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 572–3 (emphasis in original).

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> to describe reasoning as illogical or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it.[57]

88 By way of example, the COP Amphibians in evidence contains an obvious error. Clause 10 deals with temperature requirements. It provides that tropical frogs be kept at temperatures of at least 200°C and semi-tropical frogs at a temperature of at least 150°C. A decision to issue a written direction that frogs are not being kept in compliance with cl 10.3 as written, without regard to the impossibility of maintaining healthy frogs at that temperature, could be characterised as unreasonable. By contrast the temperature ranges for crocodiles in the COP Reptiles have an air temperature range for basking sites at 30-33°C and a water temperature range that 'should' be between 26-28°C. Hoser says water temperature should be at least 30°C. A decision that water temperature is outside the range provided by the applicable code could not be said to be unreasonable. In the absence of a mandatory maximum and minimum, whether the actual temperature in fact amounts to a breach of the COP Reptiles is a different question going to merit.

89 The failure of the plaintiff's ground that the decision is unreasonable or illogical and so beyond power does not mean that the belief held by the decision maker is correct. The correctness of that belief is contested by Hoser, in the sense that he contends that water temperature for crocodiles should be no less than 30°C. The correctness and merit of those contentions may be engaged if or when the Department decides to prosecute Hoser for such a breach.

90 Finally, while the expert opinions are relevant to this ground of review, they do not persuade me that, in the application of the Codes to the circumstances in which the wildlife were held, that the decision was either legally unreasonable or illogical. Putting them at their highest they demonstrate a difference of opinion between these three experts and the authors of the Codes, supported by the bibliography and reference to the Victorian Herpetological Society website. That difference of opinion

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57 *Re Minister for Immigration and Multicultural Affairs ex Parte Applicant S20/2002* (2003) 198 ALR 59, [5] citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

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is relevant to the fact of whether or not a breach can be proved, but not to whether the belief of the decision-maker is unreasonable or illogical.

G.4 Ground Four: Bad faith and improper purpose

G.4.1 Submissions

91 Hoser alleges bad faith on the basis that the Notice unfairly targets him because other persons with identical caging for their reptiles have not received similar notices. He ascribes malice to the delegate of the Secretary as a result of three particular actions: use of incorrect scientific names as part of a policy to refuse to cite scientific names or works of Hoser, a refusal to provide a Covid grant that he says was paid to all other wildlife demonstrators in Victoria, and finally two events in 2011, being a 'raid' on Hoser's facility and a refusal to pay an invoice for a snake removal. In other grounds malice or bad faith is also raised as is the improper exercise of power at the direction of others.

92 Hoser's submissions raised wide-ranging and historic matters not tied in any real way to the decision to issue the Notice. The bad faith or improper purpose was characterised in terms of it being a repeated attempt to disable his business[58] and an attitude of ongoing bad faith by the Department generally towards him. In this way Ground Four overlaps with the Ground One discussed earlier. When asked to tie these grounds to the decision maker's decision to issue to the Notice, Hoser submitted that the manner in which the audit was conducted on 12 September 2023 went to bad faith on the part of the Department. Hoser submits that the Department first 'raided' his property in 2011 and subsequently issued charges. He said this was relevant to the current Notice because it established a long-term pattern of targeting his business.[59]

93 Hoser said that the 12 September 2023 visit that preceded the Notice was not accurately described to him prior to the inspection and the conduct of the inspection

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58 Plaintiff's Submissions dated 26 March 2024, [48].
59 T 37.25.

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was overly aggressive. Hoser submits that the Department had represented to him that the purpose of its visit was to count his reptiles, not to assess their housing and welfare.

94 Hoser refers to Watterson's affidavit affirmed on 16 February 2024 and submits the contents of this affidavit ground his claim of bad faith because there were errors contained in the report and the Department's unwillingness to amend or discuss the errors demonstrates its bad faith. In his submissions Hoser disputed each of the observations contained in paragraph [11] of the affidavit being that Hoser's animal enclosures:

> 11.1 did not meet the size requirements imposed by the Code of Practice for the Welfare of Animals — Private Keeping of Reptiles;
>
> 11.2 had been left in an unhygienic state, including the presence of faeces;
>
> 11.3 did not have appropriate natural or ultraviolet lighting;
>
> 11.4 did not have appropriate heating parameter and devices;
>
> 11.5 did not have appropriate furniture;
>
> 11.6 did not have appropriate signage for dangerous reptiles;
>
> 11.7 did not have appropriate locks to prevent unauthorised access; and
>
> 11.8 did not provide appropriate amounts and sizes of water for water-based reptiles.

