
TRANSCRIPT OF PROCEEDINGS

S ECI 2023 06152

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION - TRIAL DIVISION

MELBOURNE

TUESDAY 9 APRIL 2024

BEFORE THE HONOURABLE JUSTICE FORBES

RAYMOND HOSER

v

THE DEPARTMENT OF ENERGY, ENVIRONMENT AND CLIMATE ACTION
VICTORIA AKA DEECA (INCLUDING THE CONSERVATION REGULATOR)

APPLICATION

THE PLAINTIFF was not represented by Counsel.

MR R. CHAILE appeared on behalf of the Defendant.

1 © The Crown in right of the State of Victoria. This work is
2 copyright. No part of it may in any form or by any means
3 (electronic, mechanical, microcopying, photocopying, recording
4 or otherwise) be reproduced, stored in a retrieval system or
5 transmitted without prior written permission of the Authorised
6 Officer.

7 HER HONOUR: Mr Hoser, can you see and hear me?

8 MR HOSER: Yes, Your Honour.

9 HER HONOUR: Okay and you're appearing for yourself today?

10 MR HOSER: Yes, Your Honour.

11 HER HONOUR: And your appearing via audio-visual link as I
12 understand it with the consent of the defendant.

13 MR CHAILE: That's correct, Your Honour.

14 HER HONOUR: All right. I'll make an order that you have leave
15 to appear and make your submissions today via audio-visual
16 link. And Mr Chaile you appear for the defendant?

17 MR CHAILE: Yes, if it please the court.

18 HER HONOUR: Thanks. Can I first apologise to both parties for
19 the late start. The matter that I had at 9:30 took longer
20 than I anticipated but the parties shouldn't feel
21 constrained in any way in terms of that late start. The
22 matter's been allocated a day and it will have as much of
23 the day as is needed. If that means we go over into
24 tomorrow then, or whenever that certainly, from my point
25 of view not a problem. As a preliminary matter I thought
26 be might just sort out what material is before me.

27 MR CHAILE: Yes, Your Honour. If it would assist I could set
28 out for the defendant's material and what we understand to
29 be the plaintiff's material. Your Honour, the defendant's
30 material comprises a detailed set of written submissions
31 that were filed on 5 April. Does Your Honour have those?

32 HER HONOUR: Yes, I do. I have those.

33 MR CHAILE: Thank you. And then the evidence on which the

1 defendant relies are two affidavits of Lucile Waterson.
2 The first affidavit is dated 16 February 2024 and
3 commences at court book 501.

4 HER HONOUR: Yes.

5 MR CHAILE: The second affidavit which is supplementary in
6 nature is dated 21 March 2024 and that's at court book
7 516.

8 HER HONOUR: Yes.

9 MR CHAILE: In terms of what we understand to the plaintiff's
10 material and he can supplement my understanding if
11 necessary. The plaintiff relies on submissions dated
12 27 March which are at court book 9.

13 HER HONOUR: Yes.

14 MR CHAILE: I should also add that there is an amended
15 originating motion that's at p1 of court book.

16 HER HONOUR: There's the amended summons which is adjourned to
17 today as well and for completeness the notice of
18 appearance is in the court book as well.

19 MR CHAILE: Yes, and then as we apprehended the plaintiff
20 relies on five affidavits. The first is an affidavit
21 dated 20 December 2023 which commences at court book 109.

22 HER HONOUR: Yes.

23 MR CHAILE: The second is an affidavit dated 7 March 2024 which
24 is at court book 202.

25 HER HONOUR: Yes.

26 MR CHAILE: The remaining three are purported expert reports.
27 The first is from the plaintiff dated 7 March at court
28 book 452. The next one is an affidavit of Clifford Ross
29 Wellington dated the same day at court book 466. And the
30 last is an affidavit of Paul Wolf also dated 7 March at
31 court book 489. I understand that the plaintiff send

1 through some reply submissions immediately prior to this
2 hearing. I must confess in the time allowed I cannot
3 profess to have reviewed them in detail but subject to
4 Your Honour's views we would have no objection to Your
5 Honour receiving that as part of the plaintiff's material.

6 HER HONOUR: All right. So that's the material as it's
7 disclosed by the court book. There are, I think, some
8 additional submissions that the plaintiff wants either
9 included or relied on in some way.

10 MR CHAILE: Yes. I was remiss not to refer to that but those
11 submissions are the plaintiff's submissions in relation to
12 the stay that was previously heard by Your Honour and I
13 think the plaintiff also wishes to refer to the
14 defendant's submissions on those occasions. Obviously no
15 objection is taken to that course.

16 HER HONOUR: Okay. So what I might do then is before we do
17 anything the plaintiff also has filed today some
18 submissions in response dated 9 April 2024. And Mr Hoser
19 you want to rely on those as well?

20 MR HOSER:: That's correct, Your Honour.

21 HER HONOUR: Okay. Apart from the material that's in the court
22 book and those three additional submissions, the two stay
23 ones and today's ones, is there any other material that
24 you want to rely on?

25 MR HOSER:: Your Honour, yeah, look, yes. The - my
26 recollection there's been a bit of water under the bridge
27 so to speak and I've got trouble remembering it. It think
28 on one occasion I filed, on one particular date I think I
29 filed two affidavits. A large one and a small one. I
30 just want to make sure that that did, in fact, happen.

31 HER HONOUR: Well I've got two affidavits of yours of 7 March.

1 MR HOSER:: Yeah that would be correct. That would be the
2 right ones.

3 HER HONOUR: That would be the ones? So there are three that
4 are yours altogether. One from December and then the two
5 in compliance with my orders that you filed on 7 March so
6 they're both accounted for.

7 MR HOSER:: Yes those two yes. They're both accounted for.
8 That's correct. My submissions of today's date, now look
9 I don't know, now you obviously the judge and you're the
10 one in charge of the law which I know is trite to say.
11 And I raised as one of the potential - - -

12 HER HONOUR: I don't want to get into the content of them just
13 yet, I'm just identifying it.

14 MR HOSER:: No, no, no, I'm not getting - no, no we're talking
15 about material that be admitted. Now in relation to the
16 res judica[sic] or estoppel arguments that are raised in
17 material from both sides. There was an assertion, and I
18 may have got the context wrong which is why I'm raising it
19 now that the matters that were litigated in the period
20 2011 to 2014 in various courts relating to the prevention
21 of cruelty to animals charges and breaching of the code of
22 conduct and basically (indistinct).

23 For example with the diamond python I sent - I think
24 I appended a copy of the summons or the relevant part of
25 the summons in relation to one of the charges to show that
26 the issue had been dealt with by the court. The exact
27 same issue. Same case, same water bowl, same everything.
28 In response to the submissions that were given to me very
29 late on Friday, bearing in mind I've been working every
30 day since, the - I then went through the video of the
31 illegal nine hour raid in 2011 where the wildlife

1 officers, pick up, identify the cages and photograph the
2 diamond pythons in their cages which were subject to the
3 charges. And you will see - you can match them up with
4 the very same - - -

5 HER HONOUR: Mr Hoser, what's the point you want to make about
6 your submissions of 9 April?

7 MR HOSER:: The point I'm making is that the submissions
8 overnight last night I sent some emails with sections of
9 video from that raid that showed the exact same cages and
10 signage in 2011 that were subject of the charges. To show
11 that it is a re-litigation of exactly the same thing. And
12 I wanted that to be included as well.

13 HER HONOUR: How many emails are involved?

14 MR HOSER:: One, two or three emails. I'll try to be more
15 specific, Your Honour. Two emails. There's two emails.
16 They were sent at 5:16 and 5:19 yesterday.

17 HER HONOUR: Okay. Mr Chaile.

18 MR CHAILE: Yes, Your Honour. I believe the evidence to which
19 the - - -

20 MR HOSER:: Sorry one email.

21 MR CHAILE: Okay. Are two videos of a raid in 2011,
22 apparently. I should add that we do object to the tender
23 of that material, principally because it's irrelevant but,
24 ultimately, because of its irrelevance, if Your Honour is
25 minded to admit it as a shortcut to deal with the
26 principal issues, we would accept that that's a course
27 available to Your Honour. But we do object, because it's
28 entirely irrelevant to the issues in this proceeding.

29 HER HONOUR: All right. Okay. What I will do in relation to
30 those emails and in relation to the three expert
31 statements about which objection has been taken - - -

1 MR CHAILE: Sorry, Your Honour. I'm loath to stand up, but
2 I just want to clarify, no objection is taken to the
3 admissibility of Mr Hoser's statement.

4 HER HONOUR: Yes.

5 MR CHAILE: The Department's position is that it should be
6 given limited weight.

7 HER HONOUR: The two.

8 MR CHAILE: It's the objection the admissibility to the other
9 two statements.

10 HER HONOUR: The two. All right.

11 MR CHAILE: Yes.

12 HER HONOUR: Well, in relation generally to the admission of
13 material over objection, I will take the material, and
14 I'll deal with the substance of any objection in my
15 reasons and either exclude it if it's properly excluded
16 or, if it's admitted, admit it and give it what weight is
17 required.

18 So, Mr Hoser, that means in relation to
19 Mr Wellington's affidavit and Mr Wolfe's affidavit, I'll
20 take them as an exhibit for the purpose of the argument
21 about whether they should be admitted or not, and I'll
22 deal with admissibility when I give reasons. And,
23 similarly, I'll take the tender of the two emails that you
24 sent last night at 5.16 and 5.19.

25 MR HOSER: No, I think it's 31 actually, Your Honour. I made
26 an error on that.

27 HER HONOUR: Okay.

28 MR HOSER: And it was 5 - - -

29 HER HONOUR: My associate's nodding, so the two emails.

30 MR HOSER: 5.16 and 5.31, I think we're looking at.

31 HER HONOUR: Okay. They were received by the court at 5.17 and

1 5.31. Those two emails - - -

2 MR HOSER: Yep, that's right.

3 HER HONOUR: - - - I'll mark as exhibits and note that there is
4 an objection as to relevance, and I'll deal with that
5 objection in the course of my reasons. So the argument
6 today will need to address those matters.

7
8 #EXHIBIT 1 - Court book containing seven documents.

9
10 #EXHIBIT 2 - Submissions relating to the stay application
11 from the plaintiff of 14/02/24 and the
12 defendant of 16/02/24, and the supplementary
13 submissions of the plaintiff dated 09/04/24.

14
15 #EXHIBIT 3 - Two emails received by the court at 5.17 pm
16 and 5.31 pm on 08/04/24.

17 There was some reference to the transcript of the stay
18 application, but that's not presently before me. Does it
19 need to be?

20 MR CHAILE: Your Honour, we - - -

21 HER HONOUR: Sorry, yes. Mr Hoser first.

22 MR HOSER: Thank - thank you, Your Honour. I was going to say,
23 look, you were present last time when the - our learned
24 gentleman on the other side of the Bar table made the
25 comment about the code of practice being a aspirational
26 document or words to that effect. I've got the exact
27 words in my submissions.

28 Assuming that he has no dispute with the
29 recollection in my - you know, 'cause I wrote down the
30 exact words of what I put in my submissions in relation to
31 the previous hearing. There is no need for availability
32 of the audio transcript of that hearing. If the lawyer on
33 the other side wants to play hard ball and claim that I've
34 got it wrong which - then - then we would obviously need
35 to go back to that material. So, I suppose, to that

1 extent, the ball's in both your court and - and their
2 court. If you wrote down the exact words, we'll be fine.
3 If they want to challenge that, then obviously - - -

4 HER HONOUR: Well, okay. So all right.

5 MR HOSER: In the absence of a challenge, we don't need it.

6 HER HONOUR: So you're content to rely on your submissions.

7 Mr Chaile, do you seek to put the transcript before me?

8 MR CHAILE: No, Your Honour.

9 HER HONOUR: All right. Then the transcript is not before me.

10 All right. Can I perhaps, for the benefit of the parties,
11 indicate that it would assist me if both parties could
12 proceed on the basis that there are really, I suppose,
13 five issues that deal with the administrative law grounds
14 of review? Those five grounds don't necessarily match up
15 with the grounds as identified in the amended notice of
16 appeal, but because they overlap a little bit, it would
17 assist me if the submissions could deal with those five
18 grounds as grouped, and I'll tell you how I've described
19 them.

20 One is the res judicata estoppel issue; one is the
21 improper purpose or bad faith issue; one is the question
22 of relevant considerations and, the corollary of that,
23 irrelevant considerations; one is the issue of a denial of
24 procedural fairness; and one is the question of
25 irrationality or unreasonable nature of the decision. So
26 those are, if I can describe them as, the five principal
27 areas to direct submissions.

28 There are a number of other things that aren't
29 picked up by that, sort of miscellaneous issues such as,
30 for example - for one example, at least - the ground that
31 relates to the refusal of the COVID grant, for example.

1 It might fit in one or other of those five topic headings,
2 but it might not, so perhaps a sixth topic is
3 miscellaneous other grounds.

4 And then a seventh topic are the questions of
5 admissibility of particular evidence, so that is directed
6 at the Wellington and the Wolfe affidavits and at the two
7 emails that are Exhibit 3. Now, I'm in the parties' hands
8 as to the order and the way in which they want to address
9 them, but I'd be assisted if it could be done within that
10 broad framework. Does that make sense to you, Mr Hoser?

11 MR HOSER: It does, and I'm in your hands, Your Honour,
12 inasmuch as - and I'm not a lawyer and my understanding of
13 what happens today is - is a bit vague, because I spoke to
14 a few people, and they say, 'It's literally in the hands
15 of the judge.' Some judge will turn around and say, 'I'm
16 going to read all the submissions, and only want' - the
17 only thing that's over and above that are the judges
18 who'll want you to go through the whole lot, chapter and
19 verse.

20 To the extent of what you just mentioned, I can
21 state that if you were to read my submissions and cross-
22 reference them with those of the other side - now as you'd
23 read theirs as well, you will see that the - all those
24 issues that you've just mentioned - res judica, bad faith,
25 relevant considerations and irrelevant ones, denial of
26 procedural fairness, and unreasonableness - the evidence
27 of all of the above are in the affidavits, and the
28 summaring[sic] up and, like, joining the dots - for want
29 of a better word - is in my submissions. The refusal of
30 the COVID grant, by way of example - - -

31 HER HONOUR: So, yes, I don't want you to make your submissions

1 just yet. I just want you to - - -

2 MR HOSER: No, I wasn't gonna make the submissions.

3 HER HONOUR: That's okay.

4 MR HOSER: I wasn't gonna make submissions about it. I was
5 just gonna say - - -

6 HER HONOUR: But does that sort of seven topics give you a
7 helpful framework within which to make your submissions,
8 I suppose, is the question.

9 MR HOSER: It does and it doesn't inasmuch as if I was
10 preparing from scratch, it would. Because I've already
11 done my submissions and those issues are, in fact, covered
12 and the submissions of yesterday also cover them
13 (indistinct) under those topics because, for better or
14 worse, the other side in their submissions that I only
15 received late on Friday are - bear in mind, I've worked
16 every day, and not just worked every day.

17 I've had to deal with animals every night, so
18 I literally have not had time to look at anything till
19 late yesterday. But in their materials where they address
20 those various legal issues, they - they deal with res
21 judica at length, and they deal with bad faith and so on.
22 I've published my rebuttal - for want of a better word -
23 in my submissions that were filed this morning. And, to
24 that extent, they are dealt with in that written material,
25 probably more eloquently than I will do speaking to you
26 now.

27 HER HONOUR: All right.

28 MR HOSER: And to that extent - - -

29 HER HONOUR: Well, can I add this to the topics, if you like,
30 that I've identified, and that is you should assume that
31 I have read your affidavits and I have read your

1 submissions, save for the 9 April ones that were received
2 this morning which I've not had an opportunity to read
3 yet, but that I will read. So - - -

4 MR HOSER: Okay. That's a good start. And - - -

5 HER HONOUR: So your oral submissions are directed really to
6 supplementing or highlighting particular matters.

7 MR HOSER: Yes.

8 HER HONOUR: I don't need you to replicate everything that
9 you've already said, but under each of those seven topics
10 what I would like you to do in your submissions is to
11 highlight for me the critical points.

12 MR HOSER: Okay.

13 HER HONOUR: Okay?

14 MR HOSER: I appreciate that, Your Honour. Now, just on
15 that - - -

16 HER HONOUR: So does that make the process clear?

17 MR HOSER: Yep. Yes, I hear you, and it's as clear as I think
18 you can make it. I'm not faulting you, Your Honour.

19 HER HONOUR: Okay.

20 MR HOSER: What I was going to say, though - - -

21 HER HONOUR: All right, yes.

22 MR HOSER: In terms of the refusal of the COVID grant - and
23 this is just an example of how you need to look at it or
24 I submit you need to look at it, Your Honour - and that
25 is - - -

26 HER HONOUR: Well, we'll come to your submissions in a moment.
27 At the moment I'm just making sure - - -

28 MR HOSER: No, no. No, I'm not dealing with submission.
29 Please let me just get this out.

30 HER HONOUR: All right.

31 MR HOSER: It's important. You've got the refusal of the grant

1 in itself is one issue, but a second issue that ties in
2 with that refusal is the prior example of the previous and
3 ongoing bad faith of the department. So to give you, you
4 know, examples, we've got the raid of 17 August 2011 and
5 all the criminal charges and rubbish that went on for
6 years after that. You've then got a refusal of the COVID
7 grant.

8 You've got the use of the registered trademarks by
9 their business Zoos Victoria continually to steal our
10 clients. And the bad faith issue in terms of the issuing
11 of the directions notice. If it was an - obviously what
12 I'm asking you to do is even where one issue might appear
13 to be separate to the other, and even in the submissions
14 from both sides, the reality is, is they all tend to tie
15 in to one another at different times and places. So the
16 bad faith and unreasonableness of their actions is in many
17 respects no different to their conduct spanning some
18 decades which has to be taken as consistent.

19 It's - you know, if - what I'll be arguing is their
20 behaviour and their actions against me is consistently
21 malicious, consistently wrong. This is not just a one off
22 - it's not as if this directions notice is the first time
23 that the department have acted wrongly to me and were I to
24 have actually litigated every time they'd done the wrong
25 thing, I'd be in court every day.

26 HER HONOUR: So, Mr Hoser, I guess from what you say, it's
27 clear that the COVID issue is really a matter that's
28 relevant and that you'll deal with when you're dealing
29 with the improper purpose and bad faith heading. So it's
30 not - it might not be something that is otherwise not
31 picked up by those headings, and that's fine.

1 MR HOSER: Yes. What I'm saying is - - -

2 HER HONOUR: I've really just put a heading in there to say if

3 there's anything that's missed in my categories, it fits

4 in as the sixth category, that is, a miscellaneous

5 category, okay?

6 MR HOSER: Yeah.

7 HER HONOUR: But if it's better dealt with by you under bad

8 faith, that's fine.

9 MR HOSER: So even, for example, res judica [sic]. That

10 becomes a relevant consideration. The fact that the

11 department have already litigated it would be a relevant

12 consideration that they should've considered - - -

13 HER HONOUR: And so you might say, 'I've dealt with res

14 judicata. It's - you know, what I've said there is also

15 relevant under this topic, but I'm not going to repeat

16 myself.'

17 MR HOSER: Correct.

18 HER HONOUR: Okay.

19 MR HOSER: Correct.

20 HER HONOUR: Good.

21 MR HOSER: Correct. And, Your Honour, because I'm - no

22 disrespect to you or anything, but because I am not

23 represented and I'm half asleep and I haven't had time to

24 prepare probably as well as I should have, I will tell you

25 in advance, there will be times where I will not

26 explicitly identify common threads or common links or even

27 points that will be - will - should be obvious to you or

28 apparent to you when you read all the material and join

29 the dots. That's what I'm saying.

30 HER HONOUR: Yes, that's fine. I understand that. All right.

31 MR HOSER: Thank you.

1 HER HONOUR: Mr Chaile, from your perspective, you content that
2 we proceed with that general framework?

3 MR CHAILE: Yes, Your Honour.

4 HER HONOUR: Okay. And, Mr Hoser, it's your application, so
5 that means you go first with your submissions. Then
6 Mr Chaile will give his submissions. And then you will
7 have a limited right of reply in conclusion. Really, that
8 is limited to addressing anything that comes up in the
9 oral submissions that is not contained in what's been
10 written and not addressed by you in your principal
11 submissions. Okay.

12 MR HOSER: Okay. Thank you. Yep.

13 HER HONOUR: It's not an opportunity to repeat submissions that
14 you've already made; it's to address anything new that
15 you've only heard from Mr Chaile's submissions.

16 MR HOSER: I hear Your Honour and understand, yeah.

17 HER HONOUR: Really, by way of clarification of anything, okay?

18 MR HOSER: Yeah. Your Honour, there is another issue at hand.
19 You just mentioned written rulings which would be good.
20 I assume that's your proposed plan; is that right?

21 HER HONOUR: Yes.

22 MR HOSER: And - - -

23 HER HONOUR: Yes, I'll make a written judgment.

24 MR HOSER: So that will not be today.

25 HER HONOUR: It will not be today.

26 MR HOSER: Now, the reason I ask that is an issue that has
27 emerged - and I don't know if I could - yeah. An issue
28 that has emerged was a claim by the Wildlife Department in
29 a previous case that they didn't really want to extend
30 this directions notice (indistinct words) by any date
31 because all my animals are going to drop dead. Sitting

1 next to me I've got crocodile and a few death adders and
2 things for you to look at if need be.

