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TRANSCRIPT OF PROCEEDINGS

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S ECI 2023 06152

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION - TRIAL DIVISION

MELBOURNE

WEDNESDAY 10 APRIL 2024

(2nd day of hearing)

BEFORE THE HONOURABLE JUSTICE FORBES

RAYMOND HOSER

v

THE DEPARTMENT OF ENERGY, ENVIRONMENT AND CLIMATE ACTION

VICTORIA AKA DEECA (INCLUDING THE CONSERVATION REGULATOR)

1 MR CHAILE: Thank you. Your Honour, I now intend to turn to  
2 the grounds, but before I do I have a couple of matters of  
3 housekeeping.

4 HER HONOUR: Yes.

5 MR CHAILE: Your Honour, the first matter is one that I think  
6 was raised before Your Honour on the last occasion, and  
7 I don't believe it's controversial, and that is that we  
8 would seek an order substituting the name of the defendant  
9 to reflect that the proper defendant is the secretary to  
10 the Department, not the Department itself.

11 HER HONOUR: Yes.

12 MR CHAILE: The second matter of housekeeping, Your Honour, is  
13 the matter on which I addressed Your Honour at the  
14 conclusion of yesterday's hearing. My instructions are  
15 that the Department will undertake not to commence any  
16 prosecution of the plaintiff for a breach of regulation  
17 sub-paragraph 1 until delivery of Your Honour's judgment  
18 in this proceeding.

19 HER HONOUR: Okay.

20 MR CHAILE: Thank you, Your Honour.

21 HER HONOUR: Thank you. Can I raise firstly, Mr Hoser, do you  
22 consent to an order substituting the name of the defendant  
23 to be the secretary of the Department?

24 MR HOSER: I don't think I - there could be other issues  
25 involved that I'm legally unaware of, but I'll take your  
26 guidance on that, Your Honour. I just - look, the problem  
27 we have, Your Honour - - -

28 HER HONOUR: I'm sorry, I didn't hear what you said.

29 MR HOSER: Your Honour, there could be some ulterior motive or  
30 something. Like with this department, we can't trust them  
31 further than we can throw them. So the problem is -

1 I mean, you know, they're a law unto themselves. You've  
2 seen their submissions. They reckon they can make any  
3 order they want under the Act. In their submissions, they  
4 made it clear, as far as they're concerned, their  
5 discretion allows them to make any order under a - a  
6 directions order.

7 And then in another breath they say 'He's got zero  
8 power.' Now they're saying - now they've reversed it  
9 again and they said they're going to prosecute me if they  
10 get a favourable ruling from you. I mean, we're between a  
11 rock and a hard place. They've given this order they know  
12 we can - - -

13 HER HONOUR: Mr Hoser, at the moment, the Department wants to  
14 amend the title of the defendant so that the secretary is  
15 the named defendant rather than the amorphous body that is  
16 the Department itself. Is your position that you either  
17 consent or oppose that application?

18 MR HOSER: Is there - is there - no, that's probably the best  
19 way to put it.

20 HER HONOUR: Okay.

21 MR HOSER: In absence of further information, I can't oppose or  
22 consent. That's correct.

23 HER HONOUR: Okay.

24 MR HOSER: I'll leave it in your hands.

25 HER HONOUR: All right. So that's the first issue. And you  
26 understand the undertaking that Mr Chaile just gave to the  
27 court on behalf of the secretary.

28 MR HOSER: I did hear that, Your Honour. Can I just - can we  
29 get a confirmation, though, so we know where we stand,  
30 that I will be protected if you find - - -

31 HER HONOUR: No, that's not what was said and it's not

1 appropriate that the Department tell the court what its  
2 intentions are down the track. What has been given is an  
3 undertaking not to commence any prosecution prior the  
4 delivery of reasons.

5 MR HOSER: Yeah, I heard that. I heard that. All right.

6 I suppose, is it the best - - -

7 HER HONOUR: So you heard and understand that.

8 MR HOSER: Well, I understand what the words - - -

9 HER HONOUR: But we're not going to enter into an exchange  
10 about what might happen once my reasons are delivered.

11 That's not an appropriate discussion for this proceeding.

12 MR HOSER: Okay, that's your - Your Honour, I understand that's  
13 your order. I would have thought that was an entirely  
14 appropriate discussion, but we'll have to agree to  
15 disagree, Your Honour, you're in charge, so I accept that.

16 HER HONOUR: All right. Okay. All right. I'll give leave to  
17 substitute the name of the defendant to be the secretary,  
18 and it's the secretary - you better just give me the  
19 formal - - -

20 MR CHAILE: Yes, Your Honour. It's the Secretary of the  
21 Department of Energy, Environment and Climate Action  
22 Victoria.

23 HER HONOUR: Okay. Thanks. So I'll give that leave. Can  
24 I raise a matter of housekeeping.

25 MR CHAILE: Yes, Your Honour.

26 HER HONOUR: Overnight I was looking at the spreadsheet that's  
27 attached to Ms Watterson's affidavit, and I was hoping  
28 that either a legible paper copy, or it occurred to me  
29 perhaps if it's a document that began life as an Excel  
30 spreadsheet, a copy in that format electronically could be  
31 provided to me because I'm finding it almost impossible to

1 navigate the Word document electronically.

2 MR CHAILE: Yes, Your Honour, and I understand that issue.

3 Your Honour's associates raised that issue with me this  
4 morning. My instructors are trying to arrange a legible  
5 hardcopy. I can't guarantee that I'll be delivered in the  
6 course in the morning but it'll be delivered as soon as  
7 it's ready. If there is a native format that's easily  
8 readable, like an Excel spreadsheet, we will also provide  
9 that to the court and to the plaintiff.

10 HER HONOUR: Thank you. Yes. Yes. So in whatever form it  
11 comes, obviously Mr Hoser needs a copy in that same form.

12 MR CHAILE: Yes, Your Honour.

13 HER HONOUR: And I don't need it before the conclusion of the  
14 hearing, I just need it. While I'm on that, though, can  
15 I ask you to clarify something for me in relation to that.

16 MR CHAILE: Yes.

17 HER HONOUR: And it was really just to clarify some of the  
18 headings across the top.

19 MR CHAILE: Yes.

20 HER HONOUR: Now, if I go back to find it in the court book.

21 MR CHAILE: Your Honour, I believe it commenced at court book  
22 513.

23 HER HONOUR: Yes, thanks. And if I - so if we then - if we go  
24 from left to right there's some columns that identify  
25 who's recording information of the enclosure and the  
26 species, and then - sorry, let me just - then there's a  
27 series of columns. There's class and sub-class, then  
28 there's something that says WLSP code, which I assume is  
29 wildlife species code. And then it was really the next  
30 four columns: 'Enclosure Q OBS; total SP Q OBS; Q on  
31 return; Q in RB', and then a column that says, 'RB equals

1 Q OBS?', which were all Double Dutch to me.

2 MR CHAILE: Yes. Your Honour, I must confess it's also not  
3 immediately apparent to me. To avoid the risk that might  
4 misinform the court, could I seek the court's leave to  
5 file a further affidavit from Ms Watterson, the purpose of  
6 which will be solely and confined to explaining what each  
7 of the heading is intended to mean? And that would be the  
8 entire purpose of the affidavit. If Your Honour does not  
9 need that by way of affidavit evidence, we can only  
10 provide that by way of a note or a (indistinct) that would  
11 assist the court.

12 HER HONOUR: The simplest thing might be to do it by affidavit.

13 MR CHAILE: Yes.

14 HER HONOUR: Yes. Simply giving me the narrative rather than  
15 the shortform of headings for those columns.

16 MR CHAILE: Yes. Yes, Your Honour. Yes.

17 HER HONOUR: Thank you.

18 MR CHAILE: It won't contain any narrative evidence in that  
19 respect.

20 HER HONOUR: Thank you.

21 MR CHAILE: Thank you, Your Honour.

22 HER HONOUR: All right. Those were my questions about that  
23 document now.

24 MR CHAILE: Your Honour, I'll start the grounds by adopting  
25 the - - -

26 MR HOSER: Your Honour - sorry, Your Honour, if I can just  
27 interrupt before my learned friend starts, in terms of  
28 housekeeping.

29 HER HONOUR: Yes.

30 MR HOSER: There were two things, and one's an - one - first is  
31 an oversight of me. I got an email from the court with an

1 Epiq transcript payment form, and I had intended of doing  
2 that overnight on - not last night, the night before, and  
3 I - when I finished at 3 am or whenever it was, I forgot,  
4 and it only occurred to me literally as I was logging in  
5 now. I'm happy to fill that in as soon as practicable.  
6 That's not an issue. Now, it says that both parties pay  
7 the costs. Now, the issue there were was 10 wildlife  
8 officers here and there was one of me. Does that mean  
9 I pay one-eleventh of the cost or does that mean I have to  
10 pay half the cost?

11 HER HONOUR: The cost is shared between the parties. There's  
12 one plaintiff and one defendant.

13 MR HOSER: But the - the defendant involves a greater number of  
14 people and greater - obviously greater resources as well.  
15 And bear in mind the defendant has caused these  
16 proceedings to take place. I would have thought they  
17 should pay all of it by - by - by reason.

18 HER HONOUR: Well, the position is that the parties share it  
19 equally, subject to any order that's made subsequently.

20 MR HOSER: I'd be asking for an order, if you could make it  
21 now, that it is paid pro rata on the basis of numbers of  
22 people that were present on the day, and/or the relative  
23 sizes of the entities, or - or the fact that the  
24 Department has issued the - commenced the proceedings by  
25 virtue of issuing the order.

26 HER HONOUR: Mr Hoser, I think that's a misapprehension, that  
27 this proceeding has been commenced by you. I'm not going  
28 to make an order now department - - -

29 MR HOSER: There was no - I had no choice. There wasn't any  
30 choice in my - - -

31 HER HONOUR: I'm not going to make an order now departing from

1 the usual position that the parties equally share the cost  
2 of transcript. If there's to be any adjustment to that,  
3 it's a matter that can be dealt with when final orders are  
4 made.

5 MR HOSER: Okay. So basically for the time being, I fill in  
6 that form - what you're telling me - and I fill in that  
7 form and I put on the bottom of it, '50 per cent' or  
8 whatever the case may be. As in, 50 per cent, whatever  
9 they want, that amount, signed off on.

10 HER HONOUR: That's right. And if you want an adjustment of  
11 that, that's a matter that can be dealt with at final  
12 orders.

13 MR HOSER: Okay. If you can just - because I may forget - I'll  
14 write it down but I may forget, if you could just make a  
15 note that I'd be seeking adjustment in relation to  
16 those - - -

17 HER HONOUR: It'll be on the transcript. Okay. Was there  
18 another housekeeping matter?

19 MR HOSER: (Indistinct). Yes. Look, we've raised a bad-faith  
20 argument, and in terms of - we were talking about UV  
21 yesterday and the turtles in particular. The bodycam  
22 footage will show the outdoor cages quite - quite  
23 explicitly, and they've - they've - - -

24 HER HONOUR: Sorry, this doesn't sound like a housekeeping  
25 matter, Mr Hoser. Is it a housekeeping matter?

26 MR HOSER: I would be asking - yes, yes. I'd be asking for you  
27 to call for the bodycam footage available to all parties  
28 taken on the day of visit in (indistinct).

29 HER HONOUR: Well, it's not my place, but if you're - - -

30 MR HOSER: Okay.

31 HER HONOUR: - - - but if you're making a call for the bodycam



1           footage, that's another matter, and it's not a matter that  
2           I would do.

3 MR HOSER:   Yeah, I would - I'd make that call now.   I make that  
4           call now, then.

5 MR CHAILE:   Your Honour, I'll seek instructions.

6 HER HONOUR:   Okay.

7 MR HOSER:   I should - look, in fairness - look, I should have  
8           made the call earlier, but, as I said, I'm not  
9           represented, and it is - it is germane to the proceedings  
10          because it relates to the bad faith.   It also relates to  
11          the argument that was raised only as recently as last  
12          Friday, that I had the opportunity - or maybe even more  
13          recently than that, that I had the opportunity to discuss  
14          the directions notice for the duration of the eight-hour  
15          raid, when of course that wasn't the case because there  
16          was no mention of directions orders in that time period.  
17          Look - - -

18 HER HONOUR:   All right.   So I understand you've made a call for  
19          the bodycam footage.   Mr Chaile will get some instructions  
20          about that, and, subject to those instructions, that those  
21          documents will be - or, sorry, that footage will be  
22          produced to the court in answer to the call, subject to  
23          whatever response to that.

24 MR HOSER:   Yes.   Yes, and, Your Honour - and I'm relying  
25          specifically, in the terms of the comments that I had the  
26          - and these were made Friday, which I only read a day ago,  
27          the comments that I had the opportunity throughout the  
28          raid - raid to discuss, you know, any parts of the  
29          directions order or proposed directions order or alleged  
30          breaches, and because none of this was raised at the time,  
31          that wasn't possible, and that will be shown in the - in

1 the various bodycam footages. And there was multiple -  
2 multiple - I think they all wore bodycams, so there's  
3 probably 10 lots of footage in there.

4 HER HONOUR: All right. Yes. I understand the reason why  
5 you've made the call. We'll deal with that in due course.

6 MR HOSER: Thank you, Your Honour.

7 MR CHAILE: Thank you, Your Honour. Your Honour, I'll start  
8 with res judicata and Anshun estoppel.

9 HER HONOUR: Yes.

10 MR CHAILE: The plaintiff contends that the decision to issue  
11 the directions notice was precluded by reason of an Anshun  
12 estoppel or res judicata. As far as I apprehend it, in so  
13 doing, he relies on four previous decisions. The first is  
14 the decision of the Magistrates' Court. I use the word  
15 'decision', but that's slightly inept because we don't  
16 have a decision before us in that respect. The second is  
17 the decision of the tribunal in 2012, which was the  
18 subject of the Court of Appeal judgment. And the third is  
19 the Court of Appeal's judgment and the fourth is the  
20 tribunal's decision in 2015.

21 Your Honour, I've set out in our written submissions  
22 and in some detail the principles applicable both to  
23 Anshun estoppel and res judicata. It's sufficient for  
24 Your Honour to observe at this point that both doctrines  
25 are founded on the same underlying rationale, namely, that  
26 there should be finality in litigation. That underlying  
27 rationale requires that there be a coincidence of either  
28 fact or law raised in a subsequent proceeding that has  
29 merged into the judgment of an earlier proceeding.

30 That coincidence means that a later proceeding must  
31 raise an issue of fact of law that was legally

1           indispensable to a prior judgment, and that judgment must  
2           be an adjudication on the merits. We accept that there  
3           are some circumstances in which a consent order involves  
4           such an adjudication, but in lay terms and in simple terms  
5           it requires the court to have made actual findings of fact  
6           of law that subsequently arise in a later proceeding. At  
7           the outset, Your Honour - - -

8   HER HONOUR: And we're not dealing with consent orders in any  
9           of these, so we can put that - - -

10   MR CHAILE: Yes, Your Honour, I just didn't want to be  
11           understood as saying that there always needs to be an  
12           adjudication of all of the arguments in issue. Your  
13           Honour will be aware, sometimes, for example, in an  
14           appellant circumstance, all the parties might agree that  
15           an appeal should be allowed, but the Court of Appeal  
16           for itself nonetheless determines whether or not such a  
17           consent order should be made in the proper exercise of  
18           judicial power.

19   HER HONOUR: Yes.

20   MR CHAILE: The starting point, Your Honour, is we're not  
21           dealing with a subsequent proceeding in the conventional  
22           sense - we're dealing with an independent exercise of  
23           statutory discretion in December 2023. In our submission,  
24           that independent exercise of statute discretion does not  
25           attract the doctrines of Anshun estoppel or res judicata,  
26           nor could they, because otherwise they would be a fetter  
27           on that discretion.

28   HER HONOUR: So it may arise if there's a prosecution down the  
29           track, but it can't arise at this stage.

30   MR CHAILE: Yes, Your Honour.

31   HER HONOUR: Okay.

1 MR CHAILE: The next point, Your Honour, is that there is a  
2 wholly absent coincidence of fact and law between what was  
3 in fact determined by the proceedings on which the  
4 plaintiff relies and what is the subject matter of the  
5 directions notice. In order to do that, Your Honour -  
6 sorry, in order to make that point good, I do need to take  
7 Your Honour to some of the documents. The first  
8 documents, Your Honour, concern the Magistrates' Court  
9 proceeding. The plaintiff yesterday said there were was  
10 23 charges; we've only two charge sheets in evidence. The  
11 first is at court book 458, Your Honour.

12 Your Honour will see there that the charge is, 'On  
13 7 July 2011 at Melton, the accused, being the holder of a  
14 commercial wildlife demonstrator licence, did contravene a  
15 condition, limitation or restriction of the licence in  
16 that the accused did fail to conduct a demonstration in a  
17 way that promoted an understanding of the ecology and  
18 conversation of wildlife contrary to the Wildlife Act  
19 1975.'

20 That's one charge, Your Honour. The second charge  
21 that's in evidence is on the following page, court book  
22 459, and that charge is, 'On 17 August 2011 at Park  
23 Orchids, the accused did confine an animal, namely, one  
24 diamond python, where the confinement of the animal caused  
25 or is likely to have caused unreasonable pain or suffering  
26 to the animal contrary to the Prevention of Cruelty to  
27 Animals Act 1986.'

