TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Applicant No 1 of 2025-26 v Minister Administering the State Service Act 2000 [2026] TASIC(RO) 2

PARTIES: Applicant No 1 of 2025-26 (Applicant)

Minister Administering the State Service Act 2000 (Respondent)

SUBJECT: State Service Act 2000, s 59(1)(b), review of State Service action

FILE NO: RO7 of 2025-2026

HEARING DATE(S): 11 September, 1 and 14 October, 25 November 2025 (Barclay P), 3 September 2026 (Thompson C)

HEARING LOCATION: Hobart

DATE REASONS ISSUED: 24 September 2026

COMMISSIONER: Commissioner S Thompson

CATCHWORDS: Industrial Law – Review of State Service action – Whether employer's acceptance of investigator's findings, determining that the State Service Code of Conduct was breached, and proposing a sanction is 'action' amenable to review – Meaning of 'action' in *State Service Act 2000* (Tas), s 59(1)(b).

Industrial Law – Review of State Service action – Nature of review – Appeal by rehearing applying the correctness standard.

REPRESENTATION:

C Green (Dobson Mitchell Allport) for the Applicant

M Short for the Respondent

APPLICANT NO 1 OF 2025-26 v MINISTER ADMINISTERING THE STATE SERVICE ACT 2000

REASONS FOR DECISION **24 September 2026**

[1] This is a review of action under the *State Service Act 2000* (the SSA), s 50(1)(b). It arises because the respondent undertook an investigation into whether the applicant breached the State Service Code of Conduct under the SSA, s 9 (the Code), accepted an investigator's findings that the Code was breached, and has proposed to terminate the applicant's employment. The applicant contends the respondent to have engaged in three separate actions, each of which (he says) is amenable to review:

- accepting the investigator's factual findings;
- determining that the conduct the subject of those factual findings breached the Code; and
- proposing to terminate the employee.

[2] For brevity, I will refer to each, respectively, as *accepting*, *determining*, and *proposing*. Before reviewing the action, I must determine whether it is amenable to review under the SSA, s 50(1)(b). If the action is amenable to review, I must review it to decide whether the Secretary made the correct and preferable decision.

[3] I conclude that *accepting* the investigator's factual findings and *determining* that the Code has been breached is a single action that is amenable to review. However, *proposing* the sanction of termination is not an action amenable to review. As to the merits of the application, I conclude that the respondent made the correct and preferable decision. The application will be refused.

[4] Before proceeding further, it is necessary to explain the course that this matter took. Barclay P heard submissions over several days in September, October, and November 2025. The learned President reserved his decision but his appointment to the Commission ended prior to the matter being determined. The matter was recently reallocated to me. I have read the transcript of the hearings before Barclay P and received further submissions. The delay is particularly unfortunate because it has paused the Code process and caused uncertainty for all involved. The Commission apologises to the parties for the delay.

Background

[5] The applicant is a permanent State Service employee of the respondent (the Department). He is employed at a senior level with significant and important management responsibilities. He is subject to the Code.

[6] In response to complaints about inappropriate workplace behaviour, the Department appointed an independent investigator to investigate whether the applicant had breached the Code. The investigation was conducted in accordance with Employment Direction No 5 (ED5), which finds its force in the SSA, s 10(3).

[7] The applicant contends that the investigation was procedurally unfair; an issue to which I will return. The Secretary of the Department (the Secretary) considered the investigator's report and afforded the applicant an opportunity to respond to it, which the applicant did. The

Secretary then found several allegations proven and determined that the applicant had breached two provisions of the Code:

- s 9(3) An employee, when acting in the course of State Service employment, must treat everyone with respect and without harassment, victimisation or discrimination; and

- s 9(7) An employee must maintain appropriate confidentiality about dealings of, and information acquired by, the employee in the course of that employee's State Service employment.

[8] The allegations, or parts of them, that the Secretary found proven may be summarised as:

- Allegation 1: During a work-related conversation in his office, commencing an inappropriate conversation with a colleague about sex-dolls and showed that colleague a website containing sex dolls. This breached s 9(3).