3 I can just pluck them out boxes next to me, and show
4 you they're all in perfect health, as they have been for
5 many years. Now, because their death is not imminent in
6 their current caging, the snake sitting behind me is
7 actually mating as we speak, just across where I'm
8 looking. The issue is - - -

9 HER HONOUR: Mr Hoser, it's not going to be necessary for me to
10 view the animals that you have with you because - - -

11 MR HOSER: No, okay. That's fine, but - - -

12 HER HONOUR: - - - I'm not going to be making a decision about
13 their health. I understand, I think, that what you're
14 worried about is that compliance with the directions
15 notice - the date at the moment is seven days after today
16 and am I going to have my reasons done within seven days.
17 Is that really the concern that you raise?

18 MR HOSER: And then the other issue is - yes, and the other
19 issue is if, for example, you issue your reasons on day 6,
20 basically I'd be in a situation where I'm not in a
21 position to spend a million dollars to renovate my cages
22 because that's agreed evidence that it's going to cost me
23 over a million dollars to change cages to fit what they
24 want which will kill some of the animals anyway. But
25 let's assume I spend a - I wouldn't be able - it's not
26 physically possible to comply with the order even at its
27 most beneficial to the other side.

28 Bearing in mind they haven't defined half the things
29 in there. So what I would be seeking in the - based on
30 what's happened so far is that either you rule that -
31 either you direct the department to extend the compliance

1 time or the department agree to extend the compliance time
2 to some period after this - like a month after some final
3 ruling which I hope will be in our favour anyway.

4 HER HONOUR: All right. Well, I think at the moment that issue
5 perhaps is something that Mr Chaile can address in the
6 course of his submissions.

7 MR HOSER: It's - - -

8 MR CHAILE: I'll seek instructions on that issue, Your Honour.

9 HER HONOUR: Thanks. So he'll have to seek some instructions
10 about the department's position and he'll address that in
11 the course of his submissions. I understand the concern
12 that you raise.

13 MR HOSER: Yeah. And it actually beggars belief that the
14 department have such a callous disregard for the welfare
15 of my animals, so they don't even have - - -

16 HER HONOUR: Mr - Mr - - -

17 MR HOSER: The lawyers - he doesn't even have a clue what's
18 going on in that regard. That's just crazy, Your Honour.

19 HER HONOUR: Mr Hoser, I'll ask you to just confine your
20 comments to submissions that you make, and I'm really not
21 interested in gratuitous comments about the competency or
22 otherwise of other people.

23 MR HOSER: It's not the competency I was questioning, Your
24 Honour.

25 HER HONOUR: It was the callousness.

26 MR HOSER: It was their concern for the welfare - the concern
27 for the welfare of our reptiles.

28 HER HONOUR: And I am not interested in submissions from you
29 about the question of callousness in such a way.

30 MR HOSER: Wouldn't it get down to part of the bad faith and
31 unreasonableness and denial of procedural fairness which

1 are three issues you raised?

2 HER HONOUR: Mr Hoser, I've just asked you not to make
3 gratuitous comments about what you think.

4 MR HOSER: I'm sorry. It wasn't - it was a question. It was
5 phrased - - -

6 HER HONOUR: I'm open to listening to your submissions.

7 MR HOSER: It was phrased as a question, Your Honour. To me it
8 seem - look, I'm not the judge. I'm not a lawyer, but to
9 me it seems blindingly obvious that the department - - -

10 HER HONOUR: Yes, all right.

11 MR HOSER: - - - is demonstrably not - - -

12 HER HONOUR: I understand your point. I don't need you to
13 repeat it. And I would thank you not to make those
14 comments, comments of that nature again. Now - - -

15 MR HOSER: Your Honour, it's hard because you say 'that
16 nature,' that's - I'm - I'm not trying to (indistinct)
17 Your Honour. I don't want to start the case with an
18 argument, but I am really hamstrung on making what I think
19 are reasonable submission, and - - -

20 HER HONOUR: You haven't started your submissions yet. That's
21 the difficulty. Okay.

22 MR HOSER: Okay.

23 HER HONOUR: Now, we're about to start your submissions, and
24 I'd like you to indicate under which topic you're
25 addressing me as we go. The order of it is a matter for
26 you, but it would be helpful for you to identify the topic
27 as a preface to your comments.

28 MR HOSER: Okay.

29 HER HONOUR: Thanks.

30 MR HOSER: The res judica[sic] issue is dealt with in detail in
31 my filed material, and further detail in the submissions

1 of last night. They were prepared overnight. In summary,
2 the very exact issue, cage sizes, water bowls, substrate,
3 the hives, or lack thereof, and every other item
4 identified in the Code of Practice has again been cited in
5 this current matter or dealt with in the court proceedings
6 that were commenced in 2022 - 2012. It finished in 2014.
7 They were also dealt with in the VCAT proceedings.

8 It was subject to the Court of Appeal, which issued
9 the final ruling in September 2014, and they were dealt
10 with in extreme detail, the exacting's in extreme detail.
11 And there was lots of expert witness evidence and so
12 forth, went over many, many days with a finding again in
13 my favour in VCAT in 2015. The VCAT, I think is - - -

14 HER HONOUR: The first proceedings you referenced, 2012 to 14,
15 are they Magistrates' Court proceedings?

16 MR HOSER: Magistrates' Court proceedings. Yes, correct.

17 Now - - -

18 HER HONOUR: Okay. And there's the VCAT proceeding that went
19 to the Court of Appeal, and then there's the - - -

20 MR HOSER: That's from 2012 to 2014.

21 HER HONOUR: Yes.

22 MR HOSER: And then the final VCAT proceedings, which was - the
23 hearing itself was 2015.

24 HER HONOUR: Yes.

25 MR HOSER: It was resolved at some stage that year.

26 HER HONOUR: Okay.

27 MR HOSER: Now, in the case of - in the case of the VCAT
28 proceedings, in my second submissions, I refer - it's the
29 latter paragraphs of that ruling, and it's a fairly short
30 and sweet ruling. In that particular - in that particular
31 VCAT ruling - sorry, Your Honour, just bear with me. It's

1 going to be easier for me to do it this way. I'm not as
2 computer savvy as I should be. In that particular VCAT
3 case, which was Hoser v Department of Environment, Land,
4 Water, and Planning (Review and Regulation) [2015] VCAT
5 1147, 30 July 2015.

6 When one goes to that judgment, which I believe is
7 in your file, but it may not be. At paragraph 28, there's
8 the general comment - bear in mind that the whole case
9 revolved around this Code of Practice, and all the issues
10 have been raised again here - is the statement by the -
11 the findings by the judge. 'Broadly, I think Mr Hoser's
12 snake husbandry skills are good. I'm more of the
13 understanding that the snakes are largely healthy at that'
14 - that's actually paragraph 27.

15 It goes on at 28, 'Overall, the evidence, not only
16 of Mr Watterson, but of the applicant himself, satisfies
17 me that the applicant's snakes in particular, and wildlife
18 in general, are well looked after by the applicant.' And
19 it goes on at no.32, for example, he says, 'I am satisfied
20 that he does not mistreat his snakes.' And it goes on.

21 And then at 33, quite significantly, he says, 'The
22 whole dynamic of the conflict between the applicant and
23 obviously, the respondent relies on this from the place of
24 personalities. The applicant is critical on the
25 respondent to a point of offence. Up to a point, he has
26 cause to be critical. It is all a matter of degree.' So
27 in other words, any criticism that I have publicly made of
28 the department have a factual basis. Simultaneously to
29 that, the department's actions to me have been found to be
30 unreasonable by the VCAT judge, and that is confirmed
31 where he says, at paragraph 35, the decisions of the

1 respondent are set aside. That, Your Honour, should've
2 been the end of it.

3 HER HONOUR: The decision that was under question there wasn't
4 a directions notice. Was it?

5 MR HOSER: No. It was whether or not I should have a wildlife
6 demonstrator's licence. And as part of that decision,
7 every single aspect of my business, my husbandry of my
8 reptiles, and everything else I've basically done since
9 the day I was born, was under review. So that is a -
10 we're talking here - - -

11 HER HONOUR: But, Mr Hoser - - -

12 MR HOSER: This is an example as to how wide-ranging it was,
13 Your Honour.

14 HER HONOUR: No, I understand that, but what I want to ask you
15 is this question. There is a distinction for the purposes
16 of looking at questions of res judicata and issue estoppel
17 between the issues that are decided by the case, and the
18 evidence that is before the tribunal. The fact that
19 something is in evidence before a decision maker is not
20 the same thing as the identification of the issue that is
21 decided by the case. So just because there was evidence
22 before VCAT about cages or the welfare of the animals in
23 2015, that evidence isn't subject to any res judicata or
24 issue estoppel. The issue about the - - -

25 MR HOSER: I was - - -

26 HER HONOUR: The issue in this case of Mr Butcher's was a
27 question about whether or not you were a fit and proper
28 person to hold a wildlife licence. That's a different
29 issue - - -

30 MR HOSER: No, Your Honour. No. No, Your Honour.

31 HER HONOUR: - - - that is decided in this case. Do you

1 understand what I'm - - -

2 MR HOSER: With all due respect - - -

3 HER HONOUR: Just let me finish.

4 MR HOSER: I hear what you said, Your Honour.

5 HER HONOUR: Do you understand what I say about the distinction
6 between the identification of an issue in the proceeding,
7 and the identification of evidence in the proceeding?

8 MR HOSER: I hear what you said.

9 HER HONOUR: And you understand what I've said.

10 MR HOSER: And I will - I understand what you said, but with
11 all due respect, Your Honour, the issue of the cages was
12 also the relevant issue of the proceedings.

13 HER HONOUR: Okay.

14 MR HOSER: Had my cages been found not to have been proper, had
15 I found to have been in breach - of breaching the Wildlife
16 Act and the Code of Practice - wildlife regulations and
17 the Code of Practice, that issue - the finding of that
18 would have scuttled me on the global issue of suitability
19 to hold a permit. It was directly relevant. The issue of
20 the cages, the issue of the reptiles, the issue of the
21 videos and the photos that were tendered in the proceeding
22 of the nine hour arms raid was central to those
23 proceedings.

24 Now, this is not the - what I'm telling you,
25 Your Honour, and it is born - it is born in the judgment
26 itself. The central - one - one of - the other central
27 issue was the devenomised[sic] snakes. One of the central
28 issues that made or broke this case was my compliance or
29 noncompliance with the wildlife regulations and the Code
30 of Practice, and that is why the judge had to make the
31 finding, which he's done, in his final judgment that I had

1 complied with those codes because a finding that I had not
2 complied with the codes, a finding that I was not
3 concerned for the welfare of the snakes, a finding that my
4 snakes were not well looked after would have resulted in
5 the decision of the respondent not being set aside.

6 So, Your Honour, you cannot, in my respectful
7 submission, separate that decision from the finding that
8 my snakes and my cages were - there are other animals, but
9 it was predominantly snakes - the reptiles and their cages
10 were either - were either compliant or not complaint.

11 That - the final result of that case was dependent
12 on that, and the department argued with full force, and
13 full vigour, and the best lawyers they could buy that my
14 cages and my keeping did not comply with the code, and did
15 not comply with the wildlife regulations, including the
16 issue of not being sufficiently locked. Bearing in mind,
17 they're in a locked building. They're in locked buildings
18 that are sealed, and (indistinct words).

19 HER HONOUR: Okay. So yes. So I understand that argument in
20 relation to Mr Butcher's decision.

21 MR HOSER: Yes. It is - it's not a - it's not just one of
22 those (indistinct) that went down the window a part of the
23 collateral attack. It was central to the case.

24 HER HONOUR: Yes.

25 MR HOSER: The other central thing (indistinct) was that my
26 de venomised snakes had regenerated venom, which was a
27 complete and utter lie made up by the Department, and
28 which they admitted to - to lying about in the lead up to
29 this hearing.

30 But, again, that becomes relevant in terms of bad
31 faith, relevant considerations and unreasonable, and the -

1 the Department was happy to fabricate a lie about snakes
2 regenerating venom to damage myself, my business, and the
3 welfare of our animals. Bearing in mind that some of
4 these de venomised snakes were deliberately killed in that
5 raid, and I actually saw a relevant part of that video as
6 recently as last night. So what I'm telling you is in
7 terms of res judica, you cannot divorce the alleged
8 compliance or non-compliance with those - the Code and the
9 - the Regulations in the VCAT matter, because that was
10 central to it.

11 HER HONOUR: Yes.

12 MR HOSER: And that reflects in the judgment, in paragraphs 27
13 to 35. That is compliance with those codes and rules
14 meant that the respondent's decision, who had decided
15 I was not compliant, were set aside.

16 HER HONOUR: Yes.

17 MR HOSER: So the respondent said, 'You - you don't comply with
18 the code, no licence.' The judge said, 'Uh-uh, he does
19 comply with the code. Licence.'

20 HER HONOUR: I understand.

21 MR HOSER: So it was very expensive. I had to pay hearing fees
22 every day. The Department strung it out forever.

23 HER HONOUR: Yes.

24 MR HOSER: They brought in all these bogus witnesses, and as
25 I said, we beat them in their own court, in their own
26 game. And that should - we thought that was the end of
27 it, and it was funny, because my wife said to me at the
28 time 'Thank God that's over.' And I said - I played a
29 song, you might know it. Can't remember the singer's
30 name. It goes (indistinct words).

31 HER HONOUR: All right. Mr Hoser, I need you to move on.

1 I understand that submission now.

2 MR HOSER: Now, in terms of the Court of Appeal.

3 HER HONOUR: Yes.

4 MR HOSER: It was the same. It was effectively - the VCAT case
5 was a more detailed run of the Court of Appeal, because at
6 every round, the Department pulled out basically all stops
7 to - to basically nail us. And they even went into
8 newspapers and said they would've spent what's necessary
9 to close us down.

10 The Court of Appeal, same story. The two dynamics
11 were the raid, the animals not being kept in compliance
12 with the Regs and the Code. Or allegedly not being
13 complied. And, again, the same - the same dynamics
14 occurred. If we did put the animals in ages that they
15 said were complaint - there wasn't a directions notice,
16 but there was a - just a - there was - there was charges
17 pending - it was a case of the animals would die. The
18 animals would die.

19 Now, significantly, we, you know, we obviously - as
20 - as per the finding in paragraph 30 - sorry, at 31, where
21 Judge Butcher said, 'I am satisfied that he genuinely
22 concerned for welfare of his snakes, and he cares for them
23 in a proper manner.' In a proper manner. That means he
24 complies with the code.

25 Now, since that judgment, nine years have elapsed.
26 The crocodile sitting right next to me here, waiting to be
27 shown to you, friendly as a dog or a cat, is still in good
28 health because I have complied with the Code. Now, if
29 I was to comply with a directions notice and dial down the
30 heating of the crocodile's cage, as per the directions
31 notice - that exact direction - that crocodile will end up

1 the same way as the ones at Melbourne Zoo, which is dead.
2 And that fact alone proves that I have been complying with
3 the Code and the Regulations.

4 And it also proves that - and in terms of relevant
5 considerations and bad faith and unreasonableness - that
6 one direction that I dial down the heat on the crocodile
7 in particular - which is still alive and well and was held
8 by 5000 two weeks ago in two days, and is quite happy
9 that, great ambassador for conservation - that animal will
10 be dead if I was to follow the directions notice.

11 Now, in his submissions overnight - sorry, on Friday
12 - my learned friend from the DEECA Department claimed that
13 the directions notice system gives the Department a whole
14 - basically, he's saying they can do what they want. He
15 said, 'We can do what we want, you know. We've got a
16 broad - a broad scope of what we can do for our directions
17 notice.'

18 Your Honour, the directions notice has a place. But
19 the broad scope does not extend to an arbitrary direction
20 to a person when they are well aware that that direction
21 would end up in the death of the animal. It is meant to
22 be protected wildlife that is protected by the Wildlife
23 Act, and the Code of Practice. It is a false claim to be
24 invoking the Code of Practise to issue a directive
25 allegedly for breaching that code, that they know will
26 kill the animal. I mean - - -

27 HER HONOUR: Well, this is moving beyond res judicata to some
28 of the other topics. So can I just pull you back to the
29 res judicata topic for the moment.

30 MR HOSER: Yes.

31 HER HONOUR: And you've taken me to the - - -

1 MR HOSER: The issue - - -

2 HER HONOUR: You've taken me to the 2015 VCAT decision, and

3 you've said that - - -

4 MR HOSER: Yeah. Now we're onto the Court of Appeal.

5 HER HONOUR: - - - res judicata arises from that, and you've

6 taken me to the Court of Appeal case. Are they the two

7 decisions that you rely on.

8 MR HOSER: No.

9 HER HONOUR: Or the two cases that you rely on, for that

10 argument?

11 MR HOSER: No. There's a third. There's a third - there's a

12 third one.

13 HER HONOUR: All right. What's the third one?

14 MR HOSER: It was just a Magistrates' Court.

15 HER HONOUR: And I just need you to identify that one for me,

16 or where it is in the material.

17 MR HOSER: Just bear with me. I'm - there's no ruling -

18 there's no ruling in the judge - there's no published

19 ruling. But the judgment I do refer you to, which I'm

20 going to talk about now, is Hoser v Department of

21 Sustainability VSCA [2014] VSCA 206, 5 September 2014.

22 I think that is in your material.

23 HER HONOUR: Yes. That's the one you just took me to.

24 MR HOSER: No. I had you at the VCAT one before that.

25 HER HONOUR: No. Sorry, you just took me to paragraph 31 of

26 the Court of Appeal decision. So that's the second case

27 you're relying on.

28 MR HOSER: No. That was - no. That was paragraph 31 for VCAT.

29 Sorry, Your Honour. No. I referred you to paragraph 31

30 of the VCAT decision, that was.

31 HER HONOUR: Okay. Sorry. My error there.

1 MR HOSER: Now - - -

2 HER HONOUR: Yes. I've got the Court of Appeal decision up.

3 That was - - -

4 MR HOSER: Yep. Now, I'm just - I'm just running -

5 running - - -

6 HER HONOUR: And I understand that your argument is the same.

7 That the - - -

8 MR HOSER: Yeah. It's the same. It's the same.

9 Everything - - -

10 HER HONOUR: - - - various things in the reasons give rise to a

11 res judicata or Anshun estoppel. What paragraphs in

12 particular?

13 MR HOSER: For example, paragraph 47.

14 HER HONOUR: Forty-seven?

15 MR HOSER: Was a finding at VCAT, on the evidence and

16 submissions of the Department of Sustainability, and

17 I quote: 'That the finding had displayed a contemptuous

18 attitude towards his obligations under his license, and

19 the reckless disregard for a breach of those obligations.'

20 Now, they're talking about a number of issues. And to

21 give you an idea how wide ranging these - and these are

22 the same issues that were covered in the VCAT judgment,

23 'cause it talks about my publications in the VCAT judgment

24 as well.

25 And paragraph 50 talks - has a quote, where the

26 judge at VCAT - which is being appealed - wrote

27 erroneously: 'He has been working with reptiles all his

28 life and has published extensively, although he did not

29 provide any details of such publications' - which is

30 highlighted by the - your court judges. 'He says he is

31 widely cited, including articles concerning the

1 performance of his surgery' - that's devenomising the
2 snakes. And then she's written, 'Again, there were no
3 details provided in support of those claims.'

4 Now, those statements, of course, are wholly untrue.
5 That was provided, and that's exactly why the - in
6 paragraph 51, the Appeal Court judges refer to the
7 publications I had. Sorry - 51, 52, 53. Paragraph 52,
8 sorry. Fifty-two, it talks about - well, I referred to
9 material that, you know, my publications and so on, and
10 how I had boxes of them in the car, and the Wildlife
11 Department and the judge weren't interested in it.

12 HER HONOUR: Okay.

13 MR HOSER: Where the - where the counsel for the judge - for
14 the Department says, 'Oh, well. Might have a look at
15 those later, Your Honour, and I will just continue with
16 the cross-examination.' So - and then the judges wrote:
17 'It appears that the respondent's counsel did not take up
18 the - did take up' - they've written there: 'It appears
19 that the - the respondent's counsel did take up the - the
20 applicant's invitation' - not sure whether that was meant
21 to be 'did not'.

22 HER HONOUR: So paragraphs 47, 50 to 53, are the paragraphs
23 that you principally are drawing to my attention?

24 MR HOSER: They - they show that all these wide-ranging issues,
25 you know, contempt for my licence conditions, which
26 includes the Code and the Regulations, they've argued all
27 this in this case as well. And if one scrolls further
28 down here, and I'm just trying to scroll through it. I've
29 literally got it on the screen in front of me, trying to
30 see where obviously the - these - the issues of the caging
31 is - is in there, but it was - was all raised in the

1 proceedings. Blah, blah. I'm just - sorry about this.
2 They - they basically found in my favour. They - again,
3 they - they reverse the cancellation decision.

4 HER HONOUR: Yes.

5 MR HOSER: And while they - while the judges harp on in their -
6 their judgment which, again, is relatively short. It's
7 only, like, 80-odd paragraphs. The issue of my contempt
8 for the rules, including the caging - the cage size -
9 alleged cage - alleged cage sizing and so on was not
10 agreed by the Court of Appeal judges. And had they agreed
11 with that, that alone, Your Honour, would have resulted in
12 a reversed decision; that is, my licences and approval
13 would not have been renewed.

14 And I must say, Your Honour, in fairness, if a
15 person is mistreating reptiles knowingly, they most
16 certainly should not be licensed. You know, I - there's
17 no question, okay? You've got agreeance on that one.
18 That's not the case here. I mean, I spend - look, last
19 night, I finished on the computer about 3 o'clock. I then
20 had to spend an hour cleaning cages and checking on a few
21 animals and tearing them up or whatever because it's
22 mating seasons.