28 HER HONOUR: Yes.

29 MR CHAILE: So, Your Honour, in my submission, these charges  
30 concerned specific conduct on specific dates, namely,  
31 7 July 2011 and 17 August 2011, none of which have

1 anything to do with the question whether the plaintiff  
2 complies with regulation 43(1), and more specifically the  
3 codes of practice either in 2023 or presently. There is  
4 therefore no coincidence or commonality to attract at even  
5 a base level the doctrines of Anshun estoppel or res  
6 judicata.

7 Further, Your Honour, there is no judgment of the  
8 Magistrates' Court by reference to which Your Honour can  
9 form any informed view as to the existence of a  
10 coincidence. Your Honour, as to the issues before the  
11 tribunal in 2011, that judgment is not before Your Honour,  
12 but I think it's immaterial because the Court of Appeal  
13 deals with that judgment in some length.

14 Your Honour, I wish to commence with the Court of  
15 Appeal judgment. That commences at p7024 of the combined  
16 book of authorities. Your Honour will see that it's a  
17 judgment of their Honours, Justices Redlich, Tate and  
18 Santamaria, at paragraph 1 of the judgment their Honours  
19 identified that 'The plaintiff sought leave to appeal  
20 against orders made by the tribunal which found the  
21 respondent's decision to suspend his wildlife demonstrator  
22 licence, wildlife control licence, authorisation and  
23 approval, and then to cancel those licences.'

24 Your Honour, in terms of assessing coincidence, I do  
25 need to spend a little bit of time identifying how the  
26 issues evolved before the Court of Appeal, and what was  
27 determined and what the Court of Appeal identified was not  
28 necessary for its determination.

29 Your Honour, at paragraph 5 on the same page, their  
30 Honours note, 'In the course of this appeal the  
31 applicant's formal case has evolved and his filed

1 documents have undergone a number of iterations. Due to  
2 the unsatisfactory state of this material, a hearing on  
3 21 May 2013 did not proceed and the applicant was required  
4 to reformulate his grounds submissions.

5 'The applicant filed an amended notice of appeal  
6 supplemented by amended written submissions, but new  
7 submissions remain inadequately linked to the grounds of  
8 appeal. Both the written submissions of the amended  
9 notice of appeal sought to reopen questions of fact that  
10 have been determined by the tribunal. Thus, prior to oral  
11 hearing the applicant was requested to further refine his  
12 material and questions of law for determination. At the  
13 hearing before this court on 17 March 2014, the applicant  
14 sought leave to file a further notice of appeal.'

15 At paragraph 6 there is a recitation of that amended  
16 notice, and then at paragraph seven the court says, 'As  
17 can be seen, each of these grounds contain lengthy  
18 particulars in the form of submissions. The amended  
19 written submissions dated 13 December 2013 further amplify  
20 some of these particulars. The written submissions also  
21 raise broad further grounds concerning matter about which  
22 the applicant has consistently complained.' There are  
23 then allegations about actual and apprehended bias by the  
24 tribunal, and the final sentence, Your Honour, the court  
25 says, 'For the reasons that follow, we do not find it  
26 necessary to address these further allegations.'

27 At paragraph 8, Your Honour, there is the dismissal  
28 of the suggestion that - the issue of whether the  
29 applicant was a fit or proper purpose - sorry, a fit or  
30 proper person, arose. The court says it does not appear  
31 to have any substance. As such, it cannot be made out.

1 The court then says, 'We are satisfied that the remaining  
2 grounds in the applicant's amended notice of appeal  
3 complemented by his written oral submissions sufficiently  
4 expose the questions of law that are central to the  
5 applicant's argument.

6 'However, the proposed further amended notice of  
7 appeal is also in an unsatisfactory form. Making due  
8 allowance that the applicant is unrepresented before this  
9 court, we are not persuaded that the further amended  
10 notice of appeal or the applicant's amended submissions  
11 raise questions of law which would justify grant of leave  
12 to file further amended notice.'

13 Your Honour, I now wish to take Your Honour to  
14 paragraph 14. There, Your Honour, the court observes that  
15 in May 2010, the applicant was charged with 13 breaches of  
16 conditions of his licence. At paragraph 14, the court  
17 notes that the applicant was found guilty of all those  
18 charges in the Ringwood Magistrates' Court but he applied  
19 to the County Court on appeal and pleaded guilty to nine  
20 breaches.

21 At paragraph 17, Your Honour, there is a reference  
22 to what occurred on 07/07/11, which I bring to Your  
23 Honour's attention because Your Honour will be aware that  
24 was one of the charges in evidence as to what occurred on  
25 that day. And at paragraph 18, the court observed that  
26 the tribunal also noted evidence put forward by the  
27 respondent of the applicant had committed further possible  
28 breaches of licence conditions and tribunal orders at  
29 subsequent demonstrations attended by personnel of the  
30 respondent.

31 Your Honour, the findings made by the tribunal are

1 set out by the court at paragraph 25, Your Honour. And  
2 what that paragraph demonstrates is that the tribunal  
3 found that the applicant had committed offences under the  
4 Wildlife Act and had committed further breaches of his  
5 licence conditions, most prominently in relation to the  
6 Melton demonstration.

7 HER HONOUR: Which is the 7 July conduct.

8 MR CHAILE: July. Yes, Your Honour. The tribunal found that  
9 the applicant's demonstrations did not comply with the  
10 licence conditions and that the applicant's demonstrations  
11 created an unreasonable risk to the public. Having found  
12 that the threshold requirements for cancellation under  
13 ss25(d) and 28(f) had been satisfied, it fell to the  
14 tribunal to determine whether to exercise their discretion  
15 to cancel those licences.

16 And at paragraph 26 and 27, the court then  
17 identifies that there were a number of findings made  
18 adversely to the plaintiff's credit, and the basis on  
19 which the tribunal exercised that discretion. The court's  
20 findings, Your Honour, are - - -

21 MR HOSER: Sorry to interrupt. Sorry to interrupt. Your  
22 Honour.

23 HER HONOUR: Mr Hoser, I'd ask you not to interrupt.

24 MR HOSER: Please, I've got a black screen. I can't see  
25 anything. I can't do anything on the computer. I'm just  
26 asking if you can stand the proceedings down for two  
27 minutes so I can shut down the computer and actually see  
28 and do anything.

29 HER HONOUR: Sure.

30 MR HOSER: 'Cause at the moment, I've got literally no screen.

31 HER HONOUR: Okay. You've lost the visual - - -



1 MR HOSER: I've lost everything. I've lost everything. I've  
2 lost everything. I've just got a black screen, so I just  
3 want to turn everything off and then try and start again.  
4 Sorry, Your Honour.

5 HER HONOUR: All right. That's all right. No, that's fine.  
6 That's certainly an appropriate interruption to make.  
7 I'll stand down for five minutes.

8 (Short adjournment.)

9 HER HONOUR: All right. Mr Hoser, you've got us back again?

10 MR HOSER: Yes, Your Honour. I'm sorry about that.

11 HER HONOUR: No, no.

12 MR HOSER: It - it just, yeah, came back really quickly, but it  
13 - it was just black screen. I thought (indistinct).

14 HER HONOUR: No, that's fine. Good. All right. Mr Chaile.

15 MR CHAILE: Thank you, Your Honour. I was taking Your Honour  
16 to paragraph 30 of the Court of Appeal's judgment, and  
17 it's really paragraph 30 and 31 that summarised what was  
18 found by the court.

19 At paragraph 30, Your Honour, the court says, 'The  
20 terms of the discretion granted by the Wildlife Act are  
21 unconfined, and as such the tribunal had a broad scope as  
22 to the factors that it could take into account in the  
23 exercise of that discretion. However, for the reasons  
24 that follow, we are of the opinion that the tribunal erred  
25 in some of its findings and in its exercise of the  
26 discretion to affirm the respondent's decisions. Though  
27 it was open to the tribunal to conclude that its  
28 discretion to affirm the respondent's suspension and  
29 cancellation decisions was enlivened, the tribunal's  
30 exercise of that discretion miscarried.'

31 And the reasons why it miscarried are identified by

1 the Court of Appeal in paragraph 31 where the court says,  
2 'Our conclusions may be summarised as follows. In  
3 assessing the gravity of the applicant's breaches of  
4 conditions 13 and 14 of his Wildlife Demonstrator License  
5 and the moral culpability attaching to those breaches, the  
6 tribunal failed to take into account the consideration  
7 that the enforceability of the conditions breached was  
8 doubtful given the uncertainty of the exception provided  
9 for in conditions 13 and 14 due to the lack of any  
10 definition of a pit or barrier; the respondent's conduct  
11 over time in failing to provide the applicant with a  
12 description of the barrier required; and the inconsistent  
13 manner in which the respondent had purported to enforce  
14 those conditions.

15 'The tribunal also failed to take into account a  
16 body of evidence relevant to the question whether the  
17 applicant had established that he was an expert such that  
18 his opinion was relevant to an assessment of the gravity  
19 of the breaches. The tribunal erred in its conclusion  
20 that the applicant had a 'reckless disregard' for the  
21 conditions of his license. Furthermore, the conclusion  
22 that the applicant's demonstrations placed the public at  
23 risk of harm was based upon general evidence that it is  
24 possible that de venomised snakes might regenerate their  
25 venom glands, rather than on a specific determination as  
26 to the safety of the applicant's snakes.

27 'The tribunal's errors in relation to the gravity of  
28 the breaches of the applicant's licence conditions, the  
29 applicant's expertise, his reckless disregard for his  
30 licence conditions and the risk to the public infected its  
31 conclusion that the applicant was not a fit and proper

1 person to continue to hold the Wildlife Demonstrator  
2 Licence, Authorisation and Approval. Finally, the  
3 tribunal erred in concluding that there was no credible  
4 evidence that the suspension or cancellation of his  
5 licence would significantly affect the applicant's  
6 livelihood.

7 Those were the matters that were determined by the  
8 tribunal and that were considered by the Court of Appeal  
9 in allowing an appeal from that determination. None of  
10 those matters have any bearing or any relationship to the  
11 question whether the applicant complies with the  
12 applicable codes in the way in which his reptiles are kept  
13 in their cages or enclosures. Nor contrary to what  
14 I understood to be some of the oral submissions yesterday  
15 is there any reference in any of the decisions to the  
16 question whether the applicant complies with the code.

17 No finding or fact of law in relation to that issue  
18 has been made, and Your Honour, I submit that no finding  
19 could have been made, and in order to make good that  
20 proposition, Your Honour, I aim to take Your Honour to the  
21 Court of Appeal's second judgment. It was emailed around  
22 yesterday. It is cited in our submissions, and by some  
23 omission it was left out of the voluminous authorities,  
24 but Your Honour, it's important to observe that the court  
25 of appeal declined to remit the proceeding to the tribunal  
26 because by the point in time that the Court of Appeal  
27 delivered its judgment the licence since had been  
28 cancelled - would have already expired, so there was no  
29 utility. The Court of Appeal observes that at paragraph  
30 10 of its judgment.

31 HER HONOUR: This is no.2?

1 MR CHAILE: Yes, Your Honour. It's [2014] VSCA 346.

2 HER HONOUR: Yes.

3 MR CHAILE: The court says that, 'As we said in the judgment,  
4 while we would ordinarily have remitted the matter for  
5 reconsideration by the tribunal, in the circumstances  
6 there was no utility in doing so, as the licences subject  
7 of the proceedings had expired. This led the applicant to  
8 seek further orders in his summons.'

9 Critically, Your Honour, at paragraph 11, 'We did  
10 not make an affirmative order that the applicant's  
11 licences should not be cancelled. As the High Court has  
12 said, and as we noted in the judgment, in an appeal from  
13 the tribunal' - under the relevant provision - 'the matter  
14 the subject of an appeal would ordinarily be remitted to  
15 the tribunal. We held that the tribunal erred in its  
16 reasoning for its decision. However, it would have been  
17 open to the tribunal on remitter, having corrected those  
18 errors that we identified, to still conclude that the  
19 respondent's decision to cancel the applicant's licences  
20 should be affirmed.'

21 The court then says, 'The discretion to cancel an  
22 authorisation is enlivened under s28F of the Wildlife Act  
23 when "there are reasonable grounds to do so". The  
24 discretion to cancel a licence is enlivened under s25D  
25 when the holder of the licence has been found guilty of an  
26 offence under the Act or has breached a condition of the  
27 licence. It is uncontested that the applicant had done  
28 both. On a remitter the tribunal may have affirmed the  
29 cancellation of the licences.'

30 And again, Your Honour, I don't need to take Your  
31 Honour to it, but at paragraph 13 the court dealt with an

1 order sought by the plaintiff that he should have the  
2 costs of the proceeding and the tribunal, and the court  
3 declined to make an order of that kind on the basis that,  
4 even had the applicant succeeded in the tribunal, he would  
5 not have been entitled to costs as (indistinct), and  
6 critically, the applicant may not have succeeded at a  
7 further hearing.

8 So, to the extent that there is any overlap between  
9 the issue whether or not the applicant's licences should  
10 be cancelled and what was determined by the Court of  
11 Appeal, the effect of the Court of Appeal's judgment, as  
12 it itself observed, was to, effectively, leave that  
13 question open in such a way that it could have been  
14 determined adversely to the plaintiff had it been  
15 remitted, but in my submission, there is still no  
16 coincidence of the kind that would attract issues  
17 (indistinct words).

18 Your Honour, in the interest of time I don't propose  
19 to take you to the tribunal's judgment in 2015 save as to  
20 note that the subject matter of that judgment is  
21 identified in paragraphs 1 and 2, which is at p7116 of the  
22 book of authorities, and that, subsequent to the Court of  
23 Appeal's judgment, the plaintiff applied for further  
24 licences which application was denied, and the issue  
25 before the tribunal was whether or not the decision to  
26 deny those licences - or not to grant those licences -  
27 should be affirmed, and the tribunal decided to the  
28 contrary. But if Your Honour observes the reasoning, no  
29 question in that case arose as to the applicant's or  
30 plaintiff's compliance with the code insofar as the  
31 keeping of his reptiles was concerned.

1 HER HONOUR: Yes.

2 MR CHAILE: Your Honour, the plaintiff now appears to contend  
3 that because the cages and enclosures, which are the  
4 subject of the directions notice, are the same cages and  
5 enclosures that he had at the time of the previous  
6 proceedings that that factor is sufficient to attract both  
7 doctrines. With respect, Your Honour, that again fails to  
8 understand the way in which the doctrines operate. They  
9 do not apply merely because a matter which is the subject  
10 of a fresh exercise of statute discretion existed at the  
11 time of a prior judgment.

12 The requirement for a coincidence or commonality  
13 means that there must have been some findings as to the  
14 factual substratum that informed the exercise of  
15 discretion or the legal effect of that discretion in the  
16 sense of the obligations that it conveys to the recipient  
17 of a notice. That necessary condition is entirely absent.  
18 Your Honour, I will now turn to bad faith and improper  
19 purpose. Initially, Your Honour, we had apprehended from  
20 the plaintiff's submission and his evidence that bad faith  
21 and improper purpose was advanced on two bases.

22 The first was that the decision to issue the  
23 directions notice was made for the purpose or, as it's  
24 put, with the clear intent of disabling the plaintiff's  
25 business as well as the animals themselves, and for that  
26 reason it was not a bona fide exercise of power. The  
27 second reason is that it was an exercise of power on  
28 behalf of another person - being Zoos Victoria - its  
29 business and other rival wildlife demonstrators, although  
30 there's no identification of who those other demonstrators  
31 are.

1           Our submissions in writing, Your Honour, set out the  
2 principles applicable to both and the fundamental  
3 deficiency in this ground, Your Honour, is that both  
4 allegations of bad faith and improper purpose are  
5 extremely serious allegations to make. They are  
6 sufficiently serious that they require proof by reference  
7 to cogent and credible evidence.

8           In our submission, there is simply no evidence  
9 before Your Honour as to the subjective state of mind of  
10 the decision maker to support any allegation that the  
11 decision was made to disable the plaintiff's business or  
12 his animals or that the directions notice was issued at  
13 the behest of some other entity in order to prioritise or  
14 to benefit their business.

15           So, in our submission, those bases for the  
16 allegation of bad faith fail at the threshold. As that  
17 ground evolved yesterday, we now understand that a further  
18 - there are numerous additional bases on which it is put,  
19 but the principal basis with which I wish to deal in the  
20 context of this ground specifically is that Ms Watterson  
21 gave false evidence in her affidavit.

22           My understanding of the plaintiff's submission is  
23 that the evidence is false because it could not have  
24 objectively been - sorry, I'll withdraw that. The  
25 evidence given by Ms Watterson is false because the state  
26 of mind that she professes to have formed could not  
27 objectively have been formed by a person inspecting the  
28 plaintiff's reptiles in their cages and enclosures.

29           Your Honour, that submission also fails at the  
30 threshold. It fails at the threshold because Ms Watterson  
31 was not the decision-maker. An allegation of bad faith

1 requires there to be personal fault on the part of the  
2 decision-maker. The decision-maker was Mr Johnston, not  
3 Ms Watterson. Therefore we submit that that critical  
4 condition cannot be satisfied. Moreover, Your Honour,  
5 even if it could be satisfied the fact that there's a  
6 difference of opinion as to the opinions held by  
7 Ms Watterson falls well short of the standard required to  
8 establish bad faith. The authorities are clear, Your  
9 Honour, and we've set them out in our submissions.

10 Errors, even egregious errors of fact of law are  
11 insufficient to demonstrate bad faith. There needs to be  
12 conduct of a kind that justifies the moral opprobrium of  
13 the court and that condition, Your Honour, we say is  
14 entirely unsatisfied in the present circumstances and in  
15 an ordinary case in which the plaintiff was legally  
16 represented the aspersions cast about the veracity of  
17 Ms Watterson's evidence, in our submission, would not have  
18 been made.