- Allegation 3: Making inappropriate comments to a different colleague about the applicant's sex life and sex dolls, and telling that colleague about his and the Department's various concerns about the performance and/or behaviour of other colleagues. This breached s 9(3) and (7).

- Allegation 4: Disclosing personal, including psychiatric, medical information about colleagues to others. This breached s 9(7).

[9] The investigator's report is central to the Secretary's findings and determination because the Secretary accepted the investigator's findings.

[10] The applicant agreed that he engaged in some of the conduct but disputed that any of the conduct breached the Code.

[11] The Secretary proposed to terminate the applicant's employment and invited the applicant to respond. The applicant then applied to the Commission for a review of the Secretary's "determination and proposed sanction" under the SSA, s 50(1)(b). Because the applicant has made this application, the Secretary has not proceeded to impose a sanction. As noted above at [4], the ED5 process is on hold.

[12] The Department submits that the Secretary's determination is amenable to review but the proposed sanction is not. Whether and what action is amenable to review must be determined before the merits of the applicant's application may be considered.

State Service Code of Conduct and Employment Direction No 5

[13] Strictly speaking, the applicant is employed by the Minister Administering the SSA, although many of the employer's functions and powers have been delegated to the Secretary.[1] The distinction is immaterial and I have used the terms respondent, Department, and Secretary interchangeably unless otherwise indicated.

[14] Section 10 addresses the procedure for investigating and sanctions imposed in respect of breaches of the Code. It is convenient to summarise some of the relevant aspects. ED5 is the procedure for investigating and determining whether an employee has breached the Code.[2] The SSA prescribes some requirements of ED5, one being that ED5 must afford

[1] *State Service Act 2000*, s 14.
[2] Ibid, s 10(3).

procedural fairness in determining whether an employee has breached the Code.[3] That is what ED5 does: it prescribes the procedure to be followed in investigating whether an employee has breached the Code.

[15] The employer may impose one or more sanctions if an employee is found, under ED5, to have breached the Code.[4] One such sanction is termination of employment.[5] But that is not the end of the matter. Termination of employment is regulated by the SSA, s 44 for permanent employees and s 45 for fixed-term employees. The employer may terminate a permanent employee in writing on specified grounds.[6] One of those grounds is that the employee breached the Code.[7] Termination is reviewable by the Commission only in its unfair dismissal jurisdiction under the *Industrial Relations Act 1984* (IRA).

[16] As I have explained above, the SSA imposes preconditions before employment may be terminated. Other conditions are imposed by ED5. In particular:

- before determining that the Code has been breached, the employee must be provided with a copy or summary of the investigator's findings and provided an opportunity to respond, which response the Secretary must take into account;[8] and

- before deciding to impose any sanctions, the employee must be advised of the proposed sanction(s) and the relevant factors and provided an opportunity to respond, which response the Secretary must also take into account.[9]

[17] I repeat that the applicant's employment has not yet been terminated. Instead, the Secretary *proposes* to terminate the applicant's employment and has provided him with an opportunity to respond. That is a result of the Secretary's *finding,* based on accepting the investigator's findings, that the applicant engaged in certain conduct, and *determining* that, by engaging in that conduct, the applicant breached the Code. Based on that *finding* and *determination*, the Secretary was permitted to impose a sanction under the SSA, s 10(1). Prior to determining a sanction, the Secretary was required to advise the applicant of the proposed sanction and the factors relevant to it and afford him an opportunity to respond.[10] That is what the Secretary did in *proposing* termination.

State Service reviews of action

[18] The SSA, s 50 allows an employee to apply to the Commission to review State Service action. The provision states:

> **50. Review of actions**
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> (1) Subject to subsections (2) and (3), an employee is entitled to make application to the Tasmanian Industrial Commission for a review –
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> (a) of the selection of a person or an employee to perform duties other than duties to be performed for a specified term or for the duration of a specified task; or

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[3] Ibid, s 10(4)(a).
[4] Ibid, s 10(1).
[5] Ibid, s 10(1)(g).
[6] Ibid, s 44(1) and (2).
[7] Ibid, s 44(3)(a).
[8] ED5 cl 8.10.
[9] Ibid, cl 10.2.
[10] Ibid cl 10.2.

