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**THE JUDGES**  
OF THE  
**SUPREME COURT OF TASMANIA**  
DURING THE PERIOD COMPRISED IN THIS VOLUME

The Hon EWAN CHARLES CRAWFORD  
Chief Justice

The Hon PETER ETHRINGTON EVANS

The Hon ALAN MICHAEL BLOW, OAM

The Hon SHAN EVE TENNENT

The Hon DAVID JAMES PORTER

The Hon HELEN MARIE WOOD

The Hon STEPHEN JAMES HOLT  
Associate Judge

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*ATTORNEYS-GENERAL*

The Hon LARA TAHIREH GIDDINGS MHA  
(Until 24 January 2011)

The Hon DAVID JOHN BARTLETT MHA  
(From 24 January 2011 until 13 May 2011)

The Hon BRIAN NEAL WIGHTMAN MHA  
(From 13 May 2011)

*SOLICITOR-GENERAL*

GEOFFREY LEIGH SEALY sc

# CORRIGENDA

(2011) 20 Tas R 185

*Pervan v Frawley*

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After paragraph [101] add “[See Addendum — Further reasons for judgment — pars [120] – [127]”

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After paragraph [119] add

## ADDENDUM

**Further reasons for judgment**

**17 June 2011**

120 After handing down my reasons on 3 June 2011, the applicant drew my attention to an oversight of mine in relation to the issue of the apprehension of bias of the investigator: see pars [90] [101] above. The error occurs in [91] in which I said that the applicant's submissions proceeded on the unstated assumption that the bias rule, as an aspect of procedural fairness, applied to Mrs Alder in her position as investigator. I also said that counsel for the Attorney made no response to this implicit assumption. As now pointed out, the fact is that cl 4.1 of CD5, which is the clause governing the instigation of an investigation, also provides that:

“*The Investigator must be impartial* and must report to the Head of Agency in accordance with clause 4.9 on the outcome of their investigation.” [Emphasis added]

121 Senior counsel for the applicant kindly accepted that in the course of argument my attention had not been drawn to that part of cl 4.1. But of course, I ought to have adverted to it given that it is contained within cl 4.1, the other terms of which were the subject of close attention.

122 The applicant sought to make further submissions in relation to the issue. Counsel were agreed that as nothing had progressed beyond me handing down my reasons, I had jurisdiction to do so: *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28 at [43]. I heard further argument on 9 June 2011, and reserved my decision on the additional points raised. I said that I would publish reasons in due course by way of an addendum to the reasons previously published. I now do so.

123 The requirement in cl 4.1 is that the investigator be impartial. There remains no suggestion of actual partiality. The earlier reasons show my ultimate approach to the matter of apprehended bias. In fact I proceeded on the basis that the bias rule, as an aspect of procedural fairness, applied to Mrs Alder in her position as investigator, but said that it was clear that the test for apprehended bias must take into account the nature and the role of the person whose decision

or conduct is the subject of scrutiny. I referred to, amongst other authorities, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [40]. However, the applicant now argues that having regard to the explicit requirement in cl 4.1 for the impartiality of the investigator, the test to be applied should be the most stringent one; that normally to be applied to a judicial officer hearing a case. I have difficulty in following how that can be so, and precisely what it meant in practical terms was not, in my view, properly explained. I reject the submission; the proposition simply cannot be correct.

- 124 The law which I am to apply is that stated by the High Court in *Ebner* and the other authorities to which I have referred in pars [92] and [93] above. This is an investigation. It is an evidence gathering exercise. The duties and obligations of the investigator include giving the employee the opportunity to be interviewed, and to provide documentary evidence if the person wishes. The investigator is to provide a report on the outcome of the investigation, which report “must provide evidence (if any), relevant to the circumstances relating to each alleged breach of the Code”, and to include as attachments “any relevant submissions, statements, records of interview or other documentary material”. The investigator can make no findings or determinations of fact, although as I previously said, it might be expected that at least some comment on the strengths and weaknesses of the evidence might be made. The authorities make it clear that the test for apprehended bias in this case must be applied in relation to that particular role.
- 125 I accept that, as submitted, the fair-minded observer can be properly attributed an understanding of the terms of CD5. The applicant submits that in the context of the CD5 process, the conduct of Mrs Alder has gone so far beyond the investigatory role, that she has become effectively a prosecutor in a cause; or at least the observer would think so. That submission is also rejected. As to the issue of the additional allegations, it is important that cl 4.7 specifically contemplates that during the investigation, the possibility of further breaches may be revealed. These may be added to the investigation if the Head of Agency forms the necessary belief. More generally, the observer would know of the evidence gathering and reporting roles, and would recognise that a particular view of things may arise in the investigator's mind without that compromising the proper performance of the duty.
- 126 The law requires an articulation of the logical connection between the matters complained of and the feared deviation from the proper course: *Ebner* (above) at [8]. Looking at the matter again, I remain unpersuaded that a fair-minded lay observer, imbued with an understanding of the processes and the surrounding circumstances, is likely to feel that because of the matters complained of, Mrs Alder might not provide a fair and impartial report on the evidence which has been gathered. In other words, that she might become an advocate for persons claiming to be aggrieved by the applicant's conduct, and present an unfair and unbalanced report as a result. In so concluding, I am mindful that the question is not to be determined on how Mrs Alder will in fact approach the matter, but that the question is one of real possibility and not probability: *Ebner* (above) at [7].
- 127 For those reasons, the outcome of the application for review will remain the same.