19 Your Honour, just to close off on that ground the  
20 allegation of improper purpose cannot be sustained because  
21 there is no evidence as to purpose other than the purpose  
22 for which the discretion exists. And I say that because  
23 if Your Honour looks at the direction's notice there is an  
24 objectively identifiable basis upon which each of the  
25 conclusions stated in the directions notice has been  
26 based. Your Honour will be aware that in the absence of  
27 evidence if there is a basis on which to form the view  
28 that the decision has otherwise been made in exercise of a  
29 proper purpose that inference of presumption is to be the  
30 prevailing one.

31 Your Honour, I now wish to deal with the allegation



1 that the decision-maker, Mr Johnston, failed to take into  
2 account relevant considerations, Your Honour. We  
3 understand this ground as it has been articulated in the  
4 submissions and the pleadings to comprise two sub-grounds.  
5 The first is that in making the decision the decision-  
6 maker failed to take into account the following factors.

7 The demonstrated long term good health and welfare  
8 of reptiles and frogs housed in the relevant cages and the  
9 very relevant demands of the codes of practice for cages,  
10 that are the cages be appropriate for the species and the  
11 specific requirements, ease of maintenance, need for  
12 proper hygiene, need to be able to inspect said animals on  
13 demand, safety of the handlers.

14 The second sub-ground, Your Honour, is that the  
15 decision-maker failed to take into account further  
16 material after the directions notice was issued. That  
17 further material is identified as further failure to take  
18 into account relevant facts including further evidence  
19 from the plaintiff after the code of practice was issued.  
20 I assumed that the COP is a reference to the directions  
21 notice, was issued on 7 December 2024 [sic] including the  
22 long-term good health of the relevant reptiles and  
23 detailed reasons why the cages set up, furnishing,  
24 substrate, hides, water bowls, heating systems, climate  
25 control are as they are and in full compliance with the  
26 relevant codes of practice.

27 This is further confirmed in the email of DEECA's  
28 lawyers on 26 March 2024 in refusing to withdraw the  
29 directions notice in the face of evidence submitted to  
30 date in the form of five affidavits.

31 Your Honour, the first ground misunderstands or

1 (indistinct) the distinction between considerations in the  
2 Peko-Wallsend sense namely considerations which are  
3 mandatory in the exercise of a statutory discretion being  
4 considerations which are to be identified by reference to  
5 the applicable statutory scheme and statutory purpose and  
6 submissions in evidence.

7 The exercise of power under sub-regulation 2, Your  
8 Honour, is premised as I said yesterday on satisfaction of  
9 a jurisdictional fact. Namely that the cages or  
10 enclosures are not designed, constructed or maintained to  
11 comply with sub-regulation 1. The evaluative task of the  
12 decision-maker, Your Honour, in that respect is to assess  
13 relevantly whether or not the relevant cages or enclosures  
14 comply with the applicable codes of practice.

15 That is not coterminous with the broader evaluation  
16 on which the plaintiff relies which requires the decision-  
17 maker to consider in a broad sense the good health and  
18 welfare of reptiles and frogs and to do so without having  
19 regard to the actual requirement which is to provide for  
20 the good health or welfare of the animal in accordance  
21 with the applicable codes.

22 That is the language in regulation 43(1)(e). That  
23 allusion, Your Honour, in our submission means that the  
24 matters that the plaintiff considers to be relevant  
25 considerations are not mandatory relevant considerations  
26 of the Peko-Wallsend sense. The evaluative task for the  
27 decision-maker is far more confined than that. It is a  
28 task simply assessing what is the way - sorry, I'll  
29 withdraw that. The task is simply to assess the way in  
30 which the reptiles or animals are actually kept in their  
31 cages and enclosures and whether that factual sub-stratum

1 accords with the requirements in the codes of practice.

2 It doesn't require some broader evaluation or some  
3 general or amorphous evaluation about the general health  
4 and welfare of the reptiles, because that concept is  
5 qualified by the requirement that those matters, the  
6 health and welfare of the reptiles, are to be determined  
7 in accordance with the code. It is the code that tells us  
8 whether or not that broader requirement to the extent that  
9 it applies is satisfied.

10 HER HONOUR: And that's because the code describes minimum  
11 requirements.

12 MR CHAILE: Yes, Your Honour. Precisely. Your Honour, in this  
13 respect, I feel like - although I'm trying to avoid taking  
14 on too many authorities, I still feel it might be useful  
15 to take Your Honour to Chang and Neill. Your Honour that  
16 is at p1483 of the combined book of authorities. In  
17 particular, Your Honour, I wish to take Your Honour to  
18 paragraph 73 where the court says, 'As the above example  
19 demonstrates there is an important distinction between  
20 evidence or facts of concern are relevant consideration  
21 and the relevant consideration itself'.

22 That distinction is supported by the following  
23 observations of Justice Brennan in Peko-Wallsend, and in  
24 our submission, Your Honour, the relevant consideration  
25 for the decision-maker was whether or not the cages or  
26 enclosures were designed, constructed or maintained in  
27 compliance with the applicable codes. That is the  
28 consideration.

29 To the extent that there are other considerations  
30 that bear on that assessment those considerations are the  
31 matters that are set out in the codes themselves. They

1 are not the generalised matters on which the plaintiff  
2 relies. As to the second sub-ground, Your Honour, our  
3 submission is it cannot be that a decision-maker is  
4 required as a mandatory relevant consideration, and in the  
5 Peko-Wallsend sense to take into account considerations  
6 that were brought to their attention after the exercise of  
7 discretion or the making of a decision.

8 The fact that those matters were not before the  
9 decision-maker in the way that they were conveyed by the  
10 plaintiff means that the decision-maker cannot have been  
11 in error not to have taken those matters into account in  
12 making the decision. Noting the principal argument which  
13 is that the relevant considerations are what are  
14 stipulated in sub-regulations 1 and 2 and the codes of  
15 practice.

16 HER HONOUR: So your argument though is that 1E I think is the  
17 one that makes reference to health and welfare of animals  
18 is really confined not really to questions of health and  
19 welfare but to compliance with the code or non-compliance  
20 with the code.

21 MR CHAILE: Yes, Your Honour.

22 HER HONOUR: And it would follow then that there may well be an  
23 inference that if you don't comply with the codes, it's  
24 not in the interest or the health and welfare of the  
25 animal. And I'm not expressing this very well, but really  
26 the task for the decision-maker is not to make any sort of  
27 evaluative judgment about the animal's health and welfare,  
28 simply about whether the conditions comply with the  
29 minimum standards imposed by the code.

30 MR CHAILE: Yes, Your Honour. The statutory language is for  
31 the good health and welfare in accordance with the

1 applicable codes.

2 HER HONOUR: Yes.

3 MR CHAILE: We say the words 'in accordance' means that the  
4 latter qualifies the former. And that consideration is  
5 not expanded by the purposes of the Act to which I took  
6 Your Honour at the outset of my oral submissions, because  
7 those purposes seek to preserve the welfare of animals in  
8 the general sense but also as the second purpose of two  
9 purposes to provide for the regulation and prohibition on  
10 activities by the people who hold or possess animals. So  
11 we say that the overarching statutory purposes don't alter  
12 the analysis that from a constructional perspective, the  
13 fact that subparagraph (d) refers to health or welfare in  
14 accordance with the codes means that the evaluative task  
15 is to be taken by reference to the code.

16 HER HONOUR: Okay. And if the code is silent as to a minimum  
17 requirement or is expressed in discretionary terms as to a  
18 minimum requirement, what's the task for the decisionmaker  
19 in applying the code in those circumstances?

20 MR CHAILE: Yes, Your Honour. The task for the decisionmaker  
21 is to form an evaluative judgment as to whether the  
22 discretionary consideration has been met. And on review,  
23 Your Honour, the task for the court is to identify whether  
24 there were objective facts capable of supporting the  
25 forming of that subjective assessment in the sense that it  
26 has to fall within a range of possible outcomes that a  
27 rational decisionmaker can reach, not that the court  
28 would've made the same determination.

29 And that task - which I will deal with, Your Honour,  
30 when I get to the irrationality ground - is a very  
31 difficult task to establish, namely that the decision that

1           was reached was not open to the decisionmaker on the  
2           material before him or her.

3   HER HONOUR:   Yes.   Yes.   I'm happy for you to come back to it  
4           under that heading.

5   MR CHAILE:    Yes.

6   HER HONOUR:   But just while we were talking about relevant and  
7           irrelevant considerations, it's helpful to clarify it for  
8           me.

9   MR CHAILE:    Yes, Your Honour.   And that's a pertinent question,  
10           because as I took Your Honour to yesterday, Your Honour  
11           will be aware that the code is drafted to set out some  
12           general objectives and then specific objectives.   I will  
13           deal with this when I address the number of grounds that  
14           remain, but effectively in our submission, that just  
15           invokes the ordinary construction or rule that the  
16           specific takes precedence over the general, and the  
17           general supplements any gaps that are left by the  
18           specific.

19           So, in effect, no conflict between the two arises,  
20           because as Your Honour has identified or as Your Honour  
21           has suggested, there's a clear legislative choice that  
22           compliance with the code is sufficient as a baseline level  
23           to establish conduct that is consistent with the good  
24           health and welfare of the reptiles and, extrapolating that  
25           principle further, that compliance with the specific  
26           aspects of the code will necessarily involve satisfaction  
27           of the general aspects.

28           The plaintiff in his case relies on the proposition  
29           that it's not possible necessarily to comply with the  
30           specific parts of the code because compliance with those  
31           specific parts would involve a contravention or

1 noncompliance with the general parts, but we say that  
2 that's not the way in which these documents are meant to  
3 be understood or applied. But I'll deal with that in a  
4 moment, Your Honour.

5 HER HONOUR: Okay.

6 MR CHAILE: I'll now turn to the procedural fairness ground,  
7 Your Honour. Your Honour, the procedural fairness grounds  
8 really have two sub-grounds. The first is an allegation  
9 of bias. We've set out in detail, Your Honour, the  
10 principles applicable to both actual bias as an  
11 apprehended bias.

12 And, in our submission, neither set of principles  
13 can be satisfied in the circumstances because nothing has  
14 been demonstrated to show that the decisionmaker,  
15 Mr Johnston, was incapable of persuasion or did not make  
16 the decision on the basis of objective material or that  
17 there is some apprehended factor which means that there  
18 would not be a neutral evaluation on the merits. So we  
19 say from an evidentiary perspective and the threshold  
20 perspective, the allegations of bias must fail.

21 HER HONOUR: He made the decision on the basis of what was  
22 presented to him from Watterson and the others.

23 MR CHAILE: Yes. Yes. I also believe he was also in  
24 attendance at the inspection, and he has some notes which  
25 are attached to Ms Watterson's supplementary affidavit.  
26 They're unintelligible to me, but it was based on his  
27 observations and effectively what was in the officer's  
28 report.

29 HER HONOUR: Okay.

30 MR CHAILE: I will focus on the second basis of complain, which  
31 invokes the hearing rule, Your Honour, and that complaint

1 is that the plaintiff alleges he was not given an  
2 opportunity to be heard prior to the issuing of the  
3 directions notice. It is accepted, Your Honour,  
4 conventionally with modern authority that the exercise of  
5 a statutory power or discretion may, in the absence of any  
6 contrary intention or indication, be assumed to attract  
7 the rules of procedural fairness.

8 The law has not yet developed, however, to hold that  
9 all exercises of statutory power or discretion attract  
10 this constructional presumption. There is a qualitative  
11 requirement, Your Honour. That requirement is that the  
12 exercise of power must be apt to affect a person's rights  
13 or interests. That qualitative condition, Your Honour, is  
14 absent in the context of the notice issued under  
15 regulation 43(2).

16 The issuing of a notice under that provision, Your  
17 Honour, does not have any immediate effect on the rights  
18 or interests of the recipient. There is no exposure, as  
19 is ordinarily the case for noncompliance with a statutory  
20 notice, to any penalty for a failure to comply with the  
21 notice. The setting aside of the notice does not alter  
22 the recipient's legal position insofar as a possible  
23 contravention of (1) is concerned. That risk or that  
24 exposure remains entirely unaffected whether a notice is  
25 issued, whether it is complied, or whether it is set  
26 aside. I should interpolate they - - -

27 HER HONOUR: So what follows from that is that even if Mr Hoser  
28 was successful in setting this decision aside, he would  
29 remain at risk of prosecution for the things that are in  
30 the directions notice, nevertheless.

31 MR CHAILE: Yes. Yes. So Your Honour, I think, identified



1 sort of the legal effect of the notice accurately  
2 yesterday where Your Honour referred to it as a precursor.  
3 We embrace that characterisation. It is a precursor, but  
4 not in the legal sense. I say 'not in the legal sense'  
5 because it is not a condition that would otherwise govern  
6 the power to take action for a breach of regulation 43(1).  
7 There is no requirement for a notice to be issued under  
8 (2) in order for that action to be available to the  
9 relevant regulator. And we've addressed this in our  
10 written submissions.

11 HER HONOUR: Yes. So it's a precursor, but it's a not a  
12 necessary step to take before launching a prosecution.

13 MR CHAILE: Yes, Your Honour. And the fact of noncompliance  
14 does not intensify the risk that already exists at the  
15 point in time at which a notice is issued. The only  
16 possible way in which a notice may affect the rights or  
17 interests of a person is in an ameliorating sense, namely  
18 that there is a presumption or an understanding or at  
19 least a theoretical possibility that if the recipient  
20 complies with the notice that the risk of exposure for a  
21 failure to comply with (1) will be avoided or removed.

22 But that is not the legal effect of a notice. The  
23 compliance with the notice does not affect any residual  
24 discretion that may repose in the decisionmaker as to  
25 whether or not there continues to be a noncompliance with  
26 regulation 43(1).

27 HER HONOUR: Mr Hoser's argument took it one step further in  
28 that he said, 'Well, the noncompliance may well be put up  
29 as a relevant sentencing matter in the event that either a  
30 plea of guilty or a finding of guilt is eventually made',  
31 and in that sense, he says that the directions notice does

1           have potential effect. Do you - - -

2 MR CHAILE: Yes, Your Honour. I understand that submission.

3           I must confess, it was a submission made without notice,  
4           but I will accept the proposition that a failure to comply  
5           with notices on the Department may be relevant to the  
6           court's assessment of the need for specific deterrence,  
7           but what factors the court may consider relevant in its  
8           assessment of sentence I cannot make any greater  
9           submission on because it would involve speculation. But  
10          what I will say is that it's - - -

11 HER HONOUR: Yes, but it's not excluded is all, really.

12 MR CHAILE: It's not excluded, correct.

13 HER HONOUR: Yes.

14 MR CHAILE: But the statutory scheme does not suggest or  
15          disclose any legislative intention that a failure to  
16          comply should have an immediate effect on what penalty  
17          might be imposed for a breach of regulation (1). We know  
18          that the maximum penalty is 50 penalty units for each  
19          contravention, but beyond that, there is nothing in the  
20          legislative scheme that the failure to comply with a  
21          notice should have or must have that effect.

22                 Your Honour, it's important to observe that the  
23          requirements of procedural fairness are not coterminous  
24          with the hearing rule. The requirements accommodate that  
25          rule as one of its limbs, but it does not mean that where  
26          a person is owed procedural fairness that that is the same  
27          as that person being owed an opportunity to be heard  
28          before the exercise of a statutory power. The ultimate  
29          question is whether or not the attraction or the  
30          implication of the hearing rule conforms with the  
31          statutory scheme.

1           In my submission, it does not so conform. It does  
2 not conform because it introduces a layer of regulation  
3 and administrative difficulty which will inhibit the  
4 issuing of a notice under provision in circumstances where  
5 the notice has limited or no legal effect. The  
6 implication of such a rule ignores and conflicts with the  
7 circumstance that the issuing of a notice under that sub-  
8 regulation is itself an expression of procedural fairness  
9 by putting the recipient on notice that a view has been  
10 formed that they are in contravention of (1) and providing  
11 them with an opportunity to avoid or ameliorate that risk.

12           In our submission, the implication of the hearing  
13 rule - sorry, Your Honour, I'll withdraw that. Before  
14 I summarise that, it also has to be understood in the  
15 context of a statutory scheme in which every licence that  
16 is issued is accompanied by a condition that entitles or  
17 requires the recipient to allow inspection of the property  
18 for the purposes of assessing compliance with the Act and  
19 the regulations and applicable codes.

20           So in the context where the person has statutory  
21 notice of that purpose and where a notice under (2) has  
22 limited legal effect, it is our submission that implying a  
23 rule to be - sorry, in applying a requirement to be heard  
24 before the issuing of that notice would be inconsistent  
25 with the efficient administrative scheme sought to be  
26 erected by the regulations.

27           Your Honour, if the rule did apply, the next  
28 submission of the Department is that it was met. I need  
29 to take Your Honour to a few documents in that respect.  
30 The first proposition on which that submission relies is  
31 that the notice was issued following a detailed inspection

1           which occurred in accordance with statutory procedure.  
2           And, Your Honour, I'll take Your Honour to court book 179.  
3           Sorry, Your Honour, if you just give me a moment. I'm  
4           having - - -

5   HER HONOUR: Yes. No, that's fine.

6   MR CHAILE: And you'll see, Your Honour, that - maybe I'll  
7           start at the bottom of the chain, actually. I won't take  
8           it in order of the way that the propositions are put.  
9           Your Honour, if I can take Your Honour to court book 181.