(b) of any other State Service action that relates to his or her employment in the State Service.

(2) An employee is not entitled to make an application for a review under subsection (1)(a) if that employee was not an applicant for the duties to which the appointment or promotion relates.

(3) An employee is not entitled to make an application for a review under subsection (1)(b) in respect of the termination of the employee's employment.

(4) Notwithstanding anything contained in subsection (1), (2) or (3), disputes in relation to the decision to terminate employment are to be dealt with by the appropriate industrial tribunal in accordance with the legislation under which that tribunal is established.

[19] 'Action' is defined as including a "refusal or failure to Act".[11] 'State service action' is defined as "action by an officer or employee", excluding actions to make an appointment under s 31(1).[12]

Is the action amenable to review?

[20] Is the Secretary's *finding* of particular conduct, *determination* that the applicant breached the Code, and *proposal* to terminate the applicant's employment reviewable action under the SSA, s 50(1)(b)?

[21] Neither party submitted that the SSA, s 50(4) prevents the Commission from hearing the review. It is not entirely clear to me what work sub-s (4) has to do in light of sub-s (3) but, in the absence of submissions to the contrary, I proceed on the basis that it applies only to a review *once* a decision to terminate has been made. However, I should not be taken as expressing a concluded view about s 50(4).

Finding the facts and determining the breach

[22] The employer concedes that each of the *finding* and *determination* is a reviewable action. I doubt whether the *finding* and *determination* are separate actions. The employer's concession would appear to be inconsistent with cl 9 of ED5 which refers simply to *determining* that the employee has breached the Code. It appears to me that this necessarily includes both a finding of the facts (whether by the Secretary making the findings or by adopting the findings of another person such as an independent investigator) and determining whether those facts, as found, constitute a breach of the Code. So much is consistent with cl 9.2's reference to the "facts found and the basis for the determination". It is not clear to me that the determination under cl 9.2 is bifurcated into two separate reviewable actions as the parties in this case have decided to do. I am inclined to think that they are a compound, single action.

[23] But neither party made submissions on it and it is unnecessary to decide the point. I am satisfied that finding the conduct and determining that the Code was breached, whether a single action or bifurcated as the parties have done, is reviewable under the SSA, s 50(1)(b).

Proposing the sanction

[11] *State Service Act 2000*, s 49.
[12] Ibid.

[24] What, then, of *proposing* a sanction under cl 10(2)? I accept the employer's contention that this is not amenable to review.

[25] Ordinary principles of statutory interpretation must be the starting point. I must look to the words of the SSA whilst, at the same time, having regard to its context and purpose.[13] Dictionaries may be of some assistance. On its face, the wording of ss 49 and 50(1)(b) is very broad: action includes *inaction*. The Macquarie Dictionary relevantly defines 'action' as "something done; an act; deed". As I will endeavour to explain, the Secretary's *proposing* does not sit comfortably with that definition. While the act of communicating the proposal is undoubtedly an act, the contents (that is, what in fact the proposed sanctions are) is more akin to a state of mind rather than *something done*, an *act*, or a *deed*, or something *not done* or a *failure to act*.

[26] What is an 'action' in the SSA? The applicant submits that it has a broad meaning that extends to the *proposing* of a sanction. He relies on two cases.

[27] The first is *Applicant No 1 of 2021 and Tasmanian Health Service.*[14] In that case, the applicant was unable to perform duties because of a direction under the *Public Health Act 1997*. His employer stopped paying him on the basis that he was not performing duties, in respect of which the applicant sought a review. Barclay P distinguished the cause of the applicant's inability to perform duties (the Public Health Direction and the applicant's non-compliance with it) and the *decision* not to pay him (a decision made by the employer). Barclay P considered the latter decision to be an *action* taken *by* the *employer* and therefore reviewable.