95 He submits that the findings were made in bad faith because they were incorrect, and that the Department refused to listen to his subsequent explanations for the system he uses for cages.[60]

96 The defendant notes that allegations of bad faith and improper purpose are sufficiently serious such as to require proof by reference to cogent and credible evidence.[61] The defendant submits that there is no evidence going to the delegate's

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60 T 42.13–23.

61 T 140.1–7; Defendant, 'Written Submissions of the Defendant', Submissions in *Hoser v Secretary of the Department of Energy, Environment and Climate Action* S ECI 2023 06152, 5 April 2024, [146]–[148].

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subjective state of mind from which one could conclude that he issued the Notice for the purpose of disabling Hoser's business or at the direction of another person.

G.4.2 *Consideration*

97 A bad faith ground, in the context of administrative decision making, is one that must demonstrate a lack of honest or genuine attempt by the decision maker to undertake the task required. It involves a personal attack on the integrity of the decision maker because it focuses inquiry on that person's actual state of mind. The burden of proof for allegations is one that is met with due consideration of the seriousness of the allegation that is made.[62] As was referred to in the defendant's submissions, Allsop J, as he then was, said:

> Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the Tribunal or officer in question.[63]

98 A ground of improper purpose directs inquiry at the statutory purpose or objects and the identification of a purpose not permitted by the legislation giving the power. Again, the identification of purpose must be ascertained from evidence as to the purpose of the decision-maker.

99 Making good these grounds is something not easily established. Hoser makes a number of allegations broadly against the Secretary and the Department but does not address the central requirement for either bad faith or improper purpose, which is evidence going to the state of mind or motivation of the delegate himself. Rather his assertions are expressed generally against the Department or the authorised officers who conducted the audit upon which the Notice was based. That in itself is sufficient reason for these grounds not to succeed. His assertion that Watterson's affidavit was incorrect and therefore establishes bad faith also cannot be accepted, as Watterson is not the decision maker. Her observations of the wildlife are the basis for

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62 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

63 *NAAG v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 713, [24], quoted in *NAAV v Minister for Immigration, Multicultural and Indigenous Affairs* (2002) 123 FCR 298, [107].

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the decision of the decision maker. Regulation 43(1)(e) makes specific reference to the applicable codes and bad faith or improper purpose is not established by demonstrating differing opinion as to the operation or correctness of information in those codes. The authorised officer, in conducting an inspection, is bound to have regard to the Codes. The question of whether the Codes of Practice provide for best practice is disputed by Hoser but this does not make out the grounds of bad faith or improper purpose.

G.5 Ground Five: Procedural fairness

G.5.1 Submissions

100 Hoser identifies wide ranging errors, including a failure by the Secretary to enquire as to a list of twelve matters before issuing the Notice. These included enquiries about various aspects of Hoser's practice including matters such as movement of the wildlife between cages, information as to enrichment by handling and other methods, feeding schedules, temperature regimes, climate control, lighting including ultraviolet lighting as is used at his premises and the reasons for his use of particular cage sizes, furniture, water bowls and other enclosure features.

101 Hoser's written submissions, which do not relate back to particular grounds identified in the amended Originating Motion, identify a lack of procedural fairness arising on two bases: first, that the Secretary was biased in the issuing of the Notice because he had pre-determined to issue a Notice even before the 12 September 2023 inspection,[64] and second, that the hearing rule was breached because Hoser had no opportunity to provide reasons to the Department justifying his cage sizes and other aspects of his wildlife housing before the Notice was issued. Hoser submits that he was not notified that the 12 September 2023 inspection was a precursor to written directions being issued. He submits that during the inspection of his premises, the Department did not notify him that they observed any breach of either of the Codes, nor was he asked about any alleged breaches so that he had the opportunity to

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64 Plaintiff's Submissions dated 26 March 2024, [137]–[138].

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provide an explanation. He could not refer to me to a relevant part of the legislation that afforded him this right, but submits that the language of the Notice raises his legitimate expectation that he is going to be charged and this grounds his right to be heard.[65]

102 The Secretary contends that there is no basis for establishing actual or apprehended bias on the part of the decision maker and says the plaintiff has not articulated any such basis. As to the hearing rule, the Secretary submits that the relevant legal consideration as to whether a hearing is required is whether exercise of power is apt to affect a person's rights or interests. The defendant submits that the issuing of the Notice, because it does not require the issuing of charges, has no immediate effect on Mr Hoser's rights or interests. The defendant accepted that compliance with the Notice could have an ameliorating effect and that a failure to comply may impact a court's later decision on penalty if breach was proven, but submits that the relevant question is whether the attraction of the hearing rule conforms with the statutory scheme. The defendant submits it does not as it would introduce 'a layer of regulation and administrative difficulty which will inhibit the issuing of a notice under provision in circumstances where the notice has limited or no legal effect'.[66] If it does attract procedural fairness requirements, the defendant submits that they were either afforded to Hoser or, in the alternative if they were not, any such denial was not material.