10   HER HONOUR: Yes.

11   MR CHAILE: Your Honour will see at the bottom there's an email  
12           from Mr Johnston to the plaintiff on 6 December at 4.06  
13           pm.

14   HER HONOUR: Yes.

15   MR CHAILE: There, Mr Johnston says, 'Good afternoon, Mr Hoser.  
16           As per our conversation confirming that Lucille Watterson  
17           and I will be attending your residence (indistinct) Park  
18           Road on Tuesday, 12 December at 9 am. The purpose of our  
19           visit is to follow up from the previous inspection  
20           conducted on 12 December 2023.'

21           The next email up in the chain, Your Honour, is an  
22           email from the plaintiff on the same date at 10 pm. It  
23           says, 'Andrew, noting how snowed I am at present dealing  
24           with DEECA-protected criminals like Mark Pelli and Michael  
25           Alexander, got proceedings involved in both this week in  
26           court and other times dealing things, including a wicked  
27           dose of flue, I'd appreciate if you not play legal ambush  
28           with me and send me a detailed list of EXACTLY what you  
29           need to discuss in person next Tuesday. It is better you  
30           be a solution and not a problem.'

31           The next email, Your Honour, is at court book 180.

1 It's on 8 December. It says, 'Good afternoon, Mr Hoser.  
2 I refer to telephone' - it says 'conservation', but  
3 I assume he means conversation.

4 HER HONOUR: Yes.

5 MR CHAILE: 'On 7 December 2023.' So there was a conversation  
6 in the interim. 'As per your request, please see attached  
7 directions notice and accompanying cover letter which  
8 outlines the requirements and timeframe for the notice to  
9 be complied with. For your reference, I have attached  
10 copies of the applicable codes. As discussed, Forest and  
11 Wildlife Officer Lucille Watterson and myself will meet  
12 with you at your address on the 12th in order to further  
13 explain the notice and discuss any questions you may  
14 have.'

15 Your Honour, the next email is on the same page at  
16 the top of the page, and it's from the plaintiff. It  
17 says, 'Dear all, please read my reply to your documents',  
18 and I'll take Your Honour to that in a moment. 'In  
19 summary, your demands would result in adverse welfare  
20 implications for all affected wildlife, being all that we  
21 hold here. In any event, the directions notice is  
22 illegal, and you are therefore asked to immediately  
23 withdraw it.'

24 I won't take you to the next email, Your Honour,  
25 first because it doesn't make sense in context. I'll need  
26 to take Your Honour to the letter then sent by the  
27 plaintiff. That letter commences, Your Honour, at court  
28 book - it's a long letter. It commences at court book  
29 170.

30 HER HONOUR: Yes.

31 MR CHAILE: I won't read the whole letter, Your Honour, but

1 I will note - - -

2 HER HONOUR: Mr Hoser, could I ask you to just put your  
3 microphone on mute for present?

4 MR HOSER: Sorry, Your Honour.

5 HER HONOUR: That's okay. I'm just getting a bit of background  
6 noise which I'm finding distracting, so it'll stop that  
7 problem. Thanks for that.

8 MR CHAILE: Your Honour, four paragraphs down, it says, 'In  
9 summary, you are being formally asked to immediately  
10 withdraw the notice and to apologise in writing for  
11 issuing it.'

12 Your Honour, on the following page, there are some  
13 demands that the Department submit to Mr Hoser for  
14 approval: 'the exact and detailed and all particular  
15 plans for what cages you seek to be reconstructed; details  
16 of each cage and what goes in each, including where that  
17 is to be done; cages to be put; ongoing upkeep  
18 requirements, including costs; who's able and available to  
19 build and deliver up the said cages; and confirmation it  
20 is, in fact, doable or possible; and, assuming I approve  
21 your plans, then for the Department to undertake to pay  
22 him a grant to do it or have the Department's people do it  
23 at the Department's expense.'

24 And, Your Honour, I won't go through the rest of the  
25 document, but Your Honour will see at the end of the  
26 letter, which is at p177, there is a heading 'next steps'.

27 HER HONOUR: Sorry, on which - - -

28 MR CHAILE: Sorry. Court book 177, Your Honour.

29 HER HONOUR: Seventy-seven. Yes.

30 MR CHAILE: And it says there, 'To progress this matter  
31 further, you are therefore asked to do one of the

1 following in writing as soon as possible, preferring (a)  
2 over (b) over (c): (a) is immediately formally withdraw  
3 your notice against me dated 7 December 2013' - I assume  
4 that means 2023 - 'served yesterday and apologise for  
5 issuing it; (b), submit to me for approval the exact plans  
6 for what cages seek to be constructed.' I've already read  
7 that out to Your Honour.

8 '(2): Assuming I approve your plans', then the  
9 Department to pay for a grant or to pay for it by having  
10 other people to do it. '(c), in the event that you do not  
11 agree to (1) or (2) above and noting that it is, in fact,  
12 almost certainly not possible for me or anyone else to  
13 comply with your demands as written - and this ignores the  
14 deleterious animal welfare implications caused by  
15 compliance - please advise in writing in detail and full  
16 particulars what needs to be done to appeal, overturn,  
17 revoke the directions notice, assuming I even have such  
18 rights.'

19 But critical, Your Honour, is the following  
20 paragraph: 'In light of the fact that the directions  
21 notice has now been served and the contents of the letter  
22 above are self-explanatory, I ask that our next step be  
23 that we cancel the meeting for Tuesday next week unless  
24 you have some other compelling reason to attend. Yes,  
25 I had made time for you, and let your next step be as soon  
26 as possible revoke the directions notice issued on  
27 7 December 2023 in writing.'

28 Your Honour, the next email from Mr Johnston  
29 commences at court book 178 at the bottom of the page.  
30 And the relevant aspect, Your Honour, is at court book  
31 179. Your Honour will see in the second last paragraph,

1 Mr Johnston says, 'As per your request, I will cancel our  
2 meeting on Tuesday, 12 December. However, the notice is a  
3 valid and current document and will not be withdrawn.'

4 So, Your Honour, in our submission, the statutory  
5 scheme does not contemplate or accommodate any requirement  
6 for the decisionmaker to hear from the recipient of a  
7 directions notice prior to its issue. But moreover, Your  
8 Honour, the notice - what the emails demonstrate, Your  
9 Honour, is that the notice was proposed to be given to the  
10 plaintiff in person to be explained in person and to  
11 answer any questions that the plaintiff may have had about  
12 the notice in person.

13 The plaintiff requested, to put it neutrally, that  
14 that information be provided to him beforehand, and it  
15 was. And when it was, he then issued a demand either that  
16 it be withdrawn and an apology be given to him or that the  
17 costs of compliance - sorry, Your Honour, I withdraw that  
18 - or that the requirements for compliance be provided to  
19 him and, if approved by him, be met out of public funds  
20 and that the meeting be cancelled, which was done at the  
21 plaintiff's request.

22 So, in our submission, the proposition that the  
23 plaintiff was denied an opportunity to be heard, if it is  
24 accepted by the court, is entirely of the plaintiff's own  
25 making in the way in which he addressed the issuing of the  
26 directions notice, which had he not approached it in the  
27 way that he did, would have been presented to him in  
28 person, and there would've been an opportunity for him to  
29 be heard on that occasion.

30 Noting our principal submission is that there was no  
31 requirement for him to be heard in advance, given that the



1 statutory purpose of the inspection on 12 September is  
2 amply clear. Your Honour, in our submission, the  
3 plaintiff's complaint really is of the kind that was  
4 disavowed by the court in Alpha One. It was not a  
5 requirement of procedural fairness for Mr Johnston to  
6 disclose to the plaintiff what he was minded to decide so  
7 that the plaintiff could be heard or otherwise to  
8 criticise the reasoning process by which that decision was  
9 to be made.

10 We have cited that judgment in our submissions,  
11 Your Honour. It's at court book 78 at paragraph 1 -  
12 sorry, I think appeal book 78 at paragraph 126. We say  
13 that that's not what the requirements of procedural  
14 fairness required in this case. Further, Your Honour, if  
15 that is what the requirements of procedural fairness  
16 dictated, any failure to comply with that requirement was  
17 not material.

18 We say it was not material, Your Honour, because the  
19 conduct of this litigation and the correspondence that was  
20 provided to the Department immediately following the issue  
21 of the directions notice, shows that the difference in  
22 opinion as to the applicability of the codes, its  
23 contents, its applicability to the plaintiff's reptiles,  
24 are so deep-seated that it is unlikely that the plaintiff  
25 would've said anything that might've altered the decision  
26 that was ultimately made, or that he could've provided  
27 some information that might have rationally affected the  
28 assessment to issue the decision.

29 So we say that the materiality threshold is not  
30 satisfied, in the present circumstances, and that  
31 proposition is established by the considerable gap between

1 what the Department thinks is the applicable legal  
2 framework, and what the plaintiff thinks is the applicable  
3 legal framework. That fundamental difference of opinion  
4 could not have been bridged, whatever representations  
5 might've been made by the plaintiff.

6 Your Honour, I now wish to turn to rationality and  
7 reasonableness. Your Honour, we apprehended that the  
8 plaintiff submits that the decision to issue the  
9 directions notice was neither rational nor reasonable for  
10 four reasons. First, because the decision maker  
11 misapplied the codes of practice. Second, because there  
12 was a failure to follow correct procedures. Third,  
13 because there was no evidence to support the issuing of  
14 the directions notice. And fourth, the good health of the  
15 plaintiff means an inference was drawn, that inference  
16 being identified by the plaintiff as there was an  
17 inference of animal abuse or cruelty for which there was  
18 no basis.

19 The Department's submission is that none of these  
20 errors are established, let alone sufficient to vitiate  
21 the decision to issue the directions notice. The  
22 principles relevant to reasonableness and rationality are  
23 complex, Your Honour. We've set them out in detail in our  
24 written submission. I wish to emphasise, however, for  
25 Your Honour's benefit, six matters.

26 The first is that the task for the court is the  
27 ascertainment through understanding the approach of the  
28 decision maker, and characterising the reasoning process  
29 of whether a decision or state of satisfaction is so  
30 lacking a rational, logical foundation that the decision  
31 or relevant satisfaction was one that no rational or

1 logical decision maker could reach, such that it was not a  
2 decision contemplated by the provisioning question. That  
3 is from the Full Court's judgment in Djokovic, and we've  
4 set out the citation for Your Honour in the submissions.

5 Second, Your Honour, the decision of a decision  
6 maker exercising statutory power can only be challenged on  
7 the ground of unreasonableness when no reasonable decision  
8 maker could've reached the conclusion that they did, or  
9 where there is no evident or intelligible justification  
10 for the decision. That's an uncontroversial statement,  
11 and it's best reflected in the judgment of Justice Ginnane  
12 in *Drave v Victorian Building Authority*, also cited in our  
13 submissions.

14 Third, Your Honour, it is a rare case to find that  
15 the exercise of a discretionary power was unreasonable and  
16 irrational, whether reasons demonstrate a justification  
17 for that exercise of power. And where reasons are  
18 provided, they are the focal point for the assessment of  
19 legal unreasonableness. The first of those propositions  
20 comes from the judgment of their Honours as Justices  
21 Nettle and Gordon in *SZVFW*, and the second arises from the  
22 judgment of the Full Court in *Minister for Immigration and  
23 Border Protection v Singh*.

24 Fourth, Your Honour, where a decision maker or  
25 statutory function calls for a broad and subjective  
26 evaluation, the task of demonstrating the requisite lack  
27 of an evident and intelligible justification becomes a  
28 virtually insuperable hurdle. That, Your Honour, comes  
29 from the judgments of Chief Justice French and Justices  
30 Bell, Keane, and Gorder, in *Plaintiff M64*.

31 Fifth, Your Honour, no evidence ground refers to

1 there being not a skerrick of evidence and comes out once  
2 there is just a skerrick of evidence. That comes from the  
3 judgments of Justices Keane, Gordon, Elderman, Steward,  
4 and Gleeson in *Vearne*. And finally, Your Honour, the  
5 question as to whether the jurisdictional factor is  
6 satisfied is whether there are objective facts sufficient  
7 to establish the circumstances to which regulation 43(1)  
8 refers. And that is the consequence of the judgments of  
9 Chief Justice Kiefel and Justice Bell, Justice Gageler,  
10 and Justice Gordon in *Prior v Mull*.

11 Your Honour, I'll deal with the last aspect first,  
12 the satisfaction of the jurisdictional fact. In our  
13 submission, Your Honour, and noting the injunction that  
14 Your Honour is to have regard to the reasons for decision,  
15 and we say the reasons are contained in the directions  
16 notice themselves as supplemented by the officer's report.  
17 The directions notice, on its face, provides an  
18 intelligible and objective basis for the directions issued  
19 in that notice. I have taken Your Honour through the  
20 directions notice and the officer's report. I don't  
21 propose to do that again.

22 But our submission is that when one looks at the  
23 directions notice, and one looks at the officer's report,  
24 it's quite clear that each finding or each direction which  
25 forms a subject of the notice has been made and is  
26 identified by reference to specific observations and  
27 objective facts. Your Honour - - -

28 HER HONOUR: When you say the decision notice contains the  
29 reasons - - -

30 MR CHAILE: Yes.

31 HER HONOUR: If I go to that at 121 of the court book.

1 MR CHAILE: Yes.

2 HER HONOUR: It's a statement that the decision maker  
3 reasonably believes you're committing offences by not  
4 adhering to the applicable codes of practice. But that's  
5 simply a statement of belief. It sort of doesn't go to  
6 the reasons why that belief is there.

7 MR CHAILE: Yes, Your Honour.

8 HER HONOUR: So then you go to the additional comments, which  
9 make reference to there intending to be follow up  
10 inspections, but so when you say the reasons, what are  
11 they?

12 MR CHAILE: Yes, Your Honour.

13 HER HONOUR: How do you articulate them?

14 MR CHAILE: Yes.

15 HER HONOUR: Because the directions notice doesn't actually  
16 articulate reasons.

17 MR CHAILE: No, it doesn't in the conventional sense,  
18 Your Honour. But the nature of the notice has to be  
19 understood in its context. The directions notice is  
20 intended to be a statement of directions to the recipient  
21 in order for that recipient to comply with an apprehended  
22 breach of sub-regulation 1. So if one is to look at the  
23 purpose and the context of the notice. The reasons are  
24 the written directions that are provided to the recipient.  
25 They commence, Your Honour, at court book 123 in this  
26 case.

27 HER HONOUR: Yes. So the tables, in effect.

28 MR CHAILE: Yes.

29 HER HONOUR: Yes.

30 MR CHAILE: And so, Your Honour, it's a bit inapt to talk about  
31 the decision as one global decision. It's probably more

1 accurate to consider it for each direction being an  
2 individual decision that's captured within the one notice.  
3 And each individual decision is identified there in terms  
4 of the breach that's occurred, the observations that  
5 inform that finding of breach on which the decision maker  
6 has relied, and what is required to remedy that alleged  
7 breach.

8 HER HONOUR: Yes, okay. That answers my questions.

9 MR CHAILE: Your Honour, at this point, I might also deal with  
10 an aspect of the bad faith argument, which is namely that  
11 the - as I had apprehended - and I apologise if I haven't  
12 apprehended it correctly - that the notice had led the  
13 plaintiff to believe that there was some legal consequence  
14 for a failure to comply, that might have demonstrated bad  
15 faith, or that the notice itself somehow countermands or  
16 gainsays the submission as to the actual operation of the  
17 statutory scheme. I will just deal with that briefly,  
18 Your Honour, so I don't omit to do so.

19 Your Honour will recall that the plaintiff fixed  
20 upon a statement that appears at court book 118, Your  
21 Honour. That statement is, 'Failure to comply with this  
22 notice and the conditions of your licence may constitute  
23 an offence under the Wildlife Regulations 2013 and the  
24 Prevention of Cruelty to Animals Act 1986, and may result  
25 in penalties and/or restriction, suspension or  
26 cancellation of your licence.'

27 The first observation, Your Honour, is that that's  
28 in the covering letter, that statement. I accept that  
29 it's an inelegant expression, and partially incorrect, but  
30 I submit - my submission is that what it's intended to  
31 convey is that if you don't comply with the licence, the

1 risk of noncompliance with sub-regulation (1) cannot be  
2 ameliorated. The reason - - -

3 HER HONOUR: Pretty important distinction for the person  
4 receiving it, though, isn't it?

5 MR CHAILE: Yes, I accept that, Your Honour, but the reason  
6 I say that is that, if Your Honour looks at the - at the  
7 notice itself, Your Honour, in particular, at court  
8 book 19 at the bottom of the page, the last sentence:  
9 'Failure to comply with the instructions of this notice by  
10 the specified date may result in the person in possession  
11 of the wildlife being found guilty of offences under  
12 sub-regulation 43(1)(d) and (e). Furthermore, such an  
13 offence may be considered as a factor in determining any  
14 future applications to renew your commercial wildlife  
15 licence.'

16 So, in my submission, the notice itself identifies  
17 what the potential breaches of the statutory scheme are,  
18 and what the consequence of those breaches - namely,  
19 contravention of 43(1)(d) and 43(1)(e) - may have on a  
20 renewal of the licence. So, in my - - -

21 HER HONOUR: It's certainly something that reads in a way that  
22 would - that may lead people who receive it to believe  
23 that there's some consequence if they don't comply with  
24 this document not just that it may mean that there are  
25 other things that might also happen. It does read - - -

26 MR CHAILE: Yes. No, I accept that proposition, Your Honour.  
27 It's not well expressed; I will accept that. However,  
28 noting the injunction that these type of administrative  
29 notices should not be read with an eye attuned to error,  
30 I think the intention is to convey that if you don't  
31 comply with this notice, you may commit an offence under

1 those provisions. It does not explain that the issuing of  
2 the notice suggests that an offence subsists. But, in any  
3 event, Your Honour, my submission is that whatever is said  
4 in the notice - the letter cannot affect the way in which  
5 the statutory scheme actually operates.