[28] In reaching that view, Barclay P considered the Commission's jurisdiction to review matters under the SSA, s 50. The source is the IRA, s 19AA, which provides that the Commission "is to review a *matter* in respect of which an application has been made to it…" [my emphasis]. Barclay P went on to consider the broad meaning of 'matter' by reference to *Palmer v Ayers*, where the High Court described it as:

> [T]he subject matter for determination… identifiable independently of proceedings brought about for its determination and encompasses all claims made within the scope of the controversy… capable of identification [but not] exhaustive definition.[15]

[29] *Palmer v Ayers* is of little assistance; the Court having considered the meaning of 'matter' for the purposes of the *Commonwealth Constitution* as opposed to the meaning of 'action' in the SSA. Having said that, it is plain that 'action' is a broad term. Consistent with *Applicant No 1 of 2021*, the word encompasses more than determining the conditions.

[30] *Applicant No 1 of 2021* may be distinguished from this matter. In that case, the action determined the employee's rights and interests. The action determined whether or not he was paid. Here, the *proposing* of a sanction on the applicant is inchoate. The effect on the applicant's rights and interests is uncrystallised. While *advising* the applicant of that proposed sanction is a physical act, the proposed sanction itself is redolent of a state of mind on the Secretary's part. I recognise that the actions would have a profound psychological effect on the applicant, but the actions do not alter his rights and interests. His rights and interests are affected by the next stage, being the sanction that is imposed.

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[13] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14] (Kiefel CJ, Nettle and Gordon JJ).
[14] RO23 of 2021/22, Tasmanian Industrial Commission, Barclay P, 9 December 2021.
[15] (2017) 259 CLR 478; [2017] HCA 5 at [26] (Kiefel, Keane, Nettle and Gordon JJ).

[31] The second case is *Cannan and Fuller v Nyrstar Hobart Pty Ltd*.[16] That case involved a misconduct investigation where the investigator found an allegation unsubstantiated. The employer disagreed, finding the allegation to be substantiated. The Fair Work Commission (FWC) then found the employer's decision to dismiss the employee to be unfair. *Cannan* illustrates the distinction between the investigator's findings and the employer's findings but does not much assist in informing the meaning of 'action' in the SSA.

[32] My point is that there is a distinction between decisions which are final, operative, or determinative or a factual issue, and preliminary or anterior conclusions which are a step along the way in the course of reasoning leading to that ultimate decision.[17]

[33] 'Action' is a protean term. It has specific meanings in various pieces of legislation. The way in which it is used in unrelated legislation[18] is of little assistance. It is apt to mislead. The High Court has made clear makes clear that we must look to *this* legislative scheme's context and purpose.[19]

[34] To my mind, the SSA's context and purpose compel a conclusion that 'action' does not extend to *proposing* sanctions in respect of a breach. The better view is that determining a breach under cl 9 is a State Service action amenable to review, so is imposing a sanction under cl 10, but *proposing* a sanction is not. There are several reasons why I do not think that 'action' extends to *proposing* sanctions. First, it does not affect an employee's rights and interests. As I have explained above, it is more akin to a state of mind.

[35] Second, the finding of a breach and imposition of a sanction are undoubtedly reviewable under cl 10 as I have already explained.[20] It would be an unusual outcome were the employer's decision to *propose* to sanction and the employer's decision to later *sanction* to each be amenable to separate review. The result is inconsistent with the efficient and proper administration of justice. It would fragment the decision-making process with the former becoming, in effect, a 'trial' run. See generally *Pervan v Frawley*.[21] Fragmentation would be even greater in the case of the sanction of termination. That is because termination itself is reviewable by the Commission in its unfair dismissal jurisdiction under the IRA. Indeed, there is a further right of appeal in the case of termination to the Full Bench, but only on the basis of error.

[36] The imposition of a sanction other than termination of employment under s 10 would be reviewable as a State Service action under the SSA, s 50(1)(b). Those sanctions are final in that they dispose of the Code process. A sanction such as counselling creates rights and obligations. There is an activity or an action: the employer's right to counsel the employee and the employee's obligation to participate in that counselling. Relevant also is the denunciation associated with a sanction.