23 HER HONOUR: Mr Hoser, let's - - -

24 MR HOSER: And then I went to bed at 5 am.

25 HER HONOUR: I understand that you've been under - - -

26 MR HOSER: I mean, it's what I do every day, and it's quite
27 (indistinct) - - -

28 HER HONOUR: I understand all of that. You've told me that a
29 couple of times.

30 MR HOSER: Yes, Your Honour, but you need to - - -

31 HER HONOUR: But I need you to focus on the submissions. And

1 we've got two decisions, and I understand your submissions
2 about res judicata and issue estoppel in relation to each
3 of those. The third one is the Magistrates' Court.

4 MR HOSER: Now, that was - - -

5 HER HONOUR: And what have I got in the materials in relation
6 to that decision?

7 MR HOSER: Now, in terms of that decision, there's no
8 transcript. That was in - - -

9 HER HONOUR: Is there an order?

10 MR HOSER: Yeah, the case was dismissed. The - there was 23
11 charges.

12 HER HONOUR: Where do I find that?

13 MR HOSER: I refer to it in my affidavit. I do have the audio
14 file from the Magistrates' Court. I'm happy to tender it
15 up if need be. But, basically, the charges were all
16 struck out, and I was acquitted. So, you know, and the
17 Department had their - they prepared their brief of
18 evidence, and they had all the pictures of all the snakes
19 in exactly the same - very similar to what you see in the
20 affidavit of Lucille Watterson's or both of her
21 affidavits. Same snakes, same cages, same water bottles,
22 same newspaper, same heights, same everything. Cages are
23 unchanged.

24 The only difference between 2011 and 2013 is there's
25 three additional racks in the shed. So there's four racks
26 in the - what we call the bungalow, and in the shed, there
27 was two racks at the time, and there's been three added.
28 They're not all full, but they're there. So that's what
29 we - we have had.

30 But the - the charges were September or October
31 2012. The date is in my affidavit material and, as I say,

1 I did purchase the audio file from the court. I haven't
2 tendered it in evidence, because it's - the way the
3 Magistrates' Court give you the disc, they don't - it's
4 not as one audio file. It's in a confusing sort of setup,
5 so short of sending the disc - - -

6 HER HONOUR: That's all right. It's not before me, and it
7 probably doesn't need to be.

8 MR HOSER: But, again, those specific charges - and I sent you
9 the charge sheet relating to one of the diamond pythons.
10 And, bear in mind, I think there was four of them at the
11 time. Each snake was subject of a charge. It was same
12 charge: cage was too small or whatever the charge -
13 however the charge was written. That's it. Now, that
14 charge - they - when you charge someone with an offence,
15 they're charged under one or other Act. They're not
16 charged for the same thing under two different Acts.

17 They - they picked one, so the fact that the actual
18 charge is written in contravention of the Prevention of
19 Animal - Prevention of Cruelty to Animals act as opposed
20 to the Wildlife Regulations - I wouldn't be putting any
21 weight on that, Your Honour, as reason that it's not
22 estoppel or res judica, which is what was submitted by the
23 Wildlife Department over the weekend, because the reality
24 is it was exactly the same facts and circumstances, and
25 the offence as charged would - would gather a similar
26 penalty. I mean, it's the same thing. So to - - -

27 HER HONOUR: So the Magistrates' Court charges were under the
28 Prevention of Cruelty to Animals Act?

29 MR HOSER: That particular one was. I don't know. There was
30 23 charges, Your Honour. I - I'll have a look at the
31 charge sheet. Just one moment. I think it should be -

1 Your Honour, there's been so many documents and, bear in
2 mind, we've had a few raids in the process and had to take
3 them.

4 HER HONOUR: Well, that was really my question. Are any of the
5 charge sheets from the Magistrates' Court before me?

6 MR HOSER: Yes, you've got - you've got that. Yes, you have.
7 You have a charge sheet with two of the charges or three -
8 two or three of the charges (indistinct), which includes
9 the - which includes the diamond python charge. You have
10 that in front of you.

11 HER HONOUR: Okay.

12 MR HOSER: That is in one of my affidavits. It's in - I think
13 it's in my second affidavit of 7 March or thereabouts.

14 HER HONOUR: Okay.

15 MR HOSER: It is in there. I'm - I'm looking for it, yet
16 I can't see it in this folder. You'll just accept that
17 I do - I remember we got - bear with me, Your Honour.

18 HER HONOUR: Sorry, Mr Hoser. I've lost you. You're not on
19 the screen anymore.

20 MR HOSER: No, no, because I - I walked - I walked to be able
21 to - look, I thought I had it in my fingertips. I -
22 I don't, and I was to just check what all the other
23 charges were. As I say, there were 23 charges, but they
24 were all wildlife related. And that - the one I sent you,
25 because it - the reason I sent you one with the diamond
26 pythons is it's quite explicitly about cage sizes, and it
27 was quite fortuitous that I was able to scroll through the
28 videos of the raid and find it quite quickly - the taking
29 pictures of it, because they took pictures of every snake
30 in every case in the same way they did more recently.

31 And that was their brief of evidence. They had a

1 picture of the snake in the cage, and I couldn't find that
2 brief of evidence. It's probably been taken in one of the
3 raids and - but I did find it on the video. Now, I've got
4 the charges here. I'm just looking at it now, Your
5 Honour. Some of the charges were under the Wildlife Act.
6 There's - as I say, there was 23 of them.

7 HER HONOUR: Yes, no. Mr Hoser, you're not giving evidence
8 from the Bar table. What I wanted to know is are the
9 charges - - -

10 MR HOSER: Well, you asked me about the charges. I was - - -

11 HER HONOUR: I'm asking you where they are in the material.
12 Have they been exhibited to your affidavit or not?

13 MR HOSER: Yes, they have.

14 HER HONOUR: Okay.

15 MR HOSER: They have.

16 HER HONOUR: Thank you. That's all I needed to know.

17 MR HOSER: Don't recall the page, Your Honour.

18 HER HONOUR: No, that's all right. I can find them in the
19 page, but they're - - -

20 MR HOSER: I can't recall the page, but they are exhibited to
21 the affidavit.

22 HER HONOUR: That's all right. That's all I needed to know.

23 Right. Okay. So they're the three cases that you rely on
24 for the issue estoppel res judicata point.

25 MR HOSER: Yes.

26 HER HONOUR: All right. And I understand the submission you
27 make, and it's essentially the same in relation to each of
28 those cases that the issue of cage sizes and animal
29 welfare have been determined

30 MR HOSER: All the same issues as in the directions notice,
31 yep.

1 HER HONOUR: Yes, okay.

2 MR HOSER: Yep.

3 HER HONOUR: All right.

4 MR HOSER: So they've relitigated it in - - -

5 HER HONOUR: Is there anything else you wanted to say about

6 that topic?

7 MR HOSER: Sorry?

8 HER HONOUR: Is there anything else you wish to say about that

9 topic?

10 MR HOSER: I believe I've covered it fairly well.

11 HER HONOUR: Yes.

12 MR HOSER: And if you read my - if you read my affidavits which

13 will have the evidence and the submissions, you will see

14 the - see - see where my arguments go.

15 HER HONOUR: Yes.

16 MR HOSER: Now, just so you know, Your Honour, my affidavit of

17 7 March 2024 at p7 has attached - - -

18 HER HONOUR: Now, you've got two affidavits of that date,

19 so - - -

20 MR HOSER: Yeah, the second affidavit. The second one.

21 HER HONOUR: Okay. So that's the one that you swear as an

22 expert?

23 MR HOSER: I swear them all as an expert.

24 HER HONOUR: All right. Well, when you say 'the second one' -

25 okay. So is that the one that starts at p202 in the court

26 book?

27 MR HOSER: I don't know, because I'm looking at the - I -

28 I couldn't work the court - the court book's too hard.

29 I've just got it - brought it up on my screen separately,

30 Your Honour. But it is the second affidavit of that date,

31 so it's the smaller of the two, and in the appended

1 items - - -

2 HER HONOUR: It's the one filed at 10.23 pm on that date.

3 MR HOSER: Probably. I'm looking at an unsealed version. I'm
4 sorry, Your Honour.

5 HER HONOUR: That's all right. I just want to make sure I'm
6 looking at the right one. Okay. So it's the one that's
7 at p452 of the court book. Yes, okay.

8 MR HOSER: And p7 of that document. So the page number's on
9 the top-left corner of the actual document as opposed to a
10 court book page number. But p7 of the document should be
11 headed 'Form 3 Charge Sheet and Summons'.

12 HER HONOUR: Yes.

13 MR HOSER: And then you flick to the second page where it's got
14 Charge 8, and yeah, there's different charge, but yeah,
15 there's two diamond pythons there. On 17 August
16 (indistinct words) namely one diamond python where the
17 confinement of the animal - - -

18 HER HONOUR: Yes, I can read it there, yes. Okay.

19 MR HOSER: Yep. And the second video that was emailed, the one
20 that you got at 5.31 pm, will show the wildlife officer
21 with the exact cages and the exact snakes photographing
22 him in the same room, the same building, which match what
23 we have in the affidavit material of Lucille Watterson in
24 her second affidavit. The same cages, same (indistinct).

25 HER HONOUR: Okay.

26 MR HOSER: And the snakes (indistinct) in perfect condition.
27 So it's been done, and they're using the directions notice
28 process as a backdoor way to relitigate something, and to
29 that extent this is not - the characterisation by the
30 department that this is an unrelated legal thing and no
31 connection is fraudulent. Now, also significant, Your

1 Honour, is - we've had to spend considerable time and
2 expense having to contract someone to create those racks
3 the snakes are in which are not very simple things.

4 The racks that those snakes are in have heating
5 systems at the back of them. They're designed to be
6 escape proof on several grounds so that they're the best
7 possible rack system in that some racks - they don't
8 accommodate for lockable lids. They have no lids, the
9 cages. They slide out.

10 The racks we have accommodate for custom size boxes,
11 lockable lids, everything. And they're quite expensive.
12 So after we'd been cleared by the courts at three separate
13 courts, and the department basically has said, 'Right.
14 Game's over. You can continue to operate without undue
15 harassment', we've gone and purchased three more which are
16 in the photos of the department.

17 Three more of the exact same racks, only to be told
18 now, 'Oh, they're rubbish. Chuck them out. Start from
19 scratch.' And again, before I miss it, Your Honour, it's
20 not res judica [sic], but so it's not missed. The
21 costing, at the barest minimum for what is in that
22 directions notice, is over \$1m. Over \$1m.

23 HER HONOUR: All right. So - - -

24 MR HOSER: Which is again highly unreasonable.

25 HER HONOUR: All right. Well - - -

26 MR HOSER: Bearing in mind that there's no welfare benefit for
27 the animals and it would actually damage the welfare of
28 the animals.

29 HER HONOUR: Mr Hoser, let's perhaps move from the res judicata
30 point, then, to perhaps the improper purpose bad faith
31 point because - - -

1 MR HOSER: Exactly, Your Honour.

2 HER HONOUR: - - - your comments are sort of really moving
3 probably - - -

4 MR HOSER: Heading in that direction.

5 HER HONOUR: - - - to under that heading.

6 MR HOSER: Yes.

7 HER HONOUR: So let's formally move to that heading.

8 MR HOSER: Now, again, it gets to the history of the
9 department. The very day that they've issued the - these
10 charges - I don't know if (indistinct) when the charges
11 were laid. They were laid almost 12 months after the
12 raid. So the raid was in 2011 and they've issued the
13 charges in June a year later. Now, Your Honour, it's
14 ironic that in a raid where they killed about 20-odd
15 snakes - and I can't remember the exact number - when
16 they've gone out and actually sought - they've actually
17 sought for and killed as many de venomised snakes as they
18 could, wanting to disable our business, and as I said,
19 I was watching a relevant part of that video, bearing in
20 mind (indistinct).

21 HER HONOUR: But Mr Hoser, let me just ask you this. The
22 relevance, if any, of the raid in 2011 is all about bad
23 faith in a decision made in twenty - in the decisions
24 notice, 2023.

25 MR HOSER: Correct. It is - they don't stop. They're like
26 Hamas terrorists.

27 HER HONOUR: So what I need you to do is start from the
28 proposition that it's the decision notice about which
29 you've got to establish was made for an improper purpose
30 or for bad faith. So start with that decision rather than
31 any bad faith that you might allege about the 2011 raid or

1 the 2012 charges because that's not really the question.
2 MR HOSER: Okay. The bad faith is shown in the lead up to the
3 visit. It was - the phone calls were made and recorded,
4 and the Wildlife officer said it was coming to do an audit
5 to count your animals to make sure that the numbers of
6 animals you say on your Wildlife return match what you
7 keep. Now, Your Honour, once a year, about now, we have a
8 file a return with the Wildlife Department itemising all
9 the animals we have, all those that have died over the
10 following year, all those that are bred over the following
11 year, all those that we have either sold or given away to
12 other people, and all those that we've been bought [sic]
13 in or been given or bought or whatever. So ins, outs,
14 births, deaths.

15 We send them a return every year, so the Wildlife
16 Department has an idea who's got what. That's the system.
17 And because I actually - I don't agree with most of the
18 wildlife laws, but I comply with them, so I - you know, if
19 I had it my way I wouldn't be telling the government -
20 I wouldn't be justifying myself to the government. I'd
21 rather it was the other way round. But anyway, I comply
22 with the law, you know? Like when I drive past a school,
23 and a 40k zone is not a school kid in sight. I comply
24 with it.

25 HER HONOUR: Let's keep on point.

26 MR HOSER: So the raid - the last visit in September was to
27 count the animals. How long will it take? We will be out
28 of your house by 11 o'clock. Well, that's fine because
29 I had to go and train dogs at 12 o'clock that day.

30 HER HONOUR: Yes.

31 MR HOSER: We train dogs to avoid snakes, and we've even

1 trained judicial - - -

2 HER HONOUR: The detail about what happened you've put in your
3 affidavit, and I've read your affidavit so you don't need
4 to tell me all of that.

5 MR HOSER: Yes. So the bad faith is they lied - they then come
6 in with those - like a SWAT team, all heavily armed, all
7 with body cameras dressed like neo-Nazis, and they come in
8 filming, photographing everything, and even at that point
9 in time, after, you know, the initial barrier is broken
10 down and I'm quite cooperative with them and there's no
11 resistance. Do what they want, answer all their
12 questions, whatever. They're photographing all the
13 animals. Now, even at that point - - -

14 HER HONOUR: So your first - sorry. Let me - so as I'm clear,
15 your first point is that bad faith is demonstrated by the
16 manner in which the audit was conducted.

17 MR HOSER: Correct.

18 HER HONOUR: Okay. Next point about bad faith is what?

19 MR HOSER: And even at that point in time - sorry?

20 HER HONOUR: The next point that demonstrates bad faith is
21 what?

22 MR HOSER: Yeah. So even when they're photographing the
23 animals, the alleged basis of that is so that they know
24 what I've got because Wildlife officers are concerned
25 that, you know, an animal might die and I might take one
26 from the wild to replace it or I might smuggle one in from
27 interstate or - that's the - why they have all these
28 wildlife laws, to stop all this sort of stuff.

29 HER HONOUR: Yes.

30 MR HOSER: So it's a pretty standard thing. They come in and
31 photograph everything. Every time they raid you they

1 photograph everything. Our animals get photographed all
2 the time. We do a reptile show at a shopping mall. They
3 photograph every animal. They come out with (indistinct
4 words) audience.

5 HER HONOUR: Yes. I get that point.

6 MR HOSER: We - they do - - -

7 HER HONOUR: Photographs are standard.

8 MR HOSER: Our animals are photographed more often than Bindi
9 Irwin. So, you know, they're photographing animals,
10 that's fine. There is no indication of a direction notice
11 at any stage, and in the banter, I'm talking about, you
12 know, this snake is bit of a prick, it's just poed in the
13 cage after I cleaned it, you know, an hour ago, because
14 before they'd arrived I was cleaning cages.

15 And, well, venomous snakes poo a lot more than most
16 other reptiles, so yeah, they poo a lot, that's fine,
17 which is one of the reasons you have more newspaper, for
18 that very reason, because they're messy. Anyway, in the
19 banter I talk about old snakes, and I mentioned that I had
20 a turtle that I fixed up an eye infection with, and I just
21 made the comment, 'Oh, this guy I fixed up an eye' - - -

22 HER HONOUR: Mr Hoser, can I just bring you back again because
23 submissions aren't - - -

24 MR HOSER: We're going to bad faith.

25 HER HONOUR: - - - the place for me to talk about your
26 evidence. The submissions are to tell me what the
27 evidence which I've read - your affidavit - and I'll read
28 it again - what - the ways in which that evidence, you say
29 - what I should do with it.

30 MR HOSER: Okay, yep. Now, in terms of the bad faith - - -

31 HER HONOUR: So I'm not interested in you telling me again

1 about what happened at the audit.

2 MR HOSER: Okay.

3 HER HONOUR: I'm interested in the submission - - -

4 MR HOSER: (Indistinct words) three directions notice that were
5 issued. Now, if you have a look at the affidavit, the bad
6 faith is pretty well summed up in the affidavit of Lucille
7 Watterson. She's given her detailed account of the road.

8 HER HONOUR: Yes.

9 MR HOSER: And at paragraphs 11.1 through to 11.8 she sets out
10 what she says were breaches of the code of conduct or what
11 she observed. I'll try to bring it up. I was reading it
12 just before we started today. So at 11 and 1 she says the
13 animals - 'I observe (indistinct) did not meet the size
14 requirements imposed by the code of practice for the
15 welfare of animals.'

16 Now, that's fundamentally incorrect, as already
17 mentioned. The code doesn't even cover one snake per
18 cage, and so to that extent there are no size requirements
19 imposed, bar the overarching need to be big enough for
20 them to move around in and big enough to have a thermal
21 radiate which self-evidently all the cages did. Bearing
22 in mind that they walked around with a temperature gun
23 measuring temperatures at each end of the cages, and as a
24 rule they were different, except when the heating system
25 was turned off on some of the cages; not that they
26 bothered working that much out.

27 But the fact that they were able to measure
28 temperature gradients - and they reported the temperature
29 gradients in the cages in their report - confirmed that
30 the size requirements were being met for every animal. So
31 at every point, one is wrong. So the affidavit is made in

1 bad faith. This sworn document. It was made in bad
2 faith, as is what follows from that - which is, of course,
3 the direction of matters.

4 HER HONOUR: But just because something is wrong doesn't mean
5 it's in bad faith. Why do you say it's linked?

6 MR HOSER: Consistency. It gets to the - well, it becomes bad
7 with - well, Your Honour - Your Honour, it becomes bad
8 faith when these errors are pointed out to the department
9 and, as a reasonable person would do and say, 'Well, look,
10 I've got it wrong; I'll fix the mess', they have tried to
11 cover their error with a bigger error. A lie to cover a
12 lie. That's what we've got.

13 So when I then contacted the department and said,
14 'You know, you're - you're - the recent notice is out - is
15 out of order' - and I gave a number of reasons - they
16 refused to discuss it; refused to negotiate; refused to
17 amend; refused to change; basically, 'Comply, or else.'
18 So the fact that they have continued to run this mantra
19 that the size requirements don't comply with the code of
20 practice, after I'd sent them several detailed letters -
21 which are in the affidavit material - explaining why the
22 size requirements are being met - they've continued right
23 the way to trial.

24 HER HONOUR: Yes.

25 MR HOSER: The claim that they had been left in an unhygienic
26 state, including the presence of faeces, is absolutely
27 ridiculous. The photos, which are in the first and -
28 well, the first affidavit, in particular - they phylotype
29 six or so cages of animals, and I didn't see any faeces in
30 any of those, for a start. So the six cages they've given
31 as examples as to how bad my cages are had no faeces. If

1 you look at the photos of 200 odd cages - bear in mind,
2 they hadn't been cleaned - a lot of them hadn't been
3 cleaned; they were in the process of being cleaned - very
4 few of them have faeces.

5 And the significant part is - is, in the cages where
6 you see faeces, you will also see the presence of
7 newspaper, which means they can be properly cleaned in
8 line with the code of practice, which says that the cages
9 have to be easily cleaned and kept clean - which is not
10 possible with any other subject or - or not as possible,
11 in a larger cage with naturalistic furnishings, where
12 faeces will get stuck in the rocks and logs and are
13 indetectable from it 'cause it's the same colour and all
14 the rest of it.

15 So again, the claim that they were left in an
16 unhygienic state is not the case. No one - and - the code
17 of practice included - specifies that you have to have an
18 eye on every animal for 24 hours a day and clean up their
19 faeces when they do it. So to claim that the presence of
20 faeces in a - in a small number of cages is indicative of
21 neglect or breaching of the code of practice of welfare of
22 private keeping of reptiles is wholly incorrect.

23 Now, another issue - a legal issue that you might
24 want to address, Your Honour, if it hasn't been mentioned
25 - but I'll mention it now - so you might want to write
26 this down - is this Code of Practice for the Welfare of
27 Animals - Private Keeping of Reptiles, in itself, is not
28 even applicable to myself. We have a commercial Wildlife
29 Demonstrator's License. A private reptile keeping license
30 is a separate pass or licence within the department. So
31 to that extent, there is no code of practice for private

1 keeping of reptiles. The department has de facto used
2 this code on us. I suggest that is not legal, and I ask
3 you to make the determination to that effect.

4 And on that basis, that would simply negate the
5 entire directions notice, because it's based on that code
6 of practice and clearly, it's not applicable to us. So
7 I've mentioned that, as well. Does that make sense,
8 Your Honour?

9 HER HONOUR: You'd better say it again, because it's not part
10 of your grounds.

11 MR HOSER: No. Well, I'd like to seek to add to them. The
12 Code of Practice for the Welfare of Animals - Private
13 Keeping of Reptiles is clearly worded and designed for
14 people that keep reptiles privately, on a private basis in
15 terms of a private reptile keeper's license. We have what
16 is called a Demonstrator's License. So we have reptiles
17 that are used for the demonstrative purposes of public
18 education; that are regularly handled; regularly cleaned;
19 we have large numbers of them. We're, on a matter of
20 logistics - and this applies to all zoo and wildlife
21 displayers worldwide.