6 HER HONOUR: I agree, yes.

7 MR CHAILE: Yes. Your Honour, the fact that the directions  
8 notice has an evident intelligible bases - sorry - basis  
9 means that the jurisdictional fact is amply satisfied. It  
10 also means, Your Honour, that the no evidence ground is  
11 bound to fail. In this respect, Your Honour, I wish to  
12 deal with a couple of the issues that arose yesterday from  
13 the plaintiff's submissions.

14 In so doing, I don't wish to be seen as undermining  
15 the principal submission, to which I will get, which is  
16 that what the plaintiff wants is for the court to engage  
17 in a merits review of the views formed by the decision-  
18 maker, but merely it is to establish, as a baseline  
19 proposition, that it was open to the officers to form the  
20 observations they did, based on the material that was  
21 before them.

22 Your Honour, I wish to take Your Honour to the code,  
23 and in particular to deal with the issue of furniture  
24 which arose yesterday. That appears at PDF p26 of the  
25 combined book of authorities, Your Honour. And Your  
26 Honour will see, paragraph 1, 'The interior design of  
27 enclosures must be consistent with the environmental needs  
28 of inhabitants. A basking site, such a rock slab or log,  
29 should be provided under the heat source in all reptile  
30 enclosures. Snakes must be provided with a rough object,  
31 such as a rock or log, to provide a sloughing aid. These



1 enclosures should be landscaped to allow for the reptiles  
2 to feel secure. This may involve a hollow log, shelter  
3 box, plant pot, or angled piece of bark or rock.

4 'These should not be located in an area at the low  
5 end of the temperature range. They may be positioned in  
6 such a way as to allow the reptile to still be seen by the  
7 keeper. Where semiaquatic reptiles are kept, such as  
8 turtles or crocodiles, a dry area must be provided, to  
9 allow the reptiles to dry out. Climbing branches must be  
10 provided for arboreal species. Where a reptile is allowed  
11 to hibernate, adequate facilities must be provided to keep  
12 the animals dry and out of drafts, keep the temperatures  
13 above the species minimum, allow regular checks, while  
14 keeping handling to a minimum.' So those are a series of  
15 requirements: some mandatory, some suggestive.

16 Your Honour, I wish to take you to one of the  
17 pictures that's annexed to Ms Watterson's supplementary  
18 affidavit. It's at court book 581, Your Honour. And,  
19 Your Honour, this image has purely been selected because  
20 it shows almost the entirety of the enclosure on all  
21 sides. I had understood the plaintiff, in one of his  
22 complaints to be that the images had been selectively  
23 edited, or selectively taken, in order to conceal the true  
24 state of affairs, so I've sought to identify an image  
25 that, to the extent possible, shows everything that's  
26 surrounding the enclosure.

27 HER HONOUR: So, 581. Sorry. Yes.

28 MR CHAILE: Your Honour, in my submission, having read - - -

29 MR HOSER: Sorry - sorry to interrupt. Sorry to interrupt.

30 I'm just - when you say 581 - the number on - on the PDF  
31 file is 583, and at the bottom of the page, I have 581.

1 Which one are you referring to?

2 MR CHAILE: It's at the - the bottom of page is 581, and then  
3 in the corner there's something - there's the number 66.

4 MR HOSER: Sorry, so - so when you say 581, that - - -

5 HER HONOUR: It's five-eight - - -

6 MR HOSER: It's at the bottom of the page, and it's the one  
7 with 66 on - right, okay, so we're looking at the same  
8 picture. Thank you. Thank you.

9 HER HONOUR: All right. Thank you. 581.

10 MR CHAILE: Your Honour, I don't wish to belabour the point,  
11 but having taken you to the requirements for cage  
12 furniture, in my submission, it is plainly evident that it  
13 would be open to a decision-maker, looking at this  
14 picture, to form the view that the requirements in the  
15 code have not been met. I make that submission by way of  
16 example. But Your Honour will see from the directions  
17 notice and the officer's report that significant care has  
18 gone into identifying and assessing whether or not each of  
19 the enclosures complies with the code.

20 HER HONOUR: All right.

21 MR CHAILE: Your Honour, at this point, I might deal with  
22 another submission that arose in the plaintiff's address  
23 yesterday, and that submission that the requirement to  
24 introduce locks on the enclosures was not a requirement  
25 that was supported by the code, because it had always been  
26 understood that it was sufficient simply to ensure that  
27 the place in which the reptiles were kept was locked.  
28 Your Honour - if I can take you back to the code, Your  
29 Honour and, in particular, s7, which deals with the  
30 housing of dangerous reptiles, Your Honour.

31 HER HONOUR: Yes.

1 MR CHAILE: Paragraph 2, Your Honour - and it's six lines down  
2 - it says - the first sentence - the first full sentence  
3 in that line says, 'A formalised security and inspection  
4 system must be implemented to ensure that access doors and  
5 enclosure lids are kept locked at all times.' Is Your  
6 Honour able to see that?

7 HER HONOUR: Yes, I've got that.

8 MR CHAILE: So, in my submission, the code itself provides  
9 ample basis for the view to be formed that there should be  
10 locks on the enclosures. Is Your Honour content for me to  
11 move on?

12 HER HONOUR: Yes, sorry.

13 MR CHAILE: No worries. Thank you, Your Honour. Your Honour,  
14 I need to deal briefly with the plaintiff's complaint  
15 about the misapplication of the codes of practice, because  
16 that will also dovetail into the remaining ground as to  
17 the content of the code. Your Honour, the plaintiff  
18 contends that the officer deliberately misapplied the code  
19 in breach of other parts - being the more important parts  
20 - to deliberately misapply the law and issue the  
21 directions notice; and, had the codes been properly read  
22 and utilised, the decision maker would have found not  
23 fault with either the Hoser cages or his keeping methods -  
24 in fact, he or she would have found that he conformed to  
25 world best practice.

26 Your Honour, this contention appears to be based on  
27 two propositions, which I'll reproduce verbatim.  
28 'Compliance, in any sense of the word, would kill or  
29 adversely affect the wildlife. They would be in breach of  
30 the Wildlife Act, wildlife regulations, and associated  
31 codes of practice, and on that basis, the directions

1 notice should not have been issued and some parts of the  
2 directions order are made in defiance of the code of  
3 practice and not in line with it and are therefore not  
4 legal. The cage size demands for the snakes, for example,  
5 are not covered in the code of practice for reptiles. It  
6 only specifies cage sizes for two or more snakes.'

7 Your Honour, the first proposition is misconceived,  
8 because it overlooks that the jurisdictional fact is  
9 whether or not an enclosure or cage is designed,  
10 constructed or maintained to comply with sub-regulation 1.  
11 That is the criteria which enlivens the exercise of  
12 discretion. The second proposition, Your Honour, is  
13 nothing more than a bald faced invitation into merits  
14 review. The court is aware that review on the merits is  
15 anathema to the jurisdiction that it exercises on judicial  
16 review. More fundamentally, however, Your Honour, it  
17 betrays a misunderstanding as to the way in which the  
18 codes are to be construed and applied.

19 I have dealt with the way in which the codes are  
20 properly to be construed. Namely, by reference to the  
21 uncontroversial principle that the specific governs over  
22 the general. But importantly, Your Honour, the  
23 plaintiff's contention that the specific parts of the code  
24 that have been relied upon by the decision maker do not  
25 apply rests on the proposition that they set minimum  
26 standards for two snakes and more.

27 In our submission, that rests on a false premise.  
28 It ignores the general requirements, in clause 3.1.1, that  
29 the cage must be of sufficient size so as to provide  
30 enough space, both horizontally and vertically, to enable  
31 the animals to take exercise and to protect animals from

1 undue dominance or conflict; and the cage must be large  
2 enough so that there is a temperature gradient.

3 So putting to one side the specific requirements,  
4 these reflect the more general evaluative requirements to  
5 which I referred Your Honour earlier. It is open for a  
6 decision maker to form a view that a cage does not comply  
7 with these general and evaluative requirements; and for  
8 Your Honour to be satisfied that that decision was open,  
9 because it is based on intelligible information that was  
10 before the decision maker.

11 But, Your Honour, more importantly and  
12 fundamentally, the submission that the specific  
13 requirements only apply when you've got two reptiles or  
14 more, in our submission, ignores the basic principles of  
15 construction. It is true that the minimum requirements  
16 are set by reference to two reptiles, but an ordinary and  
17 common sense understanding of those requirements is that  
18 is the minimum standard that is applied for up to two  
19 reptiles and, as the code of practice says, for every  
20 reptile thereafter, those minimum requirements are to be  
21 expanded by 20 per cent.

22 HER HONOUR: But why should I read in the words 'up to' when  
23 the code doesn't say that?

24 MR CHAILE: Granted, Your Honour. I accept that the code does  
25 not say 'up to' two standards, but Your Honour should  
26 accept that that is the proper construction of the code in  
27 circumstances where it is intended to set minimum  
28 standards that are to be met by all persons holding  
29 wildlife in this jurisdiction. The outcome of the  
30 alternative construction is that it would leave single  
31 reptiles entirely unregulated, with no applicable minimum

1 standards.

2 HER HONOUR: Well, it would still make single animals subject  
3 to the code, but to the general statements rather than the  
4 specific ones.

5 MR CHAILE: Yes, Your Honour. Yes.

6 HER HONOUR: It's not unregulated.

7 MR CHAILE: Correct, Your Honour.

8 HER HONOUR: But it becomes, then, an evaluative judgment  
9 rather than a minimum judgment.

10 MR CHAILE: Yes. Yes, Your Honour. So our principle  
11 proposition is the first one: namely, that even if the  
12 minimum standards don't apply, it was still open to  
13 Mr Johnston to form the views that he did by reference to  
14 the general requirements in clause 3.1. Because that does  
15 not infringe or traduce the principle of construction that  
16 the specific is to be preferred over the general, because  
17 it applies in the context of a finding that the specific  
18 is inapplicable.

19 But in our submission, ultimately, it doesn't matter  
20 - for him to rely on that general discretion - because the  
21 specific discretion is also intended to apply.

22 Your Honour, the code is an administrative document,  
23 prepared by reference to industry material and the  
24 information that's been provided, for people who are  
25 experts in the field.

26 HER HONOUR: Well, not just that. It will apply to the person  
27 who goes to the pet shop and buys a python, as well as  
28 experienced people.

29 MR CHAILE: No. No. Yes, Your Honour. Yes.

30 HER HONOUR: So they're going to be - their audience are both  
31 experienced or industry people and not so experienced

1 people.

2 MR CHAILE: Yes. No. No. No. Your Honour, I fear I might  
3 have been misunderstood. I'm not saying that this invokes  
4 the principle that it's to be read in the way that an  
5 expert person in the field or an ordinary person in the  
6 field would understand it. I'm saying that one has to  
7 look at and interpret the code by reference to the  
8 circumstances in which it comes to exist, and its  
9 existence is informed by what's in the bibliography and  
10 the people that have contributed to its preparation.

11 HER HONOUR: Yes.

12 MR CHAILE: It is not a legislative instrument in the  
13 conventional sense, and therefore some allowance has to be  
14 made for the fact that its language may be inexact in  
15 terms of the requirements that it imposes. But in our  
16 submission, when one has a look at the purpose of the  
17 code, as set out in the introduction - the purpose of  
18 enforcing or imposing minimum standards to be met by  
19 everyone who holds animals suggests that the minimum  
20 requirements for two reptiles necessarily includes one  
21 reptile.

22 HER HONOUR: Yes. That's the step that I have some difficulty  
23 with.

24 MR CHAILE: Yes, Your Honour.

25 HER HONOUR: Just because of the very clear language that's  
26 used.

27 MR CHAILE: Yes. Well, Your Honour, in that respect, I would  
28 not accede to the proposition that the clear language  
29 excludes that two reptiles includes one reptile. I would  
30 accede to the proposition that the language does not  
31 include the words 'up to' two reptiles, and so it may be

1           ambiguous in that respect. Which is why, in my  
2           submission, Your Honour has to construe it by reference to  
3           its express purpose.

4           Sorry, Your Honour. I'm just going to ensure that  
5           there's nothing left for me to deal with on this point  
6           before I move on. Yes, Your Honour. I should also add  
7           that that observation about the absence of the words 'up  
8           to' only applies in the context of terrestrial snakes and  
9           arboreal snakes. For crocodiles, it's for small  
10          specimens. 'Up to two specimens' can be maintained in the  
11          enclosure.

12 HER HONOUR: Yes.

13 MR CHAILE: Your Honour, I note the time. I will be brief with  
14          the remaining per number grounds, unless Your Honour has  
15          any further questions on the specific grounds.

16 HER HONOUR: No.

17 MR CHAILE: Your Honour will be aware that a number of the  
18          forms of relief sought by the plaintiff are premised on  
19          this court sitting in judgment on the content of the code.  
20          Those prayers for relief and the grounds are set out in  
21          our written submissions, and we've addressed them in  
22          detail.

23          The fundamental point, Your Honour, is that this  
24          court does not sit in judgment on the wisdom or content of  
25          legislative instruments. The function of the court on  
26          judicial review, or in the exercise of judicial power more  
27          generally, is to determine whether or not the decision  
28          that has been made - to issue the directions notice - has  
29          been made within the bounds of legality. It is no part of  
30          that function for this court to express any view as to  
31          whether or not the code of practice is deficient because



1 it does not conform in some way to the plaintiff's  
2 expectations; nor would the court accept such an  
3 invitation, because the court is not sufficiently  
4 qualified to make that judgment.

5 HER HONOUR: Yes. I'm limited to looking at the application of  
6 that document by the decision maker, but not the wisdom of  
7 the document itself.

8 MR CHAILE: Yes, Your Honour. And we've set out a number of  
9 High Court authorities which confirm that limitation on  
10 the ample exercise of judicial power. Your Honour, there  
11 is a complaint that the directions notice is infirm in  
12 some way because of the Department's refusal to answer the  
13 questions asked by the plaintiff following its issue. We  
14 submit that that's not a ground of judicial review or a  
15 ground on which the notice can be vitiated.

16 HER HONOUR: Yes.

17 MR CHAILE: Your Honour, there is an argument that the  
18 directions notice is invalid because it breaches the  
19 concept of competitive neutrality. A simple point in  
20 response to that ground is that it doesn't identify any  
21 cause of action which would support any ground to relief  
22 to invalidate the directions notice, and so we say it can  
23 be put to one side.

24 And similarly, Your Honour, the complaint or the  
25 request that this court direct the Department to give the  
26 plaintiff a \$15,000 COVID grant is not a matter of  
27 judicial review, falls outside the scope of the  
28 proceeding, has no relationship to the directions notice,  
29 and no cause of action that would entitle him to that  
30 relief has been identified and, therefore, has been unable  
31 to be addressed by the Department.

1           Your Honour will be aware, from our written  
2           submissions, that this is the second occasion on which  
3           that relief has been sought. It was refused by the  
4           tribunal at first instance on the basis that the cause of  
5           action that the plaintiff, on behalf of his company,  
6           posited was not one available to him. At that point in  
7           time, the plaintiff submitted that this was not a  
8           governmental or administrative decision. It was a  
9           commercial decision, and now it's sought to be included as  
10          part of this proceeding, in a way where it hasn't been  
11          developed in any formal sense to enable the case to be met  
12          in any proper way. Your Honour, I've got one final matter  
13          with which to deal.

14 HER HONOUR: When you say that that matter was dealt with in  
15          the tribunal, and you mention that in your reasons - - -

16 MR CHAILE: Yes.

17 HER HONOUR: Which tribunal?

18 MR CHAILE: The Victorian Civil and Administrative Tribunal,  
19          Your Honour.

20 HER HONOUR: Which decision?

21 MR CHAILE: Sorry, the application that the plaintiff brought  
22          against Agriculture Victoria and the Minister for  
23          Agriculture, for that grant to be given to him.

24 HER HONOUR: Okay, yes.

25 MR CHAILE: The citation is in the written submissions, Your  
26          Honour.

27 HER HONOUR: No, that's fine. Thanks.

28 MR CHAILE: Your Honour, before I sit down, the final matter  
29          was the call for the bodycam footage. My instructions are  
30          that that call is resisted. It is resisted, Your Honour,  
31          on the basis that that footage was not reviewed by the

1 decision maker and was not before the decision maker at  
2 the point in time at which he made the decision to issue  
3 the directions notice. It is not referred to in in the  
4 directions notice. It had no bearing on the decision that  
5 was in fact made and that is the subject of review in this  
6 proceeding.

7 HER HONOUR: Okay. As I understood Mr Hoser, the reason for  
8 the call was to use that footage to support the submission  
9 that he makes in the affidavit that I think he's sworn  
10 about the absence of any mention of the possibility of a  
11 directions notice during the inspection on that day, and  
12 his submission was that it was organised for an audit as  
13 to the numbers.

14 MR CHAILE: Yes.

15 HER HONOUR: So that was the basis upon which he called for it  
16 in the absence of it being produced, for the reasons that  
17 you've said it would be open for me to draw an inference  
18 that that footage would support the argument that he  
19 makes, if I chose to draw that inference?