[37] To my mind, the proposing of a sanction is a step in the process prescribed by cl 10. The process is completed upon the exercise of the SSA, s 10 powers. I do not overlook that the employer is not obliged to impose a sanction where the Code has been breached. A finding of a breach without a sanction may still have consequences for an employee and remains of some force. This militates in favour of the *determination* that the Code has been breached being a reviewable action separate from and anterior to the reviewability of the imposition of

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[16] [2014] FWC 5072. Wells DP's decision was subsequently set aside in part, albeit on an unrelated basis: *Nyrstar Hobart Pty Ltd v Cannan* [2015] FWCFB 888.
[17] See generally my observations, sitting in the Tasmanian Civil and Administrative Tribunal, in *Arkley v Teachers Registration Board* [2026] TASCAT 45 at [27]-[28].
[18] For example, the meaning of 'adverse action' in the *Fair Work Act 2009* (Cth).
[19] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34.
[20] Termination of employment is amenable to review but only under the IRA, s 29(1A)(a). It is expressly excluded from a review of action: SSA, s 50(3).
[21] (2011) 20 Tas R 185; [2011] TASC 27 at [17], [60]-[61] (Porter J).

a sanction. The context and purpose compel a conclusion that the *determination* itself is reviewable.

[38] The SSA does not contain express statutory objects. However, the State Service Principles in s 7 inform the Act's context and purpose. The interpretation I have adopted remains consistent with those principles: having a single review of sanction under the IRA provides a fair system for review of decisions.[22] To the extent that an employee may argue that the employer's proposing of sanctions or another procedural aspect was unfair, these arguments could be made at and taken into account in an unfair dismissal claim under the IRA.[23] In fact, an unfair dismissal claim under the IRA may be a lower hurdle for an employee to meet than a review of action. A review of action is an appeal by rehearing,[24] whereas error is not an element of an unfair dismissal claim.[25] But I need not decide the point.

[39] Returning to this matter, while the Secretary has formed the tentative view that a sanction no less than termination should be imposed and so proposed termination, this is not an *action*. His view has not yet crystalised into action.

Conclusion as to jurisdiction

[40] I conclude that:

- the Secretary's determination that the applicant breached the Code, comprising the findings of fact and the determination that those facts constitute a breach the Code, is a reviewable action under the SSA, s 50(1)(b); but

- the Secretary's proposing of a sanction is not a reviewable action.

[41] For completeness, I note that the imposition of a sanction other than termination would be reviewable under the SSA[26] and termination would be reviewable under the IRA.[27] Either way, the applicant would have an opportunity for a merits review.

What is the test on review?

[42] Before conducting a review of the Secretary's determination, I must identify the test that the Commission must apply. The parties appear to disagree about the correct test. I understand the Secretary to submit that the applicant must demonstrate a particular type of error. In particular, he contends that the applicant must establish that the Secretary's determination was not reasonably open on the evidence before him.

[43] I reject the Secretary's submission. It is overly narrow and inconsistent with recent observations by the Full Court. There are several decisions of single judges of the Supreme Court that have considered the test prescribed by s 51 in its current or previous form. It is unnecessary to discuss each of them. The issue appears to have been answered by the Full Court in two separate judgments in *Bullard v Tasmanian Industrial Commission*.[28] I approach the issue as follows.

[44] A review of action under s 51 is an appeal by way of rehearing. But it remains a merits review, not a judicial review. The Commission is to take into account the material before the

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[22] *State Service Act 2000*, s 7(1)(m).
[23] *Industrial Relations Act 1985*, ss 30(2) and (6), 31(1B) and 30(7).
[24] *Bullard v Tasmanian Industrial Commission* [2023] TASFC 3 at [61] (Geason J and Marshall AJ) and [143]-[145] (Porter AJ).
[25] *Minister Administering the State Service Act v Tasmanian Industrial Commission* [2023] TASSC 10 at [71], [81]-[84] (Porter AJ).
[26] Section 50(1)(b).
[27] Section 29(1A)(a).
[28] [2023] TASFC 3 at [61] (Geason J and Marshall AJ) and [140]-[145] (Porter AJ). Although the Full Court's observations were obiter, they are highly persuasive. Porter AJ's explanation is detailed and, in my respectful view, should be followed.

decision-maker as well as any additional material which the Commission decides to accept. The Commission is to make the correct or preferable decision. But it may only disturb the action ('grant the application') if error is established. The concept of error is broad and not limited to *Wednesbury* unreasonableness[29] or the fifth type of error referred to in *House v The King*[30] as the Secretary submits.