G.5.2 Consideration

103 Hoser's submission as to a lack of procedural fairness from actual or apprehended bias is not grounded in any evidentiary basis other than Hoser's own attribution that the decision maker had predetermined to issue a Notice 'in a form that could not reasonably be complied with'.[67] To succeed in demonstrating a lack of procedural fairness because of actual bias, an applicant must show more than that a decision

65 T 75.9–13.
66 T 152.1–5.
67 Plaintiff's Submissions dated 26 March 2024, [137].

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maker held an adverse view about a matter, perhaps even a strong view.[68] An applicant must show a mind 'so committed to a conclusion already formed so as to be incapable of alteration'.[69] In *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[70] there was evidence of prior public statements of the Minister in strong terms about Mr Jia's character that the Court said did not to amount to actual bias. Hoser's wide ranging complaints about conduct of unidentified persons in the Department going back some years lack the focus of an evidentiary basis upon which to assess actual bias by the decision maker in question.

104 As to apprehended bias, the test is whether a fair minded observer, properly informed of the circumstances, might reasonably apprehend that the decision maker might not bring an impartial mind to the issue for decision.[71] The relevant apprehension is, as with actual bias, that the decision maker will not give the matter proper consideration or would not be open to persuasion. For apprehended bias the test involves two possibilities: that a bystander might apprehend bias and that the decision maker might not be open to persuasion. Hoser has not identified any behaviour of the decision maker that might give rise to this apprehension in a bystander. Insofar as he has described the conduct of the 12 September 2023 inspection in his first affidavit, he says authorised officers were rude and overbearing which he alleges gives rise to an apprehension of them having a closed mind. However, save for one person, the officers conducting the inspection were not the decision makers. Hoser does not identify any specific word or behaviour of the individual decision maker. Clearly Hoser apprehends that the decision maker was biased, but the test is an objective one.

105 I accept that the language of the Notice is such that it does raise an expectation that non-compliance would likely lead to charges being laid. Indeed, it is apparent that in the statutory framework a written direction may be used as a tool to ensure

68 *Minister for Immigration and Multicultural Affairs v Jia Legang* (2001) 205 CLR 507, 520-1; 590-1.
69 Ibid 532.
70 Ibid.
71 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344, 350, 363.

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compliance with licence conditions without resorting to prosecution. However, that is not to say that the Notice itself affects any right or interest of a licence holder under the Wildlife Act. It is the outcome of any charges laid that potentially affect the rights and interests of Hoser. Although Hoser submits that there is an actual legal consequence of non-compliance with the Notice, as non-compliance might be a relevant matter in imposing penalty for breach, in my view the relevant question at any penalty stage would be the reasons for non-compliance rather than the fact of non-compliance.

106 Therefore, I do not accept the argument that the Secretary was obliged to afford Hoser an opportunity to be heard on the matters to be included in the Notice before it was issued. Given the discretionary nature of the Secretary's power to take such a step, and the opportunity to respond prior to any date set for compliance, the Secretary has no obligation to raise concerns in some preliminary way prior to issuing a Notice. The statutory scheme provides an opportunity for the identification and remedy of welfare breaches regarding the Wildlife Regulations without the commencement of court proceedings or the issue of an infringement notice. Compliance with a written direction under reg 43(2) cannot be compelled.

107 After the Notice was issued, Hoser had an opportunity to address all the matters contained in it that he disputed. He did so in a lengthy written response dated 9 December 2023 and follow up email of 12 December 2023. His complaint is not so much that he has had no opportunity to present his case, but that the Department did not accept his argument. This demonstrates that had Hoser been afforded an opportunity to be heard before the Notice was issued, that lost opportunity was not material to the decision.

G.6 Remaining Grounds

108 Hoser alleges that the decision to issue the Notice is attended by legal error because it is a decision in breach of the Secretary's mandatory policy of competitive neutrality. That policy, relevantly one of the state government, requires government entities to apply principles of competitive neutrality when government businesses

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compete in the market. The purpose of the policy is to ensure no advantage is gained from public ownership. Although Hoser describes a breach of 'competitive neutrality laws', competitive neutrality is a matter of government policy. No relevant law is identified. This complaint is properly part of the bad faith or improper purpose grounds, as it rests on the allegation that the Secretary's motivation was to disable Hoser as a competitor of Zoos Victoria (a government-owned entity). For the reasons expressed earlier in Ground Four the allegation is not made out.