22 We need animals that we have 24 hour access to so
23 that we can use them in a reptile show. We can't have
24 them in a cage where they can hide in a log for a long -
25 and we don't have access to it. From the point of view of
26 keeping them well and in good health, it also is better to
27 have 24 hour access, because if there is any whiff of ill
28 health, we can, you know, grab the animal and deal with
29 it.

30 So for that reason, the code of practice - what
31 would apply for the private keeping of reptiles would be a

1 completely different set of circumstances to a commercial
2 outfit such as ourself, or an educational outfit such as
3 ourself, which necessitates people handling reptiles
4 regularly.

5 Animals are being transported around; exposed to
6 pathogens that a private keeper might not get exposed to;
7 the whole regime of what we operate under is very
8 different. I mean, we have to inoculate our animals for
9 diseases and parasites that the average keeper wouldn't
10 even have to concern themselves with.

11 HER HONOUR: Yes. All right. I understand. And you want to
12 add that ground.

13 MR HOSER: So - yes, Your Honour. That the Code of
14 Practice - - -

15 HER HONOUR: All right. Well, subject to what Mr Chaile says
16 when he addresses his submissions about that - I'll
17 decided whether that gets added or not in due course.

18 MR HOSER: Okay. I don't believe that he has a reasonable
19 ground, and the fact that I'm doing it at this late stage
20 I don't believe should be against me, because (1) I'm not
21 represented; (2) it is a matter of public interest; and
22 (3) it's the nature of what has happened and the speed of
23 what has happened - bearing in mind I've had other legal
24 cases to deal with with this (indistinct), clearly - - -

25 HER HONOUR: Well, let's not pre-empt his position.

26 MR HOSER: No.

27 HER HONOUR: We'll wait and see what it is.

28 MR HOSER: Yes. Okay. So the - we got to 11.2. Now, 11.3 -
29 'Did not have appropriate natural or ultraviolet lighting'
30 - is also incorrect. Reptiles do not need either a - even
31 - no reptile you'll find on the planet needs natural or

1 ultraviolet lighting 24/7. In the buildings the reptiles
2 are in, they have day/night cycles. They have night.

3 HER HONOUR: Well, can I just ask you a question about that
4 statement. Are you saying your enclosures don't have
5 natural or ultraviolet lights, but that's because reptiles
6 don't need them?

7 MR HOSER: In the case of most of the animals here, none of
8 them need any of it. But they do have day/night cycles.
9 The buildings that these animals are in have time
10 switches, and it's all automated. They have an automated
11 day/night cycle, so they all get light. They do get
12 light. And, in the case of the shed, which is sealed for
13 good reason - because it's better off being sealed than
14 having skylights and things; we actually had the skylights
15 taken out - but they have lighting.

16 HER HONOUR: I'm really trying to understand. You made a
17 statement that sounded to me like you said the animals
18 don't - - -

19 MR HOSER: No. No animal needs lighting 24 - no. No. You
20 don't need 24/7 lighting. This is not hydroponics and
21 things like that.

22 HER HONOUR: They need some lighting.

23 MR HOSER: Yes.

24 HER HONOUR: Natural and ultraviolet?

25 MR HOSER: No. No. Lighting. No. They need lighting. They
26 need light. They need a day/night cycle. It doesn't have
27 to be sunlight. A fluoro tube. A light bulb. That is
28 perfectly okay.

29 HER HONOUR: Okay.

30 MR HOSER: Now, in terms of ultraviolet lighting,

31 Your Honour - - -

1 HER HONOUR: All right. No. So I'm just trying to understand.
2 Your position is that they need lighting and they need a
3 light like a daily cycle of light and dark.
4 MR HOSER: Yes. Well, as a rule. Yes. As a rule. But all
5 these things I'm saying, Your Honour - there can be
6 exceptions.
7 HER HONOUR: All right.
8 MR HOSER: But as a rule. Yes.
9 HER HONOUR: Okay.
10 MR HOSER: As a rule. Yes. They all need a day/night cycle
11 and they all need lighting. It does not have to be
12 sunlight. In fact, sunlight is - - -
13 HER HONOUR: Sorry. That's what I'm just clarifying now. Your
14 animals get a day/night light cycle.
15 MR HOSER: Correct.
16 HER HONOUR: The light source being an electric light bulb,
17 rather than sunlight.
18 MR HOSER: Yeah. A light bulb or fluoro tube. An electric
19 light bulb, fluoro tube, or both.
20 HER HONOUR: Yes. So artificial lighting rather than sunlight.
21 MR HOSER: So in - in the - in the shed building - Your Honour,
22 in the shed, they get both. They get fluoro and - and
23 light bulb at the same time.
24 HER HONOUR: Yes. Okay.
25 MR HOSER: In the - in the office building, they get light
26 bulbs. Now, there are windows where daylight can come in,
27 but that doesn't hit the cages.
28 HER HONOUR: Okay.
29 MR HOSER: And they're - and all the buildings are air
30 conditioned. The buildings - - -
31 HER HONOUR: And they don't get ultraviolet light.

1 MR HOSER: None. No cages here, that - about - say - the
2 animals are in on a - well, let me qualify it. The
3 turtles live in an outdoor cage during the summer months,
4 so they get ultraviolet - they get sunlight every day.
5 All right. In the - in the cooler months, where we deem
6 it's too cold for them outside, for several reasons - and
7 they're - that also leads to the management of what we do.
8 Because they are used for wildlife shows, they are handled
9 daily. They - they need to be - - -

10 HER HONOUR: Okay. Just put the turtles to one side for a
11 minute, then, if they're the exception.

12 MR HOSER: No. The second - the second - - -

13 HER HONOUR: Generally speaking, the lighting source is bulbs
14 or fluoros, and the question I'd asked was about
15 ultraviolet.

16 MR HOSER: Yeah. Now, ultraviolet - - -

17 HER HONOUR: And is it the position that the cages don't?

18 MR HOSER: Yeah. Your Honour, ultraviolet comes from the sun.
19 You can have tubes. Now, the wildlife officers would have
20 seen fluoro tube holders and ultraviolet lights at our
21 facility. We have it, but we do not use them because
22 they're nowhere near as effective as natural sunlight.
23 Now, the turtles need UV; so they get it during the
24 summer.

25 During the winter when they're indoors, they are put
26 outside regularly in a wire cage in the sun on cold
27 weather where they get natural sunlight which is why, as
28 you can see from the photos of the turtles in the pictures
29 there, they all have perfectly formed hard shells which is
30 significant because all of those turtles were inherited as
31 sicklies from people and fixed up their shell infections,

1 but our turtles all are perfect condition, healthy hard
2 shells, which is only possible with UV, and in our case,
3 the UV comes from the sun.

4 HER HONOUR: Mr Hoser, I just asked you to put the turtles to
5 one side for a minute because what I was trying - - -

6 MR HOSER: Okay.

7 HER HONOUR: - - - to understand was whether the remainder of
8 the animals - - -

9 MR HOSER: No, none of them. None of them.

10 HER HONOUR: - - - who are in the racking, none of them get UV
11 lighting.

12 MR HOSER: None of them need UV. None of them get it. The
13 only exception to that is the green tree frogs where UV is
14 not mandatory, but it is very useful for combatting fungal
15 infections and things of that nature, and to that - for
16 that reason, our frogs get it in the sunlight, not in - in
17 the UV tube. In the sunlight. And that is done by moving
18 the cage they are in or a cage - because we use the
19 plastic containers - into the sun where the sun hits them
20 direct.

21 And that is done either late in the day in summer or
22 during the day in winter where they get the sun on them,
23 and they literally only need a few minutes a month would
24 be enough, but ours are left out there sometimes for, you
25 know, half an hour, an hour or more at a time. So they
26 have - they get their UV.

27 They do not need a UV tube on them every day, and in
28 the wild, as you would know, most frogs are nocturnal.
29 They come out at night, and in the wild state, you would
30 not be surprised if a green tree frog never saw the sun,
31 but ours do get to see the sun and it - because as we

1 (indistinct) it's - the health benefits outweigh the
2 risks. They can get skin cancers and things from the sun
3 like we can.

4 HIS HONOUR: All right.

5 MR HOSER: But we believe that - and this is another thing.

6 Too much UV will give other drams. So we regulate the UV.

7 HIS HONOUR: All right. Mr Hoser, I'm - it's just gone 1
8 o'clock. So I'm going to break for the luncheon
9 adjournment. When we come back, we'll move on to 11.4.
10 Okay. And we're dealing with - principally with the issue
11 of improper purpose bad faith. Although it
12 obviously - - -

13 MR HOSER: Yes, no. I understand that. Yes, yes.

14 HIS HONOUR: It obviously picks up other issues as well because
15 I accept that there's an overlap between these grounds.

16 MR HOSER: Yes, yes, yes. So yes. So in terms of the UV, we
17 have the UV under control, but it - the department never
18 bothered to look at what we do, asked our keeping regimes.
19 They literally walked in. They seen five turtles in a -
20 in a - in a plastic container on newspaper, not in a pond.

21 HIS HONOUR: Yes. I understand.

22 MR HOSER: And the bloke said - you know, he said, 'Why aren't
23 they in water?' I said, 'They're turtles'. He says,
24 'I've never seen a turtle out of water'.

25 HIS HONOUR: Thanks, Mr Hoser. I understand. We'll adjourn.

26 MR HOSER: Goodo. Thanks for that.

27 LUNCHEON ADJOURNMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

UPON RESUMING AT 2.18 PM:

HER HONOUR: Before we resume, I might just remind Mr Hoser that the correct form of address to the court is Your Honour, not more informal manners of address. All right. Mr Hoser, we're at 11.4 under the topic of improper purpose or bad faith.

MR HOSER: Just before we get to 11.4, just closing up on 11.3. I just want to draw attention, Your Honour, to variables that you need to be aware of in terms of lighting. The lizards we have, the snakes we have - the snakes and lizards, none of them require UV of any form. They typically - you know, it's just not required point blank. In terms of those remaining items - and that includes crocodiles as well. In terms of the crocodiles, the turtles and the frogs, limited amounts of UV is useful, mainly - and I'll say essential for the turtles and the frogs.

However, in the form of a tube, as in an indoor lighting, the tubes are not - we ourselves and most other people do not like to use the tubes because almost impossible to measure the output of a UV device once they're plugged in and monitor it daily, and they lose - you buy a UV tube and literally within days they lose most of their effect, so, to that extent, they are - you can be lulled into a false sense of security: they could change and (indistinct words). There's heaps and hazards and dramas. They can get smashed in their cages, all sorts of things.

The sunlight is also a double-edged sword and it's very powerful, and when applied to any small animal -

1 reptile, frogs, small mammal - they can overheat and die
2 extremely quickly. So again it has to be used extremely
3 judiciously, bearing in mind you have a situation where
4 most animals will actually avoid direct sunlight at all
5 times as a matter of course.

6 So our regime that we have where we can move them
7 outside for doses of UV as appropriate as required under
8 strict controls removes all the hazards without a - now,
9 the body camera footage of the raid in September last year
10 was not tendered, and I believe that was also an act of
11 bad faith, because as they walked around, it would have
12 shown footage of the lighting system, the heating system,
13 the air conditioning systems that affect all our animals,
14 but it would have also shown you outdoor cages that the
15 animals are moved to for their UV.

16 It would have shown the outdoor cage in which the
17 turtles are kept in the warming months, and that had not
18 been tendered by the wildlife officers, I say, as an act
19 of bad faith to try to maintain this false claim that they
20 know is false, and that they observed - and I'm drawing
21 attention to paragraph 12. She says, 'I observed the
22 enclosure in which the animals were kept by the plaintiff.
23 Do not have appropriate heating (indistinct)' - sorry -
24 'appropriate natural UV lighting.'

25 Which brings me back to something else of note:
26 prior to the visit when they said they were going to count
27 my animals, I actually undertook and did move a lot of
28 animals from one cage to another and vice versa in order
29 to make it easier for them to count and identify the
30 animals. Now, as I said, watching the raid from the
31 previous occasion in 2011, when they came in, it was un-

1 warned - they just literally barged in - and the animals
2 here, we know what's where, but the cages are not labelled
3 correctly, so a cage with a label for taipan may well have
4 a blue-tongue lizard in there or a copperhead, and so it
5 goes on.

6 And that - that's why they spent nine hours trying
7 to go through the animals in 2011. So to forestall that,
8 numbers of animals were moved around, and, for example, a
9 bunch of eight tiger snakes were shifted from a bunch of
10 enclosures up into smaller enclosures because none of them
11 have labels and it was easier to do it that way, and
12 others were labelled all sorts of things. So there was
13 quite a few hours spent just arranging the animals so that
14 they could basically do their counts quickly and easily.

15 So the irony is - is quite a lot of these animals
16 weren't even in the cages they normally live in, but where
17 they were, were all fine anyway. But as I say, the
18 turtles were indoors in winter and I have to mention the
19 management of the turtles in particular, Your Honour,
20 because in the wild state in this part of the world - bear
21 in mind that they are native to this part of the world,
22 the ones we have, they hibernate in winter, that is, they
23 go to the bottom of a pond and just sit there and do
24 nothing or they just go in a nice warm place on land and
25 maybe under a rock and just sit there for months on end
26 and do sweet - very little.

27 And in captivity, we could do that as well. Now,
28 because ours do reptiles shows and they're walking around
29 and active in school classrooms and stuff, they
30 necessarily will burn energy, and if we were not to feed
31 them over the winter they would starve to death. So in

1 our situation, the keeping regime and different - is
2 slightly different. They are indoors and rotate between
3 periods in the dry cage and in indoor tanks, which they
4 saw and videotaped.

5 They're in their - you know, they're in the pictures
6 of what they've got, where they're fed and cleaned and so
7 on. So the thing is - is, because that was all seen,
8 there was no basis for the claim that she had observed,
9 'They do not have appropriate natural or ultraviolet
10 light.' The outdoor cage was seen, it was filmed.

11 There was no questions asked, and self-evidently, if
12 you had, you know, four or five or - there's seven in
13 total - turtles in - in a cage on newspaper with a
14 skerrick of water, and those same turtles were
15 photographed in the same cages 13 years prior, 12 years
16 prior, bearing in mind that that raid was also in the
17 middle of winter, obviously they've had water somewhere
18 along the line or else they'd be dead.

19 So they can't claim they didn't have that. And to
20 say that at that split second they were indoors and
21 therefore not exposed to sunlight is not an appropriate
22 finding or observation in the circumstance. So, to that
23 extent, it's bad faith and not supported by any evidence.
24 In terms of 11.4 now, Your Honour, where the claim is
25 made, 'Did not have appropriate heating permeameter and
26 devices.' That is refuted in their own evidence, where
27 they've measured - where they've measured heating in the
28 cages. They're measured temperatures of warm and cold.

29 They came along with their heat gun and did that.
30 So again there is no basis for that observation. The
31 heating devices were all plugged into the walls; you know,

1 on the heat mats and so on, there's plugs and power boards
2 all over the place. It's all very easy to see. It's not
3 rocket science. At no stage did they bother to measure -
4 to observe the timing devices and see when the - when the
5 heating systems went on or off. They did not bother to
6 check the timing device in the shed for when the lights go
7 on and off in the shed.

8 But it was all sitting there in front of them, it
9 was filmed by them. And so, because they observed it,
10 they're not in a position to make the claim that it didn't
11 exist as per paragraph 11 of the affidavit, 11.4. Now,
12 Your Honour, it's also worth noting that at no stage did
13 the word 'directions notice' ever get mentioned. So I was
14 never asked or any attempt to point out the heating
15 parameter devices because there was no interest in - they
16 had no interest in what we were doing in terms of, you
17 know, the temperature cycles, either daily, weekly,
18 monthly or seasonally.

19 There was no - no interest in any of that. There
20 was no attempt made by me to justify what was or wasn't
21 being heated and why, because there was no questions in
22 that direction. And - - -

23 HER HONOUR: Well, this is really going to a natural justice
24 heading now.

25 MR HOSER: Yes, they do cross, but in terms of observation, as
26 I say, it's all there, observed: in their photos, in
27 videos, in their body camera. Bear in mind it was 10 of
28 them working as a cohort, as a team. It's not possible
29 for them not to have observed it. There were massive
30 great air conditioning units in each building. You can't
31 miss them. You know, they kept on pointing at the sign

1 that said, 'CCTV camera', and that was right next to the
2 air conditioner. So it's not like they didn't see it. So
3 again you've got a statement made in bad faith. Now, they
4 went away for three months, Your Honour, before they
5 issued the directions of those, where they went through
6 everything shall we say forensically.

7 Now, they've got access to the wildlife returns for
8 the previous 20 years, they've got access to the photos of
9 the previous raids: so there was the big one in 2011,
10 there was another one in 2014 where they'd come over to
11 decide whether or not to give me my licences, and so
12 they've got two sets of photos and they've got a third set
13 of photos, and we can match up the same animals in the
14 same cages and the same photos, and the vast majority are
15 still there. Some have died of old age or whatever. But
16 the reality is they weren't in a position to make the
17 claims that have come.

18 Now, so the appropriate heating parameter and
19 devices are present in every cage. Some may have been
20 turned off, some may have been turned on. That could have
21 been because of the time of day or the season, but every
22 animal here is housed individually, as they saw, so that
23 they have - not just for their species, but they have, you
24 know, literally customised heating for whatever.

25 So the green snake that's in my background, for
26 example, at the moment is on a regime of short warm days
27 and long cold nights for the breeding, because this is
28 their breeding season and that's what's required in order
29 to breed them, which is in common with another 10 snakes,
30 10 to 15 snakes here, and the rest are not on that regime.

31 But they didn't bother asking, you know, and now if

1 you look at the code of practice, which is what this case
2 is about, paragraphs 1 and 2 - and I think it's
3 paragraph 2, it says, 'You must provide for the specific
4 requirements of each species you keep, and it is up to the
5 keeper to familiarise themselves through the relevant
6 literature which is exactly what I have done with each and
7 every species, as indicated by my success in breeding, for
8 example, those green pythons that you see behind me.

9 Alternately, the carpet python that you see depicted
10 in the affidavit of Watterson which she's held up as
11 apparently a badly been kept snake. In that photo the
12 snake is heavily pregnant. She laid eggs about two months
13 later. Those eggs hatched at the end of January, and the
14 11 resulting babies are all alive and well as of today's
15 date in cages that they have claimed defy - you know, they
16 - according to their claim, they should all have died by
17 yesterday.

18 It defies (indistinct) the offspring of that carpet
19 snake - again, they photographed them in other cages, and
20 they're referred to in my submissions. So, that one,
21 11.4, is again a false claim. Now, Your Honour, 11.5, the
22 cages in which the animals kept (indistinct) did not have
23 appropriate furniture. Appropriate furniture is a very
24 vague term. Do I have to have a table and a colour
25 television in each cage? I doubt that is appropriate
26 furniture.

27 If one reads the code of conduct, one would have to
28 interpret the appropriate furniture as being what is
29 required for the health and welfare and wellbeing of the
30 animals. Now, that does not include hazards. Each and
31 every cage, which you'll see is very similar, and you can

1 scroll through the photos in the second affidavit of
2 Ms Watterson - Ms or Mrs, I don't know the pronoun. My
3 apologies, Your Honour. You will see that each cage has -
4 the animals in there are quite evidently of good health in
5 the cages. You'll see they're not over fed. They're not
6 under fed.

7 They don't have ridges on their backs. They are, as
8 a cohort, healthy-looking reptiles. Now, you will see
9 that all of them have a water bowl which is elevated,
10 which I note by virtue of the nature of the water bowls,
11 provides a so-called rough surface if they need to scratch
12 themselves, which is not a need in our case because our
13 animals don't get (indistinct) but if they were to have
14 the misfortune of getting (indistinct) they can scratch
15 themselves.

16 The hides in each cage, which are made from the cut
17 bottoms of buckets, are also appropriate because they give
18 the animal a place to hide while at the same time
19 affording myself as the keeper and their carer 24/7 access
20 to them for whatever need is required, be it for a reptile
21 show or to give them medications or to check them out for
22 their general health and wellbeing. In - - -

23 HER HONOUR: So do I understand your argument to be in relation
24 to furniture that there are things in the enclosures which
25 are addressing the purpose of furniture that's in the
26 directions notice? Is that really what you're saying?

27 MR HOSER: Everything every snake needs is in there, and very
28 significantly, which relates to the code of conduct in
29 paragraph 2, there are no unwanted hazards. So if you
30 look at one of my - - -

31 HER HONOUR: Yes. No, I understand the argument so I don't

1 need illustrations of it.

2 MR HOSER: Good. Okay. So they have no more furniture than is
3 required, no less furniture than is required. They have
4 the exact amount. Now, Your Honour, as is mentioned in
5 the affidavit material and the expert reports from myself
6 and the others, every aspect of those cages is measured to
7 the optimal degree, be it the size for the temperature
8 gradients, be it the size and shape so the animals
9 (indistinct words) excessively open spaces which is
10 exactly what happens.