[45] Instead, the standard is the correctness standard. That is because this action did not involve the exercise of a discretion. In contrast, it seems to me that action in imposing a sanction is the exercise of a discretion, it being more akin to passing a sentence. Whether the standard of review in such an instance requires the application of judicial restraint rather than the correctness standard is a question I need not determine.

[46] What does the correctness standard entail? The answer was explained by Gageler J in *Minister for Immigration v SZVFW*,[31] who followed a line of authority leading back to *Warren v Coombes*.[32] The Commission's task is to determine whether the Secretary's decision was correct. This requires me to make my own assessment of the evidence and, if I consider that the Secretary has erred, correct his decision. In doing so, I must give due weight to the advantages that the investigator and the Secretary had in assessing the evidence.[33]

Was the Secretary's action correct?

[47] With great respect, I found the applicant's submissions difficult to follow. In his email submission to the Secretary prior to the determination being made, the applicant complained about several denials of procedural fairness and merits-based concerns about the investigation report. Before the Commission, the applicant's counsel expressly adopted the applicant's own email submission to the Secretary and made further submissions as to errors.

[48] Doing the best I can, I have identified the errors that the applicant contends the Secretary made. Because several of the grounds relate to procedural fairness, I will explain the procedural fairness requirements of the investigation as may be relevant to the applicant's grounds.

[49] As Gleeson CJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*:[34]

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

[50] The requirements will depend on the circumstances. The Full Court of the Federal Court has previously said:[35]

> [W]here the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.

[29] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223: that no reasonable decision maker could have made that decision; that the decision was not reasonably open on the evidence.
[30] (1936) 55 CLR 499 at 505.
[31] (2018) 264 CLR 541; [2018] HCA 30 at [30]-[34].
[32] (1979) 142 CLR 531.
[33] *Warren v Coombes* (1979) 142 CLR 5311 at 552.
[34] (2003) 214 CLR 1; [2003] HCA 6 at [38].
[35] *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 CFR 576 at 590-592.

> …
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> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

[51] I turn to the errors alleged by the applicant. I have endeavoured to address them in the same order as he did, although I have grouped them where they overlap.

[52] First, the applicant had insufficient time to respond to the investigator's report and was not afforded an opportunity to respond in person to the Secretary. It is true that the investigator took a significant period of time to conduct the investigation and initially offered the applicant two weeks to respond to a 262-page report (including annexures). The applicant subsequently sought and was granted a third week. However, the applicant nonetheless made a response. While the report was lengthy, he was able to respond to it and had three weeks given he was stood down from performing his duties. The applicant has not identified any practical injustice. This ground fails.

[53] Second, the allegations were mischaracterised and their framing flawed. I reject this contention. It is clear that the applicant disagrees with some of the investigator's conclusions. I have read carefully the investigator's lengthy report. He had the advantage of assessing the interviewees. The applicant's criticisms are not made out. For example, he draws an arbitrary distinction between a 'personal interest' and a 'casual discussion' in the context of a discussion about sex dolls that the applicant had in his office with a subordinate. Read in context, it is apparent that 'interest' is used to label the applicant's raising of the topic. As the investigator expressly noted, it was not suggested that there was anything nefarious, nor that there was malintent on the applicant's part. To the extent that the applicant contends that the allegations were imprecisely drafted, I reject that contention. Having considered the investigator's report and the information that she gathered, I am satisfied that the allegations were sufficiently clear for the applicant to respond to them. Put differently, I am satisfied that the applicant was afforded procedural fairness.

[54] Third, the applicant was not provided with all of the material before the investigator. That ground is not made out. Procedural fairness did not require the applicant to have all the material. I have already explained that procedural fairness required that the applicant "be informed of the nature and content of adverse material".[36] The applicant does not suggest that this did not occur. He has not demonstrated practical injustice.