109 Finally, Hoser's ground that the COP Reptiles does not apply to him raised in the hearing is also not made out. He submits that as the COP Reptiles is headed 'Private Keeping of Reptiles' it does not apply to him as he holds a Commercial Wildlife (Wildlife Demonstrator) Licence which is different to a Private Wildlife Licence. The Secretary rejects this submission on the basis that neither the Regulations nor the COP Reptiles 'provides any basis to suggest that there is an inherent or express limitation or qualification such that the Code only applies to those people who do not hold a Demonstrator Licence'.[72] Rather the Code applies to 'all persons who possess wildlife'.[73]

110 As the language of the Codes make clear, keeping reptiles of certain species by persons is regulated by the licencing regime in the Wildlife Act and Wildlife Regulations. The Codes describe requirements of all persons. The Wildlife Regulations define a Commercial Wildlife Licence as any one of eight particular licences and a Private Wildlife Licence as any one of four particular licences. All twelve licences are prescribed categories for the purpose of licencing under s 22 of the Wildlife Act. Regulation 43 in its terms applies to a person other than someone with written prior approval in accordance with reg 43(3). There is nothing in either the legislative scheme or the codes themselves that limits the application of regulation 43(1)(e) to holders of any particular licence or to those licences that

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72 T 103.30–104.2.
73 T 104.3–7.

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collectively are defined as a Private Wildlife Licence. In Part 10 of the COP Reptiles, specific reference is made to records that must be kept for all species for which a licence is required under the Wildlife Regulations. This would include commercial wildlife licences.

H Remedies

111 First, on the basis that a legal error attends some parts of the written directions in the Notice, the remedy sought is that I set aside the decision. Whether to grant a remedy on judicial review is a discretionary matter.[74] Hoser submits that I should set aside the whole of the decision, even if I were to find that only some parts were erroneous.[75] It is not necessary to consider whether some part should be set aside, because the time for compliance with the Notice expired on 16 April 2024. Further, the Notice lacks legal effect, providing only an opportunity to take corrective action and avoid the prospect of being prosecuted for offences against the Wildlife Regulations. In the absence of any changes implemented on matters directed by the Notice, Hoser is liable to prosecution for the state of his wildlife enclosures whether or not the Notice is set aside after its expiry. For reasons analogous to those provided by the Court of Appeal in 2014 when it refused to remit the decision to VCAT because the relevant licence had expired, there is no utility in setting aside the expired Notice. The Secretary may bring charges under the Wildlife Act and/or the Wildlife Regulations, and if so must prove the breaches that are alleged. Setting aside the Notice would not preclude the Secretary from bringing charges arising out of the 12 September 2023 inspection.

112 Apart from setting aside the whole of the Notice, Hoser sought other wide ranging relief. He sought a declaration and ruling that he has wholly complied with reg 43(1). This is clearly relief going to the substance or merit of the administrative decision. He sought a positive ruling directing users of the applicable Codes of Practice to other resources offering directions on the appropriate size and furnishing

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74 *Martin v Magistrates' Court of Victoria* [2019] VSC 493 (Forbes J) citing *Mann v Medical Practitioners Board (Vic)* (2004) 21 VAR 429, [17] (Nettle JA).

75 T 85.10–22.

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of reptile enclosures, including a work of Hoser himself, again relief beyond the realm of judicial review. Alternatively Hoser sought that I direct the Secretary to extend the time for compliance with the Notice, or that the Secretary agree to such an extension of fifty years, the effect of which would exempt him from the licencing requirements of the legislation. Again this is not a remedy available on a judicial review. Finally he sought that I make a formal recommendation that the Codes of Practice be re-written and updated. Whatever the good sense of ensuring Codes of Practice, particularly those with statutory force, reflect current best practice, an order making some formal recommendation with imperative force is beyond the power of the Court. It is a matter for the Department or the legislature.

113 Hoser's application succeeds in respect of the misapplication of the COP Reptiles in respect of minimum cage sizes for lizards, terrestrial snakes and arboreal snakes held singly. Given the absence of legal effect of the Notice and its expiry, I see no purpose in setting the decision aside, in whole or in part. The legal consequences operate, not as Hoser submits from a failure to comply with the Notice, but from any positive finding of breach of the relevant Wildlife Regulations by the Magistrates' Court or by an infringement notice with the right of review by a court.[76]

114 I will hear from the parties as to the form of final orders.

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76 *Infringements Act 2006* (Vic) s 40.

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