11 HER HONOUR: Yes.

12 MR HOSER: Be it the hides that the snakes live under, and they
13 are of that very structure because they are easily cleaned
14 where you can remove all faecal material, because that's a
15 biohazard. They are hard enough to afford the animals
16 protection, light enough that if they are dropped on the
17 animal they're not going to injure them or injure their
18 tails which are fragile. They tick every conceivable box.
19 They have an entrance they cannot get stuck in. There is
20 - they're not toxic material. They are of the perfect
21 shape for them to curl up in without kinking and - - -

22 HER HONOUR: Yes. No, I understand the argument about
23 furniture, so can we move on to the next point.

24 MR HOSER: Yeah. Now, do not have appropriate signage for
25 dangerous reptiles. Your Honour, that is not true. In
26 our licence and among the charges that we had to face in
27 the previous years were charges of putting animals at risk
28 of theft. Now, the facility here is not a public
29 facility. We are in a quiet suburban area. The shed in
30 which the - the shed and the bungalow behind the shed - so
31 the bungalow is not even visible from the street, but the

1 shed which covers - which blocks it is large and green.
2 It has no door - sorry - has no windows.

3 It's a locked building protected by security
4 cameras. Placing signage - bear in mind that no one's
5 allowed access and the only way they're going to get in
6 there is to smash the joint down to get in there. To have
7 signage outside the building indicating dangerous reptiles
8 would be merely an invitation for a thief to come and get
9 them. So, signage is contra-indicated by the Wildlife Act
10 and our licence conditions.

11 It is not appropriate that there is any signage
12 indicating dangerous reptiles in the buildings, and we
13 actually had signage at one stage because that was the
14 permit requirement, and we were ordered by the department
15 to remove the signage. Tom Thuys, T-h-u-y-s, of the
16 department ordered us to remove that signage as far back
17 as 2008. So it's somewhat bizarre that one Wildlife
18 officer's told us to remove the signage, and now we're
19 being fingered for not having it. So again, it is - - -

20 HER HONOUR: Well, as I read the affidavit, it's talking about
21 signage on the enclosures, not signage on the building in
22 which they're housed.

23 MR HOSER: Well, the enclosures are concealed in a locked
24 building which only authorised persons have access, so to
25 that extent we know what's in the cages, and again, it is
26 expedient not to have signage because if someone burgled
27 the place and thieves enter - which is an ongoing issue -
28 they will be confronted not knowing what they've got, and
29 if they want to go into the cage they will be at risk.
30 They won't be forewarned.

31 They know what we're - to get - for someone to want

1 to break in here will know what we've got anyway, but once
2 they're in the building, you know, there's no - you know,
3 if they know their animals, they'll know which ones are
4 dangerous, and if they don't know the animals, well,
5 that's a risk they're going to take. But again, there is
6 no benefit in having signage on the front of the cage with
7 a set of crossbows - you know, with a cross bones in front
8 of the cage.

9 I mean, it's not hard to do, but it's pointless,
10 especially in the nature of the system we have where our
11 cages will describe them, for want of a better word, as
12 modular where we can shift animals between cages. We can
13 end up finding ourselves with an issue where an animal is
14 labelled dangerous where it could have a non-dangerous
15 animal. It's a pointless exercise.

16 HER HONOUR: All right. Okay.

17 MR HOSER: Steel building. There is - - -

18 HER HONOUR: So that's 11.6. I understand that. Just trying
19 to keep you moving because this case has been allocated a
20 day.

21 MR HOSER: Yep.

22 HER HONOUR: And only a day.

23 MR HOSER: Yep. Okay. Now, did not have appropriate locks to
24 prevent unauthorised access. Well, the building is
25 locked. They're protected by cameras. There is no
26 unauthorised access. In terms of the cages themselves,
27 the cages are locked shut, not with a padlock, but they
28 have clips to lock them shut. So besides the fact that
29 snakes can't unclip the locks from inside (indistinct
30 words) cages, if you look at the photos of the racks, they
31 slide into the racks.

1 So if by some fluke of chance a snake works out a
2 way to be able to undo the clips from the inside, they
3 still can't lift the lid because it's held down by the
4 roof of the thing. So, therefore, their escape route in
5 terms of the snakes are padlocked on a cage in a closed
6 building that is locked is not going to deter a thief
7 inasmuch as once they smash down a door to get in the
8 building, if there's a padlock on the lid of the cage
9 they'll just smash the glass or the plastic and help
10 themselves anyway.

11 So, to that extent there is no appropriate lock that
12 is possible or required on the cage, and if you read the
13 code of practice, it also talks about cages being easy to
14 maintain. We did an experiment on this where we put holes
15 in the plastic tubs, and some of them have still got
16 (indistinct) padlocks through them.

17 And we worked out that the five hours a day spent
18 cleaning would add up to six hours a day if we had to
19 unpadlock and re-padlock each cage before cleaning, and on
20 top of that there would be no benefit because the reality
21 is unless they're going to smash down the doors and get in
22 the building anyway, and breach the cameras, it's a - it's
23 - you know, they don't - they individual cages do not need
24 to be padlocked.

25 For what it's worth, Your Honour, the rule about
26 locking cages is generally enforced by the department when
27 someone has a venomous snake in the house with children.
28 They lock the cage to prevent access to children. In this
29 case, that's not an issue. Besides the fact that my
30 children are adults, their house is on a separate part of
31 the property, so like a compound where we live, and again,

1 these are in separate buildings that are dedicated for
2 what we do. So

3 HER HONOUR: Okay. So that deals with 11.7.

4 MR HOSER: Yeah. You know, the (indistinct) - yeah. It's -
5 it's not a valid claim, and there's nothing in the code of
6 conduct, if you read the code of conduct - code of
7 practice, there is nothing in that code of practice that
8 says explicitly, we need padlocks on the cages. There's
9 nothing that says we need padlocks on the cages, and that
10 seems to be what they're demanding: a padlock or
11 equivalent on each cage, which is literally unworkable,
12 and it is not done by anyone, anywhere.

13 Now, I was watching as recently as lunch time a
14 video at the Australian Reptile Park and another one at
15 Melbourne Zoo, and in their off-display areas, they have
16 cages the same as what we have, and none of them are
17 locked. There's your answer.

18 HER HONOUR: Thank you. All right, 11.8.

19 MR HOSER: 11.8.

20 HER HONOUR: The amount of water.

21 MR HOSER: Now, that is discussed at length in my submissions.

22 HER HONOUR: It is.

23 MR HOSER: And in a scientific paper which is also provided as
24 part of the affidavit material. The water bowls, exactly
25 now - they've put for water-based reptiles but they
26 haven't defined water-based reptiles. But I will say,
27 each and every reptile has the appropriate amount of water
28 in the appropriate-sized water bowl, at all times.

29 Now, in terms of the turtles, in case it was missed,
30 the reason that people including myself, keep their
31 freshwater terrapins or turtles, which walk around on

1 land, on a dry cage in cooler weather in particular, it is
2 because excessive moisture, including sitting in the
3 bottom of a wet pool, causes - is a precursor to shell
4 diseases and infections of all kinds. Bacteriological,
5 fungus based, the whole lot. Humungous problem.

6 Most of the turtles I have here, I inherited off
7 people who had exactly that: turtles with fungal
8 problems, borne by living in - in - you know, an
9 environment where there was too much water, too much at
10 the time, or abrasions or whatever, or combinations. So
11 to the extent that t hose - the turtles in particular, in
12 the colder months in a dry cage, was the appropriate
13 amount of water for them. They do not dehydrate, but the
14 risk of the shell infections vastly outweighs any benefits
15 gained from chucking them in the water in the middle of
16 winter where they're not eating.

17 Now, Your Honour, the code of practice, at paragraph
18 2, is explicit. It says you must provide what is
19 necessary for the reptiles and you've got to do your
20 research and make sure that you do the right, you know,
21 get it right. I have done exactly that with the turtles
22 and clearly, sticking the turtles in water in winter,
23 where they're going to get shell infections and die a
24 slow, painful form of death is not the code of conduct.

25 And that recommendation and that claim that
26 associates with it in 11.8 is false and improper, and is
27 both bad faith, it - and it's irrelevant considerations,
28 it's an unreasonable - it's unreasonable. And it
29 characterises all the so-called observations in 11. Does
30 that make sense, Your Honour?

31 HER HONOUR: It does. Thank you.

1 MR HOSER: Now, 20 and 20 - at paragraph 20, she's then
2 written, 'Based on the officer's report, I formed the
3 belief that the enclosures kept by the plaintiff to keep
4 reptile wildlife on his premises did not provide for the
5 health and welfare of animals in accordance with the code
6 of practice', et cetera. That is clearly not the case.
7 That observation - that belief that is formed on her
8 alleged - first, the alleged observations themselves are
9 suspect, the belief must be similarly suspect, and
10 I believe that the claimed observations are false.

11 I'm also - and that's borne out by the evidence -
12 and the belief that the enclosures do not provide for the
13 good health and welfare is manifestly incorrect because
14 the reality is, is the bulk of the animals, other than
15 some with age-related issues, were all in immaculate
16 health. And, I mean, you can't cure dying of old age.
17 It's a problem we - we suffer. The reptiles here, as a
18 cohort, are extremely old and that reflects on the
19 excellent conditions they're kept in.

20 But because of what they've observed and their own
21 photo - their own photos in the second affidavit, I think
22 - which I think covers all or most of the animals, shows
23 them all in immaculate health and condition. So in other
24 words, the enclosures were providing for the good health
25 and welfare. Now, the only potential way and means that
26 she could form a view that those enclosures did not
27 provide for the good health and welfare of the animals
28 were if the reptiles in question were newly acquired and
29 had not had the opportunity to decline, in line with the
30 allegedly terrible cages.

31 Now, because they themselves were aware of the fact

1 that these were old animals - these had been around for a
2 long, long time - in those very same cages, because they
3 were all well aware of the previous raids, and we
4 discussed the previous raids when they entered the
5 property, they knew that the health and welfare of the
6 animals they were looking at was in line with what they
7 had been over previous years, which is generally good. So
8 there's no basis for her to form that belief, which tells
9 me either she's incompetent or got bad faith, or she's
10 made irrelevant (indistinct). Does that make sense, Your
11 Honour?

12 HER HONOUR: It does, yes.

13 MR HOSER: Thank you. Now, 22, she says - 20.2, sorry, it
14 says, 'Resist access by persons not authorised by the
15 person who possesses the wildlife, contrary to the
16 requirements of reg 43 of the wildlife regulations'. Now,
17 I should really have that in front of me, which I don't,
18 but are you able to direct me to where I can find that
19 document in the court book?

20 HER HONOUR: Not in the court book, per se, because I've got an
21 index that doesn't easily allow me to find - - -

22 MR HOSER: I just don't have it in front of me. I just -
23 before I - I think I know - - -

24 HER HONOUR: What was the point you wanted to make about the
25 regulation?

26 MR HOSER: The regulation basically, I presume, says - - -

27 HER HONOUR: The regulations are in the combined list of
28 authorities.

29 MR CHAILE: Yes, Your Honour. It's at PDF p330.

30 HER HONOUR: In the combined list of authorities?

31 MR CHAILE: Correct, Your Honour.

1 MR HOSER: At 330.

2 HER HONOUR: Thanks, Mr Chaile. So if you go to the other
3 document - - -

4 MR HOSER: Okay. I'll try to - - -

5 HER HONOUR: - - - at 330, it's there.

6 MR HOSER: Your Honour - okay. Now I - just bear with me. As
7 combined - just - sorry about this. I'm in the wrong
8 place. Yep. I think I'm in the right place. Just bear
9 with me, Your Honour. Page 330 - no.

10 HER HONOUR: Of the combined authorities.

11 MR HOSER: That's the - right, okay. Thank you, Your Honour.

12 HER HONOUR: Not the court book.

13 MR HOSER: Right, it's - yeah. Your Honour, because I'm not a
14 lawyer, I'm not used to dealing with these documents.
15 I think I'm on p330. Okay, yeah. At section (d) it says,
16 'Resist access by persons not authorised by the person who
17 possesses the wildlife'. Now, that claim in her affidavit
18 of Watterson cannot possibly be sustained, because she saw
19 they were in field buildings that were protected by locks
20 and CCTV cameras. So they were clearly - you know? And
21 furthermore, there were no signs or anything on the
22 property to indicate the presence of reptiles on this
23 address.

24 None of the cars are sign-written, nothing. There's
25 nothing that flags this property as having reptiles from
26 the outside. So to that extent - the non-flagging of the
27 animals and the fact that everything is - is bolted and
28 secured on the outside, clearly conforms to the
29 requirement. Now, in terms of the requirement at reg 43,
30 and if one looks at reg 43, 'Resist access by persons not
31 authorised by the person who possesses the wildlife'.

1 That nature of resistance is not given.

2 There is nothing in there that defines what that
3 resistance is, and therefore, while the Department might
4 argue I should have a - a nuclear missile pointed at
5 everyone that enters this address, I would submit to you,
6 Your Honour that the term 'reasonable resistance', you
7 know, the amount of resistance has to be proportionate to
8 the threat and the resources of ourselves, and I would
9 suggest to you that spending \$20,000 on a CCTV camera and
10 locking doors and all the rest of it is more than
11 sufficient.

12 And I note, Your Honour, that it is significantly
13 greater than the access that Melbourne Zoo has, where they
14 have their turtles swimming around in a pond where they
15 can be picked up by members of the public and put in a
16 carry bag and walked out with it. So, I mean it's a bit
17 rich that they've made this accusation that we're not
18 resisting access while other keepers have animals in
19 buildings and cages that are readily accessible including
20 their own businesses. They can be picked up and walked
21 off, and that happens all the time.

22 I mean the zoo just recently had a monkey stolen
23 where someone just jumped in the cage and took it, and
24 that was in the news as you're well aware. That can't
25 happen with us because people can't just jump in our cages
26 and get animals. So the claim in the affidavit that she
27 had observed that I resisted - her observation that she
28 formed a belief that our enclosures were not able to
29 resist access to persons not authorised is clearly false.
30 It's not correct. Does that make sense?

31 HER HONOUR: In the sense that you say there's no evidence

1 relied on to form that belief.

2 MR HOSER: Correct.

3 HER HONOUR: Yep. I understand that.

4 MR HOSER: Because the buildings themselves are sealed.

5 HER HONOUR: Yes. No, I understand that submission.

6 MR HOSER: And the caging as I say the practice of sealing the
7 building rather than the individual's cages is standard
8 practice as would be the case anywhere. And for what it's
9 worth, Your Honour, we do the reptile shows and we've had
10 the license for decades. And we were advised very early
11 in the peace that when we do the venomous snakes with
12 venomous snakes with venom, they must be transported in a
13 lockable box which has been the case.

14 It says a lockable box. Doesn't a say box that's
15 got to be a kept locked. A lockable box, which is what he
16 have. And of course as a matter of procedure obviously we
17 keep the box locked when the animals are not being
18 handled. Within that box the animals themselves are boxed
19 separately or bagged separately. Whatever. We uses
20 boxes, for some we use bags. We use boxes because they
21 can't get squashed.

22 But the department has never insisted - and there's
23 dozens of wildlife displays - they've never insisted that
24 individual boxes/cages within a locked building or box or
25 locked car need to be separately locked again on top of
26 that. So because that is a standard procedure
27 industry-wide, statewide, department-wide, everywhere
28 wide, it's not a proper belief for the officer who, by her
29 own affidavit has been working in the job for a little
30 while could form that belief.

31 HER HONOUR: All right. So does that conclude what you want to

1 say about improper purpose and bad faith?

2 MR HOSER: No, I'm sorry, Your Honour. There is more.

3 HER HONOUR: What is the next point you wish to make?

4 MR HOSER: Now just in passing - sorry I'll come to it. The
5 sealed affidavit of 27 March shows the animals are still
6 in good health. Now the department would be well aware of
7 that based on cross-referencing pictures from Three Rays,
8 and therefore they're claim in court at the last hearing
9 with you, Your Honour, where they said they didn't want to
10 extend the deadline for this directions order because all
11 my animals would supposedly suffer and die, that claim by
12 their lawyer is an act of bad faith by the department.

13 Because he knows full well that the animals in their
14 present situation are in their best possible position in
15 line with the code of practice. He also is aware, because
16 he's been made aware early in the peace, that dialling
17 down the temperature of the crocodile by way of example,
18 or the crocodiles, will kill them. And there's no wriggle
19 room on that. They're aware of that.

20 So they've been acting in bad faith even as they're
21 preparing and defending this case now, Your Honour. The
22 bad faith is just permeated from go to woe and the nature
23 of their defence, the nature of their submissions, and
24 I've gone through them in the document that was sent to
25 the court this morning, shows that the way they chop and
26 change and they change their arguments, you know, more
27 often than the weather changes, shows that at every step
28 of the way they have acted in bad faith.

29 Now in terms of the bad faith and their nature of
30 the defence, on the directions notice, and I'll take you
31 to the directions notice. Page 1 of the direction's

1 notice of 7 December, as in the cover letter, and what
2 follows. I've got the letter. It's got conservation
3 regulator at the top. Have you got that in front of you,
4 Your Honour?

5 HER HONOUR: I've got the letter dated 7 December 2023, which
6 is at p118 of the court book.

7 MR HOSER: Fantastic.

8 HER HONOUR: And then the notice of written direction that
9 accompanies it.

10 MR HOSER: Underneath the words, 'Dear Mr Hoser', is written in
11 bold capital letter typed, to make sure it's not missed,
12 'direction notice for wildlife demonstrator license'.
13 It's got a number there.

14 HER HONOUR: Yes.

15 MR HOSER: It says what they want us to do, and I'll take you
16 to the fourth paragraph, and it's written quite bluntly.
17 'Failure to comply with this notice and the conditions of
18 the writers may constitute an offence under the Wildlife
19 Regulations 2013 and the Prevention of Cruelty to Animals
20 Act 1986 and may result in penalties and or restriction,
21 suspension and cancellation of your license'. So that's
22 the consequences they spelt out for failure to comply.
23 They're quite explicit. Now, Your Honour, in their
24 submissions that were dumped on me last Friday, and I'll
25 draw your attention to their submissions.

26 If you go to paragraph 113 and 114 of the
27 submissions where they're trying to explain away the
28 direction's notice as being a powerless instrument, and
29 this is where they're discussing the issue of the hearing
30 rule. I can go to paragraphs 112 and 113. They're both
31 relevant but I'll try to speed things up.

1 Paragraph 113 of their submissions writes, 'The
2 requirement for an adverse interest focusses attention on
3 the nature of the power and the extent to which the nature
4 of that power has the effect of destroying, defeating or
5 prejudicing a person's rights, interests or legitimate
6 expectations. Accordingly before the presumption of
7 procedural fairness arises a court must ascertain whether
8 the exercise of power occasions some prejudice to a
9 person's rights'. They then go on and say, 'At the outset
10 the department submits that the issue of a notice under
11 R43-2 does not affect a person's rights or interests in a
12 requisite way to as attract the hearing rule'.

13 Now the letter of (indistinct) of the direction's
14 notice and that's just the letter, and there's similar in
15 the note - there's more in the notice which I didn't quote
16 - clearly identifies what rights are at risk and the
17 prejudicing of those rights in that letter. Their
18 submissions are a contrary position to their obvious
19 intent in issuing that letter.

20 It was not a letter advising, we think you can do
21 this to improve the welfare of your animals. We're very
22 concerned about your animals. We know that they have no
23 interest in their welfare of our animals. But that letter
24 wasn't framed in the words, we reckon you could change
25 your caging to this, this and this. This is our
26 recommendation and here's why.

27 It was simply, 'You must do what we say, or you are
28 going to have the s-h-i-t hit the fan.' That clearly puts
29 their thing within the hearing rule, and the fact that
30 they have now, at this late stage of proceedings spent the
31 money on the government lawyers and basically reversed

1 their position to downplay the effect of the impact of the
2 directions notice and what the consequences of non-
3 compliance are again shows the bad faith of the department
4 and their various people even to this very day.

5 It displays the bad faith from the issuing of the
6 notice, what's happened since right up until Friday last
7 week when they issued these submissions and they've come
8 up with these three paragraphs, and there's more in their
9 document because they repeat this theme repeatedly in
10 their submissions, that the directions notice is a
11 powerless interest. It shows the bad faith on their part.
12 They will reverse their argument. They'll do whatever it
13 takes to literally win this case.

14 HER HONOUR: Let me ask you this question. Put this case to
15 one side for a moment as to whether the directions notice
16 was valid or not. Were you to simply thumb your nose at
17 the directions notice and say, I'm not going to comply
18 with it because I think I am doing things consistently
19 with the code, or whatever your rationale, if you say,
20 'I'm not going to take any action at all in response to
21 your directions notice,' what are the consequences for
22 you?

23 MR HOSER: The department will raid me. They will charge me.
24 Because that's their history. We know that's what's
25 coming and that is what they have done with other people
26 who they have issued directions notices to, and they have
27 not complied with them. The charges always follow.

28 HER HONOUR: They have to prove the charges that they bring,
29 and you're entitled to defend those charges.

30 MR HOSER: Yes, but as one who's not with the government, we
31 have the problem that the cost of fighting the charges and

1 the damages is huge. So the logical position where we are
2 is to try to minimise litigation, which is why in the
3 first instance I went straight back to the department and
4 tried to resolve it without recourse to litigation.
5 Basically every step of the way my aim has been to try to
6 reason with them, but they haven't been reasonable. But
7 the problem is, is they are doing - it appears - and you
8 know their mindset is they want to - - -

9 HER HONOUR: But in sense I suppose the reason for my - sorry
10 Mr Hoser, the reason that I asked that question is that it
11 seems to me that it's right that the directions notice
12 itself doesn't affect your rights other than as a
13 precursor to bringing charges that, if proven, will affect
14 your rights. And I understand what you say about
15 attempting to head off expensive litigation. But the
16 primary issue that I'm looking at is whether or not this
17 document actually affects your rights or not.