[55] Fourth, complaint is about made about the circumstances in which the conduct allegations were raised. This is not relevant to the Secretary's determination and, therefore, not relevant to the Commission's review. I make the same observation with respect to other complaints made about an earlier meeting regarding other conduct not the subject of this

[36] Ibid.

investigation. How the Secretary became aware of the allegations is irrelevant to whether the applicant breached the Code.

[56] Fifth, defects in the investigatory process. The applicant points to four ways in which the investigatory process was flawed. These include that irrelevant persons were interviewed, sensitive information was disclosed, the risk of concoction and contamination, and "potential to encourage retrospective complaints". I am not satisfied that any of the flaws is made out. The action under review is the Secretary's determination, which relied upon the investigator's findings. The applicant has not explained how the flaws impugn the investigator's findings or the Secretary's determination. Even were there to be merit in the particular flaws, the applicant has not demonstrated the necessary nexus with the action under review. I make the same observation with respect to the applicant's criticism of the investigator's "[a]pproach and [p]erpetuation of confidentiality [b]reaches". Consistent with ED5 and *Pervan v Frawley*,[37] the applicant was entitled to a procedurally fair investigation. He was not entitled to a perfect investigation in the sense that it could not possibly have been improved, expanded upon, or made more thorough. The vice is unfairness, nor imperfection.

[57] Sixth, the investigator's methodology was unnecessary and unreasonable in that she put the alleged conduct to each witness and asked if the witness observed that conduct or knew anything about it. The applicant contends that even where the witness said she was unaware of the conduct, related propositions continued to be put. The applicant also suggests that, at some stage, the interviewer appeared to become confused about the identity of the interviewee and failed to maintain confidentiality. That may be so, but it does constitute an error. The material before the Secretary establishes the breaches that he found. That the investigation could or should have been performed better is not determinative. I repeat my observations as to the distinction between unfairness and imperfection.

[58] The applicant then turns to the substance of the investigator's findings, pointing to several matters impugning them. Broadly speaking, they relate to the investigator's retrospective analysis of conduct occurring up to 12 months beforehand and excessive weight given to documentary evidence over the applicant's account. None of the applicant's complaints is made out. It was appropriate for the investigator to prefer written documentation. Even where the documentation, such as file notes, was created sometime after the events in question, a fact finder may prefer such evidence over testimony given in an investigation a significant period of time later. The High Court's observations in *Fox v Percy*[38] about the advantage that a trial judge enjoys in receiving and considering the entirety of the evidence and the opportunity to reflect on that evidence and draw conclusions from it as a whole are apposite. The investigator had that advantage over me. I am not persuaded of any error.

[59] The applicant also contends that the Secretary erred in finding that the applicant had failed to maintain confidentiality in that he disclosed confidential and sensitive information. None of the applicant's criticisms are made out. The applicant concedes that he disclosed the information but, as I understand, contends that it was not confidential because he obtained that information through "scuttlebutt on the floor" of the workplace. There is sufficient evidence to establish that not to be the case, the applicant's evidence having been (as the investigator found) equivocal. But even if it were the case, obtaining the information through scuttlebutt would not shed the information of its confidentiality. Put differently, s 9(6) in any event required the applicant not to further disseminate that information.

[60] I have carefully considered the allegations and the material before the Secretary. I am satisfied that he was correct to find s 9(3) and (7) of the Code to have been breached in the ways identified above. The applicant has not demonstrated error. Put differently, the

[37] Supra n 11.
[38] (2003) 214 CLR 118 at [23] (Gleeson CJ, Gummow and Kirby JJ).

Secretary's factual findings and determination that the applicant breached the Code were the correct and preferable decision.

Disposition

[61] With respect to the action that is reviewable, I find that Secretary's determination that the applicant breached the Code is the correct and preferable decision. The application fails.

[62] Pursuant to the SSA, s 51(6)(a), I refuse the application.

THE STAMP OF THE TASMANIAN INDUSTRIAL COMMISSION
TASMANIA

S Thompson
Commissioner