20 MR CHAILE: In my submission, that inference would not be open,  
21 Your Honour.

22 HER HONOUR: Because?

23 MR CHAILE: It's in the nature of a Jones v Dunkel inference.  
24 The inference in the Jones v Dunkel sense is that the  
25 evidence would not have supported my case, not that it  
26 would approve or support the contrary proposition. And  
27 moreover, Your Honour, that call is made on the second day  
28 of a hearing that was commenced in December without any  
29 notice. My client has had to deal with it at short  
30 notice, and so we say that no Jones v Dunkel inference is  
31 available to the court in that respect. It also overlooks

1 a point that I've made multiple times in my submissions,  
2 which is that the statute itself provides ongoing notice  
3 as to the purpose of an inspection.

4 HER HONOUR: Yes. I haven't overlooked that submission, and  
5 I understand that. But particularly given that Mr Hoser's  
6 not represented, I thought I should at least ventilate  
7 what might flow from the resistance to that. Or - - -

8 MR CHAILE: Well, Your Honour, I think to assist the  
9 court - - -

10 HER HONOUR: Not saying one way or the other what I would  
11 necessarily do.

12 MR CHAILE: No, of course.

13 HER HONOUR: But to simply ventilate it.

14 MR CHAILE: Your Honour, on that - to assist the court and  
15 given that we are a model litigant, Your Honour, it would  
16 be open for Your Honour to infer, if Your Honour  
17 considered it relevant, noting our position that it's not  
18 relevant, that the evidence before the court does not  
19 provide any indication one way or another as to the  
20 matters that have been raised by the plaintiff. So it's  
21 not addressing Ms Waterson's affidavit, for example. Your  
22 Honour may draw an inference from that, if Your Honour  
23 wishes. We say no inference is available because it's  
24 irrelevant, but I do wish to draw that to Your Honour's  
25 attention because I feel like it's my duty to do so, as an  
26 officer of the court.

27 HER HONOUR: All right.

28 MR CHAILE: Thank you, Your Honour.

29 HER HONOUR: Thank you, Mr Chaile. Mr Hoser, would you like a  
30 five-minute break before commencing reply?

31 MR HOSER: No, I - I think we all want to get this over in

1 terms of the hearing side. I'd rather just continue, if  
2 that's okay.

3 HER HONOUR: All right. Well, as I said to you yesterday, the  
4 reply is really to - - -

5 MR HOSER: Deal with what this gentleman (indistinct).

6 HER HONOUR: - - - dot-point clarify any issues.

7 MR HOSER: Yes. Yes, I understand that, Your Honour.

8 HER HONOUR: Okay.

9 MR HOSER: And I will be relatively brief. I'm going to start  
10 with the last bit first. Ah, the - my learned gentleman  
11 said that the bodycam footage will have no relevance to  
12 Mrs Waterson's affidavit. Well, in actual fact, it does.  
13 In the raff, she reports what she observed. 'I observed',  
14 and 'These are my observation inquiries'. The bodycam  
15 footage - bearing in mind, she was wearing a body camera -  
16 will show what her and her associated officers, including  
17 the decision maker himself, saw.

18 To that extent, the bodycam footage would be  
19 extremely useful to both yourself, and myself, in  
20 determining the veracity of the claims. Ah, she's put in  
21 her affidavit what she's observed, um, that has been  
22 relied upon by the decision maker and they've acted as a  
23 pair, and they spoke as a pair on the phone to me. And,  
24 ah, to that extent, it is relevant. So I was surprised  
25 that my learned lawyer said her affidavit didn't mention  
26 the bodycam footage or had no relevance to it, when in  
27 actual fact, her exact words were, 'I made the following  
28 observations'.

29 Well, the bodycam footage will show exactly what her  
30 observations were, and quite tellingly, the bodycam  
31 footage will also show the fact that we had the outdoor

1 cages to provide the UV to the relevant reptiles and  
2 frogs, ah, which they would have captured in their  
3 bodycam. Ah, their bodycam footage would have shown the,  
4 ah, temperature control and heating systems in the cages,  
5 their measurements and observations of heat gradients.

6 Um, or, ah - what's the word - temperature gradient,  
7 heat gradient, which ever term you wish to use, in those  
8 cages, which would effectively negate some of the things  
9 in the directions notice. So I maintain my call for the  
10 bodycam footage and I - I'd appreciate, if possible, you  
11 could make that direction.

12 HER HONOUR: Given the lateness with which the call has been  
13 made for the bodycam footage and given that the  
14 photographs that are before the court have not been  
15 challenged as to accuracy, and apart from one photograph,  
16 neither party's drawn my attention to anything in those  
17 photographs in particular, I'm not going to make a  
18 direction that the respondent produce the bodycam footage.

19 MR HOSER: Okay. How I pressed that. Now, Your Honour, quite  
20 a bit of what my learned gentleman said in his submissions  
21 is actually covered in his written submissions, and he  
22 repeated it, and he actually repeated a number of claims  
23 that were in fact refuted in my follow-up submissions that  
24 were tendered as recently as yesterday. Um, so if we  
25 just - - -

26 HER HONOUR: Yes, and insofar as both parties have spoken to  
27 their written submissions, I've since had an opportunity  
28 overnight, Mr Hoser, to read the submissions that you  
29 filed yesterday. I hadn't had an opportunity when you  
30 were speaking yesterday, but I have now read those, so  
31 I should probably let you know that, that I have done

1           that.

2 MR HOSER: Thank you, Your Honour. Yep, that's good.

3 HER HONOUR: And to the extent that those submissions, in  
4           detail, address the written submissions of the defendant  
5           and the matters that have been repeated in oral  
6           submissions today, I have that material.

7 MR HOSER: Good. And so, like, mere minutes ago, ah, my  
8           learned friend said I want the - he says, 'Hoser wants the  
9           court to engage in a merits review'. Now, he said that in  
10          his written submissions repeatedly, and in my submissions  
11          of yesterday, I made it point-blank clear that is not the  
12          court's requirement and that is not the intention of this  
13          judicial review.

14                 I mean, I don't think it takes rocket science to  
15          realise that their - their - their directions notice  
16          lacked merit, but that's not the function of the court,  
17          the purpose of the court, and it's not our application.  
18          So I thought it was a bit - bit rough, a bit - bit rude  
19          for him, shall we say, to have mentioned that this time.  
20          Now, in terms of the issues that have been raised, first  
21          and foremost - and I'll try to run in sequence from  
22          yesterday.

23                 Um, the, um, ah, it was raised, the issue of this  
24          code of practice. Now, I've got, ah, the code of practice  
25          in front of me, ah, and I don't know what page it is in  
26          the court book so I'm not looking at it in the court book.  
27          But, ah, I've got it in front of me, and it says in bold  
28          type, 'Code of Practice for the welfare of animals -  
29          private keeping of reptiles.' Now, I then went to the  
30          Agricultural Victoria websites yesterday, and I've emailed  
31          the - the court and the parties a link, and I think there

1 were 33 other codes relating to all and sundry; zoo  
2 animals, circus animals, animals in ill health, wildlife  
3 rescue animals, et cetera.

4 And they have definite requirements, quite - quite  
5 notably in terms of things such as cage sizes and all  
6 sorts of things. I would also contend that this Code of  
7 Practice does not apply to us, because we are wildlife  
8 demonstrators. Our uses and requirements for the animals  
9 are quite starkly different to an animal in a zoo where  
10 they're in public display cages, which ours are not, where  
11 there is a - a requirement by law to have naturalistic -  
12 large naturalistic cages in zoos, which we're not - we -  
13 doesn't apply with us.

14 HER HONOUR: Yes.

15 MR HOSER: We need cages where we have 24/7 access to our  
16 reptiles for a swag of different reasons, besides the  
17 management advantage and - - -

18 HER HONOUR: I understand that's the ground that you added  
19 yesterday.

20 MR HOSER: Yeah. So I'm just drawing your attention,  
21 Your Honour, to the fact that on that website, which I've  
22 emailed the link to the court and to the other side, there  
23 are 33 conflicting codes. And they do include the same  
24 kids of animals, as in reptiles and frogs, that we have,  
25 with very different requirements. So to that extent, we  
26 may be able to strike the whole - strike out this  
27 directions notice, simply because it was issued in  
28 relation to the wrong Code of Practice or a non-applicable  
29 Code of Practice. Now, in my original affidavit  
30 I tendered an exhibit.

31 HER HONOUR: Just before you move off that point, I've not seen



1           that link yet. Mr Chaile, do you have any objection to me  
2           receiving and looking at that link?

3 MR CHAILE: No, Your Honour.

4 HER HONOUR: Thank you. All right. Mr Hoser, sorry. Your  
5           next point was - you were able to tell me.

6 MR HOSER: In - yeah. In my earlier affidavit, I think it's  
7           the first affidavit, of December, there's a picture of  
8           some snake cages from the book Smuggled-2, which is  
9           indirectly linked from the Code of Practice website that  
10          we were directed to for what you received the printout in  
11          the directions order. And that particular - it is  
12          referred to in my written submissions. But they - that  
13          has cages in what we would call a rack system, which is  
14          what we have. And they are described as the best  
15          available cages for snakes.

16 HER HONOUR: By whom?

17 MR HOSER: And - in the book, myself. But the book was dated  
18          1996. The picture is from 1993. And that is actually  
19          linked from - you can - you - you find it via links at the  
20          bottom of the page of the Code of Practice, which is, in  
21          turn, directed - those - those references are directed  
22          from paragraph 1 of the Code of Practice to the references  
23          at the bottom, which in turn link to that particular  
24          publication. So the Code of Practice and associated  
25          documents are linking to a - a document which I have  
26          copied in that book of yours - in my - in my affidavit,  
27          sorry, of cages effectively identical to mine.

28                 They're identified as being in the United States.  
29          The publication was from 1996, and they are identified,  
30          which predates me having any reptiles in Victoria. I had  
31          no live reptiles at the time that book was written, so

1           there's no - it's not like I've rushed out and got that  
2           photo and made the comments, you know, thinking of a - of  
3           a court case a quarter of a century later. That - you  
4           know, that's clearly an unbiased, expert opinion at the  
5           time. And just bear with me. I'll try to find the  
6           reference page for it. That's not helping me, sorry.

7   HER HONOUR: It's 193, I think, in the court book.

8   MR HOSER: You're telling 193? Sorry, Your Honour, I've got so  
9           many - I've got a few documents here open.

10   HER HONOUR: That's all right.

11   MR HOSER: Court book - did you say p193?

12   HER HONOUR: Yes, yes. 193, I think.

13   MR HOSER: Yes. So, yeah, you've got it, Your Honour, you're -  
14           you're a step ahead of me.

15   HER HONOUR: Yes.

16   MR HOSER: So that - they're essentially similar to what you  
17           can see. And you can actually - if you look closely at  
18           some of those pictures you'll see the reptiles in the  
19           cages so you get the size comparisons. And you will see  
20           the sheer number of animals. And they actually comply  
21           with the code because they comply with things such as  
22           easily cleaned, which is important, no dominant - no - no  
23           issues of dominance and threat because there's not  
24           multiple animals per cage, and security.

25           Now, in those cases, if you have a look at them,  
26           they will not - they - those cages there do not have lids  
27           and they are not lockable. So to that extent they do not  
28           comply with the code. Now, it was drawn to your attention  
29           that the venomous reptiles in particular specified at both  
30           cages and building need to be lockable. And, of course,  
31           if you go to the photo that my learned friend sent you to

1 in the bundle of pictures in - in the second affidavit of  
2 Watterson - I think that was page - the snake on p161 or  
3 something. Do you remember the page that it was referred  
4 to, Your Honour?

5 HER HONOUR: I'm just looking for my note of it. It was 165.

6 MR CHAILE: Your Honour, it was court book 581.

7 HER HONOUR: 581.

8 MR HOSER: If you go to court book 581, now, the snake in the -  
9 in the box is a python. Oh, no, I'm looking at the wrong  
10 picture, sorry. Yeah. 50 - yeah, okay. That's fine.  
11 The book is a python, but I don't think it will be  
12 disputed that the venomous snakes are much the same.  
13 We'll go down to p594, and you'll see two tiger snakes and  
14 a copperhead on that page in identical cages. But if we  
15 go back to 581.

16 HER HONOUR: Sorry, just you're jumping around a bit too fast  
17 for me. So 594 is a photo of a copperhead.

18 MR HOSER: Three venomous - three photos of three venomous  
19 snakes in identical cage.

20 HER HONOUR: 594, 595, 596.

21 MR HOSER: Yeah.

22 HER HONOUR: Yes, okay.

23 MR HOSER: Now, if we go back to p581, and - well, actually -  
24 oh, yeah, that's right. I've shrunk the pages, sorry.  
25 Yeah. Page 581 of that particular snake, I just want you  
26 to notice certain things there: the construction of the  
27 cage, the construction of the paper as a substrate, easily  
28 cleaned. There's no obvious faeces or mess in there. The  
29 water in the water bowl is clean, the water is not being  
30 spilt. There is a hide which is of the appropriate size  
31 for the snake. So all the necessary requirements. You

1 can have a look at the surface and the edges of the cage.

2 There's rough surfaces on the - - -

3 HER HONOUR: Sorry, can I just stop you there. When you say  
4 there's a hide, what are you referring to?

5 MR HOSER: You'll see that cut-up bucket that the snake is  
6 sitting on.

7 HER HONOUR: Yes, the circular elevated platform?

8 MR HOSER: Bucket, yes, yes.

9 HER HONOUR: Yes.

10 MR HOSER: Now, just bear with me. No, that didn't work. If  
11 you - I'm trying to show you. I'm just going to find  
12 another one just to - to confirm what we have, actually,  
13 just to confirm the nature of these buckets. Now, I will  
14 actually draw your attention, actually, to p566, 566.  
15 I want to address a few different concerns while we're  
16 here. They are referred to by (indistinct) material, but  
17 it's good that the IT walked me through it, because the -  
18 the other side's raised it. Those particular snakes were  
19 moved in those cages for the purposes of the inspection.

20 They're not permanently in those cages in this,  
21 'cause the other cages were unlabelled, and because of  
22 time constraints it was easy to put them in those cages  
23 for short-term rather than relabelling all the - all the  
24 larger cages. But those snakes are normally kept in the -  
25 they're quite happy in those small cages, but they're  
26 normally in the other cages, which are similar to those  
27 other ones I showed you. But what I draw your attention  
28 to is you'll see some faeces in one of those pictures in  
29 the cage. So if you look at p570 - - -

30 MR CHAILE: Your Honour. Your Honour, I'm loathe to stand up,  
31 but I really must object at this point. We have sought to

1 have been as unobstructive as possible. I did not take  
2 the court to this picture or any of - save for one  
3 picture. That wasn't the purpose of demonstrating that  
4 the jurisdictional fact could be satisfied. This really  
5 isn't another opportunity for the plaintiff to make  
6 submissions - - -

7 MR HOSER: Okay, I hear you, I hear you. But, look, if I can  
8 just cut it short, go to page - - -

9 HER HONOUR: Yes, all right.

10 MR HOSER: If you look at p559, and you'll see that's a  
11 venomous snake in the same cage as the one that our  
12 learned friend took the - took you to.

13 HER HONOUR: Same sort of cage?

14 MR HOSER: You'll see the - yeah, you'll see in p559, which has  
15 got a black snake in there, which is a venomous snakes,  
16 you know, covered by venomous regulations - you'll see the  
17 hide there, the cut bucket. And I what I want to draw  
18 your attention to is on the far-left side of the picture,  
19 you can see that there's actually a cut arch. It's like  
20 an arch shape or gap and all those buckets, in every cage,  
21 has that.

22 Now, I'm showing that to you so understand what  
23 these structures are. They are actually hides. I did  
24 describe them yesterday in the hearing but of course I'm  
25 talking about something I deal with every day and know  
26 about. You as a judge may not be aware of what I'm  
27 talking about. So every - all these white bucket things  
28 you'll see in every photo, they are actually hides where  
29 the snakes can go. Does that make sense?

30 HER HONOUR: So they can either be on top, as you see in the  
31 photo, or they can go underneath it?

1 MR HOSER: That's correct. They can go in, on top of it,  
2 around it - whatever.

3 HER HONOUR: Okay.

4 MR HOSER: It performs a function like a high log, like a rock,  
5 that the advantages, as I've mentioned to you before, are  
6 that they are solid and secure so they give the snake a  
7 sense of security if they seek it. And they are not so  
8 heavy that they can injure themselves if they get caught.

9 HER HONOUR: Let me, by reference to the photo that Mr Chaile  
10 took me to, of 581 the bucket upon which the back half of  
11 the snake is sitting, the elevated surface - although  
12 I can't see it in that photo - there is provision for the  
13 snake to get in and underneath that?

14 MR HOSER: That's correct, that's what I'm trying to tell you.  
15 That's what I'm trying to tell you, right? Now, the other  
16 thing I want to - - -

17 HER HONOUR: I understand that clarification, yes.

18 MR HOSER: Now, if you have a look at this picture as well,  
19 you'll see on the right-hand corner of the box - or  
20 actually at the end of the box but at the right-hand  
21 corner of the photo - you'll see what looks like black  
22 material attached to the box. Do you see that?

23 HER HONOUR: Is that the black line along the end of the box  
24 there? Is that what (indistinct words)?

25 MR HOSER: Yes, yes, you'll see a black line and a horseshoe.

26 HER HONOUR: Yes.

27 MR HOSER: Now, they are actually clips. So if you look at the  
28 wildlife officer's hand, to the right of that you'll see  
29 one of those shut in the shut position. Do you see that?  
30 They are - the white one, the white - you see the wildlife  
31 officer's hand in the same photo, on the - from me looking

1 at the picture at the right side and you'll see a white  
2 topped snake cage next to it in the rack. You see that?