18 MR HOSER: Well it does and in terms of what they've written in
19 paragraph 13, prejudicing a person's rights does not
20 involve the immediate charging. It could include charging
21 in the future for failing to comply. So to that extent
22 what they've written is in line with what the directions
23 notice does. It does in fact prejudice my rights because
24 by failing to comply with that notice if and when they
25 charge me, their case will be considerably stronger and
26 more likely to attract a much higher penalty than if they
27 just charge me without giving me the right to allegedly
28 comply.

29 So it does prejudice my rights, and I think you're
30 wise enough, Your Honour, to know enough about courts that
31 when the wildlife department or any government department

1 wants to charge someone and maximise the damage, they will
2 certainly rely on such things as alleged non-compliance to
3 increase the penalty and the costs and so forth. So it
4 does affect my rights, my interests and my legitimate
5 expectations, which is another phrase in paragraph 113 of
6 their submissions, which I hope you've got in front of
7 you. Are you reading that, Your Honour?

8 HER HONOUR: Yes.

9 MR HOSER: Yes. So my legitimate expectations. That doesn't
10 require the directions notice to specifically charge me as
11 such. But my legitimate expectations of being charged is
12 sufficient and it is the case law judgment that is
13 attached to it at 143.

14 Now my legitimate expectations to being charged are
15 enlivened by the directions notice itself where it is
16 written, 'Failure to comply with this notice and the
17 conditions of the writers may constitute an offence under
18 the Wildlife Regulations 2013 and the Prevention of
19 Cruelty to Animals Act 1986 and may result in penalties
20 and/or restriction, suspension and cancellation of your
21 license'. That clearly is the expectation of what is
22 going to arise from non-compliance which is what's written
23 at paragraph 113 of the (indistinct).

24 HER HONOUR: So we're clearly moving into the topic of
25 procedural fairness now.

26 MR HOSER: I agree, however I'm raising it at this point in
27 time because you will see the contrary arguments. In the
28 directions notice they've basically written without
29 anticipation of ending up in a judicial review, they've
30 basically written, you comply with this thing or else
31 we're going to smash you to pieces.

1 Now that we're in a judicial review they're ducking
2 and weaving trying to get a legal way so they can
3 basically, you know, beat me. And now they're reversing
4 it saying, oh no there's no legitimate expectation you're
5 going to get charged. There's no prejudice to your
6 rights. We're not going to destroy and defeat you and all
7 this. But the directions notice itself means that my
8 rights, interests and legitimate expectations are at risk
9 and my legitimate expectations would include expecting to
10 be charged for failing to comply with a notice that
11 remains in force which is one of the reasons we're here to
12 get it not in force.

13 Again it's got failure - the same things are written
14 beneath. It says, 'nature of offences believed to be
15 committed', which we deny but they say as far as we're
16 concerned you committed them. This is on p2. The first
17 pages of notice of written direction, and again p2 is
18 instructive of itself. It says 'direction notice' on the
19 top right-hand corner. Underneath it it's got 'notice of
20 written direction'. This is not written advice, take it
21 or leave it. This is just, 'we don't really care if you
22 don't comply', which is what they're implying in their
23 submissions of Friday at paragraph 113. This is a written
24 direction, 'you must comply'.

25 There's no 'compliance is a matter of your choice'.
26 It is 'direction notice, notice of written direction'.
27 And then you go the previous case, 'direction notice for
28 wildlife demonstrator'. That is three times in the first
29 two pages, you are told, you are directed to do something.
30 Not optional. There's no option.

31 HER HONOUR: Yes, I understand the argument, Mr Hoser.

1 MR HOSER: Then p3, 'direction notice' again, top right-hand
2 corner and so it goes on and I think there was something
3 in red about likely penalties. Yes, and then it - and
4 just to reinforce it on p4, 'reason we are issuing this
5 notice', and then in red type it's got '9615.50 (50
6 penalty units) per offence'. Then at the bottom of that
7 page it says, 'all directions in this notice are to be
8 complied with no later than Monday 8 April 2024', which
9 was yesterday. By which date all my animals should be
10 dead. And I think there's over 200 here that are still
11 alive and well.

12 So the consequences and interests are very enlivened
13 by that directions notice and the fact that in their
14 submissions they have - one of the dominant things
15 throughout these submissions from last Friday, included in
16 paragraph 114 and elsewhere where the department says, and
17 I quote at 114 the department says, 'at the outset the
18 department submits that the issue of the notice under R43-
19 2 does not affect a person's rights, interests in a
20 requisite way so as to attract the hearing rule'.

21 Now that is clearly a ridiculous argument in light
22 of what was actually written in the directions notice
23 itself and what follows, and it shows that the department
24 even now is acting in bad faith. Does that make sense,
25 Your Honour?

26 HER HONOUR: It does. I understand your submission.

27 MR HOSER: Thank you. Now, to give you another example of the
28 bad faith.

29 HER HONOUR: No, I'm not interested in any examples of it.

30 I just need whatever you need to do to supplement the
31 written submissions which are extensive on this point.

1 MR HOSER: Yes, okay.

2 HER HONOUR: And illustrations I have plenty of. You've
3 already given me more than I need in terms of
4 understanding the argument.

5 MR HOSER: Okay. Now, I refer to the different licenses this
6 morning as in the private wildlife license and the
7 commercial wildlife demonstrator license. Just at 12.22
8 pm today the lawyers for the wildlife department a Court
9 of Appeal ruling from VSCA 346, which I assume you've got
10 in front of you.

11 HER HONOUR: Yes, it was sent to the court. I've got it in
12 front of me now, Mr Hoser.

13 MR HOSER: Yes, now if you go to paragraph 22, I'm not really
14 drawing your attention to the substance of the material
15 save for the fact that there is discussion in that
16 paragraph of a private wildlife license and a commercial
17 wildlife demonstrator license. Two separate entities, and
18 the code of practice that we're dealing with, that the
19 department says applies to us has written on it 'private
20 wildlife license code of practice'. To that extent
21 I would argue that it does not apply, or it may not apply.
22 I believe I'm complying with it anyway, but it might be a
23 shortcut to throw out their directions notice.

24 So some of these submissions, Your Honour, might
25 appear counter to others, but they're only countering them
26 as much as I'm seeking an easy way to have the directions
27 notice thrown out so we can all go home and get back to
28 doing what we do best, which is conserving our wildlife
29 and educating others - which is why I raise that. If you
30 can strike out their directions notice because it doesn't
31 apply to commercial wildlife licences, I think that would

1 be fantastic.

2 Now, paragraph 147 of - I'm sorry to jump around -
3 of the written submissions of the Wildlife Department, in
4 dealing with - I think it's bad faith, or something
5 similar. Just bear with me. Bad faith. Yeah. We're
6 back onto bad faith. It talks about the legal principles,
7 and in paragraph 7, is the point made that errors of fact
8 or law - I don't know if you've got this in front of you,
9 Your Honour. Do you have that in front of you?

10 HER HONOUR: So paragraph 7 of - - -

11 MR HOSER: Sorry. No. It's paragraph - sorry - 147(vii).

12 HER HONOUR: One forty seven of the submissions.

13 MR HOSER: One forty seven, sub-section seven, is - - -

14 HER HONOUR: Yes.

15 MR HOSER: Okay. There's quite a few reasons here that apply,
16 but we'll go to seven, because I started there. 'Errors
17 of fact or law and illogicality would not demonstrate bad
18 faith in the absence of other circumstances which showed
19 capriciousness.' Now, I had to look up capriciousness,
20 which is like sudden, unexpected change. And what is
21 demonstrated by the fact that on the phone - which was
22 recorded - their objective of coming over was to count my
23 reptiles to make sure it matched what was in the wildlife
24 (indistinct), which is what it was about.

25 The issue of directions notice occurred at the end
26 of the raid, where they were just dumped on me; and then
27 in terms of the December directions notice, there was no
28 warning of that 'til a few days prior, when they
29 telephoned me and told me they wanted to see me and give
30 me a letter. And I wanted to see the letter before they'd
31 come.

1 They - that's what I say. They wanted to give me a
2 letter to discuss, and I said, 'No. Give me the letter.
3 Once I've read it, then we'll discuss it.' You know,
4 'cause then I won't - you know, I'll be able to have time
5 to research it and see what's in there and whether it's
6 true or false or whatever. That capriciousness shows bad
7 faith. At paragraph 4 - sorry, at paragraph 3 - sorry,
8 147(iii) - which is above on the same page - by way of
9 examples - and you can read it all later, Your Honour.

10 HER HONOUR: Yes.

11 MR HOSER: Well, it says, 'There are many ways in which bad
12 faith can occur, and it is not possible to give a
13 comprehensive definition.' I think, in light of that and
14 what the department has done and is seen through the
15 affidavit material, bad faith is manifest. Paragraph
16 147(iv) says, 'The absence of honesty will often be
17 crucial.' And again, the lack of honesty by the
18 department - not just in this matter, but in earlier ones
19 - is overwhelming. And therefore, the evidence of bad
20 faith is also overwhelming.

21 Now, significant also, Your Honour: there was no
22 mention, even at the time of leaving our property
23 in September, of another, very wide ranging, directions
24 notice being served on me three months later. But in - in
25 reality, Your Honour, the entire - and in hindsight, it is
26 patently obvious that the purpose of the raid and the
27 visit - bearing in mind they were very familiar with what
28 we had there anyway - was as a precursor to issuing a
29 directions notice. It was always the intent.

30 And the absence of flagging that at the outset shows
31 an absence of honesty and an absence of bad faith; and the

1 fact that in the submissions of - the lawyers of the
2 department, as recently as last Friday, say that I had the
3 opportunity, for eight hours, to talk to the department
4 about the directions notice - is also dishonest, because
5 at no time in those eight hours, except at the very
6 terminal phase when they were walking out the door, was
7 any mention made of a directions notice or any reasonable
8 belief - any - any reasonable basis for me to even think
9 that such a notice would ever be handed to me, bearing in
10 mind our animals are well-known to be kept at best
11 practice. And that is self-evident, with - - -

12 HER HONOUR: Well, let me ask you this question: I understand
13 how you put that on the bad faith argument. Leaving that
14 to one side, it's also relevant on your natural justice
15 argument.

16 MR HOSER: Correct.

17 HER HONOUR: What's the basis upon which you say that a
18 government official conducting an inspection on a good
19 faith basis has to give advance notice of an intention to
20 give a directions notice? So leaving aside the bad faith,
21 why do you say you were entitled to be told before the
22 directions notice was issued that one was coming?

23 MR HOSER: Natural justice should apply in all circumstances.
24 And - and I think this is covered in the legal background
25 here that is dealt with in the submissions of both the
26 department and myself in reply. Natural justice can only
27 be - it's the default position. It can only really be
28 dispensed with if the outcome is seriously prejudiced by
29 it. So obviously if it's a - you know, a threat to
30 national security or something or - you know, if something
31 is completely screwed up by affording a person natural

1 justice, such as maybe - - -

2 HER HONOUR: But you're assuming natural justice applies.

3 MR HOSER: In this case, there is no - - -

4 HER HONOUR: The content of that natural justice, you say,
5 required you to be told that a decision was going to be
6 made to issue a directions notice.

7 MR HOSER: Yes. And also - not even so much the decision to
8 issue the directions notice, but - the directions notice
9 was issued on the basis of alleged breaches of the law and
10 the code of conduct. Now, Your Honour, I don't know if
11 you've ever been pulled up by a police officer for
12 speeding or parking, but the first question they ask is,
13 'Do you have a reason for speeding?'

14 And obviously, if I pulled out a police badge and
15 say, 'I'm an undercover copper racing to a murder', they'd
16 probably say, 'Fine. Keep going.' And if I say, 'Well,
17 I didn't know I was speeding' - 'Well, you are. We're
18 going to give you a fine.' Or, 'We'll give you a
19 warning.' Whatever the case may be. In this case, if
20 they have identified a - what they believe is a breach,
21 the appropriate way to have dealt with it would've been
22 simply, 'Believing you have committed these breaches, do
23 you have any reasons for it?'

24 Now, I would've then gone back to the code of
25 conduct and said, 'Yes. Because the second part says I've
26 got to do what is required for the moving of the faeces,
27 and this is what is required for those faeces. The water
28 bottles, for example, are designed the way they are so the
29 animals can't jump in the water bottles and defecate in
30 them, which is why the - they're not big enough for them
31 to jump in.

1 We don't have parasitic lice. We don't have that
2 problem. They don't need to drown themselves in water
3 bottles; and we don't want them defecating in them; and we
4 don't want them pouring out of the water bottles and
5 spitting water across a dry substrate, which, according to
6 your code of conduct, needs to be kept dry.' That is a
7 perfectly reasonable explanation for the water bottles.
8 That would've - that - - -

9 HER HONOUR: But where in the legislation is there something
10 that says you're entitled to have the question asked of
11 you, 'Is there a reason for the breaches we believe that
12 we've observed'?

13 MR HOSER: Natural justice, in my submission, Your Honour,
14 would be applicable in such a case, because of the nature
15 of the issuing of the notice.

16 HER HONOUR: All right.

17 MR HOSER: It's - it's - it is a default position. There is no
18 prejudice on the department, by - the department's
19 operations are not - the department is there, supposedly,
20 to look after the welfare of animals. It is actually in
21 the department's interests to afford me natural justice,
22 because had they done so in this case - assuming they were
23 honest, which I don't believe - but assuming they were
24 honest and they had afforded me natural justice, we
25 could've averted the issue of the directions notice and
26 the welfare of my animals would have been compromised by
27 an attempt to comply with a notice that will damage their
28 welfare. So - - -

29 HER HONOUR: If they accept your argument.

30 MR HOSER: Correct. But they've never even got to that point,
31 because they went out and issued the directions notice and

1 refused to even listen to arguments, which is why we're
2 here. But as I say, Your Honour, in the case of - and
3 I keep harping back to the crocodiles because it's so - so
4 obvious and in your face, but we've been down the
5 crocodile road at VCAT. As a - 'cause this same thing
6 came up. The department's own experts - and every
7 crocodile expert in the world - will tell you that the
8 temperature they need to be at is 30. So for the
9 department to be recommending you dial down to 26 or
10 whatever they came up with is so anti the welfare of the
11 crocodile, it's not a tenable demand.

12 And the fact that, even at this late stage - that
13 they are sticking to their guns and demanding that -
14 demanding the effective execution of four crocodiles, you
15 know, some of which are well over 20 years old, is - is
16 stark raving lunacy. That cannot be justified legally.
17 That's not a legal act. It is not in compliance with the
18 Wildlife Act. It is not in compliance with the code of
19 conduct. Killing crocodiles - issuing a directions notice
20 directing me to effectively kill those crocodiles - that
21 is not in compliance.

22 And, Your Honour, in relation to that, very
23 significantly - and you'll see from the correspondence
24 in December - but - we're still in bad faith, but we'll
25 carry across a few issues now - in those letters, I asked
26 - I asked for details as to what I needed to do to comply;
27 whether they could modify parts; whether they could scrap
28 it; which - all the options. And the officers - the
29 wildlife officers refused to countenance any amendment or
30 change of any form of the directions notice. It was
31 remaining, in total, as was.

1 Now, to that extent, Your Honour, when you make your
2 finding, I would submit that you can't find that one part
3 of the directions notice is okay and the rest is not.
4 I would submit you have to take it as an entire document,
5 and if one part of that directions notice is - is out of -
6 is out of whack, for any reason, I submit that the whole
7 notice should be scrapped. Does that make sense?

8 HER HONOUR: Yes.

9 MR HOSER: Now - - -

10 HER HONOUR: So your submission is - just so I'm clear - that
11 I couldn't strike down one part of the directions notice
12 as being not made according to law; I'd have to strike
13 down the whole of it or none of it.

14 MR HOSER: Well, you'd have to strike down all of it. There's
15 no none of it option. If you find any part outside the
16 law, you'd have to strike down (indistinct). That's what
17 we're saying. Yes.

18 HER HONOUR: Yes. Okay.

19 MR HOSER: You can't say that half of it appears okay and the
20 other half doesn't; therefore I'm going to let it ride.

21 HER HONOUR: Yes.

22 MR HOSER: No. You'd have to strike the whole document out.

23 HER HONOUR: Now, Mr Hoser, it's 20 past three now. I'm just
24 conscious of time and want to put some parameters on how
25 much is outstanding.

26 MR HOSER: Yeah. Look, I understand. Yep.

27 HER HONOUR: We've covered - I think fairly comprehensively -
28 the points that, for you, are your strongest points: so
29 your bad faith point - - -

30 MR HOSER: No. There's many more strong points, Your Honour.

31 You'll - if you read the submissions, there's lots more

1 strong points.

2 HER HONOUR: Yes. I'll perhaps, whilst I've interrupted: we
3 have this court room for tomorrow, as well - assuming,
4 Mr Chaile - are you available tomorrow?

5 MR CHAILE: Your Honour, that, unfortunately, places me in some
6 difficulty. I could possibly move my commitments in the
7 morning, but I have a commitment with a client in a
8 criminal matter in the afternoon that might be difficult
9 for me to move. I do apologise, because I know that
10 generally counsel availability should be lower on the
11 priority list given the scarcity of judicial resources,
12 but I hadn't anticipated that we would need a second day
13 directly after.

14 HER HONOUR: That's okay. All right.

15 MR HOSER: I don't think I'm going to take much longer,
16 Your Honour, because the other - the other issues -
17 I think I might - - -

18 HER HONOUR: All right. Well, just before you go on, then,
19 what I - - -

20 MR HOSER: I am available tomorrow, just so you know.

21 HER HONOUR: Okay.

22 MR HOSER: I think - yeah. I'm available tomorrow.

23 HER HONOUR: The other option is that we adjourn until
24 Wednesday, and we just find some court room availability
25 on - sorry. Not Wednesday. Thursday, if that suits
26 better.

27 MR CHAILE: Your Honour, assuming - and I recognise this
28 assumption might be unsafe - that Mr Hoser wraps up
29 relatively quickly, one of the benefits of the detailed
30 written submissions is I can shortcut a number of issues,
31 and I can try to deal expeditiously with the issues that

1 have arisen today. So I would anticipate that, if the
2 court was able to sit on slightly, I can try and complete
3 my submissions this afternoon.

4 HER HONOUR: All right. Thanks. We'll see how we go, then.

5 MR CHAILE: Yes.

6 MR HOSER: Yeah. Okay.

7 HER HONOUR: And if we need to, we can perhaps roll over into
8 the morning, at least.

9 MR CHAILE: That would be convenient, Your Honour.

10 HER HONOUR: Okay. All right.

11 MR HOSER: Yeah. That sounds right.

12 HER HONOUR: The difficulty is I can't sit on tonight because
13 I've got a meeting.

14 MR CHAILE: I understand, Your Honour.

15 HER HONOUR: All right. Mr Hoser. Sorry. To come back to
16 you, then - and I think we've covered, fairly
17 comprehensively, your strongest points.

18 MR HOSER: Your Honour, I wish that was the case, but there's a
19 lot of strong points. In terms of relevant considerations
20 and irrelevant considerations, they - it cuts in with the
21 bad faith and I've dealt with it quite extensively,
22 Your Honour, in the written material - - -

23 HER HONOUR: Yes.

24 MR HOSER: So rather than rehash what's in my affidavit
25 material and the summaries and the submissions relating to
26 that - but suffice to say the department - and it ties in
27 very strongly with bad faith - they have made irrelevant
28 considerations and they have ignored relevant
29 considerations throughout. So the - but the -
30 significantly - and this - is - doesn't just include the
31 directions notice, Your Honour. It has to also be taken

1 with the refusal - 'cause I - I - I went through the
2 correct process and I asked them - I presented quite
3 substantial evidence and material and justification for
4 the department to consider certain factors - such as the
5 nature of the water bottles; such as the substrate
6 through; such as the nature of the cages; such as the fact
7 that every cage does in fact have a - any - system - and
8 they point blank refused to make any considerations at
9 all, which gets back to bad faith, but it shows that they
10 did not consider relevant material.

11 Now, in my learned friend's submissions, he talks
12 about relevant considerations and stuff, and I had planned
13 to have a number of rebuttals in my submissions overnight
14 in relation to that, but there's not much more I can - I -
15 I need to say, now, because it is in the written material.
16 Likewise, the denial of procedural fairness. And that
17 gets to the natural justice, which we covered before,
18 Your Honour, if that makes sense.

19 HER HONOUR: It does.

20 MR HOSER: Now, in terms of procedural fairness, there's
21 certain things that need to be acknowledged - and there is
22 case law, in this regard - and that is the department -
23 South Australian National Parks and Wildlife Service v
24 Wayne Court - W-a-y-n-e C-o-u-r-t. It's a case in South
25 Australia where the department charged him for bringing in
26 a crocodile from North Queensland. He had a license, but
27 he didn't have enough licenses. He needed two licenses.
28 He only had one. Anyway, they had a big court case, and
29 basically, Wayne Court was found - - -

30 HER HONOUR: Sorry. Is the case in the list of authorities?

31 MR HOSER: No. It's referred to in the book Smuggled-2, which

1 is basically linked from the - - -

2 HER HONOUR: Can you give me the citation for the case, then?

3 MR HOSER: I'll try to find it. Just bear with me.

4 HER HONOUR: Well, perhaps you can send it through later.

5 That's okay.

6 MR HOSER: I've got Smuggled-2 in front of me. It's referred
7 to in the book Smuggled-2. I've got to find it. It's,
8 like, the - the point I'm coming to - - -

9 HER HONOUR: It's alright, Mr Hoser. You can find the citation
10 later and send it through to me. That's okay.

11 MR HOSER: Okay. His name is Wayne Court. And in the case,
12 Your Honour, the department - the department was
13 lampooned, because it involved - he was, like, in my
14 situation. The lead plaintiff, for want of a better word.
15 There's a lot of reptile people, and the whole
16 Herpetological Society here is with me on this case,
17 because they're all at risk in the same way - 'cause they
18 all keep the reptiles best practice like I do.