3 HER HONOUR: Yes, I see that. There's two or three, one on top  
4 of the other.

5 MR HOSER: Yes. And you'll see in that - in those cages, they  
6 are clipped shut. Do you see that, Your Honour? They are  
7 clipped shut.

8 HER HONOUR: I do.

9 MR HOSER: And they are locked shut and they are not easily  
10 opened. They can't just be bumped and opened. They  
11 actually have to be physically grabbed and opened. They  
12 are locked.

13 HER HONOUR: So when you say locked, you mean that by that that  
14 the clip in the closed position keeps it closed?

15 MR HOSER: Yes, it is locked shut. You can't just lift the lid  
16 off. It is locked shut.

17 HER HONOUR: Yes.

18 MR HOSER: And secondary to that, you can see the rack that  
19 they are placed in, each shelf level is flushed to the  
20 lid.

21 HER HONOUR: Yes, I understand. I do see that and I understand  
22 your point that - - -

23 MR HOSER: That is a double lock mechanism that they can't even  
24 be opened until they are physically removed from the rack.

25 HER HONOUR: Yes.

26 MR HOSER: Now, relevant to the code of practice, you'll see  
27 that in most of the cages - although there's obviously  
28 been movement to move snakes and things in these pictures  
29 - you'll see a trend that the cut bucket is at one end and  
30 the water bowl is at the reverse end. So cage - the photo  
31 we're looking at it is not a good example but invariably,

1 even if you look at the original affidavit of Waterson  
2 you'll see they're at opposite ends. The water bowl is at  
3 one end, and the hide is at the other and that hide is at  
4 the warm end of the cage, where the heating system is.  
5 The heating system runs underneath. Now, going back to  
6 photograph on p581 - is that where we're at, 581? Is the  
7 right - yes, 581.

8 HER HONOUR: Yes, 581.

9 MR HOSER: Yes - back there, at the very bottom in the centre  
10 of the picture just left of 581 you will see a black  
11 (indistinct) at the bottom of the box. So you'll see the  
12 line of the plastic and a black bit and you'll see another  
13 black bit up near the hook. You see those black bits at  
14 the bottom?

15 HER HONOUR: I do.

16 MR HOSER: They are wheels.

17 HER HONOUR: Yes, and there's - - -

18 MR HOSER: So the actual boxes - and even if you look in the  
19 picture, if you look at the ones in the rack, you'll see  
20 that the bottoms of each of the boxes are not sitting on  
21 the wood or whatever that material they're made out of is.  
22 Actually there's a gap there and the reason, Your Honour,  
23 is those boxes are on wheels and they slide across - they  
24 slide into there and at the back of each of those racks,  
25 there are heating systems which have been - which do  
26 appear in other images. I'll find one. But they're  
27 what's known in the industry as a heat mat, which is a  
28 standard item sold to people like us, by people we tell  
29 these things - - -

30 HER HONOUR: A heat mat, did you say?

31 MR HOSER: It's called a heat mat. Now, they are described in



1 detail in an article that's in one of my affidavits, the  
2 system use. It's the copperhead, the one page with the  
3 copperhead. And so the actual system is quite well  
4 described. Now, the wildlife officers in turn measured in  
5 every cage with a heat gun temperatures at each end. So  
6 they were well aware that there was a heating system in  
7 play for every cage, which meant it wasn't available to  
8 them to find that we did not have that.

9 That's why their - why their findings, for one of  
10 many reasons, why their findings could not - they weren't  
11 tenable. They weren't tenable findings. Now, just to  
12 make it clear, Your Honour, I am referring in this case to  
13 every photo that they have tendered because pretty much  
14 without exception they will show clean water bowls that  
15 are unspillable, hides that are appropriate for snakes and  
16 every possible necessary requirement that the snakes need  
17 and I'm drawing attention also to the numerous snakes -  
18 and you're probably not an expert but you'll see that  
19 they're all in good condition, not too fat, not too thin.

20 HER HONOUR: I'm not going to be making any judgments about the  
21 welfare of the snake from their appearances. It's not my  
22 role and not my expertise so we don't need to go there.

23 MR HOSER: Okay, but you just - I'm just - okay, but as you  
24 look at all the pictures they all have clean water in  
25 accordance with the Act, they have - everything is  
26 provided. I'll draw your attention now, Your Honour, to  
27 pictures 544, 546, 543, 542, 541 as examples. Those  
28 snakes are adult snakes and they are offsprings of the  
29 adult carpet python in the affidavit of Lucille Waterson  
30 in her first affidavit of the large snake that was  
31 pregnant at the time again for the fourth time, that she

1           photographed.

2   HER HONOUR: Mr Hoser, I'm not sure that this is really a  
3           matter of reply. It's not clarifying anything for me.

4   MR HOSER: Okay, okay.

5   HER HONOUR: It's really giving further evidence.

6   MR HOSER: This is all information that they had but it shows  
7           that they were well aware at all times that all the  
8           essential requirements pursuant to parts 1 and 2 of the  
9           code of practice were covered. Now, I won't go further  
10          with that. Now, if I can just quickly go through a few of  
11          the issues raised by my learned friend. He was talking  
12          about cage sizes. Now, if you go to part 3.31 - now I've  
13          got to find the code of practice again, sorry. There we  
14          go. If we go to - just bear with me for a sec. If we go  
15          to 2.1 and 2.2 of the code of practice it says - and this  
16          is - we're talking crocodiles now - - -

17   HER HONOUR: Okay, well, I'm in the reptiles one so - - -

18   MR HOSER: No, you're in the reptiles code, that's the place to  
19          be. General requirements: 'Welfare of the captured  
20          reptiles must always be viewed as a high priority in order  
21          to safeguard them from disease, injury and stress'.

22   HER HONOUR: Yes.

23   MR HOSER: It then goes on. At no.2 it says, 'All reptiles  
24          held by private keepers must' - so there's no - there's no  
25          - there's no wiggle room here, Your Honour. This is the  
26          Code, and there is no wiggle room - 'must be provided with  
27          temperatures, humidity and light cycles that are  
28          appropriate to the species and allow normal physiological  
29          functioning and behaviour.'

30                  There is no negotiation on that, Your Honour. And  
31          yet my learned friend has said some of these later things

1 take priority, even if they compromise that. And he's  
2 turned around - there is no conflict because the later  
3 parts will, in effect, provide for parts 1 and 2. Now, if  
4 we now go down to 'Crocodiles' in the Code, wherever  
5 Crocodiles are. It's - - -

6 HER HONOUR: 3.1.5.

7 MR HOSER: Thank you, Your Honour. 3.1 - I'm not so  
8 experienced in reading these legal documents. The  
9 crocodiles, it says - and we go to some - there's not a -  
10 3.315. Somewhere there was a reference to - I know where  
11 I found it. It was in the - there's a section here which  
12 talks about the temperature of the water, and it's not  
13 there. It must be in temperatures, I assume.

14 There's enclosures. Temperature. Right. Okay.  
15 3.315. Yeah. It says, 'Water temperature in enclosures  
16 with crocodiles are held should be within the range of 26  
17 to 28 c.' Now, firstly, Your Honour, the word 'should' is  
18 not 'must'. By logic, the word 'must' would have to take  
19 precedence over the word 'should'.

20 HER HONOUR: Yes.

21 MR HOSER: Secondly, 26 to 28 Celsius will result in dead  
22 crocodiles. Therefore, it is obvious, besides the defect,  
23 that in order to comply with the Code, the overriding  
24 earlier 'must' - which will maintain the health and  
25 welfare of the animals in accordance with the Wildlife Act  
26 and the Wildlife Regulations, for which the Code of  
27 Conduct is subservient to, would have to have priority  
28 over an erroneous direction where - which is only an  
29 optional one, it's not a mandatory one - of dropping the  
30 temperature down by four degrees to kill your crocodile.

31 And significantly, Your Honour, in their directions

1 notice for the crocodiles - so if you go to the directions  
2 notice of the crocodiles, they've got the observation of  
3 my crocodile's temperatures - and I don't have that in  
4 front of me, but I wrote it down as my learned friend was  
5 - was talking about it. It says that they observed my  
6 crocodile cage temperatures were around the 30-degree  
7 mark, plus or minus a degree or two. And they said it  
8 conflicts with the Code that says it's gotta be down to 26  
9 or 28, and I've got to dial down the temperature.

10 Now, again, that alone is a good example of the  
11 illegality of the directions order. It is contrary to the  
12 Code, and therefore, there is - because the order is made  
13 ostensibly in light of the Code, or in line with the Code,  
14 and yet it's contrary to the Code, that could not have  
15 been made. And again we see, Your Honour, we're back to  
16 the two point - the general requirements. 2.22, there is  
17 no (indistinct) here. One - well - we'll go to one. It  
18 says, 'Welfare of captured reptiles must always be viewed  
19 as high priority in order to safeguard them from disease,  
20 injury, and stress.' That's what we so.

21 HER HONOUR: Yes.

22 MR HOSER: Number 2: 'All reptile (indistinct) must be  
23 provided.' We're going further down. We're going to the  
24 word - - -

25 HER HONOUR: No. Yes. Mr Hoser, I understand the point that  
26 you make, that it's the constructional point that  
27 Mr Chaile addressed me on about the specific and the  
28 general, and you say there's also an interplay between  
29 things that are mandatory and things that are not.

30 MR HOSER: Correct. Correct. Now, with regards to cage sizes,  
31 the issue of cage sizes is it's not physically what you

1 put in a heat gradient and so forth, because you can have  
2 a heat gradient in a very small cage. And that's not an  
3 issue. The issue - 'cause you can have what's called a  
4 heat cord, Your Honour, which is as thin as a pen, which  
5 is an item you can purchase. You can write the word down.  
6 Heat cord. Google it.

7 The reality is though, Your Honour, the issue of  
8 cage sizes comes into play when there's multiple reptiles,  
9 because they don't like each other. And this is referred  
10 to throughout in the Code of Practice. Now, you go to  
11 3.31 - sorry - (indistinct words). Just trying to find  
12 where I wrote it down. But the interplay - just bear with  
13 me. Sorry, Your Honour. Just - I've just - my hand's  
14 just passed over some button on this computer and just  
15 sent things haywire. Okay.

16 Now, in the terrestrial snakes, for example, is the  
17 wording - they talk about - at 3.12, it talks about, 'As  
18 soon as any signs of dominance related stress becomes  
19 apparent.' The same is referred to arboreal snakes.  
20 Further up, they talk about - with lizards again -  
21 overcrowding of cages.

22 At General Requirements, it talks about sharing  
23 reptiles at 2.6: 'Care must be taken when introducing' -  
24 sorry. No. Sorry. 'Care must be taken when introducing  
25 a reptile to an enclosure, including consideration of any  
26 effects this may have on the introduced animal, as well as  
27 any reptiles already occupying the enclosure.' And at  
28 cages for sizes - and we're getting to the must again.  
29 'The cage must be of sufficient size so as to provide  
30 enough space, both horizontally and vertically, to enable  
31 the exercise - animals to exercise, and to protect animals

1 from undue dominance and conflict.'

2 HER HONOUR: Yes.

3 MR HOSER: Now, Your Honour, as it happens, in case it's been  
4 missed, snakes do not verbalise, they do not communicate.  
5 They cannot tell us what they're thinking and saying and  
6 doing in a normal, coherent, verbal way. And if you've  
7 ever observed snakes in the wild, and lizards in the wild  
8 as well, but in particular, snakes, you never ever see  
9 them as a - as a rule, you never see them together. They  
10 don't like their own kind. So that is the constraint on  
11 cage sizes. Not the ability to protect of thermal  
12 gradient hiding spot, or water. They're not - they're not  
13 constraints. They - you can fit them in - in - in  
14 literally a matchbox. So - - -

15 HER HONOUR: So your point about cage sizes is that they  
16 address two issues. One is the space needed for exercise,  
17 and the other is the issue about the fact that snakes  
18 don't like each other's company.

19 MR HOSER: That's the - that's the - that's the (indistinct)  
20 factor.

21 HER HONOUR: Yes.

22 MR HOSER: Because snakes also don't like being in the open,  
23 which is why they do better in small cages. Now, this has  
24 been established scientifically for decades now, and this  
25 is why every facility, including Zoos Victoria, ourselves,  
26 Australia Zoo, all keep reptiles in rack systems in cages  
27 of relatively small size, because they do better in them.

28 HER HONOUR: Yes. But - - -

29 MR HOSER: They don't like being in the open, and the first  
30 thing they do - - -

31 HER HONOUR: But my role is not to decide what the guidelines

1           should be. My role is to say whether or not the decision  
2           maker has applied the guides correctly.

3 MR HOSER: Well, the decision maker also has it encumbered upon  
4           them to be aware of the Code, and the Code is: 'General  
5           Requirements: Welfare of the captured reptiles must  
6           always be viewed as a high priority in order to safeguard  
7           them against disease, injury, and stress.' Part 2: 'All  
8           reptiles held by keepers must be provided with  
9           temperature, humidity, and light cycle (indistinct words)  
10          the species and allow normal physiological behaviour.'

11 HER HONOUR: Mr Hoser, the clarification is good - - -

12 MR HOSER: Yes. Yes, Your Honour, sorry. This is - this is  
13          mandatory.

14 HER HONOUR: Yes. No, you've clarified your submission in  
15          relation to the - - -

16 MR HOSER: The decision maker has to run on that.

17 HER HONOUR: - - - construction, and I'd be assisted if you  
18          moved to your next point.

19 MR HOSER: Okay. So, Your Honour, those two, which are the  
20          overriding - overarching themes of the Code, our cages  
21          comply wholly with that Code. And that has been the  
22          understanding for most of the past 20 years, bearing in  
23          mind that the cages have not been changed, we have not  
24          been served with any directions notice in the past 20  
25          years, and the animals have continued to thrive and breed.  
26          Now, I'll leave that for the moment, and I covered it in  
27          more detail. Now the - my learned friend - just sorry,  
28          Your Honour. Okay now, bear with me. The bad faith is  
29          even continued into the way they have run their  
30          proceedings, Your Honour.

31 HER HONOUR: No. I am not going to entertain a submission that

1 bad faith is demonstrated by the way this proceeding has  
2 been run.

3 MR HOSER: Okay. In terms of the Court of Appeal ruling that  
4 was cited and quoted from in 2014 - in December 2014,  
5 which has now been tendered to the court, what my learned  
6 friend chose to do was not read certain paragraphs that  
7 were very relevant to those proceedings. And so I ask you  
8 to read that judgment in full. And the reason, Your  
9 Honour, is the sections that were ignored were how that  
10 case come to court. What had happened is I was not served  
11 a notice of a judgment being handed down in September of  
12 that year. So - - -

13 HER HONOUR: Mr Hoser, I will read the judgment in full, and  
14 insofar as it explains those things I will take them into  
15 account.

16 MR HOSER: And the Department lied to the court in relation to  
17 my licencing status, and they actually refer to that in  
18 their judgment of December. And say 'it is regrettable  
19 were not advised of to the licencing arrangement of  
20 Mr Hoser in the 2012 to 2014'. And that deliberate lie -  
21 so - - -

22 HER HONOUR: Now, do you want to point me to the paragraph that  
23 you are talking about?

24 MR HOSER: I will have to bring it up, just bear with me. One  
25 moment, Your Honour, I will have to - the easiest way for  
26 me to find it is through AustLII. Now - - -

27 HER HONOUR: You probably don't need to.

28 MR HOSER: No, I've got it.

29 HER HONOUR: Because I will read the whole decision.

30 Paragraph 18, 17 and 18?

31 MR HOSER: Yes. You're in the right area, Your Honour, where



1           they - yeah, 17 and 18, that general of the judgment.

2   HER HONOUR:   Yes.   Okay.

3   MR HOSER:   So they did not tell the - so the court has handed  
4           down a ruling in my favour, and I am not present.   And the  
5           Department has said 'Well, Raymond Hoser is not licenced,  
6           don't worry about it'.   So they just simply said 'Right,  
7           the Board opposes favour, go home'.   And, of course, what  
8           the Department had done quite scurrilously is, in 2012,  
9           when the half bench or two members of the Court of Appeal,  
10          allowed me to trade, renew my licences, the Wildlife  
11          Department refused to renew the licences.   And they said,  
12          'We will treat you as being licenced'.   But then they  
13          issued physical licences as well.

14                 So I did have licences in that 2012 to 2014 period,  
15          and they had actually lied to the court and said I wasn't  
16          licenced.   But I had bits of paper which had 'licence'  
17          written at top.   So then the Department said, 'You have  
18          got to re-apply at VCAT to get your licences to trade with  
19          them'.   Which was not really what was operating.   We - you  
20          know, because the - because I just thought 'Well,  
21          I haven't been operating for two years, so who cares'.

22          And the Wildlife Department has - - -

23   HER HONOUR:   I'm sorry, Mr Hoser, but I have lost the thread of  
24           what the relevance of all of this is.

25   MR HOSER:   Okay.   The relevance is that my learned friend is  
26           trying to imply that I have - I have been a serial  
27           lawbreaker and I have been doing the wrong thing nonstop,  
28           which is the complete opposite of the reality.

29   HER HONOUR:   Okay.

30   MR HOSER:   And if you also read the ruling in full of the case  
31           in 2014 - in September 2014, which is in the appeal book,

1           you will see that the Department, in 2008 - no, sorry, in  
2           2006, made me spend \$40,000 purchasing what they called 'a  
3           pit'. In 2011, or 2009 - sorry, 2009, they then charged  
4           me - a criminal charge - of having illegal pit. Which  
5           ultimately they got convictions or findings of guilt,  
6           whatever the words were. I got fined \$8,000 for complying  
7           with their regulations. And that become the grounds for  
8           cancellation, or the primary grounds for the cancellation  
9           of my licence. And the eventual - - -

10   HER HONOUR: Again, Mr Hoser, I am struggling to relevance of  
11           these background matters to a reply submission.

12   MR HOSER: Okay. I - my submission is my learned friend has  
13           quoted from these judgments, cherrypicked sections out of  
14           context and completely misled you. If you read the  
15           judgments in full, not only will you see that I have done  
16           everything correctly at all times, but you will see that  
17           the actions of the Department at all materially relevant  
18           times have been dishonest, scandalous, twisting things  
19           around, creative interpretations of the law, and not in  
20           accordance with The Wildlife Act as written or its intent.

21   HER HONOUR: All right.

22   MR HOSER: Does that make sense?

23   HER HONOUR: Yes, it does. Thank you.

24   MR HOSER: Now, I don't have much to go. I am going to do my  
25           best to get through this as quickly as I can, Your Honour.  
26           Because I am aware - I - look, we have - we have all got  
27           to deal with this now. In terms of the res judicia, that  
28           is covered in law, in our submissions. But in a few  
29           words, or not many more, the relevant facts in the  
30           proceedings mentioned were indispensable. They were  
31           legally indispensable to the result.

1           Had the findings that my - I had breached the Code  
2 or been convicted or whatever, in terms of the diamond  
3 pythons and the other animals in the other proceedings -  
4 including the diamond pythons, because it was the same -  
5 it was the same facts every time, it was all facts on that  
6 rate. I wouldn't have got my licences back. I would have  
7 been convicted; I wouldn't have got my licences back.  
8 That is what we have.

9           It is the exact same fact. That is quite apparent  
10 from the video which has been tendered to the court, and  
11 you will see the same animals in the same cages in the  
12 same racks, and that is where we're at. So the res  
13 judicia does apply, or estoppel, whichever - however the  
14 wording is, it does comply. Now, in terms of procedural  
15 fairness, the claim of no immediate result of consequence  
16 is rubbish. \$1m plus to comply, charges for  
17 noncompliance, higher penalty for noncompliance, you know,  
18 in a court.

19 HER HONOUR: Yes.

20 MR HOSER: His case that it is an optional precursor - the  
21 description of 'optional precursor' - I use the word  
22 'optional precursor', but I thought it was a good summary  
23 of the way that my learned friend put it - unfortunately,  
24 you know, there were immediate consequences of that  
25 directions notice. And noncompliance - so penalty  
26 payments notice and it has zero consequences is rubbish,  
27 and I suppose that is best seen by the fact that they  
28 haven't withdrawn it. If it had no consequences they  
29 could have just said 'We will withdraw it and make it  
30 suggestions'.

31 HER HONOUR: That really is repeating the submissions that you

1           made in full yesterday.

2   MR HOSER:   Yep.

3   HER HONOUR:  It is not really adding anything or clarifying any  
4           matter.

5   MR HOSER:  Okay.  Fair enough, I accept that.  Now, in terms of  
6           the cancellation of the meeting with Mr - - -

7   HER HONOUR:  Johnson?

8   MR HOSER:  - - - Johnson in December, if you read all of those  
9           emails in full, in complete succession, you will get the  
10          idea as to why it was cancelled at the time.  It wasn't  
11          that I didn't want to meet with them:  it was to do things  
12          in a logical, sequential order.  And I also made numerous  
13          phone calls to speak to his superior offices in relation  
14          to the directions order, because he had made it quite  
15          clear that he wasn't interested in changing it.

16                 So there was - in the absence, and the phone call -  
17          which I have not tendered as evidence, but is referred to,  
18          and the other side haven't called for it, and it is  
19          referred to in my affidavit material - Mr Johnson said  
20          point blank he is not going to change the directions  
21          notice.  And he would not provide me, in writing, with  
22          what I needed to do to comply:  what cages to buy, where  
23          to buy them from.

24                 I repeatedly put that in writing:  where do I go to  
25          buy the cages, what are the cages that he wants, what is  
26          the substrates he wants, what's - I wanted everything, so  
27          there would be no room for them to - they didn't even give  
28          me - so basically they haven't even given me the  
29          opportunity to comply.  If they said 'Well, this, this and  
30          this', I might well have said 'Yes, I will comply'.  They  
31          have not given me the opportunity to comply.  And we are

1 back to the judgment of 2014 in the Supreme Court  
2 in September where the Department was held up, hauled  
3 across the coals, for not putting in writing what I had to  
4 do to comply. And we are back in that same position now,  
5 which makes the directions order illegal on that basis.

6 The directions notice is not intelligible, in that  
7 it is not in sufficient detail to comply with, point  
8 blank. Now, in one sense - and my learned friend said,  
9 'I think the intention is conveyed'. I think that was one  
10 of the words that he said. 'I think the intention is  
11 conveyed in the Code of Practice'. Thinking of intentions  
12 is not necessarily the written law.

13 And I think that the problem that we have with the  
14 Wildlife Department in terms of this whole proceeding, and  
15 what they are doing in relation to myself and the  
16 directions notice, is they have put a creative  
17 interpretation and cherrypicked and done a lot of mental  
18 gymnastics, that is the sort of thing you'd expect in  
19 North Korea, in order to push the case, when the reality  
20 is - is a literal interpretation of the directions notice  
21 in the important, most relevant parts shows complete  
22 compliance, which is obvious from the moment they entered  
23 the door and has been obvious at every time since.

24 And I highlight the sections with the crocodiles in  
25 temperature as a holotype example. They have - so we use  
26 the word pinged. They have pinged me because my  
27 temperature doesn't (indistinct) match an optional part of  
28 the code, and yet it does match the mandatory part.

29 Now - - -

30 HER HONOUR: Yes, but - - -

31 MR HOSER: That is - - -

1 HER HONOUR: That's a submission you've already made in reply  
2 and I understand it.

3 MR HOSER: Well, that's across the whole lot. I have only  
4 zoned in on the crocodile because that is - because  
5 they've got an exact number there, it's easy to fix. It's  
6 easily - we know what's going on there.

7 HER HONOUR: It's an easy illustration of the submission that  
8 you make.

9 MR HOSER: Yes, yes.

10 HER HONOUR: And I understand it.

11 MR HOSER: Now, he - mister - my learned friend had - says that  
12 they - the directions order in the code was used properly,  
13 but, unfortunately, in every aspect it refused to address  
14 2.1 and 2.2. Now, I will submit to you, Your Honour, that  
15 in terms of 2.2 of this code of practice, which is the  
16 basis - one of - bear with me for a sec. I'm going to try  
17 and see if I can find the - the - all right. Yes, okay.

18 In terms of the code of practice, s1 is just  
19 definitions of terms. General requirements. Of all the  
20 parts of this document, that is one part - because it's  
21 your - as what my learned friend said is the overarching,  
22 they should be familiar with it. Now, Part 2, which says,  
23 'All reptiles held by private keepers must be provided  
24 with temperatures, humidity and light cycles that are  
25 appropriate to the species' - they are the key words.  
26 That are - - -

27 HER HONOUR: Mr Hoser, we've talked at length about the  
28 questions of construction in the code itself, and I think  
29 you're becoming a bit repetitive in the submissions that  
30 you're seeking to make again.

31 MR HOSER: Okay, okay, okay, okay. In terms of lockable

1           venomous cages, just quickly, there is no definition as to  
2           what kind of lock there is. It doesn't have to be a  
3           padlock, electronic lock or keylock. My position is both  
4           the room, which is key locked, and the cage - - -

5   HER HONOUR: Yes, I understand your position.

6   MR HOSER: And that has always been the understanding across  
7           the industry. And bearing in mind the other requirement,  
8           that cages must be easily cleaned. I think it's under  
9           enclosures.

10   HER HONOUR: Yes.

11   MR HOSER: They've got to be cleaned and maintained - - -

12   HER HONOUR: Yes. That's a submission you made yesterday.  
13           I understand it.

14   MR HOSER: Now, it also mentioned - - -

15   HER HONOUR: Mr Hoser, can I just stop you there because the  
16           reply is not about you going through each point that was  
17           made against you and giving me your views about it.

18   MR HOSER: Okay, yes.

19   HER HONOUR: You're really limited to just, as you did with the  
20           photographs, clarifying something that might not have been  
21           made clear that arose in the course of those submissions.

22   MR HOSER: Okay, yes. Okay, yes.

23   HER HONOUR: So I don't want you to just go through and reply  
24           to each point. I want you to say, 'I need to clarify  
25           this', and then tell me what it is that needs  
26           clarification.

27   MR HOSER: Okay. Okay, Your Honour.

28   HER HONOUR: That's really what you're limited to.

29   MR HOSER: Okay. Look, in the concept of competitive  
30           neutrality, my position is that is a mandatory legal  
31           requirement of the Department. And my contention will

1 further be that any breach of competitive neutrality would  
2 clearly render the directions notice unlawful, and the  
3 whole process I - I submit to you as being a breach of  
4 competitive neutrality.

5 Now, Your Honour, most of what mister - my learned  
6 friend said, I don't agree with (indistinct) that was  
7 contrary to - to our position. I do - just - just to  
8 clarify, in terms of the affidavit evidence of  
9 Ms Watterson, in particular the photos of all the cages  
10 and the animals, I do rely on them as showing compliance  
11 with the code, including the condition of the animals. So  
12 yes, everyone single one of them is relied upon. The  
13 affidavit material, in complete, in total, is relied upon,  
14 as is the affidavit material on both sides in relation to  
15 the stay application, because a lot of the material is  
16 similar or simply relevant - - -

17 HER HONOUR: Yes. We identified all of that material  
18 yesterday.

19 MR HOSER: And I haven't - and I haven't necessarily repeated  
20 material in the stay application material that is  
21 relevant. Look, I think if you read all the material that  
22 is before you now, you will - you will find in my favour,  
23 if that's the best way to put it. And I've got no further  
24 submissions at this point, and I thank you for your time.

25 HER HONOUR: All right. Thank you, Mr Hoser. Could I just  
26 raise one matter before I reserve and adjourn, and that is  
27 my associate tells me that there was an email sent to the  
28 court this morning at 10.31 and to the respondent. It's  
29 not been referred to and it's not before me.

30 MR HOSER: It probably should have been.

31 HER HONOUR: And it's not before me.



1 MR CHAILE: Yes.

2 MR HOSER: Your Honour - - -

3 HER HONOUR: If it hasn't been referred to and it's not before  
4 me then I think that's the state of play.

5 MR HOSER: Yes. No. Sorry, Your Honour. I - sorry. It's a  
6 late - this is the withdrawal of the claim of the  
7 devenomised snakes regenerating venom. Now, this was a  
8 case - this was relevant to a number of issues that my  
9 learned friend raised. The Department ran this claim that  
10 my devenomised - - -

11 HER HONOUR: What's the relevance of the email to the dispute  
12 that I have to decide about the directions notice? Does  
13 it have any relevance?

14 MR HOSER: Yes. No. Yes. It was made relevant by my learned  
15 friend because he was reading through all of these prior  
16 convictions and things in relation to myself and putting  
17 lives at risk. And the basis of that was that I had  
18 surgically devenomised snakes that had regenerated venom  
19 and that - - -

20 HER HONOUR: But is there any issue in the directions notice  
21 that deals with the devenomised snakes?

22 MR HOSER: Well, my learned friend raised that in his - he -  
23 yeah, he's raised that to claim that I'm a public risk.  
24 He - he raised that too. He's put that in your mind, Your  
25 Honour.

26 MR CHAILE: Your Honour, I object. I have never made a  
27 submission of that kind.

28 HER HONOUR: No. I accept that.

29 MR HOSER: No, you - you have made a - excuse me, he referred  
30 to me - - -

31 HER HONOUR: No, no, no. Mr Hoser, you'll address the court.

1 And what Mr Chaile did was refer me to various things that  
2 were said by the Court of Appeal in that decision about  
3 the revocation or cancellation in relation to your license  
4 status. Okay.

5 MR HOSER: Now, Your Honour - - -

6 HER HONOUR: And beyond - - -

7 MR HOSER: Now, the - hold on. They referred to - - -

8 HER HONOUR: Beyond what the court of appeal have recorded in  
9 their reasons, there is no submission made to me that  
10 you're a risk to the public or that in any way addresses  
11 the issue of how you handle de-venomised snakes.

12 MR HOSER: Now, there are multiple issues here.

13 HER HONOUR: So I just want to make that clear and - - -

14 MR HOSER: I hear you.

15 HER HONOUR: In any event, the material that was emailed after  
16 the start of court today and after your case had been  
17 concluded - you'd have to give me a very good reason as to  
18 why it is necessary for me to receive that evidence, which  
19 I haven't yet done, and you will need to have leave to do  
20 so.

21 MR HOSER: Okay. First, I seek leave. And in terms of this,  
22 the bad faith issue applies as well. The Department spent  
23 the best part of a decade in multiple court proceedings -  
24 sometimes with considerable success - claiming my  
25 surgically de-venomised snakes had regenerated venom, which  
26 was a scientific and physical impossibility. They - - -

27 HER HONOUR: Given that that's not an issue in this  
28 proceeding - - -

29 MR HOSER: Well, the bad faith is. On the - - -

30 HER HONOUR: Bad faith is, but the question of de-venomisation  
31 is otherwise not relevant, and it wasn't an issue in the

1 decision - it's not an issue that was raised in the  
2 decisions notice. I understand you want to say that  
3 there's bad faith because of the history of dealings.

4 MR HOSER: It is raised quite - it is raised quite extensively  
5 in my submissions.

6 HER HONOUR: Yes.

7 MR HOSER: And the reason is that - and the - and the entry and  
8 the raid, the first thing that the Wildlife officers  
9 wanted was my de venomised snakes. They wanted to know  
10 which ones were de venomised and which ones were not and  
11 I refused to tell them. Now, Your Honour - - -

12 HER HONOUR: Just a moment, Mr Hoser. Mr Chaile, I've not seen  
13 the email. Do you object to me receiving it?

14 MR CHAILE: Yes, Your Honour. I can elaborate on the  
15 objection, if Your Honour wishes, but, otherwise,  
16 I object.

17 HER HONOUR: Perhaps you'd better identify the grounds.  
18 Perhaps not with great elaboration, but the grounds upon  
19 which you object.

20 MR CHAILE: Sure. Your Honour, the email appears to contain an  
21 audio file and what purports to be a transcript of the  
22 audio file. I, obviously, have not been able to listen to  
23 the audio or to seek instructions in respect of it, and  
24 the transcript is unintelligible in the sense that I don't  
25 know who is speaking or who is saying what. So I don't  
26 actually know what this evidence is, I can't get  
27 instructions on it and, as Your Honour has identified,  
28 it's actually not relevant to any of the issues concerning  
29 the direction notice or its validity.

30 HER HONOUR: Thank you, Mr Chaile. Mr Hoser, given that the  
31 nature of the email, that is it's an audio and transcript

1 of uncertain origin, and given that it was provided - - -  
2 MR HOSER: It's from the court. It's from the - - -  
3 HER HONOUR: After the conclusion of your case, I will not give  
4 you leave to rely on the contents of that email or the  
5 attachments to that email.  
6 MR HOSER: I - I - I hear you, Your Honour, but just - just for  
7 completeness sake, it's a - it's an official VCAT audio  
8 file that's been transcribed, where the department  
9 formally withdrew their claim that the snakes regenerated  
10 venom and admitted it was false which - you know, that's  
11 why I have it, because it's so - - -  
12 HER HONOUR: All right. It doesn't form the material before  
13 me.  
14 MR HOSER: Okay. Fair enough. I won't push that, and, look,  
15 I appreciate you reminding me of it, and, I'm sorry,  
16 I probably should have.  
17 HER HONOUR: That's all right. You don't need to apologise.  
18 MR HOSER: Yeah.  
19 HER HONOUR: It was really just to not leave anything  
20 uncertain - - -  
21 MR HOSER: Unturned. Yep.  
22 HER HONOUR: - - - about the state of the material that I'm  
23 deciding on.  
24 MR HOSER: Yeah, no, I understand.  
25 MR CHAILE: Your Honour, in that respect, just so that there's  
26 no confusion, yesterday afternoon, the plaintiff sent  
27 through what he had referred to as the Wayne Court. I'm  
28 not sure if Your Honour has seen that.  
29 MR HOSER: Yes, yes.  
30 MR CHAILE: It's a picture of a book written by the plaintiff.  
31 We don't object to it admitted before Your Honour, given

1 he referred to it, but that shouldn't be a concession that  
2 it's relevant.

3 HER HONOUR: All right. I haven't seen that. Yes. Apparently  
4 I've got it but I haven't actually seen it yet. So do you  
5 want to rely on that email and attachment?

6 MR HOSER: Yes, I do, because - yeah. Yes, yes, it's - - -

7 HER HONOUR: Just for the record, when was it sent to the  
8 court? So they were emails at 3.50 and 3.56 yesterday  
9 afternoon.

10 MR CHAILE: Yes, Your Honour, so I was on my feet, but he had  
11 referred to it during the course of his submissions, so no  
12 objection is taken.

13 HER HONOUR: Okay.

14

15 #EXHIBIT 4 - Two emails and their attachments.

16 Thank you for that reminder too. I'll reserve my decision.

17 I will let the parties know when I'm in a position to  
18 publish reasons, and I note the undertaking that was given  
19 on behalf of the defendant this morning in relation to  
20 prosecutions.

21

- - -