19 In his case, the magistrate - her name was McGuinness
20 - she said that it is ridiculous that a wildlife
21 department, that should be collaborating and working with
22 people in the wildlife space, seems intent to run
23 everything through the courts - which is exactly where we
24 are here - and (indistinct) procedural fairness and
25 unreasonableness.

26 The department - and I have tried to do this with
27 them for decades, Your Honour - and we - and I mean
28 decades. Since the 1980s. The department refuses to work
29 with me and others in the wildlife space outside of their
30 own business. So Zoos Victoria is part of them. That's
31 basically it. Instead, they harass us; they abuse us;

1 they creatively interpret and reinterpret laws; draw up
2 laws and regulations - Your Honour, a lot of which have
3 very little sense of logic - which we - we comply with as
4 best we can - such as spending 40,000 on - - -

5 HER HONOUR: Okay. Sorry. So it's a case that you rely on in
6 relation to bad faith and natural justice matters.

7 MR HOSER: And procedural fairness. The department - - -

8 HER HONOUR: Sorry.

9 MR HOSER: And on their websites, they even say that they
10 collaborate with us in the wildlife space. And they've
11 never collaborated with us. Ever. This is not a normal
12 area of life. We're talking about animals that are
13 endanger of extinction. We are threatened in more ways
14 than you can poke a stick at. We're literally - myself
15 and others in our space - we are the thin green line
16 between oblivion - for quite a few of these animals. Now,
17 in my case, I was the first to - to artificially
18 inseminate snakes, which has been used to save hundreds of
19 species worldwide. So I'm at the pointy end of this.

20 HER HONOUR: Yes.

21 MR HOSER: The Wildlife Department should be consulting with
22 me; working with me; working collaboratively.

23 (Indistinct) doing a surreptitious so-called inspection
24 which is ostensibly to count animals and then to
25 photograph cages and claim they're - out of cherry picked,
26 creatively interpreted parts of a - of a - of a code of
27 conduct which, in parts, is point blank defective.

28 I mean, snakes don't excrete - - -

29 HER HONOUR: Mr Hoser, that's a submission you've already made
30 a number of times, so I think we'll keep moving on.

31 MR HOSER: Yes. Yeah. So they - the - the - the things that

1 are wrong, for example: a code of conduct that says,
2 'Snakes excrete pheromones through their faeces' - it is
3 scientifically not possible. It's just not the case.
4 Now, to resolve this in the law: well, it is
5 scientifically an error. Right. So these are - this is
6 where we could work together. The - the - the
7 Herpetological Society, who I've been speaking with as
8 recently as last night, like myself, have gone to the
9 department and said, 'We think a code of practice is
10 great, but make one that's proper.'

11 In terms of the code of practice and your - your
12 directions notice, Your Honour, I think it is worth noting
13 and relevant to unreasonableness: the code of practice
14 and the directions notice is - has a place. However, it
15 can't be used as a weapon to disable businesses in breach
16 of competitive neutrality - and I talk about competitive
17 neutrality in the submissions - and it can't be used to
18 harass people that they find an irritation, such as
19 myself. And that's what is being done here. Where it is
20 appropriate - and it can't be just creatively interpreted
21 to have the broadest possible scope, no matter how
22 ridiculous or tenuous the basis of it is. It has to have
23 a sound factual basis before it is issued.

24 Now, I'll give an example, Your Honour, where it
25 would be very useful. A person purchases a snake from a
26 pet shop. They've never kept a snake before. They take
27 it home. They're keeping it. It's licensed. The
28 Wildlife Department do an inspection and they find that
29 everything about the caging is wrong and the snake is in
30 an obvious state of decline. I have seen that myself,
31 many times, and it would make a lot of sense - now,

1 someone like me can say, 'I advise you to do this, this,
2 and this.' And I'm usually at the end where they're
3 giving me an animal that's half dead and I take it on and
4 fix it up, like some of the tortoises; like some of the
5 pythons; like, even, that albino python that was sighted
6 with the tongue hanging out of its mouth.

7 Now, what happens? In the case of the department,
8 it would make a lot of sense for them to walk in and say,
9 'Well, you don't have this. You don't have that. It
10 doesn't comply with this. Here's a directions notice.
11 This is your guideline to fix your case so that you're not
12 breaking the law.' So the person is not intentionally
13 committing a breach of the Cruelty to Animals Act. It's
14 an inadvertent breach. They typically don't know.

15 And this sort of situation is common. And a
16 directions notice would be great in that situation; where
17 the Wildlife Department can give them a pretty decent push
18 and say, 'Look, your cage is no good because you've got no
19 heat or you've got no this or something's out of whack.
20 Fix it. Now, your water bottle's no good because, you
21 know, it's evaporated because it's too shallow.' There's
22 a whole heap of things that are wrong in cages
23 (indistinct). A directions notice is a useful tool.

24 It is not an appropriate tool to attack a world's
25 best practice facility run by a globally recognised expert
26 for reptiles that visibly are in very good health across
27 the board; breed regularly; and are literally at the top
28 of the pile. A - a cohort of them that are well past use
29 by date in terms of age - now, we're talking more than a
30 decade over, you know, the wild equivalents. That is not
31 the point of a directions notice. It is not an

1 appropriate use of a directions notice - which gets to bad
2 faith, unreasonableness and the rest of it - to issue
3 three directions notices on animals that are extremely
4 old, for which the mooted - you know, a veterinary surgeon
5 cannot reverse the effects of extreme old age.

6 They were completely and utterly pointless
7 directions notices, especially when the owner of those
8 animals - as in myself - advised the wildlife officers
9 that the animals were old or whatever their issues were.
10 It's not that they observed those. They were directed to
11 those - those old animals by myself, and at no stage was
12 the question put to me, 'What are you doing about their
13 problems?' 'Are they treatable? Are they not treatable?'
14 These were never asked.

15 The inland taipan that was taken to the vet had
16 heart disease. There is no process in veterinary medicine
17 to do heart surgery on a snake. There was nothing that
18 could be done for that snake. I mean, issuing a
19 directions notice on that snake was pointless. And this
20 sums up what it was about, you know. It - it - it - it's
21 an act of bad faith. Does that make sense, Your Honour?

22 HER HONOUR: It does.

23 MR HOSER: Now - well, because of the time issue, I - I - I'm
24 mindful of - of what you said and I'm mindful of the time
25 constraints, and realistically, this matter will be best
26 served by you simply reading the material in detail. And
27 I must say, in all honesty, I thought you'd probably say,
28 'I'm gonna read all the material. Is there anything else
29 you wish to say?' So I'll leave it at that. But - yeah.
30 I just reserve the right to - to answer anything that my
31 learned friend does by oral argument that he hasn't

1 already put in writing.

2 HER HONOUR: All right. Thanks, Ms Hoser. Mr Chaile.

3 MR CHAILE: Thank you, Your Honour.

4 HER HONOUR: Sorry. Before we do that. The one thing you
5 haven't addressed - and you may have addressed it in the
6 submissions you filed this morning - was the question
7 about the admissibility of, in particular, the expert
8 reports.

9 MR HOSER: Yes. Sorry, Your Honour. Now, I have addressed it
10 in my written material.

11 HER HONOUR: Okay.

12 MR HOSER: And I would submit they are - they are admissible.
13 Now, in terms of expertise, we've already had the judgment
14 of VCAT from 2015, which I read - read out to you before,
15 which the VCAT member decides I am an expert. The
16 affidavit evidence shows I'm the most cited expert in many
17 places, such as the book on - - -

18 HER HONOUR: Yes. Nobody's challenging your expertise, so you
19 don't need to address me about that.

20 MR HOSER: Okay. So - - -

21 HER HONOUR: It's only Wolfe and Wellington.

22 MR HOSER: Now, in terms of - yep. But - no. What is under
23 challenge - or has been under challenge - is the relevant
24 weight that should be put to my affidavit material. And
25 I suggest the highest weight should be put to that
26 affidavit material. And to that extent, because the
27 affidavit material quite - quite convincingly shows that
28 I have complied with the letter of those codes of conduct
29 and the rules in every materially relevant way; in every
30 practicable way and to best - conforming to best practice
31 - as is my vested interest, Your Honour, because, you

1 know, a snake that dies on me - you know, a - a python -
2 you know, they cost three to five hundred dollars if
3 you've got to buy one, so we're better off breeding our
4 own and keeping them alive. That's why we comply, you
5 know. There is a financial interest as well as an
6 emotional interest - that we've had these animals for
7 years and we actually quite like them.

8 And my evidence - not just accepted, but at the
9 highest possible level. Now, in the terms of the evidence
10 in the other submissions: in his submissions - and
11 I didn't actually answer this, 'cause I was half asleep
12 when I was writing, so I'll answer it no - my learned
13 gentleman, who I assume wrote those submissions, said,
14 'The plaintiff did not identify his expertise in his
15 affidavit.' And in - I think it was about - paragraphs 10
16 to about 20 - Paul Wolfe does in fact explain his
17 expertise with reptiles. Now, his expertise is relevant
18 to the comments he makes in the rest of his comments of
19 facts and opinion in the rest of his affidavit.

20 HER HONOUR: Yes.

21 MR HOSER: Mr Ross Wellington is one of the preeminent
22 herpetologists in Australia. Significantly, he is an
23 employee of the New South Wales National Parks and
24 Wildlife Service, which, of any department I've ever
25 hated, it's - that is head and shoulders above any other,
26 in terms of me not liking the people in that department.
27 So here is a man in a department who's been my sworn enemy
28 since I was a child, when they burgled my house when
29 I wasn't home and took a bunch of snakes and we got them
30 back 'cause we found out they'd stolen them - - -

31 HER HONOUR: Stay on track for me.

1 MR HOSER: Here is a man from a department - who has made an
2 expert statement. And he has a CV that is unmatched in
3 terms of relevant expertise. Now, the - the evidence must
4 be accepted. It is relevant to these proceedings; claims
5 that the four main - of it are incorrect, I don't
6 subscribe to. It is discussed in my later - in all my -
7 in both - I think - certainly in my most recent
8 submissions, of - of overnight, I discuss the
9 admissibility of the evidence of Wellington and Wolfe.

10 HER HONOUR: Yes.

11 MR HOSER: But it is relevant.

12 HER HONOUR: That's fine. I just wanted to make sure that it
13 had been addressed and I hadn't overlooked it.

14 MR HOSER: Yes. Well, it's in - - -

15 HER HONOUR: But if you've dealt with it in the written
16 submissions, that's fine.

17 MR HOSER: Yes. And I - I do ask, though - because of what
18 you've just said - that they are dealt with, and also that
19 the - the weight is applied to the evidence at the highest
20 level. Because the reality is, Your Honour, because of
21 the enormous cost of compliance with a directions notice,
22 which the department has quite significantly tried to
23 ignore, and the negative impact on the animals, it's a
24 lunatic - it is literally a lunatic directions notice.
25 The evidence of Wellington confirms that, and he is a
26 bureaucrat who is not adverse to throwing out notices and
27 orders against people such as myself. And he has come out
28 swinging dead against it.

29 Now, the weight of that is so compelling - bearing
30 in mind that the department, in three months after leaving
31 this house, with all the photographic and video footage

1 that they have, were in a very good position to get expert
2 advice to confirm whether or not there had in fact been
3 breaches of the Wildlife Act. So with - for example, with
4 the - or - or the code of practice.

5 So with the water bottles as a - as a good example,
6 and the temperatures of the crocodiles: they're two very
7 simple claims that were made, and they're two very simple
8 claims that could have been addressed by an expert. 'Yes.
9 That is appropriate.' 'No. It's not.' And they would
10 have found out very, very quickly that their direction to
11 dial down the temperature to a fatal level for a crocodile
12 clearly is not legal, because it does not comply with the
13 Wildlife Act, the wildlife regulations or the code of
14 practice. Three sets of rules it doesn't comply with.

15 Now, there were - Your Honour, there may - - -

16 HER HONOUR: Mr Hoser, I'm going to stop you there, because
17 I understand the points that you make about both
18 admissibility and weight in relation to Wolfe and
19 Wellington, and that supplements the fact that you have
20 addressed it in the written submissions that were received
21 this morning.

22 MR HOSER: Yes. And I'll refer you to that. Thank you very
23 much, Your Honour.

24 HER HONOUR: Thanks, Mr Hoser.

25 MR CHAILE: Thank you, Your Honour.

26 HER HONOUR: Sorry, Mr Chaile. Mark two.

27 MR CHAILE: No need to apologise. Your Honour, I intend to
28 address the seven topics Your Honour outlined at the
29 commencement of this hearing. Before doing that, though,
30 I'll confirm that we continue to rely on our written
31 submissions, but also, with Your Honour's indulgence,

1 I propose to do three different things.

2 The first is to take Your Honour to the salient
3 parts of the statutory scheme. The second is to take
4 Your Honour to the directions notice and the basis on
5 which it is issued, and then to address the topics
6 Your Honour has identified; but, with Your Honour's
7 indulgence, I will deal with the topic of admissibility
8 first before turning to the relevant grounds of review.

9 HER HONOUR: I'm happy for you to proceed on that basis.

10 MR CHAILE: Thank you, Your Honour. I will say, Your Honour -
11 and I do apologise for this - there is a dissonance in the
12 combined book of authorities where the index doesn't
13 necessarily correspond with where certain documents are.
14 I am told, however - and my experience is - that if you're
15 using Adobe Acrobat, there are bookmarks that will
16 identify where each document is. But what I propose to
17 do, Your Honour, is to give you the PDF page number of the
18 material to which I am taking you. That seems to be the
19 most convenient way of getting access.

20 HER HONOUR: Yes.

21 MR CHAILE: With that qualification, Your Honour, the starting
22 point to which I wish to take Your Honour is s1(a) of the
23 Wildlife Act, which is at PDF p41. That provides for the
24 purposes of the act, and (a), 'They are to establish
25 procedures in order to promote the protection and
26 conservation of wildlife; the prevention of wildlife from
27 becoming extinct; and the sustainable use of and access to
28 wildlife'; and importantly (b), 'To prohibit and regulate
29 the conduct of persons engaged in activities concerning or
30 related to wildlife.'

31 Your Honour, under s22 of the Act, the secretary of

1 the department is empowered to issue a wildlife license.
2 I don't need to take Your Honour to it, but that provision
3 is at PDF p85, or p46 of the act. Importantly, however,
4 Your Honour, under (iii) of that section, which is at PDF
5 p86 on p47 of the act, 'A license is issued subject to any
6 conditions, limitations and restrictions that I have
7 prescribed.' That appears in s23(b)(i), and - and this is
8 important, Your Honour - a condition that the license
9 holder submits to inspection by authorised officers to
10 monitor compliance with the act. 'Regulations and
11 conditions of the license.' That is in s22(iii)(c).

12 So, Your Honour, in our submission, that is
13 statutory notice of the purpose for which inspections are
14 conducted under the act by authorised officers.
15 Your Honour, regulations 11 and 13 - I don't need to take
16 Your Honour to them - of the wildlife regulations
17 authorise holders of Wildlife Controller and Wildlife
18 Demonstrator Licenses to possess certain wildlife. The
19 critical regulation, Your Honour, is at PDF p330.

20 I'll start with regulation 43(i). 'A person other
21 than a person referred to in (iii) who possesses living
22 wildlife other than specified birds must keep the wildlife
23 in cages or enclosures that' - and relevantly, the two
24 relevant requirements are those in (d) and (e) - '(d)
25 resist access by persons not authorised by the person who
26 possesses the wildlife'; and '(e) provide for the good
27 health and welfare of the animal in accordance with any
28 applicable code of practice made under the Prevention of
29 Cruelty to Animals Act or the Domestic Animals Act 1994'.

30 Your Honour, (ii) is the relevant source of the
31 power to issue a directions notice. It provides 'if a

1 cage or enclosure is not designed, constructed or
2 maintained to comply with (i), the secretary may direct in
3 writing that the person possessing the wildlife make
4 specific changes or alterations to the enclosures within
5 the period specified in the direction.'

6 I'll return to this when I deal with the issue of
7 rationality, Your Honour, but in our submission, the
8 jurisdictional fact is the forming of an opinion that a
9 cage or enclosure is not designed, constructed, or
10 maintained to comply with (i) - that is, that it is
11 sufficient to enliven the power in regulation 43(ii) that
12 the decision maker has formed the view that a cage or
13 enclosure is not designed, constructed or maintained to
14 apply with the applicable codes. Your Honour, non-
15 compliance with 43 - - -

16 HER HONOUR: Sorry. Can I just go back a step?

17 MR CHAILE: Yes.

18 HER HONOUR: Sub-paragraph (ii) talks about an enclosure not
19 being 'designed, constructed or maintained' to comply with
20 sub-regulation - and it only refers to sub-regulation -
21 (i).

22 MR CHAILE: Yes. Yes.

23 HER HONOUR: But the language of (ii) - 'designed, constructed
24 and maintained' - is really picking up the language in
25 (i)(a) specifically. Isn't it?

26 MR CHAILE: Your Honour, in our submission, it picks up all of
27 them, because although the words 'designed, constructed
28 and maintained' are in (a), (b) and (c) refer to aims or
29 objectives that should be met as part of that design,
30 construction and maintenance; (d) refers to a prohibition
31 that should be met in that context, and (e) also applies,

1 because the codes delineate or delimit the requirements
2 that might apply to the design, construction and
3 maintenance of a cage or enclosure.

4 HER HONOUR: So the design, construction or maintenance is
5 looked at in relation to (a) to (e).

6 MR CHAILE: Yes.

7 HER HONOUR: Independently of each other.

8 MR CHAILE: Yes, Your Honour. So we say it's looked at in the
9 context of (a) and (e) because they set the qualitative
10 requirements - or in some respects, in relation to the
11 content of a code, quantitative requirements that need to
12 be met - (b) to (d), however, set specific objectives that
13 should inform the design, construction or maintenance of
14 those items. Your Honour will see, if Your Honour looks
15 at the regulations, that non-compliance with (i) is
16 subject to a penalty of 50 penalty units.

17 Non-compliance with (ii) is not stated to be the
18 subject of any penalty, nor is there any offence under the
19 Wildlife Act or the Forestry Act for failure to comply
20 with a direction given by the secretary. Your Honour,
21 I just wish to deal briefly with the Code of Practice for
22 the Keeping of Reptiles.

23 HER HONOUR: Yes.

24 MR CHAILE: That code commences at PDF p22. I will try to deal
25 with this quickly, Your Honour, but there's a couple of
26 things that I wish to emphasise which I hope will aid
27 Your Honour's understanding of the way the code is
28 intended to operate. But Your Honour will see, under the
29 introduction, the first paragraph says, 'The keeping of
30 wildlife, including reptiles, is a legitimate activity in
31 Victoria and provided for under the Wildlife Act and

1 wildlife regulations.' So there's an express connection
2 drawn between the code and those two statutory
3 instruments.

4 Under the regulations, people are permitted to keep
5 a number of different species of reptiles in Victoria.
6 This code is intended to complement the requirements of
7 individuals under legislation so that people keeping
8 reptiles do so in a manner that meets minimum standards of
9 animal welfare appropriate for the species concerned. The
10 next paragraph to which I think the plaintiff made
11 reference is that detailed requirements for particular
12 species can be obtained by referring to the publications
13 cited in the bibliography. 'It is the responsibility of
14 the individual keeper to source the information that is
15 necessary to meet the biological and psychological needs
16 of the animals in question.'

17 Your Honour, I'll skip the next paragraph, but the
18 last paragraph says, 'All person involved in the husbandry
19 of reptiles and especially snakes should be familiar with
20 appropriate handling techniques through demonstrated
21 experience, appropriate training courses, or attendance at
22 approved reptile holding establishments.' And there is
23 then a reference to the need to demonstrate competency
24 when you are applying for a private wildlife license if
25 you are under 18 years of age. Your Honour, section 2 on
26 PDF p23 sets out the general requirements applicable to
27 the keeping of reptiles.

28 HER HONOUR: Yes.

29 MR CHAILE: They are set out in aspirational and broad terms.

30 They are supplemented by the specific requirements that
31 follow. The first specific requirement is that set out in

1 s3 on the same page; and 3.1, dealing with sizes, sets out
2 some general requirements: namely, that the cage must be
3 of sufficient size so as to provide enough space, both
4 horizontally and vertically, to enable the animals to take
5 exercise and to protect animals from undue dominance or
6 conflict. The cage must be large enough that there is a
7 temperature gradient, with one end being warmer than the
8 other, to allow the animal to thermoregulate.

9 Those overarching requirements are then supplemented
10 by specific requirements, depending on the type of
11 reptile. Your Honour will be aware that there are
12 requirements for terrestrial snakes at 3.1.2, and for
13 arboreal snakes at 3.1.3. I'll deal with the relevance of
14 those requirements when I deal with the unreasonableness
15 argument. Your Honour will see, at PDF p29, there's a
16 bibliography of the documents and information that has,
17 presumably, informed the content of the code. At the end
18 of that biannual journal of the Australasian Affiliation
19 of Herpetological Societies being a 'good source of
20 current information on captive reptile management'.

21 Also, Your Honour, I wish to deal at this juncture
22 with the new ground that has been raised in the course of
23 the plaintiff's submissions; namely, that the code does
24 not apply to individuals who hold a Demonstrator License
25 under the act. We don't object to that ground being
26 raised at this late stage, but we'd say it fails at the
27 threshold.

28 It fails at the threshold because neither the text
29 of regulation 43 nor the text of the code for the keeping
30 of reptiles provides any basis to suggest that there is an
31 inherent or express limitation or qualification such that

1 the code only applies to those people who do not hold a
2 Demonstrator License. Requirement with the code applies
3 under regulation 43 - sorry. Compliance with the code is
4 required of all persons who possess wildlife, and the code
5 itself is intended to set minimum standards by which all
6 people who hold wildlife - and, in particular, reptiles -
7 are required to meet.

8 Your Honour, I wish to now just turn to the
9 directions notice. The directions notice commences at
10 court book 118. Your Honour, I'll deal with the
11 statements about an offence when I deal with the
12 procedural fairness ground, but it's sufficient for
13 Your Honour's purposes to note that, at court book 119,
14 the decision maker, Mr Johnston, sets out that he believes
15 on reasonable grounds that the plaintiff is committing an
16 offence pursuant to regulation 43(i)(d) and regulation
17 43(i)(e).

18 And then, Your Honour, the directions are contained
19 in court cook 123 onwards. What Your Honour will see in
20 that table is it sets out the relevant species; it sets
21 out the enclosure in which that species is contained; it
22 sets out which parts of the relevant codes are said to be
23 breached.

24 HER HONOUR: When you say 'enclosure location', it only seems
25 to identify the location of the enclosure. It doesn't say
26 anything about the enclosure itself.

27 MR CHAILE: Correct, Your Honour. But I will take you to the
28 officer's report which provides that further information.

29 HER HONOUR: Okay.

30 MR CHAILE: It then sets out the observations which inform the
31 opinion that a breach subsists, and then it specifies the

1 action required to remedy the breach. It does this for
2 every single animal in respect of which a breach of the
3 code has been found. The directions notice, Your Honour,
4 was informed - - -

5 HER HONOUR: I take it, from what I've read, that there's a
6 breach found in respect of every animal observed.

7 MR CHAILE: I'll have to check that, Your Honour. I'll take
8 Your Honour to the officer's report, next.

9 MR HOSER: I can say, Your Honour, the answer's yes. Every -
10 every cage - every animal - - -

11 HER HONOUR: Sorry, Mr Hoser.

12 MR HOSER: I was trying to help you.

13 HER HONOUR: Yes. I know you were, but it's probably better
14 that you don't interrupt.

15 MR CHAILE: Yes. Thank you, Your Honour.

16 MR HOSER: Sorry, Your Honour.

17 HER HONOUR: That's all right.

18 MR CHAILE: Your Honour, the directions notice was informed by
19 the observations made by the inspectors on their
20 inspection on 12 September. That's in Ms Watterson's
21 affidavit. I don't think the fact that an inspection
22 occurred is in dispute, and I hope it's not. Photographs
23 were taken during that inspection and a selection of those
24 photographs are included at court book 509. I don't wish
25 to take Your Honour to them.

26 The principal document which informed the directions
27 notice, Your Honour, was based on an officer's report.
28 That is at court book 513. Now, Your Honour should go to
29 that document, but I must say, the version I have in my
30 printed court book is in minuscule form, so it's probably
31 best that Your Honour has an electronic version open,

1 because you can zoom in.

2 HER HONOUR: Yes. Five one three. Yes.

3 MR CHAILE: Yes. It's very small, Your Honour.

4 HER HONOUR: Impossible to read, even.

5 MR CHAILE: Yes. Unless Your Honour's able to zoom in. The
6 first two columns identify which authorised officer was
7 responsible for noting the observations and which officer
8 was responsible for taking photographs. It identifies, in
9 this table, the enclosure location and the enclosure
10 number. It identifies the species of the occupant of that
11 enclosure. Is Your Honour able to see that?

12 HER HONOUR: Yes.

13 MR CHAILE: Yes. It records the height, width and depth of the
14 enclosure. It records whether those measurements comply
15 with the applicable minimum standard in the code. It
16 records the floor area of the enclosure, and, again,
17 whether that floor area complies with the minimum
18 standard. It records the low and high air and water
19 temperature of the enclosure. It records whether the
20 substate is considered to be acceptable. It records
21 whether there is furniture in the enclosure. There is
22 then, at the end, additional notes for each specific
23 enclosure, and then it identifies which photograph
24 corresponds to that enclosure. Your Honour will see, at
25 court book 515 - - -

26 HER HONOUR: Sorry. I'm just working my way across.

27 MR CHAILE: No. Fair enough, Your Honour. I will give you
28 some time. It is a very lengthy document.

29 HER HONOUR: Okay. So relevant photographs listed - 'NTC'
30 being notice to comply? The second last - they're the
31 notices that were issued on the day of the inspection, and

1 then there's that final column, as you say, to be put on
2 the directions notice.

3 MR CHAILE: Yes.

4 HER HONOUR: Yes. Okay.

5 MR CHAILE: Your Honour, at 515, there is a legend that
6 identifies what all the various colours that are used to
7 shade the table mean. When Your Honour goes through the
8 table, Your Honour will see that there are some
9 requirements or some measurements which are found to be
10 compliant; some which are found to be non-compliant; and
11 then, ultimately, a view is formed at the end as to
12 whether or not they should form part of a directions
13 notice to be issued to the plaintiff. Your Honour, my
14 instructor has confirmed that all enclosures were non-
15 compliant, in one form or another, with the code, but the
16 extent of non-compliance differs.

17 HER HONOUR: Yes. Thanks.

18 MR CHAILE: So, Your Honour, I did wish to take this excursion
19 through this material, because the starting point,
20 Your Honour, in the department's submission is that the
21 directions notice and the directions contained within it
22 with respect to each specific enclosure has identified the
23 objective basis on which a view has been formed that the
24 plaintiff has failed to comply with the applicable codes
25 and has justified that by reference to specific
26 qualitative and quantitative observations.

27 By qualitative observations, Your Honour, I refer to
28 the comments made by those who inspected as to what they
29 saw, as supported by the photographs; by quantitative,
30 I refer to the measurements that were taken as to the size
31 of the enclosures and the temperatures, in terms of both

1 air and water.

2 Your Honour, I wish now to just deal with the
3 question of admissibility. We've put very detailed
4 written submissions on this, but the point is ultimately a
5 simple one, Your Honour: no objection is taken to the
6 admission of the plaintiff's evidence, including his
7 purported expert report. No objection is taken to his
8 expertise.

9 The only objection that is taken is one as to
10 weight: namely that, because the plaintiff is the
11 advocate and prosecutor of his own cause, he necessarily
12 cannot satisfy the independence that is ordinarily
13 expected of expert witnesses providing evidence to the
14 court. But the consequence of the absence of that
15 evidence is not, as Justice Dodds-Streeton said in Ananda
16 Marga, that the report is inadmissible. It's that fact
17 that little weight should be attributed to it, with the
18 risk that it will fail to persuade Your Honour.

19 The situation is different in relation to the
20 statements of Messrs Wellington and Wolfe, Your Honour.
21 We do make the point that Mr Wolfe does not set out his
22 education or training, but no objection is taken to his
23 expertise. Rather, the issues with their evidence are far
24 more fundamental.

25 The first issue, Your Honour, is that their
26 statements contain opinions that are plainly outside the
27 scope of any expertise which they may have, because they
28 relate to conclusions about the proper interpretation or
29 legal effect of applicable statutory instruments; or they
30 are irrelevant because they express opinions which have no
31 bearing on proper grounds of judicial review; or otherwise

1 contain or make statements that appear to serve no purpose
2 other than to inflame or scandalise. Those statements,
3 Your Honour, are recorded at paragraph 38 of the written
4 submissions, which is at court book 41.

5 HER HONOUR: Okay. So just to be clear: no objection to their
6 expertise insofar as it relates to, presumably, the
7 keeping of animals.

8 MR CHAILE: Yes, Your Honour.

9 HER HONOUR: I'm just trying to think of it in a generic way.

10 MR CHAILE: If this was a conventional case in which they had
11 been briefed properly - namely, by reference to questions
12 and identified material and identified assumptions - no
13 objection would be taken to the capacity of each witness
14 to express an expert opinion within the meaning of s79 as
15 to the way in which reptiles are to be kept, including
16 whether or not they comply with the code. But that was
17 not the task that the experts undertook.

18 HER HONOUR: Yes. Yes. No. I was really just making sure
19 that I don't misunderstand the nature of what you're
20 conceding.

21 MR CHAILE: No. Yes. No. Your Honour, the concession is as a
22 general proposition, we accept that these gentlemen have
23 experience and expertise relevant to reptiles. Whether
24 those expertise would support some other form of evidence,
25 obviously is a matter of speculation, and I can't put it
26 any higher than that.

27 HER HONOUR: Yes.

28 MR CHAILE: But we don't say that they could not have been
29 asked to opine upon proper questions relevant to the
30 ground if they had been asked.

31 HER HONOUR: Yes.

1 MR CHAILE: I should say, Your Honour, one matter that I have
2 not addressed orally but is addressed in the written
3 submission is Your Honour obviously has to assess the
4 question of admission - sorry. I think the plaintiff's
5 just left. I don't wish to make any submissions in his
6 absence.

7 HER HONOUR: No. No. Mr Hoser? We'll adjourn until Mr Hoser
8 returns.

9 MR HOSER: I'm sorry, Your Honour. I was just - I was
10 literally just going to the toilet, but I can still hear
11 the court.

12 HER HONOUR: Well, Mr Hoser, you're online, but you're in
13 court, and so if you need a break for such a purpose or
14 any other purpose, we don't carry on in your absence.

15 MR HOSER: Yeah. I'm sorry, Your Honour. I was just - - -

16 HER HONOUR: That's all right.

17 MR HOSER: No. I - I could hear you. I could - I could hear
18 you talking, so that was fine. I - - -

19 HER HONOUR: Yes. Well, we couldn't see you, and that was
20 unsatisfactory, from my point of view.

21 MR HOSER: I'm sorry, Your Honour.

22 HER HONOUR: All right. You're back.

23 MR HOSER: Sorry, Your Honour. Yep.

24 MR CHAILE: Thank you, Your Honour. There is an anterior issue
25 as well, which is namely that Your Honour has to assess
26 the question of admission having regard to the fact that
27 the ordinary position is that expert evidence is not
28 admissible in cases of judicial review because material
29 that was not before the decision maker is generally
30 irrelevant to an assessment as to whether or not that
31 decision was made within the bounds of legality. Now,

1 I accept - and the department accepts - that there are
2 exceptions to that general rule. We say that, because of
3 the nature of the evidence, those exceptions are not
4 engaged. I should have made that point clear, first.

5 HER HONOUR: And one of those exceptions is, as is talked about
6 in Mackenzie v Head, the idea that it can go to issues
7 about unreasonableness.

8 MR CHAILE: Yes, Your Honour.

9 HER HONOUR: Or no evidence, perhaps.

10 MR CHAILE: Yes.

11 HER HONOUR: But yes.

12 MR CHAILE: Well, I'll deal with this point now, because I will
13 deal with it and reasonableness, but as Your Honour is
14 aware, the tests for identifying whether or not the
15 jurisdictional fact has been satisfied is really to work
16 out, for the court - for the court to identify whether or
17 not there was an objective basis for the opinion to be
18 reached. Certainly, expert evidence, depending on the
19 question that's before the decision maker, can bear
20 whether or not there are objective facts or whether or not
21 an inference was open on those facts. We say that that's
22 not this case, but purely because the evidence does not
23 necessarily provide any satisfactory answer to that
24 question.

25 HER HONOUR: Yes.

26 MR CHAILE: Your Honour, the more fundamental issue with the
27 statements provided by Mr Wolfe and Mr Wellington is
28 they're not the product of their own independent work. We
29 have set out the requirements of the expert code and we
30 have set out a series of authorities which make it clear
31 that both the code applicable to expert evidence and the

1 common law statement of reasoning rule require experts not
2 simply to adopt the work of another person. They are, in
3 form and substance, either substantially similar or, in
4 some respects, identical, to Mr Hoser's own statement. We
5 have an annexure to our written submissions in which all
6 of those similarities are identified side by side.

7 Although we accept that Mr Hoser is self-represented
8 and some allowance should be made for the fact that he is
9 not necessarily able to comply with the code in the
10 conventional sense, as Justice John Dixon made clear, that
11 does not diminish the vigilance that the court should
12 exercise in determining that only evidence that is
13 properly admissible should be admissible, particular when
14 it is in scandalous and irrelevant form. More than
15 anything, Your Honour, Your Honour can derive no
16 assistance from that evidence.

17 But, subject to those submissions, Your Honour, we
18 are content with the court that Your Honour proposes:
19 namely, that Your Honour can take that evidence into
20 account to the extent that Your Honour considers relevant
21 and appropriate in deciding the questions before you,
22 Your Honour.

23 HER HONOUR: Okay.

24 MR CHAILE: Sorry, Your Honour. I'm just going to check the
25 time. I've got 10 minutes.

26 HER HONOUR: That's all right.

27 MR CHAILE: Your Honour, I should be clear: although I am
28 trying to be as concise as possible, I think I would do a
29 disservice to my client if I did try to finish this
30 afternoon.

31 HER HONOUR: I think that's probably a fair assessment.

1 MR CHAILE: Yes.

2 HER HONOUR: Now, from the court's perspective, I can
3 accommodate tomorrow morning or Thursday morning.

4 MR CHAILE: Yes. Your Honour, both are acceptable to me.

5 I think, maybe, for the continuity it might be better for
6 us to sit tomorrow morning if convenient to Your Honour.

7 HER HONOUR: I would prefer that, if we can. Yes.

8 MR CHAILE: Yes.

9 HER HONOUR: Do you anticipate needing the whole of the
10 morning? I'm just thinking we can start earlier if that
11 were - - -

12 MR CHAILE: Your Honour, I would prefer, if possible and
13 convenient to the plaintiff and yourself, to start
14 earlier, although I don't anticipate I will need the whole
15 of the morning. I anticipate I will be, at most - giving
16 myself some allowance - 90 minutes. I suspect that I will
17 finish within an hour, but if Your Honour wants to start
18 at the ordinary time, that is also convenient. I just
19 wanted to make sure that - I don't know how long the
20 plaintiff is going to spend in reply, and I don't want -
21 I don't think it would be an appropriate use of judicial
22 resources to require Your Honour to come back for a third
23 day.

24 HER HONOUR: No. No. That's fine. What I would propose is
25 that, if it's convenience to both parties, we start at
26 10.00 tomorrow morning.

27 MR CHAILE: If it pleases the court.

28 HER HONOUR: And, given those estimates, I would anticipate we
29 would conclude by lunchtime.

30 MR CHAILE: Yes. Your Honour, I can either continue or -
31 sorry, Your Honour. I'm interrupting.

1 HER HONOUR: Sorry. Mr Hoser, how - - -

2 MR HOSER: I was going to say everything so far sounds fine.

3 The niggling issue of the expiry of this directions notice
4 and the risk to my (indistinct) - I would ask that my
5 learned friend try to get reason out of his department and
6 that there'll be no - no moves against us in any way,
7 shape, or form 'til this is well and truly over, because,
8 you know, we - we - we have concerns for our animals and
9 we also have commitments. We have bookings for schools
10 and so forth right through the year, so - and as it
11 happens, I'm going to walk out of here; I've got to go and
12 do and do a reptile show at a disabled place. So - - -

13 HER HONOUR: Yes. Well, we did flag that Mr Chaile would speak
14 to the question about what happens pending, sort of - - -

15 MR CHAILE: Yes.

16 HER HONOUR: Because the directions notice expired yesterday.

17 MR CHAILE: Yes. And maybe at the time - - -

18 MR HOSER: Now, bearing in mind - - -

19 HER HONOUR: Sorry. Yes. No. I understand the concern.

20 MR CHAILE: Maybe in the time allowed I can address that issue,
21 Your Honour.

22 HER HONOUR: Okay.

23 MR HOSER: Well, I don't know whether - well, we've got to look
24 after the animals here. The Wildlife Act - and really, we
25 don't want the wildlife department coming to - - -

26 HER HONOUR: So, Mr Hoser, Mr Chaile is going to address that
27 concern right now.

28 MR HOSER: Okay.

29 HER HONOUR: Okay.

30 MR CHAILE: Your Honour, to the extent that the concern is
31 they're not sure whether or not they should be looking

1 after the animals, I think that matter needs to occur
2 regardless of the status of the directions notice. The
3 department's position, Your Honour, is that the directions
4 notice should not be extended, purely because - and I will
5 develop these submissions tomorrow - non-compliance with
6 the directions notice is not productive of any legal
7 consequence. The risk to Mr Hoser that arises is that
8 there may be steps taken in relation to his non-compliance
9 with regulation 43, but that risk remains whether or not
10 the directions notice is in effect or being complied with.

11 As far as we're aware, no steps have been taken
12 whatsoever to attempt to comply with the notice, so our
13 principle position, Your Honour, if it's satisfactory to
14 the court, is that the notice should not be extended. If
15 Your Honour considers that that is a necessary step in
16 order to preserve your jurisdiction, we will of course
17 abide by that order. But what I can say, Your Honour, is
18 it's not contemplated that any action will be taken under
19 regulation 43 while this proceeding remains outstanding.
20 I can't foreclose that possibility, but in and of itself,
21 whether or not the directions notice is extended doesn't
22 have a productive legal consequence.

23 The difficulty, Your Honour, for my client is that
24 the extent to which we continue to consent to the
25 extension of the notice may be subsequently utilised as a
26 reason why - sorry; I'll withdraw that - may be perceived
27 as a consent or assent to the proposition that, in the
28 interim, compliance with the notice is not required. The
29 department's perspective is that, as a matter of good
30 conduct, every recipient of the notice should comply with
31 it; but of course, from a legal perspective, whether or

1 not a person chooses to comply with the notice is a matter
2 for them.

3 Those are the submissions that we say should guide
4 Your Honour's exercise of discretion on this question:
5 namely, that extending the notice in and of itself will
6 not have any utility in terms of the court's jurisdiction
7 in the event that the notice is ultimately set aside.

8 HER HONOUR: Is that department prepared - and I appreciate
9 you'll need to seek instructions on this - to give an
10 undertaking to take no steps to act on the directions
11 notice - or act on non-compliance with the directions
12 notice - pending my provision of reasons as to the notice?

13 That is, that there'd be no - - -

14 MR CHAILE: I'm just going to check whether we've got those
15 instructions.

16 HER HONOUR: Yes.

17 MR CHAILE: Yes. Your Honour, that's a question that my client
18 will have to consider. I will say it was not apprehended
19 that, if there was no extension, some further step would
20 be immediately taken; but whether or not they would
21 foreclose exercise of that discretion - I will need
22 instructions on that question.

23 HER HONOUR: Okay. Yes. I mean, it seems to me they're the
24 two alternatives: either there's an extension given to
25 cover the period until I provide reasons, and then
26 whatever flows, flows from the outcome; or, alternatively,
27 there's an undertaking, in effect, to maintain the status
28 quo despite the fact that the notice period is not
29 extended further, and for the same time.

30 MR CHAILE: Yes. Yes. Yes. Yes. And as I've submitted to
31 Your Honour, if Your Honour considers that an extension is

1 an appropriate course to take, we will abide by that
2 order. The concern of my client is that a notice of this
3 kind is considered serious, and it does not want to be
4 seen - and, I think, reasonably so - as suggesting that
5 the time for compliance can be extended to any point of
6 time in the future, particularly in circumstances where
7 the notice itself has very limited effect, from a legal
8 perspective.

9 HER HONOUR: No. I understand that. I also understand
10 Mr Hoser's concern.

11 MR CHAILE: Of course, Your Honour.

12 HER HONOUR: I'm really looking for a mechanism by which the
13 status quo is preserved until such time as I can deliver
14 the reasons.

15 MR CHAILE: Yes. It may be germane to that assessment,
16 Your Honour, though, that as far as I apprehend the
17 plaintiff's submissions - and I do apologise if I've
18 misunderstood - I believe his submissions are that
19 compliance is impossible. So this is not a case in which
20 there needs to be a preservation of the status quo,
21 because in the event that the notice is found to be valid,
22 compliance is a realistic prospect. I had understood the
23 position to be compliance is impossible, either because it
24 will result in the death and destruction of the animals or
25 because it's financially prohibit. That's how
26 I understood the position.

27 HER HONOUR: Yes.

28 MR CHAILE: But if compliance is a possibility, then, of
29 course, there are different considerations at play.

30 HER HONOUR: Yes. Well, I didn't mean to cut across those
31 submissions of Mr Hoser's to suggest that there may well

1 be some compliance. I understand his position.

2 MR CHAILE: Sure.

3 HER HONOUR: But in light of the submission that's made that,
4 really, this is of no legal effect in and of itself, then
5 it may become of legal effect if further steps are taken
6 and I am concerned to make sure that doesn't happen while
7 I'm busy writing some reasons.

8 MR CHAILE: Yes. No, Your Honour. I think that would be a
9 reasonable course, because that might give rise to the
10 extent to which such an action may interfere with the
11 court's jurisdiction, so I will seek instructions on that
12 question and be in a position to address Your Honour first
13 thing tomorrow.

14 HER HONOUR: All right.

15 MR CHAILE: Thank you.

16 HER HONOUR: Thank you for that.

17 MR CHAILE: If it pleases the court.

18 HER HONOUR: Mr Hoser, you understand the position, then?

19 MR HOSER: Yes, Your Honour. Yes. I think I've got a - a good
20 - good gist of it, if that makes sense.

21 HER HONOUR: All right.

22 MR HOSER: And I was going to say, I'm happy with a 10.00 am
23 start tomorrow by Zoom. I - yeah. It's fine. And I -
24 look, so far what my learned friend has said - my
25 rejoinder to that is very short, so there is not much -
26 I've written about three words, so we're looking good.

27 HER HONOUR: All right. Well, we will adjourn until 10.00 am
28 tomorrow morning.

29 MR HOSER: Thank you, Your Honour.

30 ADJOURNED UNTIL WEDNESDAY 10 APRIL 2024